

CHALLENGING CORPORATE IMPUNITY

IFIs Immunity, Corporate Crimes and
Environmental Defenders Protection



OCTOBER 2017

mobilise resist transform



**economic
justice
resisting
neoliberalism**

Nurse, Tamiang Layang village

Photo: Luka Tomac / Friends of the Earth International

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ABOUT FOEI:

Friends of the Earth International is the world's largest grassroots environmental network with 75 member groups and over two million members and supporters around the world. Our vision is of a peaceful and sustainable world based on societies living in harmony with nature. We envision a society of interdependent people living in dignity, wholeness and fulfilment in which equity and human and peoples' rights are realised. This will be a society built upon peoples' sovereignty and participation. It will be founded on social, economic, gender and environmental justice and be free from all forms of domination and exploitation, such as neoliberalism, corporate globalization, neo-colonialism and militarism.

ABOUT APAC:

FoE APac is a collective of 13 sovereign organisations working with grassroots communities on environmental and rights-based concerns in the Asia Pacific region. At present, FoE APac is comprised of member organisations based in: Australia, Bangladesh, Japan, Indonesia, Malaysia, Nepal, Palestine, Papua New Guinea, Philippines, Russia, South Korea, Sri Lanka and Timor Leste.

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INDEX

1 INTRODUCTION	3
2 CHALLENGING IMMUNITY OF INTERNATIONAL FINANCIAL INSTITUTIONS	4
3 CORPORATE CRIMES: PLANTATIONS, ENVIRONMENTAL DAMAGE AND HUMAN RIGHTS VIOLATIONS	6
4 PROTECTION OF ENVIRONMENTAL AND HUMAN RIGHTS DEFENDERS	8
5 CONCLUSIONS AND RECOMMENDATIONS	10

1 INTRODUCTION

This publication presents the official contribution of Friends of the Earth Asia Pacific region (APAC), elaborated by its member groups from Philippines and Indonesia, for the third session of the open-ended Intergovernmental Working Group (IGWG) on Transnational Corporations (TNCs) and other business enterprises with respect to Human Rights, taking place on 23-27 October 2017, in Geneva.

The content includes proposals to be considered by United Nations member states developing the structure and elements for the new binding instrument, herein called the UN Treaty. These proposals are built from APAC member groups and community struggles that challenge the immunity of International Financial Institutions (IFIs), such as the Asian Development Bank (ADB) and the Asian Infrastructure Investment Bank (AIIB); expose corporate crimes committed by TNCs and financiers on plantations sector in Indonesia and; call for instruments for environmental and human rights defenders protection, especially concerned to woman defenders, to be included and implemented under the UN Treaty, having actual examples in national laws.



Photo: Friends of the Earth Asia Pacific

2 CHALLENGING IMMUNITY OF INTERNATIONAL FINANCIAL INSTITUTIONS

by LRC / FoE Philippines

International Financial Institutions (IFIs) are currently shielded by immunity from suits related to projects they financed. The Treaty should provide provisions that will effectively purge IFI immunity and enable aggrieved parties to hold IFIs accountable through local courts, quasi-judicial agencies and international tribunals.

Although IFIs, such as the Asian Development Bank (ADB), World Bank (WB) and the Asian Infrastructure Investment Bank (AIIB), have been obligated to establish Environmental and Social Safeguard Policies to ensure each of their project's social and environmental integrity, various IFIs have not instituted adequate safeguards, or have failed to deliver the same.

As the IFIs are protected by immunity, affected communities can only raise issues of redress and grievance through the IFIs own Accountability Mechanisms. These mechanisms serve as the only institutional platform through which project-affected people

can elevate their grievances and call for remedy against harm and damages caused by IFI projects.

However, the Accountability Mechanisms of IFIs are often perceived by local groups as inaccessible due to their complex and highly bureaucratic processes. The legitimacy of these Mechanisms is also compromised by the role of the concerned IFIs Board of Directors, who eventually plays the role of judge and jury for all complaints. Limited awareness, lack of visibility and access on how the Accountability Mechanisms work have also contributed to low turnout of complaints received by IFIs.

