



## *Backgrounder*

# **CAFTA Investor Rights Undermining Democracy and the Environment: Commerce Group Case**

The Commerce Group Corporation, a mining firm registered and based in Wisconsin,<sup>1</sup> was the second multinational company to attack El Salvador's environmental policies under the controversial investor rights of the Central America Free Trade Agreement (CAFTA). The company's environmental permits for its gold mining and milling operations in Northeastern El Salvador were revoked after the company failed its environmental audit<sup>2</sup>; in April 2010, the Salvadoran Supreme Court ruled that the company had been accorded due process during and after the audit.<sup>3</sup>

On November 15, 2010 in Washington, D.C., the company pushed a CAFTA claim for compensation from El Salvador's impoverished taxpayers for at least \$100 million,<sup>4</sup> using CAFTA's controversial investor-state enforcement system. That mechanism elevates private investors and corporations onto the same level as governments, providing private rights to enforce special foreign investor privileges provided in CAFTA.<sup>5</sup> At that hearing, the El Salvadoran government argued that CAFTA's procedural rules required the company to actively terminate its domestic court case, and that its failure to do so means that the government has not consented to the CAFTA arbitration and thus the case should be dismissed.<sup>6</sup> On March 14, 2011, the investor-state tribunal dismissed the Commerce Group case on a technicality, but ruled that the claim could have otherwise proceeded under CAFTA, and that El Salvador must pay more than \$800,000 in legal costs. The proceedings came shortly after Pacific Rim (another multinational mining company) attacked El Salvador's mining policies under CAFTA. (See a separate Public Citizen backgrounder on that case at: <http://bit.ly/dmt8bM>).

The backdrop for this case is rising concerns in El Salvador about the impact of mining. Leaders of El Salvador's major political parties,<sup>7</sup> the Catholic Church and a large civil society network have increasingly expressed concerns about mining companies' operations over past years.<sup>8</sup> At the same time, intimidation and threats against civic groups raising concerns about mining issues have escalated. In the past year and a half, three prominent anti-mining activists were murdered.<sup>9</sup> Salvadoran activists focused on the Commerce Group case – along with the Pac Rim case – to call on Salvadoran President Mauricio Funes to renegotiate CAFTA.<sup>10</sup>

Broadly at stake in the CAFTA cases is whether the operations of El Salvador, a fragile democracy that emerged from 12 years of civil war,<sup>11</sup> and the policies by the country's elected leaders to ensure mining does not further damage the country's ravaged environment will prevail. Or alternatively, whether CAFTA will allow the demands of multinational mining firms to reign supreme. Although the Salvadoran government has begun to review the potential environmental and social impacts of mining in El Salvador,<sup>12</sup> the government has made no final decision about future gold and silver mining policy.<sup>13</sup> 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 Commerce Group CAFTA case spotlighted 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.<sup>14</sup> In fact, there are nearly \$9.1 billion in claims in the 14 known investor-state cases outstanding under U.S. “trade” deals. None of them relate to traditional trade concerns; all of them relate to environmental, public health and transportation policy.

Now, 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>15</sup> which are also contained in Bush-negotiated pacts with Korea, Panama and Colombia.<sup>16</sup> As of May 2011, it appears that Obama has flip-flopped on these campaign commitments, and has adopted the anti-regulatory posture of his predecessors.

### **Background On Commerce Group’s Operations In El Salvador**

Commerce Group has been involved in small-to-medium scale gold mining operations<sup>17</sup> off and on at the San Sebastián Gold Mine<sup>18</sup> in Northeastern El Salvador since the late 1960s.<sup>19</sup> The company has worked in partnership with a Nevada-registered, Wisconsin-based company (San Sebastián Gold Mines, Inc., alternately called “Sanseb”) that it owns and controls.<sup>20</sup> (In some documents, the two firms are jointly called “Comseb.”<sup>21</sup>) Other American and Salvadoran investors operated the gold mine more intensively earlier in the 20<sup>th</sup> century.<sup>22</sup>

Commerce Group exploited the San Sebastián Gold Mine from 1972-1978,<sup>23</sup> and then again from 1995-1999 under a 25-year exploitation concession in 1987.<sup>24</sup> In the 1990s, the company also operated the nearby San Cristóbal Mill and Plant gold processing facility. According to the company’s CAFTA filings,

“Commerce/Sanseb produced 22,710 ounces of bullion containing 13,305 ounces of gold and 4,667 ounces of silver at the San Cristóbal Mill and Plant from March 1995 through December 31, 1999. Commerce/Sanseb suspended production intending to expand the facility from its then existing 200-ton-per-day capacity to a 500-ton-per-day operation.”<sup>25</sup>

However, the company’s 2002 10-K filings with the U.S. Securities and Exchange Commission also cite lack of “adequate funds” as a major factor in the decision to suspend operations:

“As of April 1, 2000 the Joint Venture decided to temporarily suspend the San Cristóbal Mill and Plant (“SCMP”) operations (operations ceased on December 31, 1999) until such time as it has adequate funds to retrofit, rehabilitate, restore and expand these facilities and until there is certainty that the price of gold will be stabilized at a higher selling price.”<sup>26</sup>

This decision to suspend its operations capped off decades of legal and financial troubles for Commerce Group.<sup>27</sup> According to the *Milwaukee Journal Sentinel* from 1999:

“They haven't mined much gold in El Salvador ... Commerce Group has had a long and bumpy history, including a bankruptcy filing and numerous problems at its mine in San

Sebastián, El Salvador. Commerce Group was Commerce Capital before it filed for bankruptcy protection in September 1977 under Chapters 10 and 11 of federal bankruptcy statutes. At that time, the company owed the U.S. Small Business Administration \$15 million. Civil war forced Commerce to close the El Salvador mine in 1978. By January 1980, within two years of the closing, the price of gold peaked at more than \$800 an ounce. By the time operations resumed in 1987, the gold bubble had burst. Commerce said in February 1998 that it had hired a Charleston, S.C., investment banking firm to help find a buyer for the gold mining company. Apparently nothing has come of that.”<sup>28</sup>

Meanwhile, El Salvador had changed its mining law in 1995, and made further amendments in 2001. Under the current laws, mining companies must own or lease the relevant plot of land,<sup>29</sup> have an exploitation or exploration permit from the Ministry of Economy (MINEC) for that land,<sup>30</sup> and have an environmental permit from the Ministry of Environment (MARN).<sup>31</sup> Companies engaged in milling must also have concessions and environmental permits.<sup>32</sup> A separate Environment Law was passed in 1996 (and amended in October 2001) to allow for a period for companies with active concessions to obtain the environmental permits. (According to a newspaper report, the regulations set it at 120 days.<sup>33</sup>) The law establishes as a precondition for environmental permits that companies must elaborate an environmental assessment and improvement program, spelling out how they plan on reducing the project’s environmental contamination. Companies must also pay an environmental bond to cover the costs of the improvement program.<sup>34</sup>

According to newspaper reports, Commerce Group had its exploitation concession for the San Sebastián Gold Mine suspended on July 18, 2002, for failure to obtain an environmental permit.<sup>35</sup> Then, in October 2002, MARN awarded Commerce Group environmental permits of three-year duration each for the San Sebastián Gold Mine (MARN Resolution 493-2002) and the San Cristóbal Mill and Plant gold processing facility (MARN Resolution 474-2002).<sup>36</sup> According to Salvadoran court documents, Commerce Group’s two MARN resolutions allowed the facilities to continue operating “and established the obligation of complying, during its operation, with the environmental measures and complying with the Environmental Improvement Program in accordance with the Environmental Assessment timetable.”<sup>37</sup> Moreover...

“an environmental audit [by MARN or the General Bureau of Environmental Management] is the mechanism for evaluation and verification of compliance with the environmental measures established in the permit, and also specifies and defines the obligations that the holder must carry out with relation to the environmental permit, considering elements that were not present at the time of the environmental assessment, as well as others that the holder might intend to incorporate into the project.”<sup>38</sup>

In January 2003, Commerce Group renewed a 30-year lease with Misanse,<sup>39</sup> a Salvadoran company originally formed by mineworkers, who acquired the San Sebastián Gold Mine property in 1953 from the previous owner.<sup>40</sup> (Commerce Group had previously signed leases with Misanse in 1968<sup>41</sup> and 1975, the latter for a 30-year period dating from the start of mining operations.<sup>42</sup> In 1987, a new lease agreement was assigned to Commerce Group as a part of the mining concession application, after which Misanse was granted the rights to mine. Misanse

assigned the concession to Commerce Group. At some point during this period, Commerce Group acquired majority ownership of Misanse.)<sup>43</sup>

In August 2003, Commerce Group obtained a new 20-year exploitation concession for the San Sebastián Gold Mine from the Salvadoran government.<sup>44</sup> Commerce Group's local managers – after having in 2002 called the temporary cancellation of the concession a “confiscation” that they blamed on “political motivations” – told reporters by June 2003 that “the problem is solved.” The company became the first authorized to exploit mines under the new laws.<sup>45</sup>

Commerce Group also sought to expand the geographic scope of its mining activities. According to its CAFTA filings,

“On March 3, 2003, the Government of El Salvador granted Commerce/Sanseb a new exploration license for a 41-square kilometer area (10,374 acres), which surrounded the site of the San Sebastián Gold Mine and included three other formerly-operated mines (the “New San Sebastián Exploration License”). On May 25, 2004, the Government of El Salvador granted Commerce/Sanseb a new exploration license for an additional 45 square kilometers of area (11,115 acres) to the North of and abutting the New San Sebastián Exploration License area. This new license area encompassed eight formerly-operated gold and silver mines (the “Nueva Esparta Exploration License”). After receiving the New San Sebastián Exploration License and the Nueva Esparta Exploration License, Commerce/Sanseb invested resources for the exploration of these areas for precious metals including explorations at the La Lola Mine, the Santa Lucia Mine, the Tabanco Mine, the Montemayor Mine, and the La Joya Mine. This was done with the expectation that Commerce/Sanseb would ultimately receive exploitation concessions for these sites.”<sup>46</sup>

On November 23, 2005, MARN conducted an audit of the San Sebastián Gold Mine and determined that the requirements of Article 86 of the Environmental Law<sup>47</sup> were not being complied with. According to court documents, the auditors presented Commerce Group with a copy of this assessment,<sup>48</sup> and on January 26, 2006, issued MARN Resolution 3026-003-2006, which ordered that the company's environmental bond for the San Sebastián Gold Mine not be released.<sup>49</sup> On June 23, 2006, MARN conducted a second audit of the mine, and issued a certificate and report four days later. According to the court analysis of the report, “the certificate made it a matter of record that the environmental measures had not been completed because the project was in the preparatory phase,” but that nonetheless, the requirements of the permit had not been met.<sup>50</sup>

On July 6, 2006, MARN issued Resolution 3026-783-2006, revoking environmental permit 493-2002, ordering closure of the project, requiring Commerce Group to submit a plan for termination of operations, to carry out an analysis and monitoring of heavy metals, and to submit a post-termination monitoring plan.<sup>51</sup>

By July 12, 2006, the government's environmental minister told El Salvador's Legislative Assembly that, “We will only permit mining exploitation if the companies mitigate 100 percent of the harm, which would be impossible, since that would require greater investment than the

total gold and silver reserves.” At that meeting, he also told legislators that Commerce Group’s exploitation concession (the only such concession in the entire country) was being revoked, as would various other companies’ exploration concessions. He said that Commerce Group’s concession would be revoked for failure to begin operations within two years of the exploitation concession, in accordance with the 1996 mining law. On July 23, he said that El Salvador was not pursuing a mining ban, but was merely insisting on compliance with the law: “The environmental ministry cannot grant permits for mining projects if the company’s environmental impact assessment does not show that they’re going to protect the earth, aquifers, surface, the air and the health of the people that live in the communities.”<sup>52</sup>

On December 6, 2006, Commerce Group launched a Supreme Court case against the Salvadoran government,<sup>53</sup> asking that Resolution 3026-783-2006 be declared illegal, largely for an alleged failure to grant due process.<sup>54</sup> But the court’s verdict, handed down in April 2010, stated:

