

Submission to Open-ended intergovernmental working group on transnational corporations and other business enterprises with respect to human rights

By

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Proposals for Legally Enforceable Mandatory Treaty on Transnational Corporations, Banks, other Business Enterprises, Human Rights and its Historical Context

Transnational Corporations, Banks and other Business Enterprises are not meant to be “democratic public interest institutions.” As a consequence as early as July 1972, at the initiative of Government of Chile, which had formally denounced the US based corporation, International Telephone and Telegraph Company (ITTIC) for its interference in Chilean internal politicsⁱ, United Nations Economic and Social Council (UNESCO) had requested UN Secretary General to appoint a Group of Eminent Persons to study the role of transnational corporations in relation to developing countries and international relations. This Group was appointed. This UN Group was headed by L K Jha, former Governor, Reserve Bank of India. Like other developing countries India too still grappling with the ungovernable might of Union Carbide Corporation, another US corporation currently owned by Dow Chemical Company and the disaster caused by its end-of-life factory in Bhopal.

Such developments expose the emptiness of self regulatory and voluntary UN Global Compact. But UN Sub-Commission on the Promotion and Protection of Human Rights aptly proved the 'UN norms on the responsibilities of transnational corporations and other business enterprises with regard to human rights' emerged as a step towards ensuring corporate accountability in August 2003. The new efforts reveal that John Ruggie's report attempted to undermine it.

In view of the above historical and political context, ToxicsWatch Alliance (TWA) proposes the following for adoption in the UN treaty:

1. Open-ended intergovernmental working group on transnational corporations and other business enterprises with respect to human rights must adopt the proceedings of previous UN efforts and the Draft Code of Conduct on Transnational Corporations which emerged out of the report of the UN's Eminent Persons' and which was submitted at the special session of the UN Commission on Transnational Corporations to the UN Economic and Social Council on 31st May, 1990.
2. The legally enforceable mandatory treaty must target Transnational Corporations (TNCs), Banks and other Business Enterprises
3. It should ensure that Transnational Corporations (TNCs), Banks and other Business Enterprises are subservient to both peoples' will and legislative will.
4. It should be sensitive to vulnerable groups, such as women, migrants, indigenous peoples and human rights defenders.
5. It should ensure that Transnational Corporations (TNCs), Banks and other Business Enterprises and their subsidiaries, chain of suppliers, licensees and subcontractors are made accountable for the human rights violations and their acts of complicity, collaboration, instigation, omission, negligence or dissimulation.

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6. It should ensure that natural persons have the principle of primacy of their human rights and public interest over private economic interests.
7. It should ensure that Transnational Corporations (TNCs), Banks and other Business Enterprises do not war crimes, crimes against humanity, genocide, torture, forced disappearances, displacements, summary or arbitrary executions and violations of international humanitarian law.
8. It should prohibit discrimination on the basis of race, colour, sex, religion, political opinion, nationality, social origin, social status, belonging to an indigenous or Afro-descendant people, disability, age, among others.
9. It should stop wage gaps for same kind of work and the sexual division of work force.
10. It should be sensitive to the rights of migrant and workers and the rights of indigenous peoples.
11. It should include ban on all forms of collaboration (economic, financial or of services) with other entities, institutions or people who commit human rights violations.
12. It should ensure that Transnational Corporations (TNCs), Banks and other Business Enterprises engage in fair practices in the area of commercialisation and marketing and adopt all reasonable provisions to guarantee the safety and quality of the products and services they offer, including respect for the precautionary principle.
13. It should ensure that Transnational Corporations (TNCs), Banks and other Business Enterprises do not produce, sell or market products that are dangerous or potentially dangerous to people, animals or nature, like transgenic seeds or highly hazardous pesticides.
14. It should prevent environmental dumping and must ensure accountability for damages caused to the environment.
15. It should ban forced or child labour and provide a legal regime for a safe and healthy work environment, to pay a wage that guarantees a decent life to workers, and to respect trade union freedom, the right to strike and collective bargaining. The legally binding instrument should include provisions to end social and wage dumping.
16. It should ensure that Transnational Corporations (TNCs), Banks and other Business Enterprises publicly identify the list of countries where they carry out any kind of commercial and/or financial activity, and to publicly identify their subsidiaries, suppliers, subcontractors and licensees, as well as the legal framework of their participation in other companies or legally registered entities.
17. It should provide a legal regime for providing compensation, restitution, retribution and rehabilitation for all damage experienced or all goods that have been depleted.
18. It should codify extra-territorial obligations of Transnational Corporations (TNCs), Banks and other Business Enterprises and those in the supply chain.
19. It should make the consent of local communities sacrosanct.
20. It should prohibit the use of its armed forces by Transnational Corporations (TNCs), Banks and other Business Enterprises and those in the supply chain.
21. It should impose prohibition of patents on life forms and of the privatization of certain essential goods and services, or the prevention of private monopolies, including in the media through cross ownership.
22. It should ensure net neutrality and democratization of cyber space.
23. It should reaffirm the hierarchical superiority of human rights norms over trade and investment treaties and develop specific state obligations in this regard.

