

Mandates of the Working Group on the issue of human rights and transnational corporations and other business enterprises; the Special Rapporteur on the issue of human rights obligations relating to the enjoyment of a safe, clean, healthy and sustainable environment; the Special Rapporteur on the right of everyone to the enjoyment of the highest attainable standard of physical and mental health; the Independent Expert on the promotion of a democratic and equitable international order; the Special Rapporteur on extreme poverty and human rights and the Special Rapporteur on the implications for human rights of the environmentally sound management and disposal of hazardous substances and wastes

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Excellency,

We have the honor to address you in our capacities as Working Group on the issue of human rights and transnational corporations and other business enterprises; Special Rapporteur on the issue of human rights obligations relating to the enjoyment of a safe, clean, healthy and sustainable environment; Special Rapporteur on the right of everyone to the enjoyment of the highest attainable standard of physical and mental health; Independent Expert on the promotion of a democratic and equitable international order; Special Rapporteur on extreme poverty and human rights and Special Rapporteur on the implications for human rights of the environmentally sound management and disposal of hazardous substances and wastes, pursuant to Human Rights Council resolutions 44/15, 46/7, 42/16, 36/4, 44/13 and 45/17.

In this connection, we would like to bring to your attention information we have received concerning **the ongoing and advanced negotiations between the Governments of Kenya and the United States of America of a new trade agreement that, if adopted, would allegedly loosen tariffs on import of plastic between the two countries, provide duty-free treatment for the currently dutiable import of plastic waste to Kenya, and that may have potential environmental and human rights impacts. Such tariffs are essential to avoid undertaking and authorizing actions with environmental impacts that may interfere with the full enjoyment of relevant human rights, related to and including the right to a safe, clean, healthy, and sustainable environment.**

According to the information received, the new trade agreement is a result of significant pressure by a lobby group representing oil and chemical companies, including Shell, Exxon, Total, DuPont and Dow and the American Chemical Council.

Kenya is a State Party to the Basel Convention on the Control of Transboundary Movements of Hazardous Wastes and their Disposal since 2000 and its Plastic Waste Amendments since 2020 and currently has one of the world's strictest regulatory regimes on the use, manufacturing and import of plastic bags, as part of its efforts to limit a major source of plastic waste in the country. Concerns have been raised that pressure to secure the proposed trade agreement may undermine Kenya's strong stance against plastic waste and open opportunities for such waste materials to effectively be "dumped" in Kenya. The trade deal may also result in Kenya becoming a "hub" or transit point for waste to continue onwards to other African countries and/or provide a model for other similar agreements with African States with potential to further undermine progress to limit plastic waste on the continent.

In a recent public comment to the US International Trade Commission the American Chemical Council stated that *“Kenya could serve in the future as a hub for supplying U.S.-made chemicals and plastics to other markets in Africa through this trade agreement.”*¹

Despite statements by The American Chemistry Council that *“it is well understood that a bilateral trade agreement between the United States and Kenya will not override Kenya’s domestic approach to managing plastic waste or undermine its international commitments under the Basel Convention”*², environmental and human rights organizations have contested this claim and note that the United States has not ratified the Basel Convention, which seeks to regulate and limit the shipping of plastic waste to poorer countries.

Plastics and the persistent chemicals they contain do not degrade in the environment. While each stage of the plastics cycle poses threats for human rights, plastic waste poses particularly damaging impacts. Toxic additives and microplastics contained in rain, soil, waterways, oceans and on mountaintops cannot be eliminated by recycling, landfilling or incineration. The plastics crisis which mankind faces currently affects a broad range of human rights, including the rights to life, the highest attainable standard of health, a healthy environment, housing, water and sanitation, adequate food, equality and non-discrimination, as well as the rights to information, participation, and effective remedy, all protected under international law. Plastics often contain toxic additives that continually expose people and ecosystems to harmful chemicals and pose a risk to health and the environment.

We would like to inform you on this occasion that the Special Rapporteur on Toxics and Human rights has decided to present a report on the impact of the plastics cycle on human rights to the 76th session of the UN General Assembly.

While we do not wish to prejudge the accuracy of these allegations, we express our concern about the potential environmental and human rights impacts of the adoption of such a new trade agreement between Kenya and the United States of America, which would remove strict tariffs on import of plastic waste to Kenya.