Thus lack of real remedial action on the ground and tedious and lengthy complaint filing and investigation processes leave local communities completely dependent on IFI responses, as immunity leads the courts and national judiciary to be inaccessible for harmed local communities.



Photo: Marinduque Council for Environmental Concerns (MACEC)



Photo: Marinduque Council for Environmental Concerns (MACEC)

Considering the scaling up of IFI investments with the private sector through co-financing, Private Public Partnerships (PPPs) and pooled infrastructure funds, impacts on the environment and local communities will also significantly increase. Since 2016, IFIs such as the AIIB have approved at least 28 development projects¹ in the energy and transport sectors amounting to over \$ 2 billion worth of loans². At least 11 proposed projects are in the pipeline. Moreover, financing portfolio of the WB and the ADB includes more projects supporting Financial Intermediaries (FIs). With weak safeguards and inefficient grievance mechanisms IFIs are left unaccountable for their actions. The binding treaty should yield accountability for IFIs, especially that this trend enables the IFIs to extend the immunity to the private sector.

IFI's Accountability in Project Lending: ADB and the Marcopper Mining Disaster in Marinduque, Philippines

Over 2 decades ago, ADB extended a loan of at least \$ 25 million to the Marcopper Mining Corporation for its mining operations in the island of Marinduque, Philippines. In March 24, 1996 a drainage tunnel of Marcopper cracked, spilling millions of tons of mine tailings into the Boac River. The United Nations investigated the extent of the impact of the spill and identified unacceptable levels of heavy metals and toxic wastes in parts of the river due to the faulty waste rock siltation of the dam³.

The river had been an important source of food for the residents of Marinduque. Many residents suffered illnesses because of the toxic wastes which had been accumulating in the province's tributaries ever since Marcopper started operations in 1969⁴.

In April 2001, a case for recovery of damages was filed by affected residents in Marinduque against Marcopper⁵. After 16 years, the case is still in the trial stage and will most likely be dragged on for a few more years due to the finan-

cial and technical resources available to mining companies such as Marcopper and the inefficiencies of the Philippine justice system. Some plaintiffs have already died without getting due reparations. Other plaintiffs are senior citizens experiencing failing health.

Aside from delays in the judicial system, Marcopper may also be able to escape liability by declaring itself insolvent and unable to pay the damages sought by plaintiffs.

The long history of human rights violations perpetrated by TNCs and/or their agents have been documented worldwide. Such violations include extrajudicial killings, enforced disappearance, and other forms of harassment. Moreover, TNCs have caused colossal damage to the environment, leaving local communities unsafe and without sources of livelihood. Extending liability to IFIs will mitigate the difficulty in holding TNCs to account for their violations, as well as in indentifying the transnational character of companies. The UN Binding Treaty should be able to establish liability of IFIs that knowingly fund and continue to support companies responsible for human rights violations and environmental disasters. This will provide another layer of protection for those aggrieved by abuses committed by TNCs.

¹ See AIIB list of approved projects at <https://www.aiib.org/en/projects/approved/index.html> last accessed 20 September 2017.

² https://www.aiib.org/en/news-events/news/2017/20170328_001.html last accessed 20 September 2017.

³ Esguerra, James. "Case Study Four: Marcopper Mining Corporation (Philippines): ADB and the Environment: A Monitoring Framework for the ADB's Environment Policy. PRRM, NGO Forum on ADB: Manila, 2003.

⁴ Environmental Justice Atlas describes the health impacts of the Marcopper mining disaster at <https://ejatlas.org/conflict/marcopper-placer-dome-mining-disaster-marinduque-island-philippines> last accessed 20 September 2017; Chronic illnesses continued years after the disaster. See <http://pcij.org/stories/chronic-illnesses-on-the-rise-in-marcopper-towns/> last accessed 20 September 2017.

