# Canadian mining firm Pacific Rim and El Salvador's struggle against corporate impunity

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**The controversial legal case that Canadian mining firm Pacific Rim has launched against El Salvador has added fuel to the growing international debate on the balance of corporate rights and responsibilities and the need for new legal international frameworks to address corporate impunity.**

15 September marked the anniversary of independence of El Salvador . Tellingly on the same day, in a world where corporate power can supercede that of states, the small Central American country is in a Washington-based investment court battling it out for its right to regulate on health and environmental grounds against a transnational mining firm. The controversial legal case that Canadian mining firm Pacific Rim has launched against El Salvador has added fuel to the growing international debate on the balance of corporate rights and responsibilities and the need for new legal international frameworks to address corporate impunity.

Pacific Rim, a gold-mining corporation, is demanding $301 million from El Salvador in the International Center for Settlement of Investment Disputes (ICSID), a secretive World Bank tribunal in Washington D.C. The basis for their case is that Pacific Rim was denied concessions because it failed to meet environmental impact and licencing requirements. It is also a legal challenge to El Salvadorian government decisions since 2008 to deny gold-mining permits in order to protect scarce water resources from cyanide pollution.

The fact that a country can be challenged for ruling in favor of its citizens' right to water, health and a safe environment is perhaps surprising enough. What is more shocking is they are suing not for compensation for confiscation or expropriation – they never even started work - but for "indirect expropriation" of anticipated profits. Even if Pacific Rim loses the case in ICSID, a court that generally favours corporations, the El Salvadorian public will still end up paying the multi-million legal costs for defending the case.

The case raises though a more important issue, which is how international law – particularly trade and investment law - currently facilitates corporations suing states, while citizens who are victims of corporate abuses have no such recourse at international level. An important resolution at the UN Human Rights Commission in June 2014, which puts on the table a mandate to develop a binding treaty on the operations of Transnational corporations opens a window of opportunity to change that.

Ecuador was a driving force behind the UNHRC resolution in part because its citizens have been in legal battles for almost two decades to secure compensation from California oil giant Chevron for oil spills that contaminated indigenous communities' soil, rivers and groundwater. Chevron has

obfuscated every step of the way, refusing to pay the $9 billion dollars compensation awarded by Ecuadorian courts in 2011 and then counter-suing the Ecuadorian government.

Many other communities' struggles against corporate impunity are unnoticed by the world's media. Over the last eight years, the Transnational Institute with other organizations have been holding Permanent Peoples' Tribunals across the world to give backing to their voices and to provide solidarity to communities fighting for justice against corporate abuses including use of paramilitaries and extra-judicial killings, environmental contamination, labour and human rights violations. As well as exposing the widespread nature of corporate abuses, the tribunals have also consistently raised the importance of the international trade and investment frameworks that supports and abets these corporate crimes.

The big question has been what do we do about it. The dominant approach – supported in particular by political and business elites but also some non-governmental organisations – has been to promote corporate social responsibility (CSR). This soft-law approach promotes guidelines and voluntary compacts that corporations can sign up to in order to demonstrate their ethical credentials and win over concerned consumers. At an international level, these were best expressed in the UN Guiding Principles on Business and Human Rights agreed by the UN Human Rights Council (UNHRC) in June 2011.

This approach is notably supported most vigorously by corporations: the International Chamber of Commerce praised them for their "flexible" and "pragmatic" approach. Victims of corporate abuses, on the other hand, have been much less enthusiastic as the principles are unenforceable and provide no new legal recourse for justice. The experience we now have of using CSR approaches as the best means to address human rights abuses also raises serious questions about their effectiveness. In one of the largest EU-funded analysis of the CSR practiced by firms in Europe, it concluded that "There is little empirical evidence which explains the concrete impacts of CSR activities and programmes on the organizational performance of companies, the wider economy, or the social and environmental fabric of Europe, its nations and regions."

The combination of CSR's soft law approach wedded to Lex Mercatoria – the legal framework of trade and investment treaties – composes an effective architecture of impunity for corporations. That is why – nascent as it is - a June 2014 historic vote in the UNHRC in favour of a 'binding instrument' for corporations might be a landmark in a changing tide. It is why coalitions of people affected by corporate human rights violations celebrated as 20 governments voted in favour of a resolution to establish an open-ended intergovernmental working group (IGWG) mandated to develop this binding instrument.

There is no naivety though about the long road ahead to achieve justice for victims and a rebalancing of rights and responsibilities for corporations. The adoption of the resolution met significant resistance by the countries that host most of the corporations, the EU countries and the US in particular, who voted in block against it. Some academics and business human rights advocates have presented pragmatic technical arguments against a binding agreement arguing that without the goodwill of transnational corporations, any proposal for a treaty will inevitably become a legal morass and end up stagnating or dying.

This pragmatism apparently does not allow for a possible political future in which transnational corporations are actually held accountable at international level for their violations of human rights. It seems willing to accept international legal frameworks such as Lex Mercatoria that enshrine corporate rights to profiteering, yet finds it impossible to contemplate that corporations should have enforceable obligations too.

For communities affected by human rights abuses these pragmatic arguments don't wash. Pragmatism has long been preached to human rights defenders and affected communities as a way to stave off justice. It was preached to slaves, colonised peoples, women, indigenous people, the Black population in the US and so many other 'stubborn' and 'foolish' people that dared to imagine and demand legal and social justice. But it never quelled resistance and it never stopped change. There is no doubt that the road to legal accountability for corporate crimes is a long struggle, but the vote in the UNHRC marks an important milestone because it aims to set a trend in international law that establishes the primacy of human rights over corporate interests.

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## P.S.

* "El Salvador's struggle against corporate impunity": http://www.tni.org/article/responsibilities-or-rights-el-salvadors-struggle-against-corporate-impunity

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