“Although it establishes the reasons why the Minister of Environment and Natural Resources may revoke a permit (article 64 of the Environmental Law), the Environmental Law of El Salvador does not establish the legal process that must be applied; however, any act of an authority must be in the light of the Law and the Constitution: the Minister [sic] of Environment and Natural Resources must and shall apply the minimum principles of due process. The administrative process must include as minimum guarantees: due communication of the facts under investigation; a reasonable time period for the affected party to defend itself; an evidentiary period during which the submissions are conveyed to the opposing party; equal opportunity to set forth their arguments. In analyzing the administrative process applied by the defendant, this Court notes that, according to the certificate of the twenty-third of November, two thousand five, the environmental assessment audit was carried out using the procedure, previously described, established in the Regulations of the Environmental Law (initial meeting, verification of compliance and follow-up of the environmental measures proposed in the environmental permit, and the final meeting with the audited party). At the initial meeting, the objective of the resolution was explained; once the audit was concluded, the audited party was advised of its findings, made known to it through the engineer representing the project. A certificate was drawn up, a record was made of its delivery to the representative, and it provided notice of a period of eight business days in which the holder could submit documentation and make clarifications, thus allowing it to challenge the auditor's opinion.”<sup>55</sup>

The court deemed that Commerce Group had received due process, and found that due process was also followed in the January bond-related resolution and June audit.<sup>56</sup>

Parallel to this, Commerce Group claims that on November 3, 2005 and May 31, 2006, it requested MARN perform a new environmental audit of the San Cristóbal Mill and Plant, so as to be able to secure a new environmental bond.<sup>57</sup> On June 23, 2006, MARN conducted the environmental audit, and later that month issued a certificate (June 27) and report (June 29).<sup>58</sup> On July 5, MARN issued Resolution 3249-779-2006, which revoked Resolution 474-2002, ordering the plaintiff to submit a plan for termination of operations, and released the environmental bond.<sup>59</sup> In April 2010, the Supreme Court ruled that due process had been followed in this case as well, including through the provision of an eight-day comment period after the record and

certificate were drawn up. In fact, the Court found that Commerce Group did not even make use of its right of defense until September 4, 2006. Notably, El Salvador's attorney general argued that the decisions stemming from the June 23, 2006 audit were motivated by the precautionary and polluter-pays principles, concepts noted in the country's Environment Law.<sup>60</sup> Moreover, the court noted that it was within the government's police powers authority to revoke permits, provided that the appropriate regulations had been followed, which the court found had been.<sup>61</sup>

Despite these developments, on October 10, 2006, Commerce Group claimed that it applied to MARN for an environmental permit for its exploration in connection with the New San Sebastián Exploration License and the Nueva Esparta License. According to the company's July 2, 2009 Notice of Arbitration under CAFTA,

“MARN did not respond to the request and on March 8, 2007, Commerce/Sanseb applied to the El Salvador Ministry of Economy for an extension of these exploration licenses, as was its right. On October 28, 2008, the Ministry of Economy denied Commerce/Sanseb's application citing Commerce/Sanseb's failure to secure an environment permit. On January 20, 2009, Commerce/Sanseb's legal counsel filed a challenge in the Courts to the government's refusal to honor Commerce/Sanseb's request to extend its exploration permits pursuant to the terms of the 2002 permits. These legal proceedings have not been resolved.”<sup>62</sup>

El Salvador's filings in response to the Commerce Group's CAFTA claim focused primarily on the procedural objections highlighted in the next section of this memo. However, in its August 2010 CAFTA filing, El Salvador maintained that Commerce Group's claim related to these exploration concessions was “factually incorrect”,<sup>63</sup> and that the company only applied for an extension of the exploration license for New San Sebastián on March 2007 – several days after the exploration license had already expired.<sup>64</sup> The government also maintained that Commerce Group's lawyers never filed a challenge in the courts of El Salvador with regard to either exploration license, but rather only filed an administrative appeal related solely to the New San Sebastián license. El Salvador argued that Commerce Group's lawyers were notified of the decision to reject the administrative appeal on June 2, 2009 – a month before the Notice of Arbitration was filed.<sup>65</sup> Later, in its September 2010 filings, El Salvador argued that Commerce Group was “having serious financial trouble long before” the government took the measures the company complained about, and that the company was reporting financial losses “entirely unrelated to any Government action.”<sup>66</sup> The government went on, referring to the company:

“Claimants lacked the financial capacity to conduct their work absent any interference from the Government. Claimants stopped work in 1999 because they lacked funds, and they never resumed the work. Claimants were given a concession in 2003, but by late 2006, they had not begun work. In these circumstances, where Claimants lacked funds in 1999, were losing money in 2002, and never got the funding together to start their exploitation work in El Salvador, any allegations about Government conduct in late 2006 and beyond will not support a claim for damages. Indeed, since Claimants did no work for more than a year after receiving the exploitation concession, the concession should have been cancelled in 2004. [Footnote: See Mining Law of El Salvador, Art. 23 (“If within one year of the effective date of the contract the holder does not initiate the

preparatory work for the exploitation of the deposit, the concession shall be cancelled following a summary procedure . . . .”) (RL-21).]”<sup>67</sup>

In addition to Commerce Group’s continuing problems with Salvadoran environmental compliance, Salvadoran civil society has also criticized Commerce Group’s operations. In March 2006, a team of University of El Salvador earth science researchers led by Professor Rafael Cartagena examined seven waterways in and around Morazán department, the area in which the San Sebastián Gold Mine is located. The researchers took 24 water and 24 soil samples from five observation points, and reported cadmium levels 72 times higher than that recommended by the U.S. Environmental Protection Agency (EPA). The team also found mercury 36 times the EPA-recommended levels. An article about the study in *La Prensa*, one of El Salvador’s largest newspapers, noted that the samples were taken near Commerce Group’s operations and that cadmium and mercury are associated with mining activity.<sup>68</sup>

In September 2007, a consortium of civil society groups under the banner of the *La Mesa Nacional Frente a la Minería Metálica en El Salvador* (The National Roundtable Against Metals Mining in El Salvador) sued the Commerce Group. They argued that SSGM leaked magnesium, copper, iron and aluminum into the San Sebastián River, and that 150,000 local residents faced health risks. The *Diario Colatino* newspaper reported that livestock had died after drinking the water.<sup>69</sup> In 2010, a follow up story reported that the metals “are associated with a series of ailments, especially related to the nervous system and kidney disease... and cancer,” while noting that insufficient studies have been conducted to prove a link to the heavy metals. Luis Alonso Blanco, a former Commerce Group worker and area resident, told a *Diario Colatino* reporter that, “A thick creamy substance comes out of the spring, and leaves a carbon ashlike residue. If you rub it in your skin, and examine it a day later, you’ll have a thick scab, as if it had been there many days.”<sup>70</sup>

### **Commerce Group Launched a CAFTA Compensation Demand While Its Domestic Court Case in El Salvador Proceeded**

#### *Procedural complications*

As domestic court proceedings were still pending in March 2009, Commerce Group gave El Salvador notice of its intent to file a CAFTA claim for compensation under CAFTA.<sup>71</sup> According to CAFTA’s terms, once the Notice of Intent had been filed, the corporation then had to wait 90 days to take the next step in the CAFTA process and formally launch arbitration under the pact.<sup>72</sup> At the same time, CAFTA Article 10.18.1 imposes a three-year statute of limitations from the time when the alleged injury occurred until a claimant is required to submit a claim to CAFTA arbitration.<sup>73</sup> Since the revocation of the environmental permits took place on July 5-6, 2006, the statute of limitations to give notice of arbitration may have expired as early as July 5-6, 2009.

With little time to spare before the statute of limitations expired, and while the Salvadoran Supreme Court was still deliberating as of June 2009,<sup>74</sup> Commerce Group filed a formal notice of CAFTA arbitration against El Salvador on July 2, 2009 with the International Center for the

Settlement of Investment Disputes (ICSID)<sup>75</sup> – a World Bank body that CAFTA designates as a venue investors can use for investor-state claims.<sup>76</sup>

Meanwhile, the Salvadoran Supreme Court continued its deliberations, and rejected Commerce Group’s challenge in April 2010, as noted in the previous section.<sup>77</sup>

On August 16, 2010, El Salvador exercised its rights under CAFTA Article 10.20 to have an expedited ICSID review of whether the tribunal even had jurisdiction over the case. As part of this filing, Commerce Group was required under CAFTA Article 10.18.2<sup>78</sup> to waive its rights for initiating or continuing with any domestic challenges against the same measures. El Salvador argued that: “Although Claimants included waivers in their Notice of Arbitration, Claimants simultaneously violated the waivers by maintaining judicial proceedings before the Supreme Court of El Salvador related to the same measures Claimants allege are breaches of CAFTA.”<sup>79</sup>

El Salvador stated that Commerce Group’s CAFTA claim was based on alleged damages arising from revocation of its environmental permits – the same measures that were the basis of the domestic judicial proceedings.<sup>80</sup> Commerce Group did not dispute this, but noted that its CAFTA claim also pertained to El Salvador’s treatment of its New San Sebastián and Nueva Esparta operations.<sup>81</sup>

El Salvador argued that CAFTA’s procedural rules required the company to have actively terminated its domestic court case related to the environmental permit revocation,<sup>82</sup> and that its failure to do so meant that the government could not be sued at ICSID as per Article 10.18.2.<sup>83</sup> (Under these CAFTA rules, a country is deemed to have consented to investor-state arbitration if a case is brought following the pact’s procedural rules. If the claim is not brought according to procedure, governments can ask that it be dismissed.<sup>84</sup>) Thus, the Salvadoran government argued that Commerce Group’s failure to comply with the CAFTA “fork in the road” rules (which require investors to pick one venue for a given claim of damages) means the country has given no consent for the case and thus a tribunal would not be able to issue an award.

On September 15, Commerce Group responded to ICSID, maintaining that, because it took no concrete steps to advance its Salvadoran case after July 2009, it should not be seen as having actively pursued the domestic dispute.<sup>85</sup>

On September 30<sup>86</sup> and October 15<sup>87</sup>, the Salvadoran government and Commerce Group respectively responded to each others submissions in writing. On October 20, the government of Costa Rica made a Non-Disputing Party Submission arguing that, claimants must effectively waive domestic proceedings before governments can be seen as consenting to CAFTA arbitration.<sup>88</sup> On November 1, the Nicaraguan government made a similar submission.<sup>89</sup> That same day, the U.S. government told ICSID that it “will not be making a non-disputing Party submission.”<sup>90</sup>

On November 15, 2010, an ICSID panel examined these arguments in greater detail.<sup>91</sup> On March 14, 2011, the panel dismissed Commerce Group’s case on a technicality: If Commerce Group had simply written a letter to the Salvadoran judiciary informing it that it was waiving its right to challenge revocation of its environmental permits in Salvadoran courts, then Commerce Group’s



attack on Salvadoran mining policy would likely be going forward under CAFTA. In any event, the panel held El Salvador responsible for over \$800 million in legal costs. Indeed, when El Salvador attempted to recoup its legal costs, the tribunal sided with Commerce Group that its case was not frivolous.<sup>92</sup>

The fact that a corporate attack on a sovereign country's domestic environmental policy before a foreign tribunal would even be possible – much less cost a country almost a million dollars when they win the case – highlights what is wrong with our current trade agreement model.

### *The Substantive Claims*

Because Commerce Group's case was dismissed at the jurisdictional phase, we cannot know how a panel would have ruled on the corporation's substantive claims. However, it is worth describing these claims – which the ICSID panel deemed non-frivolous – to see the far-reaching nature of CAFTA-style investment rules.

In its Notice of Arbitration, Commerce Group said that:

“on or about September 13, 2006, MARN delivered to Commerce / Sanseb's El Salvadoran legal counsel its revocation of the environmental permits issued for the San Sebastián Gold Mine exploitation concession and the San Cristóbal Mill and Plant, effectively terminating Commerce / Sanseb's right to mine and process gold and silver. This was done without forewarning or justification”<sup>93</sup>.