⁵ This Complaint was filed by residents of Brgy. Magapua and Brgy. Bocboc, Mogpog, Marinduque, with Legal Rights and Natural Resources Center as counsel.

3 CORPORATE CRIMES: PLANTATIONS, ENVIRONMENTAL DAMAGE AND HUMAN RIGHTS VIOLATIONS

by WALHI / FoE Indonesia

For more than 18 years, several provinces in Indonesia have suffered from forest and peat land fires. In 2015, there was a big forest and peat land fires, causing 23 children dead, at least 40 million people were exposed to the smoke, and it financial cost the state at least 17 billion USD in damage, not including damages on social, economy of the community, the loss of biodiversity and culture of indigenous people. WALHI recorded that the majority of hot spots were found in the concession area of big-scaled palm oil plantation (9.168 hot spots), and pulp and paper plantation (5.669 hot spots). We found out that at least 10 groups of companies involved in triggering the catastrophe, and 439 companies involved in wildfires. Those groups are: Wilmar, Sinar Mas (Asian Pulp and Paper), Raja Garuda Mas/APRIL, Sime Darby, First Resources, Sampoerna, Cargill, Provident, and Marubeni, PTPN (state-owned plantation company).

In addition to the forest and land fires, many law and human rights violations are committed by the plantations corporations, including grabbing people's land and practices that cause deforestation and degradation of the environment. Forest conversion to become palm oil plantation and pulp and paper plantation is

the most obvious and direct threat for the remaining forests in Indonesia. WALHI Riau recorded that there is 1.8 million hectare of illegal palm oil Riau in the forest area. The forest conversion done by the plantation causing significant greenhouse gas emissions, affecting the climate change as well as bigger vulnerability for vulnerable groups such as woman, children, farmer and indigenous or local communities who rely their life on the nature.

The total area of palm oil plantation in 2016 was 11.7 million hectare, which resulted in 33.5 million tons of CPO (Crude Palm Oil) for global market need. Moreover, currently the palm oil plantation is targeting small islands having higher vulnerability towards climate change. TuK Indonesia shows that 25 company groups controlled by the big corporates controlling the majority of palm oil plantation area in Indonesia. The total area of land in Indonesia controlled by 25 groups reaches 5.1 million hectare⁶.

The reality in the field shows that the character and practice of palm oil industry in Indonesia is very bad, causing many conflicts with communities, violating human rights through land grabbing, violating labor rights, including child labor in the plantations.



Photo: Kemal Jufri, Milieudefensie / FoE Netherlands



Forest fires in Indonesia

Photo: WALHI / FoE Indonesia

Sawit Watch (2015) predicted the amount of the oil palm plantation labors already reach 10,4 million people where 70% of them were labors without any work assurance (outsourcing)⁷.

The National Human Rights Commission found out that the typology of human rights violation involving corporates are among others including agrarian conflict and environmental destruction, with the highest sub-sector of corporate is the plantation sector. In 2016, the highest conflict was in the plantation including the total of conflict area of 601,680 hectares. Usually, big companies using a militaristic approach to securing their businesses.

Indonesia has instruments and national laws such as Forestry Law, Plantation Law and Environmental Protection and Management Law. However, such instruments and national laws have not been able to reach transnational corporate crimes and supply chains allowing their business to go on as usual. Funding sector and banks have always supported the funding of extractive industry, including under UN Guiding Principles on Business and Human Rights, which are voluntary.

For such reasons, WALHI / Friends of the Earth Indonesia urges the international instrument to regulate and guarantee the fulfillment of human rights, including rights over environment towards corporations and their supply chain. The UN treaty shall

apply and bind the corporates, and including capital owners, involved on environmental law and human rights violations in all supply chains. The international regulation shall prepare controlling and law enforcement mechanisms towards human rights, and shall acknowledge the criminal and civil liability of TNCs as legal entities.

