An innovative structure for a

binding treaty on Human Rights and Transnational Corporations

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on transnational corporations and other business enterprises

with respect to human rights (OEIGWG).

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A new approach for a legal agreement involving TNCs is needed. The approach taken at UNCTC and OECD (the Code of Conduct and the Multilateral Agreement on Investment) did not result in a final text; the legal regime at the WTO (Trade-Related Investment Agreement) does not address human rights issues; bilateral investment treaties create obstacles to the development of domestic human rights law if they can impact the profitability of a foreign investment; and the access to remedy component of UN Guiding Principles on Business and Human Right falls far short of a reasonable and practical tool for addressing human rights risks from transnational and other corporations.

This paper proposes an innovative structure for the convention that builds on these realities .

The largest category of potential conflicts between human rights and transnational corporations should be addressed in national and sub-national courts. However a basic form for determining who has liabilities, and providing remedies in a given situation, is effectively blocked by the legal jurisdictional boundaries that keep relevant evidence, necessary witness statements, and assets outside the boundary of the court system of the country where the alleged transnational - human rights violation occurred.

The approach proposed here could set out procedures for enhanced and more efficient access to documents, witnesses, and police files necessary to pursue a case in national or sub-national courts. It could also set out international procedures for the collection of fines and other sanctions across borders and, in the case of a criminal conviction, assistance in enforcement of court decisions on responsible senior officials and legal bodies in other legal jurisdictions.

Another category of potential conflicts between human rights and transnational corporations include cases where domestic courts are not able to hear cases of human rights violations because of domestic wars; where national laws on human rights are too weak; or where the risk of physical or professional retaliation against plaintiffs and prosecutors is so high that it is unreasonable to file legal actions. In these more limited cases, the alternative structure provides for a high level international court system. This two tiered court of last resort could be situated in an domestic court of a country where the transnational corporations has a significant presence via extra-territorial application of human rights laws or, or, for special cases, in a self-standing international human rights corporate court.

The structure for the future binding convention could have a body with procedural arrangements for enhanced cross-border support for legal procedures that are addressing TNC and HR in individual jurisdictions; procedural sections establishing a two- tiered international court system for cases that cannot reasonable be brought before domestic courts; and an annex with standards for judging TNCs and HR. Initially the annex might have only 3-4 specific and relatively uncontroversial human rights standards while the legal procedures sections would, following the Montreal Protocol on Ozone Depleting Substances, allow the COP with a super majority vole to supplement the annex standards.

The treaty could well start off as plurilateral agreement with a minimum of 30-40 countries which are willing to start to have juridical and prosecutorial cooperation on human right matters and TNCs .

This alternative structure overcomes two major barriers to effective remedy for violation of human rights by transnationals corporations and the granting of defacto impunity – the corporate veil and the use of legal juridical boundaries to weaken the resolution of Human Rights abuses. As with the recent efforts to reduce the ability of TNCs to avoid appropriate tax payment by internationally moving income from one tax jurisdiction to another, this approach would reduce the ability of TNCs to shift senior personnel, evidence, and significant assets outside of jurisdiction where there are claims that TNCs and their senior offices were involved human right violations.

This procedurally structured agreement may well gather significant support from sections of the international rule of law community as it defines the ways for courts, prosecutors, and civil lawyers to work more effectively across boundaries.

This alternative structure is practical and functional in the near term as it recognizes both the centrality of national and sub-national courts on HR matters and defines the scope of extra-territorial application of HR legal actions

The use of annex for specific transnational corporate human rights standards allows detailed development of these standards to evolve over time, particularly those where they are potential conflicts between state human rights obligations and newly defined corporate human rights obligations. The use of a standards annex avoids having disputes about specific transnational corporate human rights definitions holding up the adoption of the entire agreements.

The structure of the convention (based on common law vocabulary) could have

1. Introductory Sections
2. General Principles Governing TNCs and human rights
3. Definitions

TNC means …

‘TNCs with an active presence in a country’ means a “TNC that is registered or has its headquarters, or has substantial business or financial activities, in the state concerned."

1. Mutual Support to Governments
   1. During the fact finding and investigatory period
      1. Spelling out the requirement that member countries provide all reasonable assistance in the fact-finding phase of a proceeding in another member country (e.g. access to witnesses, documents, police files in other member countries)
   2. During court proceedings
   3. During the enforcement of court decisions
      1. Spelling out the requirement that members cross enforce national or sub-national court decisions involving sanctions on TNCs or their senior officials (e.g. enforcement of order of payments or arrest and extradition following convictions),
   4. the availability to use the procedures under the convention directly by sub-national courts and sub-national prosecutors without interference from national authorities
2. Mutual Support for Civil Courts and civil claimants
   1. During the fact finding and investigatory period
   2. During court proceedings
   3. During the enforcement of court decisions
3. Procedures for individuals and communities which lack meaningful access to their domestic courts to file  HR applications in home countries and in courts of countries where effective control of an enterprise is based
4. Guidelines for Governments to invoke extra-territorial application of laws and regulations in home countries and in courts where effective control of an enterprise is based
5. Procedures for a supplementing Annex sections
6. Public registry of legal matters and complaints brought under any provision of the treaty, including
   1. registration of a complaint,
   2. the elements of the complaint reporting format,
   3. the obligation of TNCs or their affiliates in member countries to respond to the complaint,
7. Role of the COP
8. Role, Function, and Structure of an international court for TNC HR cases, including
   1. the establishment of a ombuds-person under the COP
9. Role, function, and responsibility of the secretariat to the COP and the international court, including
   1. the option for the secretariat to bring human rights issues with a high number of registered claims to the attention of the COP and/or HRC
10. Role of the HRC
11. Concluding Sections
    1. Including a citation to the Vienna Convention regarding the precedence of conventions such that the human rights matters are excluded from international arbitration panels under any pre-existing bilateral investment treaties
12. Annex A
    1. Internationally agreed conventions or treaties that already contain legally binding HR standards
13. Annex B
    1. The first set of HR standards for TNCs in specific sectors and/or specific areas
    2. The second set of HR standards for TNCs in specific sectors and/or specific areas

1. The author, a former staff member of UN Centre on Transnational Corporations, UNCTAD, and UN Department of Economic and Social Affairs (DESA), has been following the development of international hard and soft law relating to transnational corporations for over 30 years. He welcomes comments on this proposal at gleckman@mindspring.com [↑](#footnote-ref-1)