This account does not correspond to the paper trail in El Salvador, which shows that Commerce Group had forewarning of the problems that led to revocation of the environmental permits as early as the November 2005 environmental audit that it had failed.<sup>94</sup> The paper trail also shows that Commerce Group had several certificates by September 2006 justifying the various administrative decisions that El Salvador made, in accordance with the Mining and Environmental Laws.<sup>95</sup>

Moreover, Salvadoran documents show that the environmental permits were revoked rather in July 2006, and that Commerce Group had in fact appealed the revocation on September 4 – over a week before the date that Commerce Group alleges its environmental permits were revoked “without forewarning or justification.”<sup>96</sup>

According to its Notice of Arbitration, Commerce Group argued that:

“The actions of the El Salvadoran government, through its ministries, reflects [sic] an ongoing government policy since September 2006 to de facto deny foreign companies the right to develop mining interests in the country of El Salvador. This policy, as applied, discriminates against foreign investment:

- a. While the government of El Salvador asserts [sic] that the current ban on gold and silver mining, and exploration connected with such mining, stems from the government's desire to protect the environment, the government permits, for example, the operation of coffee *beneficios* [cooperatives], which dump liquid

- residue directly into rivers and other activities which are more intrusive on the environment.
- b. The government's ban on development of gold and silver mines applies in practice exclusively to foreign companies.
  - c. The government does not enforce its states [sic] policies against native El Salvadorans engaged in gold and silver production."<sup>97</sup>

Commerce Group claimed violations of CAFTA Article 10.3 (National Treatment), 10.4 (Most-Favored Nation Treatment), 10.5 (Minimum Standard of Treatment), and 10.7 (Expropriation and Compensation),<sup>98</sup> and demanded compensation of

1. Not less than \$100,000,000 for its losses;
2. Granting of permits allowing Commerce Group to resume its mining activities in El Salvador "subject to reasonable and appropriate environmental protection conditions and
3. Such other relief as may be available, including payment for the costs of the proceedings."<sup>99</sup>

Because the CAFTA case did not move past the jurisdictional phase, El Salvador did not have the opportunity to respond to the substantive claims, nor did Commerce Group elaborate on them in any detail in their filings.

However, past investor-state jurisprudence under the North American Free Trade Agreement (NAFTA) provides some clues to the use of these provisions. 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."<sup>100</sup>

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.”<sup>101</sup>

Even legal experts find these provisions circular, vague and worryingly elastic. The Annex was added to CAFTA after various NAFTA tribunals stretched the Minimum Standard of Treatment rule to require government compensation of foreign investors for outlandish reasons.<sup>102</sup> For instance, 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 of Treatment rule, even when the tribunal dismissed as specious other more substantive alleged investor rights violations.<sup>103</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”? The Salvadoran Supreme Court decided that Commerce Group’s due process rights had been respected.<sup>104</sup> How do these state practices factor into the definition of the Minimum Standard of Treatment?

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>105</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. Yet, the CAFTA language provides a tribunal discretion to order such compensation.

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>106</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>107</sup>

Similarly, 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>108</sup>

It would have been interesting to learn from a merits phase in the ICSID case how Commerce Group would have argued that El Salvador violated the national treatment and MFN provisions. El Salvador has claimed that has 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. El Salvador, in its CAFTA proceeding with Pacific Rim (which raised similar discrimination charges), stated that:

“Claimant has failed to identify any other investor whatsoever, whether ‘in like circumstances’ or not. Thus, the undisputed fact remains—there is no identified investor, either domestic or from another country, much less one in like circumstances who has received more favorable treatment on the basis of nationality.” (Page 70, Para 178):

“CAFTA does not provide that if a country allows companies in one industry to proceed with certain investments notwithstanding environmental issues, it must also grant permits to all other investors in other industries notwithstanding environmental concerns. There would be no investment agreements if States were going to be held to such a standard.” (Page 72, Para 183)

“Claimant has utterly failed to even identify any direct competitors, much less allege facts to show that the Government has treated any competitors— domestic or foreign— more favorably than it has treated Claimant on the basis of nationality.” (Page 75, Para 189):

“Claimant tries to overcome the fact that it can identify no investors in like circumstances by complaining that the Government's acts are against only metallic mining while ‘non-metallic exploitation activities (which are conducted primarily by Salvadoran companies or companies of non-Parties) continue’. There are several problems with this general assertion (aside from the fact that it still fails to name an investor or investment). 192. First, the only citation for the claim that El Salvador is banning metallic mining does not say any such thing. Claimant cites a newspaper article which quotes President Funes discussing the recent murder of a community member who had spoken out about the potential hazardous effects of mining in the community. The article says that the President ‘ruled out that his Government would authorize in-country mining exploration and exploitation projects to which social organizations are opposed out of fear for their effects on the environment.’ But that statement does not show any discrimination whatsoever, as it appears to apply by its own terms to all proposed investors. 193. Second, non-metallic mining is not similar to gold mining and therefore the comparison is a red herring.” (Page 75-76, Paras 191-193)<sup>109</sup>

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.<sup>110</sup>

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.”<sup>111</sup> 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, which is not permitted in U.S. law.<sup>112</sup> The Commerce Group case might have been 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.<sup>113</sup> This flew in the face of congressional instructions to narrow CAFTA’s scope to the U.S. law standard.<sup>114</sup> U.S. courts generally have not been receptive to indirect takings claims. And, in U.S. law, demands for such compensation are generally 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>115</sup>

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

There has been no large-scale tonnage gold or silver mining in El Salvador since the start of the civil war in the early 1980s.<sup>116</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,<sup>117</sup> and firms had filed exploration permits for 29 gold mines in El Salvador.<sup>118</sup>

As information about prospective environmental and health issues surrounding mining spread, and additional mining permit requests were filed, community and national civil society groups began to urge the Salvadoran government to review the country’s overall mining policy.<sup>119</sup> 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.<sup>120</sup> They argued that this was especially crucial, given the country’s limited clean water resources.<sup>121</sup> (El Salvador is a densely populated country the size of Massachusetts with limited water resources.<sup>122</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>123</sup> Roughly half of El Salvador’s rural households live in poverty.<sup>124</sup>)

This local opposition rippled into the National Roundtable (noted above), which formed in 2005<sup>125</sup> and included a range of organizations including local environmental and development committees and national non-governmental organizations.<sup>126</sup> The national coalition began

speaking out against the proposed mines, raising national and international attention,<sup>127</sup> and pushing for national mining law reform, including a ban on intensive gold and silver mining.<sup>128</sup>

By May 2007, the Catholic Church of El Salvador had joined the anti-mining coalition and issued a formal pronouncement against gold and silver mining in El Salvador signed by seven bishops and one archbishop. The letter cited potential damage to water, flora and fauna and overall public health.<sup>129</sup> In late 2007, 62.4 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>130</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>131</sup>

After Saca's conservative ARENA party lost reelection to the FMLN in March 2009,<sup>132</sup> new President Mauricio Funes' administration tasked the Ministry of Economy with executing a study,<sup>133</sup> one similar to the one Saca had proposed. 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 includes three scientists, an attorney specializing in environmental law, an economist and two generalists with related experience.<sup>134</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>135</sup>

While the anti-mining civil society leaders had faced intimidation and threats as the mining debate intensified, violence escalated as Pacific Rim's pro-mining challenge got underway at ICSID.<sup>136</sup> Marcelo Rivera, founder of the Association of Friends of San Isidro Cabañas (an environmental and development committee near the proposed El Dorado mine that is the subject of the Pacific Rim CAFTA case), 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>137</sup> As of September 2010, three men have been convicted and sentenced for Marcelo Rivera's murder.<sup>138</sup> Family members and community leaders have called for a full investigation into the intellectual authors of all three murders, as well as the physical perpetrators of the murders of Ramiro Rivera and Dora Recinos Sorto.<sup>139</sup>

### **The Stakes Are High in the CAFTA Attack against El Salvador**

At stake in the CAFTA cases 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 multinational mining firms to reign supreme.

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.<sup>140</sup> 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.

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 Commerce Group case was heard,) 32 cases relate to oil, gas or mining projects, including four that are related to gold mines.<sup>141</sup>

During the 2005 U.S. congressional debate on CAFTA, CAFTA supporters argued vehemently<sup>142</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."<sup>143</sup> Many Democratic members of Congress based their opposition to CAFTA on its replication of the NAFTA investor rights and their private enforcement.<sup>144</sup> (Under NAFTA and CAFTA alone, governments have paid more than \$350 million to corporations for the privilege of enacting new rules to protect the environment, consumers and more. In fact, there are nearly \$9.1 billion in claims in the 14 known investor-state cases outstanding under NAFTA-style deals. None of them relate to traditional trade concerns; all of them relate to environmental, public health and transportation policy.<sup>145</sup>)

Now, the environmental policy challenges under CAFTA are 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>146</sup> which are also contained in Bush-negotiated pacts with Korea, Panama and Colombia.<sup>147</sup> As of May 2011, it appears that Obama has flip-flopped on these campaign commitments, and has adopted the anti-regulatory posture of his predecessors.

*Publication date: November 2010, updated in May 2011.*

## ENDNOTES

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<sup>1</sup> 10-K from FY 2002, at page 4. United States Securities And Exchange Commission, Form 10-K, (X) Annual Report Pursuant To Section 13 or 15(D) Of The Securities Exchange Act Of 1934 For The Fiscal Year Ended March 31, 2002, Commission File Number 1-7375, Commerce Group Corp. Available at:

<http://www.sec.gov/Archives/edgar/data/109757/000100233402000046/m10k.txt>.

<sup>2</sup> Administrative Litigation Chamber of the Supreme Court of Justice of El Salvador, Case Number 308-2006, April 29, 2010, English translation at page at page 5, paragraph 2. (note that the English translation follows the Spanish). Available at: [http://www.commercegroupcorp.com/images/cafta/R-5.\\_Decision\\_Case\\_308-2006%5B1%5D.pdf](http://www.commercegroupcorp.com/images/cafta/R-5._Decision_Case_308-2006%5B1%5D.pdf)

<sup>3</sup> Administrative Litigation Chamber 308-2006 English translation at page 12.

<sup>4</sup> *Dirección General de Estadística y Censos*, "Encuesta de Hogares de Propósitos Múltiples 2008," June 2009, at page 21. "En el área rural un 49.0% de hogares se encuentran en pobreza, de los cuales el 17.5% están en pobreza extrema y el 31.5% en pobreza

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relativa.”; Commerce Group Corp. v. Republic of El Salvador, Notice of Arbitration, July 2, 2009, at page 5, paragraph 31. Available at: <http://www.commercegroupcorp.com/images/cafta/002.07.02.09.Notice.of.Arbitration%5B1%5D.pdf>.

<sup>5</sup> For a discussion of the investor-state enforcement mechanism in NAFTA and CAFTA, see Mary Bottari and Lori Wallach, “NAFTA’s Threat to Sovereignty and Democracy,” Public Citizen report, February 2005. Available at: <http://www.citizen.org/documents/Chapter%2011%20Report%20Final.pdf>.

<sup>6</sup> International Centre For Settlement Of Investment Disputes, Commerce Group Corp. and San Sebastián Gold Mines, Inc. (Claimants), v. Republic of El Salvador (Respondent). ICSID Case No. ARB/09/17, “The Republic of El Salvador’s Preliminary Objection Under Article 10.20.5 Of The Dominican Republic – Central America –United States Free Trade Agreement (CAFTA),” August 16, 2010, at page 1, paragraph 2-4. Available at: [http://www.minec.gob.sv/index.php?option=com\\_phocadownload&view=category&id=30:commerce-group-vrs-repblica-de-el-salvador&download=326:objeciones-preliminares-presentadas-en-el-caso-commerce-group-corp.-and-san-sebastian-gold-mines-vrs-republica-de-el-salvador.&Itemid=63](http://www.minec.gob.sv/index.php?option=com_phocadownload&view=category&id=30:commerce-group-vrs-repblica-de-el-salvador&download=326:objeciones-preliminares-presentadas-en-el-caso-commerce-group-corp.-and-san-sebastian-gold-mines-vrs-republica-de-el-salvador.&Itemid=63).

<sup>7</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>; “Arbitration panel favors Canada miner in dispute with El Salvador,” *EFE Ingles*, August 5, 2010.

<sup>8</sup> “El Salvador: Mining Opponents Hold Mock Burial Of Company,” *Inter Press Service*, Dec. 8, 2008; Raúl Gutiérrez; Florian Erzinger, et. al. “El Lado Oscuro del Oro,” *Unidad Ecologica Salvadoreña* (UNES) and Development and Peace report, December 2008, at Introduction, paragraph 6. Available at: <http://www.unes.org.sv/PUB.HTM>.

<sup>9</sup> Edgardo Ayala, “El Salvador: Activists Link Mining Co. to Murders,” *Inter Press Service*, January 27, 2010.

