

## Corporate Accountability International submission to the second session of the United Nations' Open-ended Intergovernmental Working Group on Transnational Corporations and Other Business Enterprises with Respect to Human Rights

[Corporate Accountability International](http://www.corporateaccountability.org) is a member-powered organization that protects human rights, public health, and the environment from corporate abuse. For 39 years we have waged successful campaigns challenging transnational corporations' violations of human rights.

Corporate Accountability International has Special Consultative Status with the United Nations Economic and Social Council (ECOSOC), is in official relations with the World Health Organization (WHO), and is an official observer to the WHO Framework Convention on Tobacco Control (FCTC). It is also a member of the Treaty Alliance and of the Global Campaign to Reclaim Peoples Sovereignty, Dismantle Corporate Power and Stop Impunity.

In representation of our hundreds of thousands of members, volunteers, and activists, we call upon the OEIWG and the member States of the United Nations Human Rights Council to include the elements and recommendations contained in this document in any draft materials developed by the OEIWG or member States in outlining the Treaty, in future negotiations, and in the Treaty itself.

### *Recommendations*

#### *1. Protect the negotiations from political interference and corporate capture.*

Around the world, transnational corporations (TNCs) are influencing and even writing government policies. Unchecked by binding regulation to limit their influence, they succeed in weakening, delaying, and blocking meaningful policy intended to protect public health, human rights, and the environment.

The OEIWG has the potential to develop a Treaty that contains lifesaving international policies to protect people from the human rights violations of TNCs. Its potential to do so, however, hinges on its ability to insulate the Treaty-making process from industry interference. The OEIWG must ensure the Treaty negotiations are safeguarded from the interference of TNCs whose interests are counter to the objectives of the Treaty.

TNCs have long used a variety of tactics to interfere in policymaking, including the following:

- **Litigation:** intimidating governments with costly lawsuits or the threat of them;
- **Public-private or government partnerships:** including promoting voluntary regulation, drafting and distributing industry-friendly sample legislation, gaining favor by bankrolling government initiatives on other issues, and providing funds directly to government regulatory bodies;
- **Corporate social responsibility (CSR) schemes:** promoting the perception that the corporation's operations and policies are environmentally friendly and respectful of human rights, misleading the public of the reality of human rights and environmental abuses; and
- **Claiming rights as stakeholders:** Setting up front groups or gaining accreditation and consultative status through industry and trade associations with a nonprofit legal status, such as the International Organization of Employers, to enjoy special consultative status with ECOSOC, and participate in public policymaking.

In setting and implementing policies that regulate the policies, practices, and products of TNCs as they affect the protection and promotion of human rights, it is absolutely critical to protect against potential, perceived, or actual conflicts of interest. Indeed, an inherent conflict of interest exists between the profit motives of the TNCs that will be regulated by the Treaty and the goals of that Treaty. As such, it is fundamental to protect the integrity of the policymaking space, its participants, and outcomes from the interests of TNCs, by safeguarding it for participation by governments and legitimate public interest observers, and insulating it from the corrosive influence of these profit-driven corporations.

Furthermore, it is imperative to develop good governance measures for the treaty that establish safeguards against corporate political interference at the national, international, and intergovernmental levels, whether in the current discussions that pertain to the Treaty, in the negotiations of the Treaty and its content, or in its implementation. The first ever corporate accountability treaty, the WHO FCTC, provides an international legal precedent for such safeguards within the U.N. system itself. Article 5.3 establishes that: “In setting and implementing their public health policies with respect to tobacco control, Parties shall act to protect these policies from commercial and other vested interests of the tobacco industry in accordance with national law.” This article and its guidelines for implementation provide policymakers additional guidance with regard to the specific measures to ensure policies and governments are protected from the interests of TNCs. These directives include increasing transparency, developing codes of conduct for government officials, protecting against conflicts of interest, raising awareness about industry tactics to undermine health, and regulating CSR activities. The success of the FCTC and its strength as a Treaty are a significant testament to the powerful effect good governance measures such as Article 5.3 can have on regulatory processes and outcomes that threaten to diminish the profits of TNCs. As such, the Treaty should include the following recommendations:

**Key recommendation 1:** State Parties shall act to protect the Treaty and its negotiations, bodies, and processes from commercial and other vested interests of TNCs by excluding them from the Treaty-making process.

