

ETUC Position on a United Nations Treaty on Transnational Corporations

Adopted at the Executive Committee on 25 – 26 June 2018

Transnational corporations (TNCs) operate in a judicial and jurisdictional void due to their global reach. There continue to be abuses and violations of human rights occurring all over the world which directly or indirectly engage the responsibility of corporations. The current model of trade, with the majority of it tied to global supply chains, in highly competitive low-cost markets, means jobs created by TNCs often fall short of decent working standards. Neither voluntary standards nor existing state obligations under international law ensure the protection of workers and victims. Therefore, there is an urgent need to prevent violations of human and trade union rights and improve access to justice, remedies and reparations for victims.

In June 2014, the United Nations Human Rights Council adopted Resolution 26/9 and established an open-ended intergovernmental working group on transnational corporations and other business enterprises (IGWG) in order to elaborate an international, legally binding instrument to regulate, in international human rights law, the activities of TNCs and other business enterprises.

The global labour movement, which has long sought the international regulation of international business, welcomed the Resolution. Since then, the International Trade Union Confederation (ITUC) and some of the Global Union Federations (GUFs) have participated in the IGWG's first three meetings and actively engaged in the process of developing a meaningful treaty on business and human rights (Binding Treaty).

Governments shall continue to proceed with the universal ratification of fundamental ILO conventions (including those on occupational health and safety - OHS) and give support to the standard-setting capacity of the ILO, based on its tripartite constituency. New conventions and instruments are needed to address the changed transnational nature of the economy and its impact on workers and their rights and working conditions. The Binding Treaty must endorse the unique role of the ILO in elaborating and supervising international labour standards.

The global labour movement has stressed that any procedure to develop a Binding Treaty must not become an excuse for governments or business enterprises to fail to implement the UN Guiding Principles on Business and Human Rights (UNGPs), responding to the demands of civil society and trade unions. As UNGPs are universally supported, they remain important and valid as a promotional instrument.

I. What we want

The ETUC supports a strong Binding Treaty that can effectively pave the way to full respect for the rule of law in the transnational activities of financial and economic actors and reaffirm the priority of respect for human rights and of general interest over the rules that protect private corporate interests. This implies the elimination of the normative asymmetry caused by Investor-State Dispute Settlement provisions and arbitration tribunals, and a new, stronger regulatory approach to TNCs' obligations in a way that gives teeth to states' duty to protect human rights.

The European Union has an important role to play in the upcoming negotiations for global justice, especially at a time of rising isolationism.

As the EU is proposing to start negotiations on an international framework for investor rights (the Multilateral Investment Court), we strongly believe that strengthening and upholding human rights for victims of corporate abuse in the context of investment should be prioritised.

We urge the EU, and its individual Member States, to use this historic opportunity to support the UN Treaty and show that Europe can be a champion for multilateralism and human rights and establishing rules for global business, contributing to sustainable and just economic, social and democratic progress.

We are currently considering legally and politically viable elements of a Binding Treaty. The following have so far been identified as minimum standards for the ETUC to support such a Treaty:

A. Scope

A Binding Treaty should include all internationally recognised human rights, including workers' and trade union rights, as defined by international labour standards, including the right to strike and take cross-border industrial action. All business enterprises, regardless of size, sector, operational context, ownership and structure, should be covered to avoid accountability gaps, as well as all forms of employment relations. Respect for the fundamental rights to organise and collective bargaining should be promoted by the Treaty, as independent and representative workers' organisation and social dialogue and collective bargaining are the best way to protect and enforce workers' rights.

B. Extraterritorial duty to protect

The Binding Treaty should provide for parent company-based extraterritorial regulation and access to justice for victims of transnational corporate human rights violations in the home state of transnational corporations.

This obligation is broadly based on the principle that states must take all measures they reasonably can, in accordance with international law, to prevent private actors from activities that have adverse human rights impacts.

UNGP 25 provides that: "As part of their duty to protect against business-related human rights abuse, states must take appropriate steps to ensure, through judicial, administrative, legislative or other appropriate means, that when such abuses occur within their territory and/or jurisdiction those affected have access to effective remedy."