<sup>10</sup> “Ambientalistas piden a Funes plantear a Obama la revisión del CAFTA-DR,” *EFE*, March 3, 2010. Original Spanish: “Una docena de organizaciones ambientalistas de El Salvador pidió hoy al presidente Mauricio Funes que plantee en la reunión con su colega estadounidense, Barack Obama, la revisión del acuerdo comercial CAFTA-DR, ante las demandas millonarias de mineras al amparo de ese convenio.” English Translation: “A dozen environmental organizations today called on El Salvador’s president Mauricio Funes to raise at the meeting with his U.S. counterpart, Barack Obama, the revision of the CAFTA-DR trade agreement, in light of the demands for millions of dollars under that agreement.”

<sup>11</sup> Raúl Gutiérrez; Florian Erzinger, et. al. “El Lado Oscuro del Oro,” *Unidad Ecologica Salvadoreña* (UNES) and Development and Peace report, December 2008, at Introduction, paragraph 2. Original Spanish: “El país mas pequeño y densamente poblado de la región, con altos niveles de exclusión social y un medio ambiente peligrosamente deteriorado; que muestra alto riesgo de desastres ante fenómenos naturales y socionaturales. Si bien, en enero de 1992 puso fin a una cuenta guerra civil, durante los últimos 20 años ha implementado al pie de la letra las recetas neoliberales y ha acentuado una fuerte dependencia económica y política de su gran “vecino del norte” EEUU., habiéndose profundizado una crisis social, política, económica y ambiental.” English Translation: El Salvador is “...the smallest and most densely populated country in the region, with high levels of social exclusion and a dangerously depleted natural environment, which shows a high risk of natural and socio-natural disasters. Although January 1992 saw the end of a bloody civil war, during the last 20 years, neoliberal policies have been implemented to the letter and have accentuated a strong economic and political dependency on the big “neighbour of the north” the USA, deepening a social, political, economic and environmental crisis.” According to a U.S. Institute for Peace study, El Salvador’s civil war lasted from 1980 to 1992. See: <http://www.usip.org/files/file/ElSalvador-Report.pdf>

<sup>12</sup> *Ministerio de Economía de El Salvador Dirección de Cooperación Internacional*, “Concurso Publico Internacional,” at 28 On file with Public Citizen.

<sup>13</sup> *Ibid*, at page 27-28. Original Spanish: “Las operaciones mineras, tanto en El Salvador como en otros países centroamericanos, han sido objeto de Resistencia social, organizada principalmente por Organizaciones No Gubernamentales (ONGs). Los argumentos expuestos refieren a la minería como una actividad de alto riesgo ambiental. La mayor preocupación esta relacionada con los recursos hídricos y la generación de mayor pobreza en comunidades donde operan los proyectos mineros. Desde hace unos dos años, el movimiento ambientalista, opuesto a la minería, ha logrado influir en los gobiernos locales y las comunidades, aspecto que ha incidido sobre la actividad minera y los alcances que esta tiene en los ámbitos sociales, económicos y ambientales...” It goes on to say, “La Evaluación Ambiental Estratégica del Sector Minero Metálico de El Salvador tiene como objetivo obtener un conocimiento amplio que permita identificar los temas claves y prioridades que tienen los actores involucrados, en los aspectos ambientales, sociales, económicos e institucionales, para lo cual se partía de una caracterización o diagnostico actual de las condiciones geológicas, ecológicas, territoriales, jurídicas, sociales, económicas y ambientales de las áreas potenciales de desarrollo de actividades mineras en el país. A partir de los resultados del diagnostico se formulara la Política Ncional de Minería, la cual, en conjunto con los resultados obtenidos del diagnostico, servirán como marco de referencia para la Evaluación Ambiental Estratégica del desarrollo de la industria minera, tomando en cuenta diferentes escenarios o alternativas. Como resultado de las alternativas analizadas, se definiera el marco estratégico de acción del sector minero metálico del país.” English Translation: “Mining operations, both in El Salvador and other Central American countries, have been met by social resistance, mainly organized by nongovernmental organizations (NGOs). The arguments relate to mining as an activity of high environmental risk. The major concern is related to water resources and generating more poverty in communities where mining projects operate. For the last two years, the environmental movement, which is opposed to mining, has managed to influence local governments and communities, something that has affected the mining industry and the impact it has on the social, economic and environmental spheres ... ” It goes on to say, “The Strategic Environmental Assessment of Metal Mining in El Salvador is to obtain a broad knowledge to identify key issues that are priorities for stakeholders in the environmental, social, economic and institutional spheres, which will be based on a current diagnosis or characterization of the



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potential geological, ecological, territorial, legal, social, economic and environmental impacts of development of mining activities in the country. *From the results of the diagnosis, a National Mining Policy will be developed*, which, together with the results of the diagnosis, will serve as a framework for a Strategic Environmental Assessment of mining industry development, taking into account different scenarios or alternatives. *As a result of the alternatives analyzed, the strategic framework for action of the metal mining sector in the country will be defined.* [Italics added]. As this quote makes clear, El Salvador is still in the process of defining its mining policy going forward.

<sup>14</sup> The “Trade Reform Accountability, Development and Employment Act of 2009” has over 140 co-sponsors in the 111th Congress. It includes a provision that says “If the trade agreement contains provisions related to investment, such provisions shall...not be subject to an investor-state dispute settlement mechanism under the trade agreement. (Trade Reform Accountability, Development and Employment Act 2009, H.R. 3012, 111th Cong., (Introduced June 4, 2009.)) For more information, see: <http://www.citizen.org/Page.aspx?pid=454>

<sup>15</sup> For a compilation of these commitments, see <http://www.citizen.org/Page.aspx?pid=905>.

<sup>16</sup> U.S.-Korea FTA, Chapter 11. Available at:

[http://www.ustr.gov/sites/default/files/uploads/agreements/fta/korus/asset\\_upload\\_file587\\_12710.pdf](http://www.ustr.gov/sites/default/files/uploads/agreements/fta/korus/asset_upload_file587_12710.pdf); U.S.-Panama FTA, Chapter 10. Available at:

[http://www.ustr.gov/sites/default/files/uploads/agreements/fta/panama/asset\\_upload\\_file684\\_10351.pdf](http://www.ustr.gov/sites/default/files/uploads/agreements/fta/panama/asset_upload_file684_10351.pdf); U.S.-Colombia FTA, Chapter 10. Available at:

[http://www.ustr.gov/sites/default/files/uploads/agreements/fta/colombia/asset\\_upload\\_file630\\_10143.pdf](http://www.ustr.gov/sites/default/files/uploads/agreements/fta/colombia/asset_upload_file630_10143.pdf).

<sup>17</sup> According to the group’s 10-K for FY 2004, Commerce Group says that it “may not be a major gold producer” in relative terms (page 6), that it “produced gold on a curbed basis” in the late 1990s (page 23), and stated that its plan to double the capacity of the mill and expand the geographic scope of its mines would result in it being a “moderate tonnage” producer (page 12). United States Securities And Exchange Commission, Form 10-K, (X) Annual Report Pursuant To Section 13 or 15(D) Of The Securities Exchange Act Of 1934 For The Fiscal Year Ended March 31, 2004, Commission File Number 1-7375, Commerce Group Corp. Available at: (<http://www.sec.gov/Archives/edgar/data/109757/000100233404000052/etkall.txt>). Moreover, a press report from 1999 stated that “they [the Commerce Group] haven’t mined much gold in El Salvador.” See Douglas Armstrong and Kathleen Gallagher, “Milwaukee Company Mines Rich Vein of Internet Gold Lowly Stock Soars After Announcement Of Venture,” *Milwaukee Journal Sentinel*, Jan. 30, 1999.

<sup>18</sup> 10-K from FY 2004 at pages 4, 5 and 10 for dates of operation.

<sup>19</sup> For geographic location, see page 40 of the FY 2004 10-K, and the image at: <http://www.commercegroupcorp.com/mines.html>.

<sup>20</sup> 10-K from FY 2004, at pages 4-5 for the relationship with Sanseb.

<sup>21</sup> 10-K from FY 2002, at page 4.

<sup>22</sup> United States Securities And Exchange Commission, Form 10-K, (X) Annual Report Pursuant To Section 13 or 15(D) Of The Securities Exchange Act Of 1934 For The Fiscal Year Ended March 31, 1996, Commission File Number 1-7375, Commerce Group Corp. Available at: <http://www.sec.gov/Archives/edgar/data/109757/0000109757-96-000008.txt>. Historic information on pages 23-25.

<sup>23</sup> 10-K from FY 2004 at 39.

<sup>24</sup> For date and duration of earlier concession, see page 11 of 10-K from FY 2002.

<sup>25</sup> For SCMP’s dates of operation, see Notice of Arbitration at page 3, paragraph 14.

<sup>26</sup> It goes on to say at page 20: “Currently the Joint Venture is in the pre-production phase at the SSGM. Simultaneously, it is performing diverse programs relative to its mining projects. Prior to December 31, 1999, gold was produced on a start-up (not full production) basis. Operations were temporarily ceased when the price of gold fell out of favor with worldwide investors who were reluctant to invest in gold or gold mining projects. The Joint Venture plans to begin its open-pit, heap-leaching process on the SSGM site when adequate funding becomes available. It also plans to continue its SSGM site preparation, the expansion of its exploration and exploitation targets, and the enlargement and development of its gold ore reserves. Furthermore, it plans to explore the potential of other gold mine exploration prospects in El Salvador.” See 10-K from FY 2002.

<sup>27</sup> At several points in the company’s history, it tried to diversify into different activities, including a campground in Missouri, an Internet firm, and more. Lee Hawkins Jr., “Gold Firm Sees Portal As New Door To Profits Milwaukee’s Struggling Commerce Group Wants To Buy, Unite Web Niches,” *Milwaukee Journal Sentinel*, Sept. 22, 1999; Lawrence Curtis, Mining Annual Review, October 2001; Commerce Group, “Commerce Group Corp. Signs to Merge With Chicago Political Firm,” Press Release, July 24, 2008. Available at: [http://www.advfn.com/news/Commerce-Group-Corp-Signs-to-Merge-With-Chicago-Political-Firm\\_27468223.html](http://www.advfn.com/news/Commerce-Group-Corp-Signs-to-Merge-With-Chicago-Political-Firm_27468223.html) See also: “Gold firm aims to restore allure; Commerce Group hires broker to explore merger or acquisition,” *Milwaukee Journal Sentinel*, Jan. 25, 1998; Cary Spivak, “Executive persists in his quest for financing to mine gold,” *Milwaukee Journal Sentinel*, March 29, 1990.

<sup>28</sup> Douglas Armstrong and Kathleen Gallagher, “Milwaukee Company Mines Rich Vein of Internet Gold Lowly Stock Soars After Announcement Of Venture,” *Milwaukee Journal Sentinel*, Jan. 30, 1999.

<sup>29</sup> Article 30 of the mining law at: <http://elsalvador.abogadosnotarios.com/leyes-el-salvador/derecho-ambiental-y-salud/ley-de-mineria>. Original Spanish: “El inmueble en que se encuentre la cantera objeto de la explotación, deberá ser propiedad de la persona que lo solicita o tener autorización de su propietario o poseedor otorgada en legal forma.” English translation: “The person who makes a [mining] application must own the real estate in which the exploitation activities are to occur, or have legal authorization from the owner.”

<sup>30</sup> Article 13 of the mining law. Original Spanish: “AUTORIZACION DE DERECHOS MINEROS: Art. 13.- Las Licencias de exploración de minas y de operación de plantas de procesamiento de minerales, las emitirá la Dirección por medio de resoluciones; las concesiones para la explotación de minas y canteras serán otorgadas mediante Acuerdo del Ministerio, seguido de la suscripción o de un contrato en la forma prevista en esta Ley y su Reglamento.” English translation: “AUTHORIZATION OF MINING RIGHTS: Art. 13 – Licenses for mining exploration and mineral processing plants will be emitted by the [Head of MINEC] through resolutions. The mining exploitation licenses will be granted through a ministerial agreement, after a contract has been signed in accordance with this Law and its Regulations.”

