



LEGALLY BINDING INSTRUMENT TO REGULATE, IN INTERNATIONAL HUMAN RIGHTS LAW, THE ACTIVITIES OF TRANSNATIONAL CORPORATIONS AND OTHER BUSINESS ENTERPRISES

Trade Union Comments

The trade unions welcome the publication of the second revised draft of the Legally Binding Instrument by the Chairmanship of the Open-ended Inter-governmental Working Group (OEIGWG). With the COVID-19 pandemic once again exposing the fragility of global supply chains and business models built on non-standard forms of employment and informality, the Legally Binding Instrument represents a unique opportunity to end the impunity for corporate human rights abuses. Following the global drop in demand as a result of the pandemic, many companies have resorted to abruptly ending the procurement of goods and services and even to defaulting on prior commitments made – with the consequence of a disastrous impact for workers in global supply chains. Simultaneously, others designated as key workers in the crisis, including seafarers and workers in packing and distribution centres, continue to work tirelessly to keep global supply chains afloat at huge personal risk of exposure and often without adequate personal protective equipment. To ensure that the global economy is not only resilient but also conducive to social progress, governments must now step up their engagement in the Binding Treaty process.

The second revised draft has introduced further conceptual clarity, alignment with the UN Guiding Principles on Business and Human Rights (UNGPs), a more coherent structure, and a text that is politically viable for States and non-State actors alike. We welcome, among other things, the strengthening of the gender dimension throughout the text, including the requirement for business enterprises to *integrate a gender perspective, in consultation with potentially impacted women and women’s organizations*, during the entire human rights due diligence process. This gender-responsive approach will help ensure that States effectively discharge their obligations to protect and fulfil women’s, including women workers’, human rights in the context of business activities.

We also believe that the second revised draft provides a sound basis for effectively addressing existing accountability and liability gaps arising from the complex structures of transnational companies and their supply chains dominating the global economy. A key priority for trade unions is that the Legally Binding Instrument ensures that transnational companies can be held liable for human rights violations throughout their activities, including those by supply chain entities, irrespective of the mode of creation, ownership or control.

Another significant improvement in the second revised draft is a provision that *explicitly* requires States to ensure that any existing or new trade and investment agreements are compatible with the human rights obligations under the Legally Binding Instrument. However, we believe that a supplementary article that obligates States to integrate a binding and enforceable human rights and labour clause in trade and investment agreements will further boost the case for sustainable trade and development.

Among the other changes we would like to see in the following draft is an explicit recognition of the differentiated impacts of human rights abuses on *workers*. Further, it is important that trade unionists are explicitly recognised as human rights defenders and that trade unions are acknowledged as being an integral part of human rights due diligence processes, among other things.

While we welcome the expanded scope of human rights protected under the Legally Binding Instrument, it is essential that respect for *fundamental principles and rights at work* is divorced from the requirement to ratify Core ILO Conventions.

The second revised draft also limits the avenues for redress in a victim's home state, which would inevitably hinder the options of returning migrant workers. Finally, the international enforcement mechanisms of the Legally Binding Instrument continue to fall below our expectations. We reiterate our call for a complementary international mechanism to oversee compliance.

It is our expectation that governments will make substantive contributions to the discussions during the 6th session of the OEIGWG in order to fulfil the mandate of HRC resolution 26/9 and to deliver the Legally Binding Instrument.

We recall that, throughout this process, we have advocated for the following key priorities to be included:

- A broad substantive scope covering all internationally recognised human rights, including fundamental workers' and trade union rights, as defined by relevant international labour standards.
- The coverage of all business enterprises regardless of size, sector, operational context, ownership and structure.
- Parent company-based extraterritorial regulation and access to justice for victims of transnational corporate human rights violations in the home State of transnational corporations.
- Regulatory measures that require business to adopt and apply human rights due diligence policies and procedures.
- Reaffirmation of the applicability of human rights obligations to the operations of companies and their obligation to respect human rights.
- A strong international monitoring and enforcement mechanism.

Based on these expectations, we provide the following comments on the second revised draft:

The **Preamble** has been enhanced with targeted amendments aimed at defining the purposes and rationale of the Legally Binding Instrument. We welcome, in particular, the reaffirmation that human rights are *inalienable, equal and non-discriminatory* in line with the Universal Declaration of Human Rights (UDHR). Further, the references to the ILO Tripartite Declaration of Principles concerning Multinational Enterprises and Social Policy (ILO MNE Declaration) and the Sustainable Development Goals (SDGs) strengthen the text and ensure policy coherence. New paragraphs emphasising the need for States and business enterprises to integrate a gender perspective in all their measures and referencing the UN Declaration on Human Rights Defenders are welcome additions.

