

**Written contribution by IBFAN to the 3<sup>rd</sup> Session of the Intergovernmental Working Group on TNCs  
and OBEs with respect to human rights  
23-27 October 2017**

October 2017

The International Baby Food Action Network (IBFAN) welcomes the opportunity given by the Chairmanship of the OEIGWG to contribute to the preparation of the third Session, to be held from 23 to 27 October 2017 at the UNOG. To this purpose, IBFAN would like to draw the attention of the Working Group to the following elements:

**1 General framework: a need to include all relevant existing international instruments**

First of all, IBFAN would like to express its strong support to such a process that, if adequately designed, will make an important contribution to the protection of all human rights and give a clear guidance to TNCs and OBEs on their responsibilities. We would like to highlight how relevant becomes, in such context, the first international instrument adopted with the aim of protecting the safe and adequate nutrition of children – the most vulnerable category of rights bearers – through the regulation of marketing practices: the International Code of Marketing of Breast-milk Substitutes and subsequent relevant WHA Resolutions (the Code). Adopted in 1981, the Code has unique historical and conceptual relevance for the whole Treaty process. It is the first international instrument aimed at providing human rights safeguards against the marketing practices of the entire business sector. Implementation of and compliance with this instrument have been monitored since its adoption, providing key lessons learned for the current Treaty process. The Code should be therefore included as a key reference in the list of the existing relevant international legal instruments.

*From WHO FAQs on the Code (2017): “The Code remains as relevant and important as when it was adopted in 1981, if not more so. The World Health Assembly has reiterated the importance of the Code numerous times over the past thirty-five years. As recently as 2016, the Assembly urged Member States to continue to implement the Code.”*

Secondly, when referring to the ILO Core Conventions, the new Treaty should also mention the ILO Convention No. 183 on Maternity Protection. This ILO instrument is fully relevant in any context where the relationship between businesses and workers’ rights is entailed.

Furthermore, IBFAN would like to stress the importance of some key General Comments adopted by the UN Treaty bodies, deeply connected to the core objective of this new binding Treaty:

- CESCR General Comment No. 12 (1999) on the right to adequate food;
- CESCR General Comment No. 14 (2000) on the right to the highest attainable standard of health;
- CRC General Comment No. 15 (2013) on the right to the highest attainable standard of health;
- CRC General Comment No. 16 (2013) on States’ Obligations regarding the impact of the business sector on children’s rights;
- CESCR General Comment No. 22 (2016) on the right to sexual and reproductive health;
- CESCR General Comment No. 23 (2016) on the right to just and favourable conditions of work;
- CESCR General Comment No. 24 (2017) on State Obligations under the International Covenant on Economic, Social and Cultural Rights in the context of business activities.

These General Comments provide a solid basis to understand why a binding Treaty to address human rights violations committed by a business sector is needed without any further delay. All the above-mentioned texts, as well as the ones already listed in the document *Elements for the draft legally binding instrument on TNCs and OBEs with respect to Human Rights*, are consistent with each other and push for action in the same direction: the regulation of activities of transnational corporations and other business enterprises.

## 2 Obligations of States: strong measures and independent monitoring

In the section dedicated to States' Obligations, the draft text includes the following: *"States shall take all necessary and appropriate measures to prevent, investigate, punish and redress such violations or abuses, including through legislative, administrative, adjudicative or judicial measures, to ensure TNCs and OBEs respect human rights throughout their activities."*

IBFAN would like to raise concerns about the wording *"all necessary and appropriate measures"*, as we believe the word *appropriate* is problematic since in many ways it represents a value judgment. It should be clearly identified what constitutes such *"appropriate measures"* to make the nature of these measures more specific. The aim should be to avoid adoption of any measures that may reveal themselves over time as being too weak and/or serving TNCs and OBEs to evade legally binding regulations. In other words, a binding Treaty should facilitate adoption of legally binding measures by States, with the goal of protecting against human rights violations or abuses within their territory and/or jurisdiction by third parties, and this should be clearly stipulated in the text of the Treaty.

Thirdly, based on our almost 40-year experience in being witnesses to fiascos of monitoring systems which failed to be independent of the party to be monitored (infant and young child feeding industry), IBFAN wishes to emphasize the importance of independent monitoring. Activities of TNCs and OBEs with respect to human rights should be monitored in a transparent and independent way for the treaty to meet its objectives. Entities charged with protecting human rights should be scrupulously screened and any undue influence and conflicts of interest avoided. In our view, only entities independent of the parties to be monitored can retain their integrity, independent judgment and credibility together with public trust. We believe it is crucial that the new binding Treaty prevents the undue influence on any monitoring body that would be responsible for evaluating any reported HR violations or abuses. Undue influence can take many forms. This fact should be acknowledged and openly counteracted.

Fourthly, once the Obligations of States are clearly defined, including in terms of creating independent monitoring mechanisms free from conflicts of interest, the proposal for TNCs and OBEs to develop their own *vigilance plan* can be seen as a complement to such obligations. However, relying only or primarily on such vigilance plans would be thoroughly inadequate. IBFAN feels obliged to raise this point with the OEIGWG based on our experience with insufficient due diligence procedures of infant and baby food manufacturers, which allow frequent systematic violations of the International Code and subsequent relevant WHA Resolutions.

With these concerns in mind, we wish to conclude by questioning the call for *"adequate consultation processes with the participation of all relevant actors"* (section Preventive Measures). While this may seem a benign recommendation, in the current climate where multi-stakeholder approaches are promoted as THE only way to address any global or national issues, it presents many risks and opens doors to corporations and philanthropies to unduly influence policy setting. As emphasized by experts, public-private partnerships [and multi-stakeholder alliances] **"increase the likelihood of new forms of conflicts of interest"** and **"erode the public-private distinction"**.<sup>i</sup>

We therefore advocate that this text is removed or that, as a minimum, a clear distinction is made between businesses that have a fiduciary duty to maximize profits and human beings who have human rights. There should also be clear definitions regarding the appropriate roles for the business sector, following accepted principles for avoiding conflicts of interest. The public sector must be protected from any undue influence from the private sector that prevents it from fulfilling its mission within the framework of the Treaty.

Prepared by IBFAN-GIFA on behalf of IBFAN

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<sup>i</sup> Anne Peters & Lucas Handschin, editors (2012). Conflicts of interest in global, public and corporate governance. Cambridge & New York, Cambridge University Press