

Reclaiming Democracy: Why mining activists should care about Fast Track & Free Trade

As citizens around the world campaign to clean up the mining industry and its dismal record of environmental performance, the industry is working to frustrate those efforts by using international trade agreements to create a new paradigm of governance that gives corporate profits new legal precedence over public health and the environment.

Already, globalization has persuaded many countries to change their laws to meet the demands of foreign investment. As one country relaxes its rules on foreign ownership of mining operations, weakened or abandoned environmental standards, and provided tax breaks, others are convinced to do so in order not to be left behind.

The North American Free Trade Agreement (NAFTA) is speeding this race to the bottom, giving foreign governments and corporations the right to challenge a nation's laws as too restrictive of corporate profits.

President Bush pressed Congress to give him Fast Track trade authority to complete a 31-nation expansion of NAFTA called the Free Trade Area of the Americas (FTAA.) The FTAA will firmly establish the maximization of corporate profits as the new basis of international law - impacting the prospects for mining reform as well as countless other environmental, public health, labor and other issues.

NAFTA Puts U.S. Environmental Laws On the Chopping Block

When NAFTA was debated, environmentalists knew that it would give Canada and Mexico the right to challenge U.S. laws in secret, international tribunals. But, NAFTA's primary impact on the environment is likely to be accomplished through an obscure clause that initially seemed innocuous, but has given foreign corporations the right to sue governments.

Language in NAFTA's Chapter 11 that appeared to merely ensure that foreign investors receive "fair and equitable treatment" as protection against property seizures is being used to sue host governments for huge damages for corporate losses due to environmental and other standards. Under Chapter 11, U.S. environmental and public health laws are in jeopardy, especially state laws that are stronger than federal standards. It's also likely that any successful efforts to strengthen federal standards would be challenged under Chapter 11.

So far, at least 20 U.S., Canadian and Mexican corporations have seized on the chance to collect multimillion-dollar settlements. These cases are alarming because:

- Chapter 11 is similar to U.S. takings law, but has a much lower standard for awarding corporations damages, allowing damages from a mere diminution in value or loss of business profits.

- Chapter 11's effects are similar to takings law, as well. Although NAFTA tribunals do not have the authority to overturn laws or order governments to change them, their rulings often indirectly have this effect. Rather than face repeated suits for damages, governments often repeal the standards in question, sometimes before a case is even argued. For example, Canada reversed a ban on the gasoline additive MMT after the U.S.-based Ethyl Corporation won a \$13 million payment.
- Chapter 11 has been successfully used to attack laws that don't discriminate against foreign corporations - a significant difference from the protection against property seizure that most imagined Chapter 11 would provide. For example, the U.S.-based Metalclad Corporation reached a \$15.6 million settlement with the Mexican government over a hazardous waste facility that was denied a permit under laws protecting drinking water supplies and endangered species. The laws affected Mexican and foreign corporations alike. Used in this manner, Chapter 11 gives foreign corporations greater rights than domestic companies.
- NAFTA tribunals bypass established court systems. Only companies and investors are given the legal right to access the courts. The tribunals are not required to hear the opinions of citizens and non-governmental organizations (NGOs), though they may if they wish, and the public does not have access to hearings and documents. Further, citizens and NGOs must submit requests to investigate charges that a government is failing to enforce its environmental laws to NAFTA's Commission for Environmental Cooperation, rather than take the case directly to a tribunal.
- Chapter 11 has been used to challenge state and local laws, as well as federal laws. In addition to the Metalclad case, which challenged a city's action under state and local law, the Canadian-based Methanex Corporation is claiming \$970 million in lost business due to a California law that bars use of the toxic gasoline additive MTBE - a possible carcinogen found in groundwater at 10,000 sites across the state. The case is currently before a tribunal.

NAFTA's environmental side agreement includes provisions to guard against the possibilities that countries will fail to enforce their environmental laws to promote trade, although the term "environmental law" is defined to specifically exclude standards that manage harvesting of natural resources, such as minerals. Even so, this limited protection for environmental laws seems at odds with Chapter 11's protections for corporate profits, especially since it is not included in the Agreement itself, but in an appendix.

FTAA Solidifies the Right to Mine the Amazon

A leaked draft text of the FTAA shows that it will extend Chapter 11's provisions to the rest of the hemisphere, giving U.S. and Canadian mining companies new leverage to head off stronger performance standards.

Political reforms, new mining technologies and new gold discoveries have combined to spark the largest single gold rush in history. Major mining firms in Canada and the U.S. see Latin American countries as a land of opportunity - vast untapped mineral resources

coupled with a low-wage workforce and less stringent environmental and health rules, to say nothing of the lure of privatization and opportunities for speculation as development banks mandate sales of public assets, often at fire sale prices.

Mining is extremely damaging to any ecosystem, but catastrophic in regions of Latin American that host some of the world's most unique populations of plant and animal life - areas like the Amazon and Patagonia. Expansion of mining in the Amazon, in particular, has raised considerable criticism from environmentalists throughout the world who regard the Amazon as a world resource that needs to be preserved.

U.S. and Canadian mining corporations now hold billions of dollars in rights to mine for gold and other minerals beneath the Amazon and in other areas of Latin America, and a hemisphere-wide free trade pact would only accelerate mineral development by giving foreign mining companies the right to challenge any government that tried to limit their access.

A Fast Track to Environmental Degradation

President Bush convinced Congress to give him Fast Track trade authority, which he needs to pass FTAA through the Congress. Fast Track, also called Trade Promotion Authority, is a set of rules that govern Congressional action on trade agreements. Under Fast Track, Congress agrees in advance, before knowing what a trade agreement will include, that it will vote up or down on the agreement, without offering any amendments, that it will limit floor debate to 20 hours in each chamber, that it will bypass the regular committee process, and that it will vote on the agreement within 60 days after the President submits legislation to Congress.

Fast Track's main flaw is the lack of accountability it imposes on trade negotiators. Congress is constitutionally responsible for setting the terms of international commerce, but yields this authority to the Executive branch under Fast Track. Congress generally sets goals for U.S. negotiators when passing Fast Track legislation, but these goals are not enforceable.

Fast Track:

- Asks negotiators to "seek to protect and preserve the environment," but goes on to say "while optimizing the use of the world's resources." Fast Track does not ensure that trade agreements will meet even this weak objective because this objective is not mandatory, and is not backed up by a clear and effective process for oversight from Congress and the public. It does not require Congressional certification that negotiating objectives have been met before trade agreements are signed.
- Trade agreements could include provisions like those in NAFTA Chapter 11, without addressing any of the problems discussed above.

- Does not ask U.S. negotiators to include even the weak provision from NAFTA's environmental side agreement - preventing countries from failing to enforce their environmental standards to promote trade.
- Sets up a new barrier to environmental regulation by asking U.S. negotiators to establish sound science, cost-benefit analysis and risk assessment as the basis for all regulations. These tools have been used by opponents of higher standards to set an almost impossibly high bar and require the consumer and regulator to prove that the science underlying a regulation is beyond dispute.