However, the UN Committee on Economic, Social and Cultural Rights goes beyond this provision and affirms that state parties should "take steps to prevent human rights contraventions abroad by corporations that have their main seat under their jurisdiction". Under the International Covenant on Civil and Political Rights, the Human Rights Committee noted in 2012 that: "the state party is encouraged to set out clearly the expectation that all business enterprises domiciled in its territory and/or its jurisdiction respect human rights standards in accordance with the Covenant through their operations. It is also encouraged to take appropriate measures to strengthen the remedies provided to protect people who have been victims of activities of such business enterprises operating abroad."

The endorsement of the Maastricht Principles on the extraterritorial obligations of states in the area of economic, social and cultural rights is another example of this development. This is an area where the UNGPs fall behind the current state of international law. The Binding Treaty provides an opportunity to clarify the extraterritorial duty to protect.

C. Ensure access to effective judicial recourse for victims of human rights violations

In addition to legal provisions shielding parent companies from liability, the opportunity for victims to seek remedies is also affected by the fact that TNCs often commit violations in countries with weak legal systems and where the independence of the judiciary is in doubt. States must take necessary measures to ensure, through judicial, administrative, legislative or other appropriate means, that victims of human rights abuses have access to effective judicial remedy

- when human rights abuses occur within their territory and/or jurisdiction;
- and when human rights abuses occur outside their territory and/or jurisdiction, but the abuses are committed by an entity which has its centre of activity in the state concerned or has a business relationship with such an entity.

D. Due diligence obligation

TNCs often operate as economic entities composed of separate legal entities or as actors within a web of other corporations that are their business partners and over which they exercise variable degrees of influence. The Binding Treaty can help to clarify the duty of the state to protect human rights in relation to the accountability gap that may result from the organisation of TNCs. The Binding Treaty should therefore oblige states to adopt regulatory measures that require businesses to adopt and apply human rights due-diligence policies and procedures set out in the UNGPs. A breach of these requirements should give rise to civil, criminal or administrative liability. We also stress the importance of transparency in TNCs' activities, particularly the disclosure of supply-chain locations and the public sharing of information on supply-chain working conditions.

E. Obligations of TNCs

The Binding Treaty should build on Pillar II of the UNGPs in confirming the applicability of human rights obligations to the operations of companies. TNCs should have the obligation to respect human rights. This means that they should be prohibited from infringing on the human rights of others and should address adverse human rights impacts with which they are involved.

F. International monitoring mechanism

The Binding Treaty should also foresee the establishment of a treaty body to regularly monitor the application of the instrument and to provide support to states to implement its obligations at national level. In addition, this body should be given the competency to receive and consider communications containing information about serious abuses of human rights caused or contributed to by business enterprises and, where a particularly serious, widespread or systematic problem seems evident, it may establish an inquiry with in-country fact finding and reporting with recommendations.

Victims of human rights abuses as well as human rights defenders and organisations representing them, including trade unions and civil society organisations, should have access to these mechanisms and use these findings when bringing cases against TNCs to court.

The establishment of such mechanisms are already the practice of existing UN and regional human rights treaties. This mechanism must operate in a way that reinforces the irreplaceable role of the ILO supervisory mechanisms.

The treaty body should collaborate with the ILO supervisory mechanisms and its experts when it comes to complaints relating to labour standards.

II. **Next steps**

The ETUC calls strongly on the EU to engage fully in the UN Working Party on a binding instrument. The EU should adopt a favourable position on this treaty proposal and should participate actively in the work of the intergovernmental working group charged with elaborating an ambitious international Binding Treaty on business and human rights, thus endorsing the position of the European Parliament.

The EU should refrain from requiring a fresh mandate. Any attempt to re-open the process risks weakening or destroying it. Instead, the EU should engage with the working group within the context of its mandate under the resolution of 2014. The Treaty process is now four years old, it is time for the EU to make concrete proposals for how the Treaty could work and engage with unions and other civil society actors to develop it.

We also ask all ETUC members to join the process of developing this instrument and to lobby governments to support a Binding Treaty in the European Council and convince still-hesitant Member States, so that all European institutions support this negotiation process.