

February 8, 2021

To the attention of:

H. E. Emilio Rafael Izquierdo Miño,
Chair-Rapporteur,

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

Honorable Chair-rapporteur:

We are writing on behalf of Action on Smoking and Health and 21 co-signatories in response to your invitation to submit concrete textual suggestions, modifications, additional language, requests for deletions, as well as expressions of support on the current provisions of the second revised draft legally binding instrument (LBI). Founded in 1967, Action on Smoking and Health (ASH), a non-governmental organization in consultative status with the Economic and Social Council, is the oldest US-based organization devoted to fight the harms caused by tobacco, both in the US and globally, and dedicated to a world with zero tobacco deaths. We are writing to express our view (shared by many) that the draft LBI should reflect the fact that tobacco companies, inclusive of transnational tobacco corporations, and incompatible with adherence to any human rights-based structure.

Background

As confirmed by the WHO, tobacco use remains the leading cause of global preventable death, killing over 8 million annually¹ and costing the global economy up to two percent of its GDP.² On the other hand, as the United Nations Development Program notes, the World Health Organization Framework Convention on Tobacco Control (FCTC) is an accelerator for Sustainable Development and reducing tobacco use is critical to achieving every goal in the SDGs.³ Accelerating the implementation of this important treaty will also help in governments efforts to protect the right to health of their citizens.

During this unprecedented COVID-19 pandemic, tobacco, cigarettes, and the actions of the tobacco industry are even more of a blight on society. As the WHO states,

Tobacco smoking is a known risk factor for many respiratory infections and increases the severity of respiratory diseases. A review of studies by public health experts convened by WHO on 29 April 2020 found that smokers are more likely to develop severe disease with COVID-19, compared to non-smokers. COVID-19 is an infectious disease that primarily attacks the lungs. Smoking impairs lung function making it harder for the body to fight off coronaviruses and other diseases. Tobacco is also a major risk factor for noncommunicable diseases like cardiovascular disease, cancer, respiratory disease and diabetes which put people

¹ Available from <http://www.who.int/mediacentre/factsheets/fs339/en/>.

² Available from <http://www.europe.undp.org/content/geneva/en/home/presscenter/pressreleases/2017/05/26/tobacco-kills-more-than-7-million-people-per-year-and-is-costing-the-world-economy-usd-1-4-trillion-annually.html>.

³ Available from <https://www.who.int/fctc/implementation/publications/who-fctc-undp-wntd-2017.pdf>.

*with these conditions at higher risk for developing severe illness when affected by COVID-19. Available research suggests that smokers are at higher risk of developing severe disease and death.*⁴

The negative human rights impact of the tobacco industry and tobacco itself are numerous and widespread, and occur throughout the life cycle of a tobacco product, from growing all the way through post-consumer waste. Besides the general right to life and the right to health, tobacco products violate children's rights⁵, including the protection of children from child labor in tobacco production⁶ and from misleading information (e.g., advertising) and women's rights⁷, including protection from the impact of (passive) smoking on pregnancy, and adversely impacts the rights of other vulnerable populations, such as the LGBT community, racial minorities, and indigenous populations.⁸

Changing international norms

In the past several years, the global public health community and the human rights community have been increasingly recognizing tobacco as a human rights issue.

The impact of tobacco products on human rights has been noted in a number of human rights fora, both directly and implicitly. The Committee on Economic, Social and Cultural Rights, in its General Comment No. 14, stated that the "failure to discourage production, marketing and consumption of tobacco" constitutes a violation of the obligation to protect under Article 12 of the International Covenant on Economic, Social and Cultural Rights on the right to health, which is also mentioned in the preamble to the FCTC. Likewise, General Comment 15 of the Committee of the Rights of the Child noted that governments must implement and enforce the FCTC as part of their obligations under the Convention on the Rights of the Child.⁹ In addition to its negative impact on human rights, tobacco as a barrier to development was included in the 2030 Agenda for Sustainable Development in target 3.a, "strengthen the implementation of the WHO Framework Convention on Tobacco Control in all countries."¹⁰

The public health community has long expressed its concern about the impacts of tobacco, and also the dangers of working with the tobacco industry. The guidelines for Article 5.3 of FCTC state that "there is a fundamental and irreconcilable conflict between the tobacco industry's interests and public health policy interests," and go on to encourage Parties to, "Establish measures to limit interactions with the tobacco industry and ensure the transparency of those interactions that occur." These concerns were reiterated in the Cape Town Declaration, a landmark document that has been signed by 165 organizations, which asserts that "We consider that the United Nations Guiding Principles on Business and Human Rights and its respect, protect and remedy framework require the cessation of the

⁴ Available from <https://www.who.int/news-room/detail/11-05-2020-who-statement-tobacco-use-and-covid-19>.

