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For Immediate Release:  
March 15, 2011

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## **Commerce Group CAFTA Ruling Highlights Threat of Foreign Investor Rules Also Included in Korea FTA: Even as Mining Firm's Frivolous Challenge of Environmental Policy Is Dismissed on Technicality, El Salvador Must Pay \$800,000**

### *Statement of Lori Wallach, Director of Public Citizen's Global Trade Watch*

That El Salvador must pay more than \$800,000 in legal fees to defend itself against a frivolous corporate challenge of its environmental laws under the Central America Free Trade Agreement (CAFTA) provides a glaring example of why having the same provisions in the Korea trade pact now before Congress is so dangerous. 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.

The tribunal in this case made clear that Commerce Group Corp. had the right under CAFTA to challenge El Salvador's mining policy. The case was dismissed 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.

Indeed, when El Salvador attempted to recoup its legal costs, the tribunal sided with Commerce Group that its case was not frivolous. 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 same outlandish investor rights were in the trade deal George W. Bush signed with Korea that President Barack Obama now wants to push through Congress early this year. If Congress implements the U.S.-South Korea Free Trade Agreement (FTA), the hundreds of Korean firms operating here would get new rights to skirt our court system and domestic laws and demand taxpayer compensation before foreign tribunals for U.S. policies that they don't like, just as these mining corporations are doing in El Salvador. In contrast to pacts such as CAFTA, the Korea FTA involves a country that has 270 corporate affiliates established in this country – all of which would be newly empowered to attack our public interest laws before foreign tribunals to demand taxpayer compensation for loss of expected future profits.

These trade pact investor attacks ring an alarm across the political spectrum – from conservatives concerned about sovereignty threats posed by the U.S. government being under the jurisdiction of such foreign tribunals to progressives concerned about the 200-plus Korean affiliates that would be newly empowered to attack domestic environmental or health policies.

The question is: Will we allow this kind of thing to keep happening? These cases reignite the debate about trade pacts' threats to the environment and public health, remind people that Obama promised during his campaign to fix this very problem and shine a spotlight on the same horrible terms in the pending Korea trade deal.

The mining environmental and safety regulatory policies at issue in this CAFTA case was of vital importance to environmental protection and the future of democracy in El Salvador.

## **BACKGROUND:**

El Salvador revoked Commerce Group's environmental permits for its gold mining and milling operations in northeastern El Salvador after it failed an environmental audit in 2006. In April 2010, the Salvadoran Supreme Court ruled that the company had been afforded due process during and after the audit. Commerce Group then sued El Salvador under CAFTA. A tribunal established under the World Bank's International Centre for Settlement of Investment Disputes (ICSID) dismissed the Commerce Group claim today. El Salvador had to pay more than \$800,000 in legal defense fees.

Even as a tribunal dismisses the Commerce Group claim, El Salvador prepares for a second round of hearings on another challenge to the same environmental policies. A tribunal for a separate mining-related investor challenge brought under CAFTA against El Salvador by Canadian-based Pacific Rim Corp. allowed that case to proceed in August 2010. The next phase of the Pacific Rim case – a hearing on jurisdiction – will be held at ICSID March 23-26, 2011.

These cases were brought under extremely controversial CAFTA provisions that grant foreign investors expansive new rights to sue governments in foreign tribunals over regulations or government actions that conflict with the pacts' special rights for foreign investors and that could undermine their expected profits. These terms are included in all three of the George W. Bush-signed-but-unapproved trade agreements with Panama, Colombia and Korea that the Obama administration inherited. The Obama administration did not change a single word of these provisions in its recent supplemental talks on the Korea FTA despite widespread demands to do so from the bipartisan National Conference of State Legislatures and numerous members of Congress.

There are currently 85 Korean-owned multinational companies with about 270 corporate affiliates in the United States that would be newly empowered under the Korea FTA to challenge U.S. policies in foreign tribunals if the pact goes into effect. There are also hundreds of U.S. firms operating in Korea that could use the same system to attack Korean public interest laws. You can see a map of these here: <http://www.citizen.org/Page.aspx?pid=3967>.

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