<sup>31</sup> See text of Articles 36-37 of the mining law. Original Spanish: “SOLICITUD: Art. 36.- La persona interesada en obtener las Licencias y Concesiones a que se refiere esta ley deberá presentar a la Dirección, solicitud escrita con los requisitos mínimos siguientes:... Permiso Ambiental emitido por autoridad competente, con copia del Estudio de Impacto Ambiental;” English translation: “APPLICATION: Art. 36. – A person interested in obtaining the licenses and concessions referred to by this law should present a written application to the Ministry with the following minimum requirements... Environmental Permit emitted by a competent body, with a copy of the Environmental Impact Assessment.”

<sup>32</sup> See Article 13, and Articles 36-37 above.

<sup>33</sup> Enrique Maldonado, “Van a contaminar los manantiales de agua,” *Diario de Hoy*, June 20, 2003. Available at: <http://www.elsalvador.com/DIARIOS/ORIENTE/2003/06/20/ACTUALIDAD/nota3.html>. Original Spanish: “Cuando entró en vigencia la Ley de Minería, se daba un plazo de 120 días para que las empresas que gozaban de licencias de exploración o explotación se adecuaron a los requerimientos de la normativa. Uno de esos requerimientos era contar con el estudio de impacto ambiental, avalado por el ministerio del ramo. La falta de ese requisito fue el motivo de que a la Mina San Sebastián, en Santa Rosa de Lima, La Unión, le fuese retirado el permiso para explotar el yacimiento de oro.” English translation: “When the Mining Law went into effect, companies that had exploration or exploitation licenses were given 120 days to comply with the regulations. One of these requirements was an environmental impact assessment, approved by the ministry. The lack of this requirement was the motive for rescinding the gold mining exploitation license from the San Sebastián mine, in Santa Rosa de Lima, La Unión.”

<sup>34</sup> Article 29 reads: “Para asegurar el cumplimiento de los Permisos Ambientales en cuanto a la ejecución de los Programas de Manejo y Adecuación Ambiental, el titular de la obra o proyecto deberá rendir una Fianza de Cumplimiento por un monto equivalente a los costos totales de las obras físicas o inversiones que se requieran, para cumplir con los planes de manejo y adecuación ambiental. Esta fianza durará hasta que dichas obras o inversiones se hayan realizado en la forma previamente establecida.” English translation: “To assure that the programs of environmental adequacy under the environmental permits are executed, the head of the project must pay a compliance bond for an amount equivalent to the total costs of the physical works or investments that are required, as a condition of compliance with the environmental adequacy program. This bond will be held until such works or investments have been realized in the pre-established form.” Article 108 reads: “El Programa de Adecuación Ambiental, deberá contener todas las medidas para reducir los niveles de contaminación para atenuar o compensar, según sea el caso, los impactos negativos en el ambiente. Para la ejecución del Programa de Adecuación Ambiental, el titular de una actividad, obra o proyecto, contará con un plazo máximo de tres años. (\* NOTA DECRETO N° 566)” English translation: “The Environmental Adequacy Program must contain all of the measures to reduce contamination levels in order to reduce or compensate, whatever the case may be, the negative environmental impacts. For the execution of the Environmental Adequacy Program, the head of an activity, work or project will have a maximum time period of three years.” The parenthetical note indicates that this requirement stems from Decree Number 566, which the bottom reference notes indicate was passed on October 4, 2001. Available online at:

<http://www.csj.gob.sv/leyes.nsf/ef438004d40bd5dd862564520073ab15/6260a80afb2a53a206256d02005a3977?OpenDocument>.

<sup>35</sup> Omar Cabrera, “Cancelan licencia para explotar oro,” *Diario de Hoy*, Aug. 16, 2002. Available at:

<http://www.elsalvador.com/noticias/2002/8/16/negocios/negoc5.html> The original Spanish reads: “El Ministerio de Economía canceló el pasado 18 de julio la licencia que tenía la empresa Commerce Group para explotar una mina ... El apoderado legal de Commerce, José Alfaro, dijo que el retiro de la licencia se debió a que su empresa no cumplió con todos los requisitos de la Ley de Minería, vigente desde 1996. Más específicamente, Commerce no logró obtener el permiso ambiental.” English translation: “Last July 18, the Ministry of Economy cancelled Commerce Group’s mining exploitation license... Commerce’s attorney, José Alfaro, said that the license was cancelled because the company did not meet all of the requirements of the mining law, in effect since 1996. More specifically, Commerce did not obtain the environmental permit.”

<sup>36</sup> Notice of Arbitration at page 3, paragraph 16.

<sup>37</sup> 308-2006, April 29, 2010, English translation at 4.

<sup>38</sup> Administrative Litigation Chamber of the Supreme Court of Justice of El Salvador, Case Number 309-2006, April 29, 2010, English translation at 4. Available at: [http://www.commercegroupcorp.com/images/cafta/R-6.\\_Decision\\_Case\\_309-2006%5B1%5D.pdf](http://www.commercegroupcorp.com/images/cafta/R-6._Decision_Case_309-2006%5B1%5D.pdf).

<sup>39</sup> 10-K from 2004, at page 4.

<sup>40</sup> 10-K from 1996, at page 24.

<sup>41</sup> 10-K from 1996, at page 24.

<sup>42</sup> 10-K from 1996, at page 11.

<sup>43</sup> 10-K from 1996, at page 49.

<sup>44</sup> Notice of Arbitration, at page 3, paragraph 15.

<sup>45</sup> Enrique Maldonado, “Van a contaminar los manantiales de agua,” *Diario de Hoy*, June 20, 2003. Original Spanish: “Incluso calificó la medida como una “confiscación” del dinero invertido junto con el oro de la mina. En aquella oportunidad, la firma atribuyó la cancelación del permiso a “una razón política”... Pero la empresa hizo nuevas gestiones y, a la fecha, “ya está superado el problema”, dice Alfaro... La mina San Sebastián sería la primera autorizada con la nueva Ley de Minería.” English translation: “[Commerce Group] called the measure a “confiscation” of their investment and the mine’s gold. At that time, the firm blamed the permit cancellation on “political motivations”... But the company took additional steps and, today, says “the problem is solved,” says Alfaro... The San Sebastián mine will be the first authorized under the new Mining Law.”

<sup>46</sup> Commerce Group Corp. v. Republic of El Salvador, Notice of Arbitration, July 2, 2009, at 4. Available at: <http://www.commercegroupcorp.com/images/cafta/002.07.02.09.Notice.of.Arbitration%5B1%5D.pdf>.

<sup>47</sup> This article reads: “Art. 86.- Constituyen infracciones a la presente ley, y su reglamento, las acciones u omisiones cometidas por personas naturales o jurídicas, inclusive el Estado y los Municipios las siguientes: a) Iniciar actividades, obras o proyectos sin haber obtenido el permiso ambiental correspondiente; b) Suministrar datos falsos en los estudios de impacto ambiental, diagnósticos ambientales y cualquier otra información que tenga por finalidad la obtención del permiso ambiental; c) Incumplir las obligaciones contenidas en el permiso ambiental; d) No rendir, en los términos y plazos estipulados, las fianzas que establece esta Ley, e) Autorizar actividades, obras, proyectos o concesiones, que por ley requieran permiso ambiental, sin haber sido éste otorgado por el Ministerio; f) Otorgar permisos ambientales, a sabiendas de que el proponente de la actividad, obra, proyecto o concesión no ha cumplido con los requisitos legales para ello; g) La negativa del concesionario para el uso o aprovechamiento de recursos naturales a prevenir, corregir o compensar los impactos ambientales negativos que produce la actividad bajo concesión dentro de los plazos y términos que para tal efecto haya sido fijados, tomando en cuenta los niveles de los impactos producidos; h) Violar las normas técnicas de calidad ambiental y de aprovechamiento racional y sostenible del recurso; i) Impedir u obstaculizar la investigación de los empleados debidamente identificados, pertenecientes al Ministerio u otra autoridad legalmente facultada para ello, o no prestarles la colaboración necesaria para realizar inspecciones o auditorías ambientales en las actividades, plantas, obras o proyectos; j) Emitir contaminantes que violen los niveles permisibles establecidos reglamentariamente; k) Omitir dar aviso oportuno a la autoridad competente, sobre derrame de sustancias, productos, residuos o desechos peligrosos, o contaminantes, que pongan en peligro la vida e integridad humana; y l) No cumplir con las demás obligaciones que impone esta ley.” English translation: “At. 86 - The acts or omissions committed by individuals or corporations, including by the State and Municipalities, that will constitute violations of this law and its regulations, are as follows: a) Initiate activities, works or projects without obtaining the corresponding environmental permit, b) Providing false information on environmental impact studies, environmental assessments and other information that is intended to obtain the environmental permit; c) Failure to comply with obligations under the environmental permit; d) Failure to pay, on such terms and stated time, the bonds established by this Act, e) authorization of activities, works, projects or grants, which by law require an environmental permit, without having been granted it by the Ministry; f) Provision of environmental permits, knowing that the proponent of the activity, work, project or concession has not met the legal requirements, g) The refusal of the concessionaire for the use or exploitation of natural resources to prevent, correct or compensate for adverse environmental impacts under a grant activity occurring within the timing and terms for that purpose has been established, taking into account the levels of the impacts; h) Violation of the standards of environmental quality and rational and sustainable exploitation of the resource; i) acts to prevent or impede the investigation of properly identified employees, belonging to the Ministry or other legally empowered authority, or failure to provide the assistance needed to carry out inspections or environmental audits of the activities, plants, works or projects; j) Issuance of pollutants that violate the permissible levels set by regulation; k) Failure to offer timely notification to the competent authority of spilled substances, products, waste or hazardous waste or pollutants that endanger human lives and physical integrity; l) Failure to comply with other obligations under this law.”

<sup>48</sup> Administrative Litigation Chamber Document 308-2006, at pages 5-6, paragraph 2(b).

<sup>49</sup> Administrative Litigation Chamber Document 308-2006, at page 6, paragraph 2(c).

<sup>50</sup> Administrative Litigation Chamber Document 308-2006, at page 9.

<sup>51</sup> See Administrative Litigation Chamber Document 308-2006, English translation at page 6, paragraph 2(d).

<sup>52</sup> A. Dimas/K.Urquilla, “Hugo Barrera abre la puerta a mineras,” *El Diario de Hoy*, July 23, 2006. Available at:

<http://www.elsalvador.com/noticias/2006/07/23/nacional/nac7.asp#>. Original Spanish: “Barrera dejó claro que en el país no hay una prohibición expresa a los proyectos mineros, sólo una regulación que dicta condiciones sobre cómo deben operar estas empresas. “Medio Ambiente no podría otorgar ningún permiso para proyectos mineros si en el estudio de impacto ambiental que presentan las compañías no tenemos establecido que se va a proteger el suelo, el agua subterránea, superficial, el aire y la salud de las personas que pueden vivir en las comunidades”, expresó el funcionario. El 12 de julio, en la Asamblea Legislativa, Barrera relacionó a las empresas mineras con daños irreversibles a la naturaleza. “La única posibilidad de permitir la explotación minera sería si las empresas mitigaran el 100 por ciento de los daños, lo cual es imposible porque la inversión sería mayor a las reservas totales de oro y plata”, dijo en esa ocasión el Ministro a los diputados. En esa reunión también insinuó que compañías con el permiso de exploración, otorgado por el Ministerio de Economía, podrían perderlo debido al impacto ambiental. La firma Commerce Group es la única con permiso de explotación en una mina de San Sebastián, al este de Santa Rosa de Lima, La Unión. Barrera reiteró en esa oportunidad, que en este caso particular, la concesión sería revocada con base a la Ley de Minería. En el artículo 28 de la normativa, entre las causas de cancelación está el atraso en el inicio de operaciones. Esta empresa lleva dos sin hacer uso de este servicio.”

<sup>53</sup> Notice of Arbitration, at page 4, paragraph 22.

<sup>54</sup> Administrative Litigation Chamber Document 308-2006, at page 2, paragraphs 1(c-d).

