Building on the Ban: Increasing impact by decreasing investment

Working paper submitted by ICAN on behalf of member organization PAX

I. Introduction

1. On 7 July 2017, 122 states adopted the Treaty on the Prohibition of Nuclear Weapons (TPNW) in the United Nations in New York. During the negotiations, states agreed on a text that recognizes the unacceptable humanitarian consequences of nuclear weapons. The TPNW entered into force on 22 January 2022 and currently has 86 signatories and 61 states parties. It is now time to move forward its implementation. This paper looks at the issue of investing in nuclear weapon producers in relation to the TPNW’s provision that prohibits assistance with production of nuclear weapons. It calls on states to clarify publicly that they consider investments in nuclear weapon producers banned under the TPNW, and to adopt national legislation to prevent such investments.

II. Investments contribute to production of controversial weapons

2. The relationship between nuclear weapon production and financial institutions cannot be overlooked. Financial institutions provide the necessary support to companies so they are able to carry out their projects. Most nuclear armed states rely on private companies for the production, maintenance and modernization of their nuclear weapons. Publicly available documentation shows private companies are involved in the nuclear arsenals of, at least, France, India, Israel, Russia, the United Kingdom and the United States.1

3. When financial institutions invest in companies associated with nuclear weapon production, they provide the financing to maintain, refurbish, test, and modernise nuclear weapons. In short: no money means no production. Research by PAX shows

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1 PAX & ICAN (2021), Perilous Profiteering: The companies building nuclear arsenals and their financial backers, available at: 2021-Perilous-Profiteering_Final.pdf (dontbankonthebomb.com)
that between January 2019 and July 2021, at least 338 financial institutions from around the world invested US$ 685 billion in 25 nuclear weapons producing companies involved in the nuclear arsenals of France, India, Russia, China, the UK and the US.\textsuperscript{2} Investors profit from the production of weapons that are unacceptable to most of their clients and could lead to the death of millions of people.

4. Investments are not neutral. Financing and investment are active choices, based on a clear assessment of a company and its plans. A bank doesn’t invest in an arms manufacturer because they also happen to make toasters: banks and other financial institutions know where their money goes. Banks’ existing due diligence practices already identify links to the weapons sector, though not always revealing a company’s involvement with the nuclear arms industry. Any financial service delivered to a company by a financial institution demonstrates tacit approval of their activities. Conversely, explicitly excluding a company because of the way it does business or because of the nature of its products also sends a strong signal of disapproval to the offending company.

III. **Investments contribute to production of controversial weapons**

5. There is a growing norm among states that financing or investing in companies that produce controversial weapons is a form of assistance with the production of those weapons. While there are currently no known explicit prohibitions on financing in international laws prohibiting inhumane and indiscriminate weapons, it is common to include a prohibition on assistance with prohibited acts. There is a growing understanding that financing falls within the scope of these prohibitions, notably the prohibition on assistance with the production and development of banned weapons. For example, in the Oxford Public International Law commentary on the Chemical Weapons Convention, assistance is understood to include the provision of “through financial resources… to anyone who is resolved to engage in such prohibited activity” and anyone that could be “not only be a State, irrespective of whether or not it is a Party to the Convention, but also an organization, an enterprise, a person, or a group of persons, regardless of Citizenship.”\textsuperscript{3} Other examples of international instruments where this understanding is visible include the Convention on Cluster Munitions and the International Convention for the Suppression of the Financing of Terrorism. Finally, the TPNW’s prohibition of assistance with production of nuclear weapons is also increasingly understood to include investments in nuclear weapon producers.

**The Convention on Cluster Munitions**

6. The 2008 Convention on Cluster Munitions (CCM) prohibits the use, development, production, acquisition, retention and transfer of cluster munitions. Article 1(1)c of the CCM states that “Each State Party undertakes never under any circumstances to assist, encourage or induce anyone to engage in any activity prohibited to a State Party under this Convention.”

7. Under Article 9 of the CCM, the Convention’s provisions apply to all persons and legal entities under the jurisdiction or control of the State Party, and the

\textsuperscript{2} Ibid, p.3.

government is required to adopt “all appropriate legal, administrative and other measures to implement” the Treaty.

8. Because assistance is not clearly defined in international law, practice by States Parties is looked at for clarification. So far, 37 states (of 123 that have joined the Treaty) explicitly acknowledge that the CCM’s prohibition on assistance in the development and production of cluster munitions also prohibits investments in cluster munitions. 11 more states have adopted national legislation to this end. This practice therefore increasingly makes clear that financing constitutes assistance with production, and that this applies also to financial institutions investing in producers of cluster munitions. These legislative acts have provided clarity and guidance to the financial industry on definitions, scope, and responsibility.

**International Convention for the Suppression of the Financing of Terrorism**

9. An international agreement that does explicitly deal with financing is the International Convention for the Suppression of the Financing of Terrorism [ICSFT]. This convention is built on the recognition of the idea that financing provides a crucial form of assistance to terrorist groups, and must therefore be prohibited. As terrorism is a tactic, and not a tangible weapon, additional complexities arise in the ICSFT. In New Zealand, legislators drew on the language of the ICSFT for the national implementation legislation for the CCM, that also prohibits the financing of cluster munitions. This illustrates the growing understanding that financing is a form of assistance, and that if assistance with certain acts is to be banned, so should financing.