We also urge the government to strongly push TNC's and other business to fulfill their obligations regarding human rights. The state has to assure in the first place the rights of the citizens are guaranteed and safe from the threats of non-state actors, in this case the power of corporations. It is the time for such obligations to be established by the UN Treaty Binding on Business and Human Rights and other business. We need the new international legally binding instrument, as well as national rules for business.

⁶ <http://www.tuk.or.id/tycoons-in-the-indonesian-palm-oil-sector/?lang=en>

⁷ <http://sawitwatch.or.id/2016/03/labors-end-year-brief-note-sawit-watch-2015-2/>

4 PROTECTION OF HUMAN RIGHTS DEFENDERS

by WALHI / FoE Indonesia and
Indonesia Focal Point for Legally Binding Treaty Initiative

WALHI / Friends of the Earth Indonesia is part of the Indonesia Focal Point (IFP) for Legally Binding Treaty Initiative, hereinafter IFP, which is a coalition of Indonesian organizations working on human rights, environment, migrant workers, women rights, rule of law, indigenous groups, right to water and other protection of rights of groups.

IFP takes a very strong argument for the establishment of legally binding Treaty as normative foundation. As IFP looks into wider situation of Indonesia, as well as of Asia, where transnational conduct of trade and investment dominates state and society affairs, so far that the domination oversteps and pushes aside state obligations.

The power of corporations and countries has been indeed disturbed by the resistance carried out by human rights defenders. Not limited to criminalization, violence and threats are the consequences for human rights activists when the issue or the case they handle become of public concern. It does not only happen to the activists, but also affects people who are actively involved

in the struggle, either through the peasant unions, fisher folk unions, women organizations and other peoples' organizations.

Based on data from WALHI, noted from 2004 to 2017, there are 131 of Environmental Human Rights Defenders criminalized, persecuted, or threatened to attempted murder. Indra Pelani, an activist from Tebo Jambi Peasant Union, was killed by security of Wira Karya Sakti (WKS) Company. Indra was killed by mob and beatings by the Rapid Reaction Unit of WKS security forces. Two days after Peasant Day Commemoration (exactly on 26 September 2015), environmentalists and peasants from Selok Awar-Awar Lumajang East Java village were tortured by a group of pro mines.

The forms and layers of violence experienced by women environmental human rights defenders are not the same experienced by men. Gender-based violence in the conflict over natural resources is a specific and typical violence experienced by women. Women defenders have a special vulnerability to various acts of intimidation, sexual harassment, prejudice, denial or rejection by



Coal transport on tributary of the Barito River

Photo: Luka Tomac / Friends of the Earth International



Photo: Luka Tomac / Friends of the Earth International

the society and even arrest. Women defenders suffer more pressure either from family, social environment, only because of their gender identity.

According to the Office of the United Nations High Commissioner for Human Rights - Human Rights Defender: Protecting the Right to Defend Human Rights report: "However, their particular situation and role require special awareness and sensitivity both to the ways in which they might be affected differently by such pressures and to some additional challenges. It is essential to ensure that women human rights defenders as well as men are protected and supported in their work and, indeed, that such women are fully recognized as human rights defenders".

Guarantee of the human rights protection for the defenders have been regulated in the United Nations Declaration on the Right and Responsibility of Individuals, Groups and People Organizations to promote and protect human rights and fundamental freedoms, known as the Declaration of Human Rights Defenders, as endorsed by the UN General Assembly on 9 December 1998. Although the Declaration is not legally binding, it should be a reference for the UN member states also for negotiations of the new legally binding instrument.

Related to this declaration, human rights defenders have the rights to promote and strive for the protection and fulfillment of human rights and fundamental freedoms at the national level (Article 1), to develop and discuss new ideas and principles of human rights, and to advocate their ideas and principles are accepted (Article 7), and be protected effectively under national law in order to react against or opposing, through peaceful means, activities and acts, including negligence by the State, which resulted in violations of human rights and fundamental freedoms as well as violence perpetrated by groups or individuals that affect the enjoyment of human rights and fundamental freedoms (Article 12 Paragraph (2)).