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- <sup>55</sup> Administrative Litigation Chamber Document 308-2006, April 29, 2010, English translation at 10-11.
- <sup>56</sup> Administrative Litigation Chamber Document 308-2006, at page 12.
- <sup>57</sup> Administrative Litigation Chamber Document 309-2006, at page 1-2, paragraph 1(b).
- <sup>58</sup> Administrative Litigation Chamber Document 309-2006, at pages 5-6, paragraphs 2(b-d).
- <sup>59</sup> Administrative Litigation Chamber Document 309-2006, at page 6, paragraph e.
- <sup>60</sup> Administrative Litigation Chamber Document 309-2006, April 29, 2010, English translation at 4 and 11.
- <sup>61</sup> Administrative Litigation Chamber Document 309-2006, April 29, 2010, English translation at 7-8.
- <sup>62</sup> Notice of Arbitration, at page 4, paragraphs 23-24.
- <sup>63</sup> August 16, 2010, at page 29, at paragraph 104.
- <sup>64</sup> *Ibid*, at page 30, at paragraph 106.
- <sup>65</sup> *Ibid*, at pages 30,-31 paragraphs 106-107.
- <sup>66</sup> International Centre For Settlement Of Investment Disputes, Commerce Group Corp. and San Sebastián Gold Mines, Inc. (Claimants), v. Republic of El Salvador (Respondent). ICSID Case No. ARB/09/17, "The Republic Of El Salvador's Reply (Preliminary Objection Under CAFTA Article 10.20.5), September 30, 2010, at page 43, paragraph 123. Available at: [http://www.minec.gob.sv/index.php?option=com\\_phocadownload&view=category&id=30:commerce-group-vrs-repblica-de-el-salvador&download=333:replica-de-el-salvador-a-sus-objeciones-preliminares-30-de-septiembre-del-2010&Itemid=63](http://www.minec.gob.sv/index.php?option=com_phocadownload&view=category&id=30:commerce-group-vrs-repblica-de-el-salvador&download=333:replica-de-el-salvador-a-sus-objeciones-preliminares-30-de-septiembre-del-2010&Itemid=63)
- <sup>67</sup> September 30, 2010, at page 44, paragraph 127 .
- <sup>68</sup> Liliana Fuentes Monroy, "Tóxicos en siete ríos de San Miguel y Morazán," *La Prensa*, Oct. 10, 2008. Available at: <http://archive.laprensa.com.sv/20080210/nacion/980597.asp>. Original Spanish: "Los resultados del examen en siete ríos revelan que en marzo de 2006, cuando se tomaron 24 muestras de agua y 24 de sedimentos, los contenidos de mercurio y cadmio sobrepasaban con creces los valores de referencia establecidos por la Agencia de Protección Ambiental (EPA) de Estados Unidos. El hallazgo se produjo en cinco puntos en el sur del departamento de Morazán y en el norte del municipio de San Miguel, una de las zonas del país con mayor actividad minera. Los investigadores, aunque no determinaron el origen de la contaminación, consideran como principal sospechosa a la minería que por décadas hubo en los municipios morazanenses de El Divisadero, Jocoro y San Carlos, precisamente en las cuencas de los ríos donde se tomaron las muestras. El equipo de investigadores del área de ciencias de la tierra de la Universidad de El Salvador subraya que, con frecuencia, el cadmio y el mercurio se han asociado a la actividad minera... Los resultados del estudio se hicieron públicos hasta diciembre de 2007, y los investigadores dicen haberse sobresaltado, a pesar de que esperaban alguna evidencia de contaminación. "Para nosotros fue una sorpresa encontrar estos metales en el lodo, mucho más cuando revisamos las referencias y lo que ocasionan a la salud humana... nos pareció importantísimo seguir con el sondeo y ampliar la referencia, así como darlo a conocer", menciona Rafael Cartagena, quien dirigió el estudio. En el caso del cadmio, los 43 microgramos por cada gramo de sedimento seco supera hasta en 72 veces el nivel de 0.6 que establece la norma de la Agencia de Protección Ambiental de Estados Unidos (EPA) para sedimentos de agua dulce. Para el mercurio, la EPA considera que a partir de 0.2 microgramos por cada gramo de sedimento seco puede haber efectos en el ambiente. Por lo tanto, los 7.2 hallados en el encuentro de los ríos Seco y La Majada equivalen a 36 veces la norma." English translation: "Test results reveal that, in the seven rivers in March 2006 where they took 24 samples of water and 24 of sediment, mercury and cadmium content far exceeded the benchmarks set by the Environmental Protection Agency (EPA) United States. The discovery was made at five points in the southern department of Morazan and northern municipality of San Miguel, one of the country's largest mining areas. The researchers, though they did not determine the source of contamination, considered as the main suspect in the mining industry that for decades was in the [area and in] precisely in the basins of the rivers where samples were taken. The team of researchers in the field of earth sciences at the University of El Salvador stated that, often, cadmium and mercury have been associated with the mining ... The study results were not made public until December 2007, and the researchers say they have been startled, even though they expected some evidence of contamination. "For us it was a surprise to find these metals in the mud, much more so when we checked the references and what they cause to human health ... it seemed important to continue the probe and expand the reference and make it known, "says Rafael Cartagena, who led the study. In the case of cadmium, the 43 micrograms per gram of dry sediment was up to 72 times above the level of 0.6 of Environmental Protection Agency (EPA) standards for freshwater sediments. For mercury, the EPA considers that from 0.2 micrograms per gram of dry sediment may have effects on the environment. Therefore, the 7.2 found in the meeting of the rivers dry and the Majada are equivalent to 36 times the norm."
- <sup>69</sup> Daniel Trujillo, "Demandan a Commerce Group Corp. por contaminación de río," *Diario CoLatino*, Sept. 25, 2007. Available at: <http://www.diariocolatino.com/es/20070925/nacionales/47484/>. Original Spanish: "La empresa minera Comerse Group Corp fue demanda, esta mañana, ante la Fiscalía General de la República (FGR) por contaminar con sustancias metálicas al río San Sebastián... La demanda fue hecha por la Mesa Nacional Frente a la Minería y esta organización aseguró que el drenaje ácido que hiciera la mina "San Sebastián" provocó que el referido río se contaminara con Manganeseo, Cobre, Hierro y Aluminio, metales nocivos para la salud humana. El río San Sebastián es el principal afluente de agua en la zona; alrededor de 150 mil personas son las que corren peligro si beben de sus aguas. Antonio Hernández, representante de las comunidades de la zona, aseguró a este vespertino que el ganado de los campesinos ha muerto por beber del agua del río." English translation: "The mining company Commerce Group was sued this morning, before the Attorney General's Office (FGR) for polluting the San Sebastián river with metallic substances ... The suit was brought by the Mesa Nacional Frente a la Minería and the organization said acid drainage from the "San Sebastián" mine contaminated the river with manganese, copper, iron and aluminum, metals harmful to human health... The San Sebastián River is the main tributary of water in the area, and about 150 thousand people are at risk if they

drink from its waters. Antonio Hernandez, representing the communities of the area, said this evening that cattle have died from drinking river water.”

<sup>70</sup> David Perez, “San Sebastián: el secreto a voces de la contaminación minera,” *Diario Co Latino*, Sept. 20, 2010. Available at: <http://www.diariocolatino.com/es/20100920/nacionales/84485/>. See a similar report from 2009:

<http://www.diariocolatino.com/es/20090916/nacionales/71425/>. Original Spanish: “Los metales pesados y su ingesta a través del aire o del agua están asociados a una serie de padecimientos, pero, sobre todo, del sistema nervioso central y de insuficiencia renal, aunque actualmente no existe un estudio objetivo de los trastornos a la salud que pueden causar los metales pesados. Se estima que las enfermedades más frecuentes en el cantón son: insuficiencia renal y cáncer, pero pueden existir otros factores causales. Por otro lado, puede suceder que las generaciones expuestas a la contaminación no desarrollen una enfermedad, sino que el agente portador trascienda de una generación a otra, y se manifieste hasta la tercera generación, siendo su portador genuino el abuelo más próximo... Luis Alonso Blanco es uno de los obreros que trabajaron para la Commerce Group, extrayendo oro y otros metales de valor económico. [Dice que] “En la estación seca se ve puro achiote, mancha la ropa y el agua si usted la agarra es gruesa y pegajosa, a los animales no se les puede dar porque no les gusta; no se la toman”, agrega. Asimismo, confirma que el agua de los pozos está contaminada, pues deja una sustancia carbonosa en los recipientes que la contiene y no es apta para el consumo humano. “Del pozo sale una nata que deja como ceniza de carburo, si la deja en un traste y la ve día siguiente, tiene una costra bien pegada, como si tuviera muchos días así”. English translation: “Heavy metals and their intake through the air or water are associated with a number of conditions, but above all, central nervous system and kidney failure, although there is currently no objective study of the health disorders that heavy metals can cause. It is estimated that the most common diseases in the county are: kidney failure and cancer, but there may be other causal factors. On the other hand, it may be that the generations exposed to contamination may not have a disease, but the carrier agent transcends from one generation to another, and they show to the third generation, with the lineage bearer nearest genuine ... Luis Alonso Blanco is one of the workers who worked for the Commerce Group, extracting gold and other metals of economic value.” [He says]: “A thick creamy substance comes out of the spring, and leaves a carbon ashlike residue. If you rub it in your skin, and examine it a day later, you’ll have a thick scab, as if it had been there many days.”

<sup>71</sup> Notice of Intent to File Claim Under CAFTA-DR, Letter from Machulak, Robertson & Sodos, S.C. to El Salvador’s Ministry of Economy, dated March 16, 2009. Available at:

[http://www.minec.gob.sv/index.php?option=com\\_phocadownload&view=category&id=30:commerce-group-vrs-republica-de-el-salvador&download=290:commerce-group-notice-of-intent&Itemid=63](http://www.minec.gob.sv/index.php?option=com_phocadownload&view=category&id=30:commerce-group-vrs-republica-de-el-salvador&download=290:commerce-group-notice-of-intent&Itemid=63)

<sup>72</sup> CAFTA, Article 10.16.2, at page 10-11 Available at:

[http://www.ustr.gov/sites/default/files/uploads/agreements/cafta/asset\\_upload\\_file328\\_4718.pdf](http://www.ustr.gov/sites/default/files/uploads/agreements/cafta/asset_upload_file328_4718.pdf).

<sup>73</sup> CAFTA Article 10.18.1: “No claim may be submitted to arbitration under this Section if more than three years have elapsed from the date on which the claimant first acquired, or should have first acquired, knowledge of the breach alleged under Article 10.16.1 and knowledge that the claimant (for claims brought under Article 10.16.1(a)) or the enterprise (for claims brought under Article 10.16.1(b)) has incurred loss or damage.” At page 10-13.

<sup>74</sup> International Centre For Settlement Of Investment Disputes, Commerce Group Corp. and San Sebastian Gold Mines, Inc., Claimants, v. Republic of El Salvador, Respondent., ICSID Case No. ARB/09/17, “The Republic of El Salvador’s Preliminary Objection Under Article 10.20.5 Of The Dominican Republic – Central America – United States Free Trade Agreement (CAFTA),” Aug. 16, 2010, at pages 13-14, paragraphs 49-51. Available at:

[http://www.minec.gob.sv/index.php?option=com\\_phocadownload&view=category&id=30:commerce-group-vrs-republica-de-el-salvador&download=326:objeciones-preliminares-presentadas-en-el-caso-commerce-group-corp.-and-san-sebastian-gold-mines-vrs.-republica-de-el-salvador.&Itemid=63](http://www.minec.gob.sv/index.php?option=com_phocadownload&view=category&id=30:commerce-group-vrs-republica-de-el-salvador&download=326:objeciones-preliminares-presentadas-en-el-caso-commerce-group-corp.-and-san-sebastian-gold-mines-vrs.-republica-de-el-salvador.&Itemid=63)

<sup>75</sup> Notice of Arbitration.

<sup>76</sup> CAFTA Article 10.16.3, at a paragraph 3.

<sup>77</sup> Administrative Litigation Chamber Document 309-2006 and Administrative Litigation Chamber Document 308-2006.

<sup>78</sup> CAFTA Article 10.18.2. The text of this provision reads: “No claim may be submitted to arbitration under this Section unless:

(a) the claimant consents in writing to arbitration in accordance with the procedures set out in this Agreement; and

(b) the notice of arbitration is accompanied,

(i) for claims submitted to arbitration under Article 10.16.1(a), by the claimant’s written waiver, and

(ii) for claims submitted to arbitration under Article 10.16.1(b), by the claimant’s and the enterprise’s written waivers of any right to initiate or continue before any administrative tribunal or court under the law of any Party, or other dispute settlement procedures, any proceeding with respect to any measure alleged to constitute a breach referred to in Article 10.16.”