We wish to draw your attention that under the United Nations Guiding Principles on Business and Human Rights (UN Guiding Principles), the State has a duty to protect against actual and potential negative impact caused by business operations on human rights and the environment. This requires taking appropriate steps to prevent, investigate, punish, and redress such abuse through effective policies, legislation, regulations, and adjudication (Guiding principle 1).

In this context, we would like to remind your Excellency’s Government of the importance of ensuring that the provisions of the new trade agreement comply with the obligation of Kenya under the UN Guiding Principles, more particularly with the duty of your Excellency’s Government to protect against actual and potential negative impacts caused or contributed by or linked to business operations on human rights and the environment, by taking appropriate steps to prevent, investigate, mitigate, and remedy such abuse through effective policies, legislation, regulations and adjudication.

¹ Source: <https://www.americanchemistry.com/ACC-Public-Comments-on-Impact-of-Tariff-Elimination-under-a-US-Ken.pdf>

² Source: <https://www.americanchemistry.com/Media/PressReleasesTranscripts/ACC-news-releases/Chemicals-and-Plastics-Industry-Corrects-Record-on-Its-Position-Regarding-US-Kenya-Trade-Negotiations.html>

We would like to urge your Excellency's Government to reflect during the negotiations of the new trade agreement on its formal commitment to implement the UN Guiding Principles effectively and coherently through the release, in June 2019, of the National Action Plan on Business and Human Rights for Kenya. Under this Action Plan, your Government articulates its intention to fulfil its commitment under the "Protect, Respect and Remedy" framework of the Guiding Principles and, as one of its critical thematic issues, to protect against environmental degradation and environment pollution by business operations. It highlights that the negative impacts of environmental degradation and pollution would "compromise the rights to a clean and healthy environment, health, reasonable standards of sanitation, clean and safe water".

We would also like to encourage your Excellency's Government to take into consideration during the negotiations how the provisions of the new trade agreement would conform with the obligations of Kenya under the Basel Convention on the Control of Transboundary Movements of Hazardous Wastes and their Disposal of 1989, to which your Excellency's Government is a State Party. In addition, we would like to highlight that, as underscored by the Special Rapporteur on human rights and the environment in his report on a healthy biosphere: "States must implement and enforce existing laws and policies and amend or create new laws for emerging challenges (e.g., plastic pollution). They should apply the precautionary principle in all decisions that could harm ecosystems and biodiversity".³

Finally, as you progress with the negotiations, the Working Group would urge your Excellency's Government to ensure that the provisions of the new trade agreement and/or related infrastructures address the question of waste management, i.e. properly recovering, collecting, sorting, recycling and processing the imported plastic waste, in order to avoid a negative impact on the environment and human rights in Kenya.

As it is our responsibility under the mandates provided to us by the Human Rights Council, to seek to clarify all cases brought to our attention, we would be grateful for the observations of your Excellency's Government on the following matters:

1. Please provide an update on the status of the negotiations with the United States of America regarding the new trade agreement.
2. Please provide any additional information and/or any comment(s) you may have on the issues raised concerning Kenya's commitments pursuant to the Basel Convention and the UN Guiding Principles on Business and Human Rights, and how Kenya will uphold its commitments when addressing the potential import of plastic waste pursuant to a potential trade agreement with the United States.

This communication, as a comment on pending or recently adopted legislation, regulations or policies, and any response received from your Excellency's Government will be made public via the communications reporting website within 48 hours. They will also subsequently be made available in the usual report to be presented to the Human Rights Council.

³ A/75/161

Please be informed that a letter on this subject matter has been sent as well to the Government of the United States of America, expressing similar concerns.

While awaiting a reply, we urge that all necessary interim measures be taken in order to avoid causing a negative impact on the environment or creating conditions for businesses that are conducive for action that may lead to violations of human rights.

Please accept, Excellency, the assurances of our highest consideration.

Surya Deva
Chair-Rapporteur of the Working Group on the issue of human rights and transnational corporations and other business enterprises

David R. Boyd
Special Rapporteur on the issue of human rights obligations relating to the enjoyment of a safe, clean, healthy and sustainable environment

Tlaleng Mofokeng
Special Rapporteur on the right of everyone to the enjoyment of the highest attainable standard of physical and mental health

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Olivier De Schutter
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Marcos A. Orellana
Special Rapporteur on the implications for human rights of the environmentally sound management and disposal of hazardous substances and wastes