We believe that the Preamble can be further strengthened with the following amendments:

- Recalling *all* International Labour Standards, in addition to the already-referenced fundamental Conventions of the ILO;
- Recognising the distinctive and disproportionate impact of business-related human rights impacts on *workers*;
- Reaffirming the primacy of human rights over business and trade by recalling Article 103 of the Charter of the United Nations on the primacy of that Charter. This recognition would be important also in view of new art. 14(5).

Article 1. Definitions now contains a comprehensive definition of *victim* in line with prevailing international law standards that includes *persons who have suffered harm in intervening to assist victims in distress or to prevent victimization*. Therefore, human rights defenders, including trade unionists, are implicitly covered by this definition. This, taken together with art. 4 (*Rights of Victims*), ensures that the rights of *potential* victims of human rights abuse are also adequately covered in line with the Legally Binding Instrument's focus on *prevention* of adverse human rights impacts. Nevertheless, we believe that the term *rights-holder* should be

used instead of *victim* so as to ensure the protection of the rights of individuals and groups of individuals whose human rights are *at risk*.

The definition of *human rights abuse* now helpfully only focuses on harm committed by business enterprises in the context of their business activities. While it refers to the defined term *internationally recognized human rights and fundamental freedoms*, the scope of *environmental rights* covered remains vague. This definition would still appear to limit abuse to those committed *against* individuals and should therefore be expanded to cover human rights abuses *resulting from* business activities in line with the central theme of the Legally Binding Instrument.

While the explicit inclusion of state-owned enterprises in the definition of *business activities* is a positive development, we note that the reference to *for profit* economic activity effectively excludes the public sector, which procures roughly \$11 trillion worth of goods and services annually.

We welcome the replacement of the term *contractual* with *business* to capture all relevant relationships as per the UNGPs in the definitions and throughout the whole text.

Article 2. Statement of purpose has been amended but reflects our broad expectations of the Legally Binding Instrument. However, we are disappointed that the reference to *fulfilment* of human rights, which would have brought the Legally Binding Instrument into line with other human rights treaties, has been dropped. Also, the statement of purpose should explicitly refer to the protection of environmental rights or at least the human rights that necessarily entail environmental aspects. Finally, we welcome the recognition of facilitating and strengthening mutual legal assistance as a key purpose of the Legally Binding Instrument.

Article 3. Scope further embeds the approach taken in the revised draft of focusing the operational provisions of the Legally Binding Instrument on cross-border activities of business enterprises while maintaining a broad scope, which includes *transnational* and *other* enterprises. We welcome this hybrid approach, which we believe will prevent that the form of an enterprise can be used in order to evade accountability in the implementation of the Legally Binding Instrument. At the same time, this approach ensures that the Legally Binding Instrument is clearly geared towards addressing *business activities of a transnational character*, which is where the normative gaps in international human rights law lie.

While art. 3(2) gives States the *discretion* to differentiate on a non-discriminatory basis how business enterprises discharge these obligations commensurate with their size, sector, operational context and the severity of impacts on human rights, we believe that this would only affect the *modalities* of implementation, not the obligations. Such an approach can be beneficial for the purposes of effectively regulating small and medium-sized enterprises and microenterprises.

We cautiously welcome the extension of the scope of rights covered beyond *internationally recognized human rights to include fundamental freedoms emanating from the UDHR, customary international law, and any core international human rights treaty and fundamental ILO convention to which a state is a party*. Taken together, these instruments embody numerous labour rights, such as freedom of association and collective bargaining, equality and non-discrimination, forced labour, and child labour, wages, health and safety, social security and the limitation of working hours. While we understand that political expediency may have played a part in limiting the definition to core treaties and fundamental ILO Conventions *to which a state is a party*, we cannot accept this condition on core ILO Conventions. Such a formulation would breach the principle of non-regression under international law due to the fact that the Declaration on Fundamental Principles and Rights at Work of 1998 requires ILO Member States to respect and promote the principles and rights contained in the ILO's Core Conventions by virtue of its membership in the Organization, regardless of ratification. It is imperative that the ratification requirement for core ILO conventions be dropped from this article.

Article 4 on the Rights of Victims has been helpfully rearranged so that state obligations are no longer discussed in the same article. We welcome the emphasis on the application of all internationally recognized human rights and fundamental freedoms to victims while ensuring that they enjoy more favourable protections for victims or non-victims under international or national law (art. 4(3)).

This article should nevertheless adopt the broader term of "rights-holders" rather than victims. The exercise of labour rights, protected under international human rights and by international labour standards, does not commence with the violation of these rights. Moreover, in art. 6 on prevention, the Legally Binding Instrument refers to rights and obligations to prevent violations. The term "victim" should be replaced with "rights-holders" throughout the text.

