

August 19, 2005

GUATEMALA: "A TOXIC TRADE-OFF". The Washington Post newspaper reports on how the Glamis Gold mining company is using "free" trade agreements and pro-company laws to push ahead with mining operations in Guatemala that are very harmful to the local Mayan populations, to the environment, to health, .

Please write the Glamis Gold company, address below, and to your elected official, demanding that Glamis Gold suspend its operation until all the pending issues can be clarified and resolved. For more information about on-going campaign to suspect Glamis' operations, info@rightsaction.org.

Please make tax-deductible donations, information below, to support the work of community-based organizations working in defense of the environment, development and human rights in regions affected by North American mining companies.

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If you want on-off this elist, info@rightsaction.org. Please re-distribute this info.

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A TOXIC TRADE-OFF, By Daphne Eviatar, washingtonpost.com , Sunday, August 14, 2005; B01

Pressing for passage of the Central American Free Trade Agreement [CAFTA] at a White House news conference in May, President Bush made the case that a vote for CAFTA was a vote for democracy: "By transforming our hemisphere into a powerful free trade area, we will promote democratic governance, human rights and economic liberty for everyone," he said.

But lawmakers who voted to pass CAFTA in late July may not have realized that a part of the trade agreement threatens to do just the opposite. That's because of a little-understood legal clause included in CAFTA, the North American Free Trade Agreement (NAFTA), and other, already existing bilateral investment treaties. Designed to protect foreign investors against unfair treatment by a signatory state, these "investor-state arbitration" provisions actually hand foreign businesses powerful rights that trump the interests or desires of local citizens.

[GLAMIS GOLD's OPEN PIT MINING]

Take the example of the current bid by U.S.-Canadian corporation Glamis Gold Ltd. to mine the ore in Guatemala's Western highlands. Local community and church leaders have vigorously protested the company's plans to dig an open-pit gold and silver mine in the department of San Marcos. They contend that the mining process, which uses cyanide to extract gold from ore, could leach deadly toxins into the surrounding water supply.

After construction began in 2004, the indigenous poor -- who make up most of the region's population and depend on scarce local water -- began protesting the mine. They continued for months into this year, even though the government dispatched the military to quell the protests and local leaders reportedly received death threats.

In response to these health and safety concerns, the government of Guatemala could

decide either to ban the cyanide process or to require the company to compensate surrounding communities for their risk. The vice president has said that the government wouldn't do anything the people don't want. But stopping the Glamis project now could be costly: Under CAFTA, the government of Guatemala could be liable for tens of millions of dollars.

How can a multinational corporation, that objects to local environmental, health or safety regulations, sue a national government? That license is provided under NAFTA. Once CAFTA is signed, it will provide the same right. In each case, a provision of the agreement allows a foreign corporation to sue a national government for money damages if it believes that the actions of the federal, state or local government in a given country are discriminatory, violate international law or can be considered -- directly or indirectly -- an expropriation of the company's investment. If complying with an environmental regulation makes a project no longer worth the cost, a company can claim that its investment has been expropriated by the state.

[THE "JUDGES"]

Whether the company is in the right won't be decided by an independent judge, however. Rather, it will be decided by a panel of three private international arbitrators chosen by the parties involved. These arbitrators are often corporate lawyers, who, in another suit, could be representing the investor. Affected citizens are not parties to the case. The government's right to protect the water supply in Guatemala, then, could be decided by British or American lawyers, for instance.

And it's not just a matter of a powerful multinational corporation challenging a struggling Central American country. In fact, Glamis, the company that's digging the mine in Guatemala, has already brought a similar legal action against the United States. In 2003, Glamis filed for arbitration under NAFTA, claiming that environmental and historic preservation regulations passed in California after the company had received a federal permit to dig there amount to an expropriation.

The regulations, championed by then-governor Gary Davis in response to strong local protests, require that open-pit gold mines be backfilled and returned to their pre-mined condition after the ore has been depleted. Claiming that the cost of backfilling would destroy the future economic value of its project, Glamis brought a \$50 million claim against the United States. (The matter hasn't been resolved yet.)

[GLOBAL IMPUNITY AND .]

Defenders of arbitration provisions claim that critics' concerns are overblown, and emphasize that, unlike Canada and Mexico, the United States has yet to lose one of these cases. Still, many legal experts argue that the provisions violate state and national sovereignty: They allow foreign investors to make an end-run around the federal courts, which usually rule on the legitimacy of public laws. As Justice Sandra Day O'Connor wrote after NAFTA's adoption: "Article III of our Constitution reserves to federal courts the power to decide cases and controversies, and the U.S. Congress may not delegate to another tribunal 'the essential attributes of judicial power.' Whether our Congress has done so with respect to tribunals created by different treaties and agreements is a critical question."