State Parties shall establish national legislation as follows:

**Key recommendation 2:** All State agencies and TNCs shall be transparent and accountable in all dealings, including proactively documenting and disclosing records of these dealings and related information to the public.

**Key recommendation 3:** All State agencies shall act against interference from commercial and other vested interests in the establishment and implementation of any legislation and policies that seek to provide appropriate oversight, regulation, and accountability of TNCs’ activities in the interests of realizing human rights and protecting the environment.

**Key recommendation 4:** State Parties shall institute two-year revolving door bans between State agencies and TNCs, and vice versa.

**Key recommendation 5:** State Parties shall prohibit the acceptance by any government employee of gifts from lobbyists.

**Key recommendation 6:** State Parties shall prohibit the use by TNCs of State public security personnel and/or armed forces, either through employment or inducement.



**Key recommendation 7:** State Parties shall establish measures to limit interactions with the industry and ensure the transparency of those interactions that occur.

**Key recommendation 8:** State Parties shall reject partnerships and non-binding or non-enforceable agreements with TNCs.

**Key recommendation 9:** State Parties shall avoid conflicts of interest for government officials and employees.

**Key recommendation 10:** State Parties shall require that information provided by TNCs be transparent and accurate.

**Key recommendation 11:** State Parties shall denormalize and, to the extent possible, regulate activities described as “socially responsible” by TNCs, including but not limited to activities described as “corporate social responsibility.”

**Key recommendation 12:** State Parties shall not give preferential treatment to TNCs.

**Key recommendation 13:** State Parties shall treat State-owned TNCs in the same way as any other TNCs.

## ***2. Recognize the primacy of the human right to water over profit-seeking in the water sector.***

States are required by the International Covenant on Economic, Social, and Cultural Rights to progressively realize economic, social, and cultural rights, including the human right to water and sanitation. State provision of physical and social infrastructure—including municipal water treatment and distribution systems, and sewage collection and treatment systems—is essential to carrying out this obligation. Further, states must ensure active, free, and meaningful participation in decisions affecting the enjoyment of social rights including the right to water.

Increasingly, the progressive realization of the human right to water is endangered by TNC profit-seeking via privatization, public-private partnerships, operation and management contracts, and their interference in public policymaking to advance these interests. In the water sector, TNCs’ profit interests have been shown to threaten the central tenets of the human right to water and sanitation, including affordability, accessibility, and availability, as well as non-discrimination, elimination of inequalities, access to information, sustainability, and active, free, and meaningful participation.

To ensure that TNCs’ interests do not threaten States’ ability to progressively realize the human right to water, states must:

**Key recommendation 14:** Ensure active, free, and meaningful participation by people in decisions affecting the enjoyment of the human right to water including by requiring popular referenda on any private sector participation in domestic water systems in the form of privatization, public-private partnerships, operation and management contracts, or similar arrangements by other names.

**Key recommendation 15:** States shall protect public policymaking processes and bodies from commercial and other vested interests of TNCs including by: protecting against TNC interference in national and international policymaking processes, limiting interactions and avoiding conflicts of interest between government



representatives and TNCs, ensuring complete transparency and accountability for any interactions that occur, and prohibiting any lobbying, gift-giving, or revolving door relationships with TNCs.

**Key recommendation 16:** Ensure no public financing is used to support TNC profit-seeking in local water systems in the form of privatization, public-private partnerships, operation and management contracts, or similar arrangements by other names.

**Key recommendation 17:** Ensure no development aid is used to support TNC profit-seeking in local water systems in the form of privatization, public-private partnerships, operation and management contracts, or similar arrangements by other names.