We believe that the non-exhaustive list of remedies in art. 4.2(c) should include *private and public apology* and, most importantly, *reinstatement in employment*. A significant challenge for workers exercising their right to freedom of association is the fear of discriminatory dismissal. In such cases, the remedy must be reinstatement given that compensation payments alone may contribute to an atmosphere of intimidation in the workplace.

Among other things, we also welcome the recognition of the rights to file collective claims (art. 4(2)(d)) and legal aid (art. 4(2)(d)) respectively.

Article 5 on Protection of Victims is a new Article incorporating elements previously captured in art. 4 relating to State obligations to protect the rights of victims. While we welcome the obligation on States to *guarantee a safe and enabling environment for human and environmental rights defenders*, it remains important to specifically refer to trade unionists as human rights defenders, given the enormous risk of threats and retaliation in practice.

Article 6 on Prevention firmly embeds the requirement of States Parties to take *all necessary legal and policy measures* to ensure that business enterprises respect *all internationally recognized human rights and prevent and mitigate human rights abuses throughout their operations* (art. 6(1)). While art. 6(2) brings the focus of prevention back to mandatory human rights due diligence legislation, it is clear that art. 6(1) sets expectations of States to go beyond this measure in line with the UNGPs.

Amendments of note include the requirement for national human rights due diligence legislation to oblige business enterprises to *integrate a gender perspective*, in consultation with potentially impacted women and women's organizations, in all stages of HRDD. We also welcome the reference to the need to ensure that consultations with indigenous peoples are undertaken in accordance with the internationally agreed standards of free, prior and informed consent.

In relation to art. 6(3)(c) on the need to consult relevant stakeholders, we believe that there should be an express provision that human rights due diligence should be informed by meaningful engagement with trade unions. It should also be recognized that consultation is a right in itself in many labour-related instruments. The OECD Due Diligence Guidance for Responsible Business Conduct makes this very clear, and this should also be reflected in the Legally Binding Instrument.

We welcome the new language in art. 6(6) clarifying that business enterprises may be held liable for failing to conduct mandatory human rights due diligence in line with the article. However, there needs to be further clarity on the relationship between this article and art. 8 on Liability (see below).

Article 7 on Access to Remedy strengthens the previous corresponding provisions in the Revised Draft by, among other things, expressly stipulating that the doctrine of *forum non conveniens* is not used by courts to dismiss legitimate judicial proceedings brought by victims. The present draft also ensures that the "reversal of the burden of proof" in favour of victims is done in accordance with "rule of law requirements" and no longer leaves this up to the discretion of courts. We also cautiously welcome the empowerment of State-based non-judicial mechanisms in art. 7(1).

Article 8 on Legal Liability is a critical component of the Legally Binding Instrument and must provide a sound basis for effectively addressing existing accountability and liability gaps arising from the complex structures of transnational companies and their supply chains dominating the global economy. A key priority for trade unions is that the Legally Binding Instrument ensures that transnational companies can be held liable for human rights violations throughout their operations and activities, including those by supply chain entities, irrespective of the mode of creation, ownership or control. Art.8.1 provides a solid foundation in that regard requiring states to put in place "a comprehensive and adequate system" of legal liability for "human rights abuses".

We welcome that art. 8.8 explicitly states that "human rights due diligence shall not automatically absolve a legal or natural person conducting business activities from liability for causing or contributing to human rights abuses or failing to prevent such abuses by a natural or legal person as laid down in art. 8.7." The requirement to implement human rights due diligence is critical in ensuring that companies take a proactive and hands-on approach to ensure human rights are fully complied with in the supply chain or the corporate group. However, it cannot become a substitute for ensuring a right to remedy for victims of corporate negligence.

While this important distinction seems to be reflected in the text, there are aspects of the text that raise confusion. For example, art. 8.8 indicates that "the court or other competent authority will decide the liability of such entities after an examination of compliance with applicable human rights due diligence standards." This

sentence seems to suggest that the implementation of human rights due diligence standards does determine the liability of the business entity, which seems to be in conflict with art. 6.6 and the previous sentence in art. 8.8. The text should therefore be clarified in this regard.

The inclusion of the requirement to ensure “gender responsive reparations to the victims of human rights abuses” under art. 8.5 is welcome. Given the existing weaknesses in the UNGPs with regard to gender, the Legally Binding Instrument could make an important contribution in closing this normative gap.

Art. 8.6 maintains the requirement that was already included in 2019 for businesses to establish and maintain financial security, such as insurance bonds or other financial guarantees to cover potential claims of compensation. The behaviour of transnational companies during the recent pandemic has once again demonstrated how critical this provision is. Even the largest companies are undercapitalized and abandoned their commitments towards suppliers overnight, which meant that workers lost their jobs and wages without notice.