These provisions should be made into the norm of the binding Treaty on TNCs. As a reference, Indonesia has a law governing environment. This law positions groups of citizens and victims-survivors as participants in the protection and on conservation of environment. This law also puts punitive damage to the perpetrators and belligerents, being state or non-state actors. This model could be employed on how the UN Treaty develops the component of human rights defenders among its elements.

5 CONCLUSION AND RECOMMENDATIONS

Friends of the Earth International and Asia Pacific region welcome the new phase of negotiations for the binding Treaty on Transnational Corporations (TNCs) and other business on respect to Human Rights at the United Nations and acknowledge the process made by the Intergovernmental Working Group (IGWG) on developing the Treaty elements based on productive, transparent and participative process since its first session held in 2015.

The Treaty Elements presented by the Chair-rapporteur ahead of the third IGWG session⁸ should be now the minimal basis for further and more ambitious negotiations and, as a priority, must set up norms of conduct and participation specified on the Treaty instrument in order to protect the process of negotiation and the Treaty content from corporate lobby, undue and imbalanced influence of transnational corporations, which too often capture UN processes, backed by their home countries, supported financially and politically by International Financial Institutions and protected by free trade and investment agreements.

Willing to contribute to the development of concrete mechanisms on key elements of the Treaty draft, and committed to mobilize from local to regional and international level for an ambitious and effective mechanism to put an end on transnational corporations impunity, Friends of the Earth Asia Pacific region presents the following recommendations based on the cases and areas of concern referenced in this report:

- The UN binding Treaty should establish liability of IFIs that knowingly fund and continue to support companies responsible for human rights violations and environmental disasters. This would provide another layer of protection for those aggrieved by abuses committed by TNCs. Extend liability to IFIs shall also mitigate the difficulty in holding TNCs to account for their violations, as well as in indentifying the transnational character of companies.

- The Treaty should regulate and ensure the fulfillment of human rights, including peoples' environmental rights, and apply binding rules to transnational corporations, including capital owners involved in environmental law and human rights violations in their supply chains. The international regulation shall prepare control and law enforcement mechanisms towards human rights and acknowledge the criminal and civil liability of TNCs as legal entities.