⁵ Available from <https://unfairtobacco.org/en/material/brochure-childrens-rights-and-tobacco-control/>.

⁶ Child labour in tobacco growing has been defined as one of the worst forms of child labour (according to ILO Convention 182) due to its detrimental effect on the physical and mental health of the children, especially from nicotine poisoning. Available from https://www.ilo.org/dyn/normlex/en/f?p=NORMLEXPUB:12100:0::NO::P12100_ILO_CODE:C182.

⁷ Available from https://unfairtobacco.org/wp-content/uploads/2020/02/CEDAW_submission_Germany_2020_Unfairtobacco.pdf.

⁸ Available from <https://ash.org/declaration/>.

⁹ UN Committee on the Rights of the Child (CRC), *General comment No. 15 (2013) on the right of the child to the enjoyment of the highest attainable standard of health (art. 24)*, 17 April 2013, CRC/C/GC/15, available from <http://www.refworld.org/docid/51ef9e134.html>.

¹⁰ Available from <https://sdgs.un.org/goals>.

manufacture and marketing of tobacco. The fundamentally harmful nature of the tobacco industry is such that it cannot be a partner in these efforts.”¹¹

Furthermore, in 2017, the Danish Institute of Human Rights (DIHR) did a human rights review of Philip Morris International, a large transnational tobacco corporation, and came to a clear conclusion.

According to the UNGPs [United Nations Guiding Principles on Business and Human Rights] companies should avoid causing or contributing to adverse impacts on human rights. Where such impacts occur, companies should immediately cease the actions that cause or contribute to the impacts. Tobacco is deeply harmful to human health, and there can be no doubt that the production and marketing of tobacco is irreconcilable with the human right to health. For the tobacco industry, the UNGP therefore require the cessation of the production and marketing of tobacco.

The public health and human rights community are increasingly reiterating the incompatibility of the tobacco industry with international cooperation in the field of human rights obligations, and cannot be compatible as long as they continue selling a product that kills half of all its consumers. This is also the position taken by the UN Global Compact on 12 September 2017, when it instituted a new exclusion for tobacco companies. "This decision recognizes that tobacco products are in direct conflict with UN goals, particularly with the right to public health, and undermines the achievement of SDG 3." We urge the OEIGWG to take the same approach in the binding instrument.¹²

Recommendations and conclusions

In accordance with the above considerations, WHO Framework Convention on Tobacco Control, the conclusions of the Danish Institute of Human Rights, and increasing human rights norms, we implore you not to work with the tobacco industry. The whole tobacco industry should be excluded, and we urge the drafting group to protect against interference from other concerning industries, particularly those using the tobacco industry playbook, such as fossil fuels, junk food, soda, as examples.

Furthermore, we urge you to guard against corporate interference in policymaking/corporate conflicts of interest in policymaking by all industries, knowing that the tactics used by the tobacco industry are not isolated to that industry alone, nor are the inherent and irreconcilable conflicts of interest with public policymaking. We are concerned to learn that several trade associations including the International Chamber of Commerce are actively participating in the negotiation sessions. Despite the lack of transparency of these organizations, we know that the US Chamber of Commerce represents Philip Morris International and many other corporations with direct conflicts of interest in the protection of human rights.¹³

In addition to these suggestions, we have the honor of attaching herewith our contributions to the work of the OEIWG on Matrices 1 and 2.

We are grateful to you for the opportunity to contribute, and we are confident that you will give the important issue of the human rights abuses of the tobacco industry the attention it deserves.

¹¹ Available from <https://ash.org/declaration/>.

¹² Available from <https://www.unglobalcompact.org/about/faq>.

¹³ Available from https://www.corporateaccountability.org/wp-content/uploads/2019/10/CA_ICCexposed_onepager_09-FINAL.pdf.

Sincerely,

Action on Smoking and Health- Washington D.C.

African Tobacco Control Alliance (ATCA)

Airspace Action on Smoking and Health

ASH Finland

AT Suisse – Association Suisse pour la Prévention du Tabagisme

BLUE 21 / Unfairtobacco

BlueLink Foundation

CLAS Coalition for Americas' Health

Comité National Contre le Tabagisme

DNF - Pour un Monde ZéroTabac

The European Network For Smoking And Tobacco Prevention (ENSP)

Health Funds for a Smokefree Netherlands (in Dutch: Gezondheidsfondsen voor Rookvrij)

Indraprastha Public Affairs Centre (IPAC)

The Institute of Leadership and Development (INSLA)

Kenya Tobacco Control Alliance

Dr. Ruth Malone

Public Health Law Center

Slovenian Coalition for Public Health, Environment and Tobacco Control

Smoke Free Israel

Smoke Free Life Coalition, Bulgaria

Taiwan Medical Alliance on the Control of Tobacco (TMACT)

Tobacco - Free Association of Zambia