Article 9. Adjudicative Jurisdiction provides a broad choice of competent jurisdiction, which is welcome given that the main goal of the Legally Binding Instrument should be to ensure that rights-holders have effective access to remedy. Art. 9.3 makes it clear that jurisdiction established under the article shall be “obligatory” and that courts *should not decline jurisdiction* on the basis of forum non conveniens. This is a critical provision, which will prove extremely valuable in expanding access to justice for rights-holders. Transnational companies will no longer be able to raise this doctrine in order to evade accountability, which in many cases has constituted a serious barrier for remedy seekers. Art. 9.4 helpfully establishes that courts have jurisdiction over non-domiciled legal or natural persons “if the claim is closely connected with a claim against” a domiciled entity. This provision will facilitate joint litigation against parent and subsidiary companies. Art. 9.5 enshrines forum necessitas, providing that a court shall have jurisdiction over non-domiciled entities “if no other effective forum guaranteeing a fair trial is available and there is a sufficiently close connection” to the forum.

However, the revised text removed the domicile of the victim as a basis for jurisdiction (art.9.1). In addition, “substantial business interests” as one of the criteria for determining the domicile of the business entity has been removed and replaced with the more limiting term “principal place of business.”

We regret these new limitations when it comes to adjudicative jurisdiction. In some cases, a rights-holder may not be able to leave their domicile to bring a claim – for example, when it comes to migrant workers who have returned to their home country but continue to have claims with respect to companies domiciled elsewhere.

Removing the place where the business entity has “substantial business interest” and instead relying on the place of incorporation or principal place of business may also have practical implications that are contrary to the purpose of the Legally Binding Instrument given that it may encourage companies to incorporate in countries with weak governance structures.

Article 10. Statute of limitations is a critical provision in ensuring that barriers to access to justice can be overcome in practice. The revised draft is strengthened by removing language limiting the scope of this article to domestic law, and including a provision recognizing that in some cases harm may not be recognizable or capable of being discussed for a long time. This is particularly important when it comes to discrimination cases or industrial disease.

Article 11. Applicable law of the revised draft rightfully removes the provision subjecting the choice of applicable law to domestic legislation and instead allows the rights-holder to request which law is to be applied. However, the law of the domicile of the rights-holder has been removed as a possible applicable law. The text should be revised in order to include this as an option as it was the case in the previous draft. This is important in order to balance the ability of transnational companies to choose host countries with weak legal and governance frameworks.

Article 12. Mutual legal assistance and international judicial cooperation is crucial for the effective implementation of the Legally Binding Instrument. We believe the text requires a provision that allows state parties to refuse mutual legal assistance in good faith only. The revised draft has been improved by limiting the possibilities for refusing the recognition and enforcement of judgments (art.12.9) by removing “sovereignty” and “essential interest” as grounds for refusal. These terms were extremely broad and prone to abuse. Finally, we reiterate the need for additional measures to ensure the implementation of this article, such as conciliation procedures where a States Party complains that another does not offer mutual legal assistance.

Article 13. International cooperation reinforces a general obligation to assist other States to better promote and protect human rights that runs throughout international human rights law. We reiterate our strong support

for this article. When it comes to partnerships with relevant international and regional organizations and civil society, we wish to see a specific reference to trade unions. Given that we represent workers at the company, national, regional and international level, we are committed to contributing to the realization of the purpose of the Legally Binding Instrument.

Article 14. Consistency with international law principles and instruments obligates States to ensure that any existing or new bilateral/multilateral agreements, “including trade and investment agreements”, are compatible with states’ human rights obligations under the Legally Binding Instrument as well as other human rights conventions and instruments. Unlike art. 12(6) of the previous draft text, this provision makes an explicit reference to trade and investment agreements. It also differentiates how this compatibility could be achieved differently for existing and new agreements. We welcome that the text has been strengthened with regard to this important aspect to give recognition to the principle of the primacy of human rights obligations over trade and investment agreements. We reiterate our proposal to include a new sub-paragraph under art. 14 (5) (c) which would include the obligation to integrate binding and enforceable human rights, environment and labour clauses in trade and investment agreements. Moreover, art. 14(5) should require the inclusion of investors’ human rights obligations in trade and investment agreements.

Article 15. Institutional arrangements once again is extremely disappointing. We reiterate our call for a complementary international mechanism to oversee compliance with the binding. We are particularly disappointed by the fact that the proposal for an International Tribunal does not appear in this draft. As a bare minimum, the following amendments will need to be considered:

Committee

- The functions and powers of the Committee should be strengthened by, among other things, having the ability to hear individual complaints. Certain provisions of the draft Optional Protocol should be included directly in the Legally Binding Instrument.
- It is also essential that civil society organizations and trade union organizations be fully involved in proposing and designating the Committee’s experts.