**The Treaty on the Prohibition of Nuclear Weapons: increasing impact by decreasing investment**

10. The Treaty on the Prohibition of Nuclear Weapons [TPNW] was adopted on 7 July 2017 and entered into force on 22 January 2021. Article 1 of the Treaty contains its prohibitions. Under article 1(a) states parties are not allowed to “develop, test, produce, manufacture, otherwise acquire, possess or stockpile nuclear weapons or other nuclear explosive devices”. Under article 1(e), it is also prohibited to “[a]ssist, encourage or induce, in any way, anyone to engage in any activity prohibited to a State Party under this Treaty”.

11. As mentioned above, the concept of assistance is not a clearly defined legal term, so practice by States Parties is necessary to determine its meaning. Implementation of these provisions, will be guided by negotiating records, discussions and agreements during Meetings of States Parties and by state practice.

12. Including a ban on financing was already suggested in the final report of the Open Ended Working Group. During the negotiation for the TPNW, many countries stated their understanding that the prohibition on assistance includes a prohibition on

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5 Countries have stated that investment in cluster munition producers are or can be seen as prohibited under the Convention on Cluster Munitions, available at: Stop Explosive Investments » Countries’ best practices

6 States that adopted legislation banning investments in cluster munitions, available at: Stop Explosive Investments » Countries’ best practices

financing and that investment in nuclear weapon producers would not be in line with the intent and purpose of the Treaty.\(^8\)

13. There are many examples, from the South African Apartheid regime to child labour to tobacco when shunning by the financial industry had a profound social impact. While it is unlikely that divestment by a single financial institution or government would create sufficient pressure on a company for it to end its involvement in nuclear weapons production, divestment by even a few institutions or states based on the same justification can impact a company’s strategic direction. Explicitly prohibiting financing in the ratification process for a new legal instrument offers a clear guidance and justification for financial institutions to divest.

14. States cannot eliminate weapons they do not possess themselves, but they can and do establish norms that make continuing possession untenable. As reported by PAX, financial institutions in countries that have not joined the TPNW have nevertheless adopted policies that exclude investments in nuclear weapons producers, with explicit reference to the Treaty.\(^9\) This shows how the TPNW can be an effective tool to increase the stigma attached to nuclear weapons, even in states that remain outside its prohibitions. Stopping the financial flow to weapons producing companies has proven to have real impact on nuclear weapons producing companies. Promoting the understanding that financing of prohibited acts is prohibited under the TPNW is therefore an effective means to extend the impact of norms outside the treaty parties.

15. Research by PAX shows that there is already a correlation between the growing understanding of the private sector’s involvement in nuclear weapons programmes, and the number of policies excluding the companies involved. In 2016, before the TPNW was negotiated, PAX listed 54 policies restricting investments in nuclear weapons producers.\(^10\) After the treaty was adopted, the number rose to 77.\(^11\) Since the TPNW went into effect, the number of known policies has increased to over 100.\(^12\) As mentioned before, many of these are citing the TPNW as part of the justification for these exclusions in their policies.

16. Financial institutions make their own judgements, but also look to governments to provide clarity on what constitutes unethical investment. An explicit recognition by states that the TPNW’s prohibition to assist the production of nuclear weapons is understood to include investments in nuclear weapon producers would therefore make a significant contribution to the growing norm against such investments and move forward the implementation of the Treaty. In sum, it is important to make it clear that the nuclear weapon business is not legitimate, just as nuclear weapons are not legitimate.

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\(^8\) Interpretive statements: financing prohibited. Available at: https://www.dontbankonthebomb.com/interpretive-statements-financing-prohibited/

\(^9\) PAX & ICAN (2022), Rejecting Risk: 101 policies against nuclear weapons, p. 10, available at: RejectingRisk-web.pdf (dontbankonthebomb.com). This concerns financial institutions with their headquarters in Australia, Belgium, the Netherlands, Denmark, Norway and Sweden.


IV. Recommendations

Make a statement

17. In order to create the basis for a common understanding that investments in nuclear weapon producers are banned under the TPNW, states are encouraged to make a statement such as:

*We understand that Article 1(f) of the Treaty, which prohibits assistance with the other acts prohibited under Article 1, includes a prohibition on investments in producers of nuclear weapons.*

Adopt national legislation

18. We urge all states to adopt national legislation explicitly prohibiting all investments in producers of nuclear weapons. This can be part of the national legislation to implement the Treaty on the Prohibition of Nuclear Weapons. Such legislation should:

- Prohibit investments in all companies involved in the production, development or maintenance of nuclear weapons
- Apply to all types of investments in such companies
- Apply to all types of financial institutions and individuals under the country’s jurisdiction
- Provide for a monitoring and enforcement mechanism