<sup>79</sup> “The Republic of El Salvador’s Preliminary Objection Under Article 10.20.5 Of The Dominican Republic – Central America – United States Free Trade Agreement (CAFTA),” Aug. 16, 2010, at page 1, paragraph 3.

<sup>80</sup> “The Republic of El Salvador’s Preliminary Objection Under Article 10.20.5 Of The Dominican Republic – Central America – United States Free Trade Agreement (CAFTA),” Aug 16, 2010, at page 10.

<sup>81</sup> Commerce Group, “Rejoinder: Republic of El Salvador’s Preliminary Objections,” Oct 15, 2010. On page 23, paragraph 67, Commerce Group notes that El Salvador complained that the company maintained “two sets of proceedings related to the same measures.” Commerce Group does not dispute that notion in the text that follows, but states on page 26, paragraph 80 that “The only measures at issue in the Domestic Proceedings were the revocation of the environmental permits. The Claimants’ Notice of Arbitration identifies a series of other measures that breach CAFTA and the Foreign Investment Law. First, the Respondent’s decisions not to renew the Claimants’ exploration licenses are undoubtedly measures. Indeed, the Respondent implicitly

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acknowledges the existence of other claims when it notes that the revocation of the environmental permits constitutes “by far the most significant claims in this arbitration.”” Available at: <http://www.arbitration.fr/resources/ICSID-ARB-09-17-Claimants-Rejoinder.pdf>

<sup>82</sup> According to El Salvador, “Claimants were required to terminate the domestic judicial proceedings prior to filing the Notice of Arbitration and even had ample time to request such termination and still file a new Notice of Arbitration with a valid waiver by September 13, 2009, after El Salvador advised Claimants that CAFTA precluded them from initiating CAFTA arbitration while continuing domestic proceedings related to the same measures. But Claimants chose not to terminate the domestic judicial proceedings because they wanted to maximize the probability of a favorable decision while hoping to preserve the CAFTA option in the event their domestic litigations did not go as they wanted. This is precisely what CAFTA prohibits and what Claimants expressly committed *not* to do in their written waivers filed as a prerequisite to initiating this arbitration.” See “The Republic of El Salvador's Preliminary Objection Under Article 10.20.5 Of The Dominican Republic – Central America – United States Free Trade Agreement (CAFTA),” Aug. 16, 2010. Page 28, paragraph 100.

<sup>83</sup> “The Republic of El Salvador's Preliminary Objection Under Article 10.20.5 Of The Dominican Republic – Central America – United States Free Trade Agreement (CAFTA),” Aug. 16, at page 1, paragraph 4.

<sup>84</sup> The relevant portion of CAFTA Article 10.20 reads:

“4. Without prejudice to a tribunal’s authority to address other objections as a preliminary question, a tribunal shall address and decide as a preliminary question any objection by the respondent that, as a matter of law, a claim submitted is not a claim for which an award in favor of the claimant may be made under Article 10.26.

(a) Such objection shall be submitted to the tribunal as soon as possible after the tribunal is constituted, and in no event later than the date the tribunal fixes for the respondent to submit its counter-memorial (or, in the case of an amendment to the notice of arbitration, the date the tribunal fixes for the respondent to submit its response to the amendment).

(b) On receipt of an objection under this paragraph, the tribunal shall suspend any proceedings on the merits, establish a schedule for considering the objection consistent with any schedule it has established for considering any other preliminary question, and issue a decision or award on the objection, stating the grounds therefor.

(c) In deciding an objection under this paragraph, the tribunal shall assume to be true claimant’s factual allegations in support of any claim in the notice of arbitration (or any amendment thereof) and, in disputes brought under the UNCITRAL Arbitration Rules, the statement of claim referred to in Article 18 of the UNCITRAL Arbitration Rules. The tribunal may also consider any relevant facts not in dispute.

(d) The respondent does not waive any objection as to competence or any argument on the merits merely because the respondent did or did not raise an objection under this paragraph or make use of the expedited procedure set out in paragraph 5.

5. In the event that the respondent so requests within 45 days after the tribunal is constituted, the tribunal shall decide on an expedited basis an objection under paragraph 4 and any objection that the dispute is not within the tribunal’s competence. The tribunal shall suspend any proceedings on the merits and issue a decision or award on the objection(s), stating the grounds therefor, no later than 150 days after the date of the request. However, if a disputing party requests a hearing, the tribunal may take an additional 30 days to issue the decision or award. Regardless of whether a hearing is requested, a tribunal may, on a showing of extraordinary cause, delay issuing its decision or award by an additional brief period, which may not exceed 30 days.”

See full text at: [http://www.ustr.gov/sites/default/files/uploads/agreements/cafta/asset\\_upload\\_file328\\_4718.pdf](http://www.ustr.gov/sites/default/files/uploads/agreements/cafta/asset_upload_file328_4718.pdf).

<sup>85</sup> Commerce Group’s Response to the Republic of El Salvador’s Preliminary Objection, September 15, 2010. At page 5, paragraph 17. Available at:

[http://www.minec.gob.sv/index.php?option=com\\_phocadownload&view=category&id=30:commerce-group-vrs-repblca-de-el-salvador&download=325:preliminares&Itemid=63](http://www.minec.gob.sv/index.php?option=com_phocadownload&view=category&id=30:commerce-group-vrs-repblca-de-el-salvador&download=325:preliminares&Itemid=63).

<sup>86</sup> International Centre For Settlement Of Investment Disputes, Commerce Group Corp. and San Sebastián Gold Mines, Inc.

(Claimants), v. Republic of El Salvador (Respondent). ICSID Case No. ARB/09/17, “The Republic Of El Salvador's Reply (Preliminary Objection Under CAFTA Article 10.20.5),” September 30, 2010, at page 43, paragraph 123. Available at:

[http://www.minec.gob.sv/index.php?option=com\\_phocadownload&view=category&id=30:commerce-group-vrs-repblca-de-el-salvador&download=333:replica-de-el-salvador-a-sus-objeciones-preliminares-30-de-septiembre-del-2010&Itemid=63](http://www.minec.gob.sv/index.php?option=com_phocadownload&view=category&id=30:commerce-group-vrs-repblca-de-el-salvador&download=333:replica-de-el-salvador-a-sus-objeciones-preliminares-30-de-septiembre-del-2010&Itemid=63)

<sup>87</sup> International Centre For Settlement Of Investment Disputes, Commerce Group Corp. and San Sebastián Gold Mines, Inc.

(Claimants), v. Republic of El Salvador (Respondent). ICSID Case No. ARB/09/17, “Response to the Republic of El Salvador's Preliminary Objections”, October 15, 2010, Available at:

[http://www.minec.gob.sv/index.php?option=com\\_phocadownload&view=category&id=30:commerce-group-vrs-repblca-de-el-salvador&download=332:replica-a-las-objeciones-prelimiarias-presentadas-por-el-salvador-en-el-caso-commerce-group-corp.-15-de-octubre-de-2010.&Itemid=63](http://www.minec.gob.sv/index.php?option=com_phocadownload&view=category&id=30:commerce-group-vrs-repblca-de-el-salvador&download=332:replica-a-las-objeciones-prelimiarias-presentadas-por-el-salvador-en-el-caso-commerce-group-corp.-15-de-octubre-de-2010.&Itemid=63).

<sup>88</sup> Submission and Letter from Costa Rican Ministry of Foreign Commerce to ICSID Tribunal, at paragraph 3. Available at:

[http://www.minec.gob.sv/index.php?option=com\\_phocadownload&view=category&id=30:commerce-group-vrs-repblca-de-el-salvador&download=338:carta&Itemid=63](http://www.minec.gob.sv/index.php?option=com_phocadownload&view=category&id=30:commerce-group-vrs-repblca-de-el-salvador&download=338:carta&Itemid=63) and

[http://www.minec.gob.sv/index.php?option=com\\_phocadownload&view=category&id=30:commerce-group-vrs-repblca-de-el-salvador&download=336:escrito&Itemid=63](http://www.minec.gob.sv/index.php?option=com_phocadownload&view=category&id=30:commerce-group-vrs-repblca-de-el-salvador&download=336:escrito&Itemid=63).

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- <sup>89</sup> Letter from Nicaraguan Ministry of Development to ICSID Tribunal, Nov. 1, 2010. Available at: [http://www.minec.gob.sv/index.php?option=com\\_phocadownload&view=category&id=30:commerce-group-vrs-repblca-de-el-salvador&download=337:escrito&Itemid=63](http://www.minec.gob.sv/index.php?option=com_phocadownload&view=category&id=30:commerce-group-vrs-repblca-de-el-salvador&download=337:escrito&Itemid=63).
- <sup>90</sup> U.S. Department of State, Letter to Secretary of ICSID Tribunal, Nov. 1, 2010. Available at: [http://www.minec.gob.sv/index.php?option=com\\_phocadownload&view=category&id=30:commerce-group-vrs-repblca-de-el-salvador&download=339:carta&Itemid=63](http://www.minec.gob.sv/index.php?option=com_phocadownload&view=category&id=30:commerce-group-vrs-repblca-de-el-salvador&download=339:carta&Itemid=63).
- <sup>91</sup> International Centre for Settlement of Investment Disputes, “Commerce Group Corp. and San Sebastian Gold Mines, Inc. v. Republic of El Salvador (ICSID Case No. ARB/09/17) Public Hearing,” International Centre For Settlement Of Investment Disputes news release, November 10, 2010. Available at: <http://icsid.worldbank.org/ICSID/FrontServlet?requestType=CasesRH&actionVal=OpenPage&PageType=AnnouncementsFrame&FromPage=Announcements&pageName=Announcement68>.
- <sup>92</sup> International Centre for Settlement of Investment Disputes, “Commerce Group Corp. and San Sebastian Gold Mines, Inc. v. Republic of El Salvador” (ICSID Case No. ARB/09/17), Award, March 14, 2011. Available at: [http://ita.law.uvic.ca/documents/CommerceGroupAndSanSebastianVEISalvador\\_Award\\_Eng.pdf](http://ita.law.uvic.ca/documents/CommerceGroupAndSanSebastianVEISalvador_Award_Eng.pdf)
- <sup>93</sup> Notice of Arbitration at page 4, paragraph 21.
- <sup>94</sup> Administrative Litigation Chamber Document 308-2006, at pages 5-6, paragraph 2(b).
- <sup>95</sup> Administrative Litigation Chamber Document 308-2006, at pages 10-11.
- <sup>96</sup> Notice of Arbitration at page 4, paragraph 21.
- <sup>97</sup> Notice of Arbitration, at page 5 at paragraphs 25-26.
- <sup>98</sup> Notice of Arbitration, at page 5 at paragraph 30.
- <sup>99</sup> Notice of Arbitration, at pages 5-6, at paragraph 31.
- <sup>100</sup> CAFTA, Article 10.5.1-2 at page 10-2.
- <sup>101</sup> CAFTA, Annex 10-B at page 10-27.
- <sup>102</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*, April 22, 2005.
- <sup>103</sup> Mary Bottari and Lori Wallach, “NAFTA’s Threat to Sovereignty and Democracy,” Public Citizen report, February 2005, at 14. Available at: <http://www.citizen.org/documents/Chapter%2011%20Report%20Final.pdf>; Award on the Merits of Phase 2, In the Matter of an Arbitration Under Chapter 11 of the North American Free Trade Agreement, Between Pope & Talbot Inc. and the Government of Canada, Apr. 10, 2001, at page 87, paragraph 181.
- <sup>104</sup> Administrative Litigation Chamber 308-2006 English translation at page 12.
- <sup>105</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. Available at: [http://papers.ssrn.com/sol3/papers.cfm?abstract\\_id=1466980](http://papers.ssrn.com/sol3/papers.cfm?abstract_id=1466980).
- <sup>106</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>107</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>108</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>109</sup> International Centre For Settlement of Investment Disputes, Pac Rim Cayman LLC Claimant, v. The Republic of El Salvador, Respondent, ICSID Case No. ARB/09/12, “The Republic Of El Salvador's Reply (Preliminary Objections),” March 31, 2010. Available at: [http://www.minec.gob.sv/index.php?option=com\\_phocadownload&view=category&id=26:otros-documentos&Itemid=63](http://www.minec.gob.sv/index.php?option=com_phocadownload&view=category&id=26:otros-documentos&Itemid=63)
- <sup>110</sup> Award, Before the Arbitral Tribunal constituted Under Chapter 11 of the North American Free Trade Agreement, *Metalclad Corporation v. the United Mexican States*, International Centre for Settlement of Investment Disputes (Additional Facility), Aug. 25, 2000, at 32-35.
- <sup>111</sup> CAFTA, Annex 10-C at page 10-28.
- <sup>112</sup> “States, Cities Flag Problems with DR-CAFTA Investment Provisions,” *Inside U.S. Trade*, April 22, 2005;
- <sup>113</sup> CAFTA Article 10.28.1.
- <sup>114</sup> According to the 2002 Fast Track legislation, “the principal negotiating objectives of the United States regarding foreign investment are to reduce or eliminate artificial or trade-distorting barriers to foreign investment, while ensuring that foreign investors in the United States are not accorded greater substantive rights with respect to investment protections than United States investors in the United States...” See 19 U.S.C. § 3802(b)(3). Available at: [http://www.law.cornell.edu/uscode/html/uscode19/uscode19\\_usc\\_sec\\_19\\_00003802----000-.html](http://www.law.cornell.edu/uscode/html/uscode19/uscode19_usc_sec_19_00003802----000-.html).
- <sup>115</sup> “States, Cities Flag Problems with DR-CAFTA Investment Provisions,” *Inside U.S. Trade*, April 22, 2005; See, Matthew C. Porterfield, *International Expropriation Rules and Federalism*, 23 *Stanford Env'tl L. J.* 3, 43-62 (2004).