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24. It should prevent further erosion of State power vis-à-vis Transnational Corporations (TNCs), Banks and other Business Enterprises and those in the supply chain when it comes to taking measures for the protection of human rights.
25. It should illegalize treaties that give priority to the privileges and profits of investors and transnational corporations over the peoples' rights and international human rights law for the protection of Transnational Corporations (TNCs), Banks and other Business Enterprises and those in the supply chain from any decision that could negatively affect their investments.
26. It should illegalize private international arbitration tribunals that allow TNCs and investors to sue States to impose their law and assert their interests. Such instances include-
 - a) Cases where States attempting to take pro-human rights measures have been challenged or condemned to pay dozens of millions of dollars to TNCs in compensation for having taken pro-human rights or pro-public interest measures.
 - b) Egypt was attacked at the International Centre for Settlement of Investment Disputes (ICSID) of the World Bank for having raised the minimum wage from 41 to 72 Euros per month in 2012.
 - c) In 2004, Mexico was ordered to pay more than \$ 90 million to Cargill for introducing a tax on sodas.
 - d) In 2010, Guatemala was ordered to pay \$ 25 million to Tampa Electric for introducing a law capping electricity prices.
 - e) In 2012, Sri Lanka has been ordered to pay \$ 60 million to Deutsche Bank, due to the modification of an oil contract.
 - f) Swedish group Vattenfall has filed a complaint against Germany for the decision to get out of Nuclear energy by 2020, estimating its shortfall to 1.18 billion euros.
 - g) Three quarters of the complaints filed at the ICSID come from TNCs based in the USA and the European Union, and target countries of the Global South. In two thirds of cases, TNCs have been successful and have received large compensations, or they got states to reduce their standards as part of a compromise.
27. It should place on states an obligation to develop, implement and comply with international human rights and environmental treaties, agreements and rules, and subordinate to those the international rules related to trade, investment, finance, taxation and security. The legal principles linked to free trade and investment norms must be subordinate to the host state's norms and international human rights norms.
28. The treaty should place an obligation on states to introduce a binding human rights supremacy clause into all trade and investment treaties that they sign, and to renegotiate existing agreements to this effect, or else to cancel them and refuse to sign any such agreements that do not explicitly recognize the supremacy of human rights obligations.
29. It should put an obligation on States to introduce into such treaties clauses concerning the universality, indivisibility and interdependence of human rights, as well as the defense of essential public goods such as water, health, education, public services, and the protection of public enterprises and cooperatives. It should prohibit states from submitting an investor-State dispute to an arbitration body under any circumstances, as it undermines State sovereignty, impairs their ability and duty to protect human rights and undermines the rights of individuals and peoples that are recognized under international human rights law.
30. It should establish the civil and criminal liability and accountability of the Transnational Corporations (TNCs), Banks and other Business Enterprises and those in the supply chain and their executives in their

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national jurisdiction. The principle of double indictment, that is both the legal entity and the individuals who take the decisions are liable shall be recognized.

31. Subaltern workers should not be held liable if they are not the actual decision makers and are only implementers.
32. It should not be possible to invoke the conviction of a subordinate to exempt the Transnational Corporations (TNCs), Banks and other Business Enterprises and those in the supply chain from their responsibilities. The treaty should include strong provisions on the shared liability – by action or omission - between transnational corporations and their subsidiaries and their chain of suppliers, licensees and subcontractors. It is common practice for TNCs to externalize costs, risks and thus the liabilities – which are assumed almost entirely by their subsidiaries, suppliers, subcontractors and licensees – while they continue to earn exorbitant profits and act with impunity. The principle of shared liability should also be applied upward, so that investors, share holders, banks and pension funds that finance TNCs can be held liable for the human rights violations committed by them.
33. It should include provisions on the obligations of International Financial and Economic Institutions. The policies imposed by World Bank Group contribute to the impunity of TNCs and provoke a number of human rights violations. As specialized organisms of the United Nations system, their conduct must conform to the Charter of the United Nations and respect human rights.
34. It should establish a mechanism to enforce the treaty and monitor its implementation in terms of its enforcement mechanisms. At present, TNCs are able to sue States at the international level but TNCs cannot be sued for the crimes and human rights violations they commit. This major legal loophole must be plugged by the treaty.
35. It should open up the possibility of submitting complaints against TNCs for their failure to comply with their obligation to respect human rights.
36. It should provide for a democratic committee and centre for analysis, investigation and inspection of the practices of transnational corporations.
37. Drawing lessons from the past, it should create such a framework which ensures that it does not get subverted by transnational corporations. It should outlaw the alliance between the United Nations and large transnational corporations. Given the fact that TNCs are neither stakeholders nor the holders of human rights, they should not be allowed to participate directly in the process where they would be both judges and parties.
38. It should provide for the establishment of a democratic international court on TNCs and Human Rights wherein international crimes, such as economic crimes, financial crimes, corporate crimes and ecological crimes are recognized and fall under its mandate.

The proposed UN treaty must overcome its structural limitations to alter the iniquitous legal landscape that protects the corporate criminals and remains callous towards several generations of vulnerable victims.

ⁱ Keller, Helen. Corporate Codes of Conduct and their Implementation: The Question of Legitimacy, http://www.yale.edu/macmillan/Heken_Keller_Paper.pdf accessed on October 10, 2013