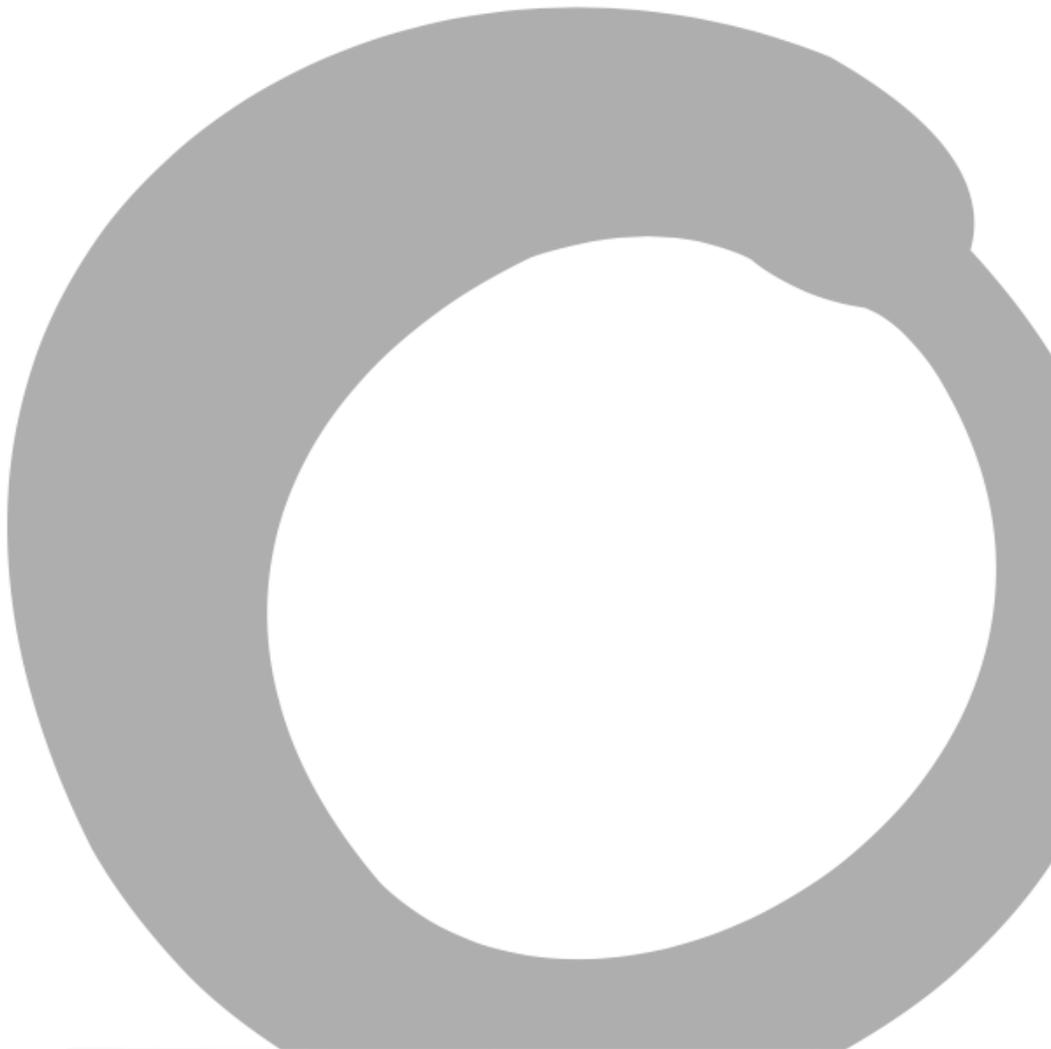
- States should push TNCs and other business to fulfill their obligations regarding respect to human rights and, in the first place, assure the rights of the citizens are guaranteed and safe from the threat of non-state actors, in this case the power of corporations, establishing the international legally binding instrument as well as national rules for business.

- The guarantee of the human rights protection for the defenders, regulated in the United Nations Declaration on the Right and Responsibility of Individuals, Groups and People Organizations to promote and protect human rights and fundamental freedoms, known as the Declaration of Human Rights Defenders, should be a reference for the UN member states negotiating the new binding instrument, specially concerning women human rights defenders. Its provisions should be made into the norm at the binding Treaty. Other examples, such as the national Law in Indonesia on environmental governance, where communities are considered participants in the protection and on conservation of the environment and where punitive measures for corporations are regulated in relation to human rights defenders component, should also be considered for this key element under the Treaty scope and structure. The necessary attention to the theme of human rights defenders in relation to the Treaty process and content has been also recently pointed out in the report of the Special Rapporteur Michael Forst on the situation of human rights defenders, with special focus on human rights defenders in the field of business and human rights⁹.

⁸ See ELEMENTS FOR THE DRAFT LEGALLY BINDING INSTRUMENT ON TRANSNATIONAL CORPORATIONS AND OTHER BUSINESS ENTERPRISES WITH RESPECT TO HUMAN RIGHTS Chairmanship of the OEIGWG established by HRC Res. A/HRC/RES/26/9 (29/09/2017) at: http://www.ohchr.org/Documents/HRBodies/HRCouncil/WG-TransCorp/Session3/LegallyBindingInstrumentTNCs_OBEs.pdf
⁹ See new report of the UN Special Rapporteur on Human Rights Defenders, Mr. Michael Forst, at: <http://undocs.org/en/A/72/170>

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