- <sup>116</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>117</sup> Debbie Fabb, “Gold fever,” *BBC News*, June 12, 2008. Available at: <http://news.bbc.co.uk/2/hi/business/7450751.stm>
- <sup>118</sup> *Ministerio de Economía de El Salvador Dirección de Cooperación Internacional*, “Concurso Publico Internacional” at page 27. Original Spanish: “Al presente, se han otorgado 29 licencias de exploración de minerales metálicos,” English translation: “At present 29 licenses have been granted exploration of metal ores,”
- <sup>119</sup> “Ambientalistas piden a Funes plantear a Obama la revisión del CAFTA-DR,” *EFE*, March 3, 2010. Original Spanish: “Una docena de organizaciones ambientalistas de El Salvador pidió hoy al presidente Mauricio Funes que plantee en la reunión con su colega estadounidense, Barack Obama, la revisión del acuerdo comercial CAFTA-DR, ante las demandas millonarias de mineras al amparo de ese convenio... A juicio de los movimientos sociales, "los impactos negativos del CAFTA-DR y las demandas de las empresas mineras Pacific Rim y Commerce Group en el CIADI", obligan a Funes a incluir en la cita 'una propuesta de revisión de dicho acuerdo comercial'.” English Translation: A dozen environmental organizations today called on El Salvador Mauricio Funes president raised at the meeting with his U.S. counterpart, Barack Obama, the revision of the CAFTA-DR trade agreement, to the millions of mining claims under that agreement... In the view of social movements, "the negative impacts of CAFTA-DR and the demands of mining and Pacific Rim Commerce Group at ICSID," requires Funes to include in "a proposal for revision of the trade agreement.”
- <sup>120</sup> “El Salvador: Mining Opponents Hold Mock Burial Of Company,” *Inter Press Service*, Dec. 8, 2008.
- <sup>121</sup> *Ibid.*
- <sup>122</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>123</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>
- <sup>124</sup> *Dirección General de Estadística y Censos*, “Encuesta de Hogares de Propósitos Múltiples 2008,” June 2009, at page 21. “En el área rural un 49.0% de hogares se encuentran en pobreza, de los cuales el 17.5% están en pobreza extrema y el 31.5% en pobreza relativa.”
- <sup>125</sup> Richard Steiner, “El Salvador – Gold, Guns and Choice: The El Dorado Gold Mine, Violence in Cabanas, CAFTA Claims and the National Effort to Ban Mining,” February 2010 at page 15. Available at: <http://www.walkingwithelsalvador.org/Steiner%20Salvador%20Mining%20Report.pdf>.
- <sup>126</sup> Institute for Policy Studies, “The Struggle Against Free Trade Continues,” Oct. 27, 2009. Available at: [www.ips-dc.org/articles/the\\_struggle\\_against\\_free\\_trade\\_continues](http://www.ips-dc.org/articles/the_struggle_against_free_trade_continues).
- <sup>127</sup> *Ibid.*
- <sup>128</sup> Tom Power, “Metals, Mining and Sustainable Development in Central America,” Oxfam Report, May 25, 2010, at 13.
- <sup>129</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. Original Spanish: “Las personas sufren graves problemas de salud debido principalmente al uso de cianuro en grandes cantidades para la extracción de oro y plata... La contaminación tendría también graves consecuencias en la flora y la fauna, extendiéndose asimismo a la agricultura, la ganadería y la pesca.” English Translation: “People suffer from serious health problems due mainly to the use of cyanide in large quantities for the extraction of gold and silver... Contamination would also have serious consequences for the flora and fauna, extending also to agriculture, livestock and fisheries.”
- <sup>130</sup> *Instituto Universitario de Opinión Pública*, “Conocimientos y percepciones hacia la minería en zonas afectadas por la incursión minera,” *Universidad Centroamericana José Simeón Cañas*, Oct. 7, 2009, at page 57, table 43. Available at: <http://www.uca.edu.sv/publica/iudop/Web/2008/finalminería040208.pdf>.
- <sup>131</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 Pac Rim](http://economia.terra.cl/noticias/noticia.aspx?idNoticia=200803112248_AFP_224800-TX-SXH27&idtel Pac Rim). Original Spanish: “El presidente de El Salvador, Elías Antonio Saca, aseguró este martes que "en principio" se opone a la concesión de permisos para nuevas explotaciones mineras en el país y pidió al Congreso estudiar el tema a profundidad.” English Translation: “The president of El Salvador, Elias Antonio Saca, said Tuesday that he is "in principle" opposed the granting of permits for new mines in the country and asked Congress to study the subject in depth.”
- <sup>132</sup> See [http://articles.cnn.com/2009-03-15/world/el.salvador.election\\_1\\_mauricio-funes-el-salvador-fmln?\\_s=PM:WORLD](http://articles.cnn.com/2009-03-15/world/el.salvador.election_1_mauricio-funes-el-salvador-fmln?_s=PM:WORLD)
- <sup>133</sup> *Ministerio de Economía de El Salvador Dirección de Cooperación Internacional*, “Concurso Publico Internacional,” at 28. On file with Public Citizen.
- <sup>134</sup> *Ibid.*, at 33, 38.
- <sup>135</sup> *Ibid.* at 28.
- <sup>136</sup> The Notice of Arbitration was issued on July 2, 2009 (Notice of Arbitration, page 7.) Marcelo Rivera's body was found in June 30 2009, Ramiro Rivera Gomez was killed December 20, 2009 and Dora “Alicia” Recinos Sorto was shot on December 26, 2009 (Edgardo Ayala, “El Salvador: Activists Link Mining Co. to Murders,” *Inter Press Service*, January 27, 2010.)
- <sup>137</sup> Matt Kennard, “How Sustainable is ‘Socially Responsible’ Mining?” *The Nation*, Feb. 17, 2010.
- <sup>138</sup> “Condenan Asesino de Ambientalista,” *El Diario de Hoy* Sept. 21, 2010. Accessed Oct. 5, 2010. Available at: [http://www.elsalvador.com/mwedh/nota/nota\\_completa.asp?idCat=6358&idArt=5162351](http://www.elsalvador.com/mwedh/nota/nota_completa.asp?idCat=6358&idArt=5162351).



<sup>139</sup> “Suspenden audiencia preliminar por inasistencia de imputados,” *Diario Co Latino*, April 30, 2010. Accessed May 13, 2010. Available at: <http://www.diariocolatino.com/es/20100430/nacionales/79483/>.

<sup>140</sup> MINEC, at page 27-28. Original Spanish: “Las operaciones mineras, tanto en El Salvador como en otros países centroamericanos, han sido objeto de Resistencia social, organizada principalmente por Organizaciones No Gubernamentales (ONGs). Los argumentos expuestos refieren a la minería como una actividad de alto riesgo ambiental. La mayor preocupación esta relacionada con los recursos hídricos y la generación de mayor pobreza en comunidades donde operan los proyectos mineros. Desde hace unos dos años, el movimiento ambientalista, opuesto a la minería, ha logrado influir en los gobiernos locales y las comunidades, aspecto que ha incidido sobre la actividad minera y los alcances que esta tiene en los ámbitos sociales, económicos y ambientales...” It goes on to say, “La Evaluación Ambiental Estratégica del Sector Minero Metálico de El Salvador tiene como objetivo obtener un conocimiento amplio que permita identificar los temas claves y prioridades que tienen los actores involucrados, en los aspectos ambientales, sociales, económicos e institucionales, para lo cual se partía de una caracterización o diagnóstico actual de las condiciones geológicas, ecológicas, territoriales, jurídicas, sociales, económicas y ambientales de las áreas potenciales de desarrollo de actividades mineras en el país. *A partir de los resultados del diagnóstico se formulara la Política Nacional de Minería*, la cual, en conjunto con los resultados obtenidos del diagnóstico, servirán como marco de referencia para la Evaluación Ambiental Estratégica del desarrollo de la industria minera, tomando en cuenta diferentes escenarios o alternativas. *Como resultado de las alternativas analizadas, se definiera el marco estratégico de acción del sector minero metálico del país.*” English Translation: “Mining operations, both in El Salvador and other Central American countries, have been met by social resistance, mainly organized by nongovernmental organizations (NGOs). The arguments relate to mining as an activity of high environmental risk. The major concern is related to water resources and generating more poverty in communities where mining projects operate. For the last two years, the environmental movement, which is opposed to mining, has managed to influence local governments and communities, something that has affected the mining industry and the impact it has on the social, economic and environmental spheres ... ” It goes on to say, “The Strategic Environmental Assessment of Metal Mining in El Salvador is to obtain a broad knowledge to identify key issues that are priorities for stakeholders in the environmental, social, economic and institutional spheres, which will be based on a current diagnosis or characterization of the potential geological, ecological, territorial, legal, social, economic and environmental impacts of development of mining activities in the country. *From the results of the diagnosis, a National Mining Policy will be developed*, which, together with the results of the diagnosis, will serve as a framework for a Strategic Environmental Assessment of mining industry development, taking into account different scenarios or alternatives. *As a result of the alternatives analyzed, the strategic framework for action of the metal mining sector in the country will be defined.*” [Italics added]. As this quote makes clear, El Salvador is still in the process of defining its mining policy going forward.

<sup>141</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>142</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>143</sup> “House Votes on Passage: H. R. 3045 [109th]: Dominican Republic-Central America-United States Free Trade Agreement,” Govtrack.us, July 28, 2005. Accessed: November 15, 2010. Available at: <http://www.govtrack.us/congress/vote.xpd?vote=h2005-443>.

<sup>144</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>145</sup> “Table Of NAFTA “Chapter 11” Foreign Investor-State Cases And Claims,” Public Citizen, April 2011. Available at: <http://www.citizen.org/documents/investor-state-chart-april-2011.pdf>

<sup>146</sup> For a compilation of these commitments, see <http://www.citizen.org/Page.aspx?pid=905>.

<sup>147</sup> U.S.-Korea FTA, Chapter 11. Available at:

[http://www.ustr.gov/sites/default/files/uploads/agreements/fta/korus/asset\\_upload\\_file587\\_12710.pdf](http://www.ustr.gov/sites/default/files/uploads/agreements/fta/korus/asset_upload_file587_12710.pdf); U.S.-Panama FTA, Chapter 10. Available at:

[http://www.ustr.gov/sites/default/files/uploads/agreements/fta/panama/asset\\_upload\\_file684\\_10351.pdf](http://www.ustr.gov/sites/default/files/uploads/agreements/fta/panama/asset_upload_file684_10351.pdf); U.S.-Colombia FTA, Chapter 10. Available at:

[http://www.ustr.gov/sites/default/files/uploads/agreements/fta/colombia/asset\\_upload\\_file630\\_10143.pdf](http://www.ustr.gov/sites/default/files/uploads/agreements/fta/colombia/asset_upload_file630_10143.pdf).