John Echeverria, executive director of Georgetown University's Environmental Law and Policy

Institute, puts it more starkly: "Congress is virtually sleepwalking through a revolutionary, and likely highly destructive, alteration of the American constitutional system of government." Echeverria is referring to the threat to U.S. sovereignty when, for example, the Canadian division of Glamis challenges the legitimacy of a California law by suing the United States.

[. CORRUPTION]

With agreements like CAFTA between rich and poor countries, the sovereignty question also has another, more sinister twist: Although these treaties protect corporations against the vagaries of unpredictable governments, they can also make it easier for corrupt national leaders to ignore the interests of their own populations and sign lucrative contracts with foreign corporations. This is a longstanding problem with extractive industries like mining and the countries that depend on them.

And this sort of corruption is one reason why poverty in those countries has soared in recent decades. According to the United Nations, in 1981, 61 percent of people in mineral and energy exporting countries were living on less than \$1 per day; by 1999, that number was 82 percent.

Of course, companies need some protections when they invest. If Guatemala suddenly nationalized its mining industry, for example, seizing all foreign-owned mines, foreign corporations would understandably be aggrieved. But enacting environmental, health or safety regulations is a different matter. The United States Supreme Court has made clear that even if a regulation significantly reduces the value of a company's investment, the government needn't compensate that loss. Environmental regulations are part of the cost of doing business. It's far cheaper to dump toxic waste into a river than to dispose of it safely, but we still want our government to impose the cost of safe disposal on companies creating the hazard.

"The mining industry spews almost half of all toxic emissions in some countries, in the process ruining local agriculture and causing a substantial boost in respiratory disorders and raising cancer rates," according to a recent, critical report on investor arbitration rights written by Oxfam America and Friends of the Earth. Mining will only encourage real development, they conclude, if it's properly regulated.

[MINING AND POVERTY]

Increasingly, people in developing countries are demanding just that. And it's a sign of progress. If democratically elected governments enacted laws in response to these legitimate concerns, that would be another important step; in fact, it'd be exactly what we want "developing" countries to do. And it's what the United States government claims to be encouraging.

Unfortunately, with the proliferation of trade and investment agreements that hand foreign investors surprisingly broad rights, local governments are losing the power to protect their people, environment and economy. Investor protection clauses "essentially restrict the ability of governments to impose public interest or environmental regulations on corporate operations," says Keith Slack, an extractive industries expert for Oxfam America. And this hinders the very sort of development that would, in the long run, make poor countries not only better places for people to live, but far better places for American corporations to do business.

These arbitration provisions also highlight the inconsistency of the Bush administration's approach to sovereignty under international law. According to many legal experts (including lawyers now bringing these claims), the significance of investor-state arbitration provisions, which wasn't clear at the time NAFTA was enacted under the Clinton administration, in the last few years has become so.

The Bush administration has refused to sign the Kyoto Protocol to reduce greenhouse gases and the treaty creating the International Criminal Court on the grounds that these treaties threaten U.S. sovereignty. But when it came time to push for Congressional support of CAFTA and other trade pacts that compromise U.S. sovereignty for the benefit of big business, the administration's concerns about the integrity of our legislative and judicial system had disappeared.

[WHAT KIND OF DEVELOPMENT AND TRADE DO WE WANT?]

The debate over these sorts of agreements isn't over whether or not to have "free trade." All trade is regulated -- just a quick glance at the 22 chapters of CAFTA alone makes that plain. The conflict is over which rules will make the liberalization of trade benefit both foreign investors and local villagers. A trade agreement that binds the hands of local governments for the benefit of foreign corporations will only undermine democracy -- and in the long run, global development itself.

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Rights Action is a development, enviro and human rights organization, with its main office in Guatemala. We: channel your tax-deductible donations to over 50 community development, environment and human rights organizations in Guatemala, Chiapas, Honduras, Haiti; provide accompaniment for 'at risk' community development leaders; carry out education & activist work with partner groups about global human rights, environment and development issues. www.rightsaction.org, info@rightsaction.org.

To contribute tax-deductible funds, make check payable to "Rights Action" and mail to:

* United States: Box 50887, Washington DC, 20091-0887.

* Canada: 509 St. Clair Ave W, box73527, Toronto ON, M6C-1C0.

On-line donations: USA and Canada: www.rightsaction.org.

Wire funds to Rights Action: contact info@rightsaction.org, 416-654-2074.

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