**Key recommendation 18:** Ensure no private entity which has been found in judicial or regulatory proceedings at the national or supranational level to have committed human rights violations, or is currently involved in judicial or regulatory proceedings related to alleged human rights violations, is eligible to enter into contracts with domestic water utilities.

**Key recommendation 19:** Require investor-state disputes related to affordability, accessibility, and availability of water, as well as the issues of non-discrimination, elimination of inequalities, access to information, sustainability, and active, free, and meaningful participation in relation to water policy, or other aspects of the human right to water and sanitation as recognized by the United Nations be heard in front of domestic courts or regional human rights courts.

### ***3. Establish the primacy of human rights over trade, investment agreements, and financial interests.***

A proliferation of multilateral and bilateral free-trade and investment agreements has conferred tremendous economic, legal, and political power upon TNCs. These agreements between countries are often negotiated behind closed doors, except for the hundreds of corporate advisers representing the interests of TNCs. These agreements often infringe upon sovereign States' ability to enact meaningful protections for labor, public health, human rights, and the environment. They also give TNCs the power to sue governments directly for putting people's rights before corporate profits using investor-state dispute settlement (ISDS) mechanisms.

Using ISDS mechanisms, TNCs sue governments that would introduce new environmental or social regulations, if these regulations have an impact on their profits. Today, there are more than 3,000 treaties worldwide that contain the investor dispute right. While globally there are strong legal provisions for TNCs to defend their profits, the same does not exist for states to hold TNCs judicially (civilly and criminally) accountable for violations of human rights.

The WHO FCTC's preamble provides helpful precedent for dealing with trade disputes preemptively, namely by stating that "The Parties to this Convention" are "Determined to give priority to their right to protect public health." This clause was intended to empower Parties to prioritize health over trade interests. The negotiations of the binding treaty to hold TNCs to account for human rights abuses provide a critical opportunity to enshrine a provision that explicitly gives Parties the authority and the responsibility to prioritize human rights over trade.

**Key Recommendation 20:** The Treaty must state the primacy of human rights over trade, investment agreements, and financial interests. Recognizing that human rights are fundamental and prevail over trade, the Treaty must enshrine an international legal obligation for the Parties to prioritize, recognize, respect, and protect human rights over trade priorities. Additionally the Treaty must state that any trade agreements that jeopardize or diminish the protection of human rights are in violation of international human rights. ISDS tribunals must



comply with this principle, ruling in observance of the prevalence of human rights over trade, and taking in consideration the precedent set by ICSID Case No. ARB/10/7, Philip Morris vs. Uruguay.

**Key recommendation 21:** Require investor-state disputes related to the affordability, accessibility, and availability of water, as well as the issues of non-discrimination, elimination of inequalities, access to information, sustainability, and active, free, and meaningful participation in relation to water policy, or other aspects of the human right to water as recognized by the United Nations, be heard in front of domestic courts or regional human rights courts.

#### **4. Provide access to justice and remedies for violations of human rights.**

To provide access to justice and remedies to affected communities and individuals is part of States' duty to guarantee the protection of human rights. As such, access to the judiciary to provide remedies for victims of TNCs' abuses is fundamental in combating corporate impunity and strengthening corporate accountability.

A Treaty to hold TNCs accountable for their abuses has the potential to make corporations criminally, civilly, and administratively liable, while guaranteeing the protection of human rights, providing access to judicial remedy, and adding an important tool for accountability.

Also of critical importance is the liability of financial institutions incentivizing, supporting, or financing projects jeopardizing the enjoyment of human rights. Financial institutions must be held accountable when the projects they promote replicate the devastating effects of corporate violations of human rights.

The WHO FCTC's Article 19 provides a helpful precedent asking Parties to "consider taking legislative action or promoting their existing laws, to deal with criminal and civil liability, including compensation where appropriate." It calls for international cooperation between host and home courts, and exchange of information. A treaty to hold TNCs accountable for their violations of human rights should include a clear provision such as this one that enshrines this obligation of the State.

**Key recommendation 22:** States shall take legislative action and promote their existing laws to deal with criminal and civil liability of TNCs for human rights violations, including compensation where appropriate.

