

**Joint Written Submission to the Third Meeting of the Open-ended intergovernmental working group
on transnational corporations and other business enterprises with respect to human rights**

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International Trade Union Confederation (ITUC)

International Transport Workers Federation (ITF)

The unfortunate reality is that corporations operate in a judicial and jurisdictional void due to their global reach. Unchecked, 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 transnational corporations (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.

Following the adoption of Resolution 26/9, the international trade union movement has actively engaged in the work of the open-ended intergovernmental working group on transnational corporations and other business enterprises (IGWG), including by contributing to the first and second meeting as well as numerous consultations held by Ecuador.

We thank the IGWG for the opportunity to submit our **preliminary comments** on the Elements for a Draft Legally Binding Instrument on Transnational Corporations (TNCs) and Other Business Enterprises (OBEs) with Respect to Human Rights (Elements). The Elements reflect a consolidation of the numerous proposals brought into the discussion by a wide range of stakeholders during the previous meetings and consultations. We welcome the inclusive approach taken and believe that the Elements provide a substantive basis for a debate on a future instrument.

Trade and Investment: We welcome the fact that the Elements explicitly recognise *the primacy of human rights obligations over trade and investment agreements* and emphasise *the duty of the state parties to prepare human rights impact assessments prior to the conclusion of trade and investment agreements* (page 3, 1.2 Principles). We strongly support the inclusion of such a reference in a future binding instrument, which would build on UN Guiding Principle 9 and its commentary and General comment No. 24 (2017) on State obligations under the International Covenant on Economic, Social and Cultural Rights in the context of business activities. States should be required to take the necessary steps to ensure that trade and investment treaties do not conflict with their human rights obligations.

Subjective scope: Considering the serious challenges and threats posed to the rights of workers throughout global supply chains, we have repeatedly emphasised the importance to address the particular risks of the operations of TNCs. We therefore support that the Elements focus on regulating activities with a transnational character when it comes to the subjective scope of a future binding treaty. At the same time, this approach raises numerous questions, which need to be elaborated upon. For example, it may be difficult to draw a distinction between activities with a transnational and local character. It is not clear what gives the activity its transnational character and whether human rights

abuses must be the direct result of this activity. The Elements, in their current form, do not provide sufficient clarity on this distinction.

Protected rights: The international trade union movement welcomes the recognition of the universal, indivisible, interrelated and interdependent nature of human rights. However, section 2.1 (page 4) seems to suggest that human rights treaties do not include labour rights by adding “as well as in other intergovernmental instruments related, inter alia, to labour rights.” The Universal Declaration on Human Rights and the International Bill of Human Rights spell out numerous labour rights, such as the right to just and favourable conditions of work (article 23 UDHR).

Obligations of States: The Elements reaffirm the obligation of States to respect, protect and promote human rights. We would propose to use the term “fulfill” rather than promote to ensure consistency with other human rights treaties. We welcome the emphasis on the state obligation to ensure that procurement contracts are awarded to bidders that are committed to respecting human rights. The Elements also foresee a requirement on states to take all necessary and appropriate measures to ensure that human rights are considered in their legal and contractual agreements with TNCs and OBEs. This is an important reference but should be strengthened, in particular in light of the increase in outsourcing of public services to the private sector. It should be made clear that states do not relinquish their international human rights law obligations when they privatise the delivery of services that may impact upon the enjoyment of human rights. States should ensure that they can effectively oversee the enterprises’ activities, including through the provision of adequate independent monitoring and accountability mechanisms. Moreover, the obligations of states in relation to state-owned or controlled enterprises and their impact on human rights need explicit mention and further elaboration within the section dealing with state obligation.

Obligations of International Organisations: The Elements propose that states should strive to ensure that international organisations in which they are members do not adopt or promote international norms or decisions, which could harm the objectives of a future binding instrument or affect the capacity of parties to fulfill their obligations therein. This proposal is important in order to ensure policy coherence within multilateral institutions, in particular when they deal with business-related issues. However, the subtitle of section 3.3 on page seems to suggest that a future binding treaty would infer direct obligations on international organizations and might therefore be somewhat misleading. We propose to move this reference to section 3.1 dealing with state obligations.

Obligations of Transnational Corporations and Other Business Enterprises: The international trade union movement advocated that a future 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. The Elements suggest that TNCs and OBEs shall comply with *all applicable laws and respect internationally recognized human rights*. The proposed language is thus an important reaffirmation but lacks clarity. For example, it is not clear whether the term “applicable laws” refers solely to national laws or also the international obligations undertaken by states through the ratification of relevant instruments. Moreover, the relationship between *all applicable laws and respect internationally recognized human rights* within the context of a future binding treaty needs further thinking and the UNGPs may provide some guidance on the issue.

Preventive measures: 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 exercises variable degrees of influence. A future binding treaty can contribute 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 international trade union movement has therefore advocated for a clear state obligation to adopt regulatory measures that require business to adopt and apply human rights due diligence policies and procedures. We therefore welcome that this issue features prominently in the Elements, which notably build on the 2017 French duty of care legislation requiring large corporations to adopt preventive vigilance plans. In going forward, we believe that the concepts introduced under “Preventive Measures” (section 4, page 7) need to be further aligned with pillar II of the UNGPs to reduce some definitional ambiguities. We are particularly concerned about the reference “resulting from their activities” and would strongly argue that the duty to exercise due diligence should not only extend to negative impacts TNCs and OBEs can cause but also contribute to or are linked with.

Access to justice and effective remedy: The need for effective remedies for victims of human rights abuses is the very reason the international union movement is strongly in favour of a binding treaty. In addition to legal barriers shielding parent companies from liability, the possibility 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. Therefore, the unions welcome the Elements on access to justice, effective remedy and guarantees of non-repetition. In particular, we would like to highlight the following elements, which are fundamental for an effective future binding treaty:

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:

- a) when human rights abuses occur within their territory and/or jurisdiction; and
- b) 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

We believe that such measures are entirely consistent with international law. Further, it is paramount that the use of the doctrine of *forum non conveniens* is limited. Indeed, a future binding treaty should emphasise the desirability of a *forum necessitas* rule, which would allow proceedings to be brought when there would otherwise be no access to justice.

Other measures envisaged in the Elements such as the reversal of the burden of proof, the enabling of class action lawsuits, and the guarantee of access to justice to vulnerable groups, including indigenous peoples, are also welcome.

We also agree that non-judicial mechanisms should not be considered a substitute for judicial remedies. Regarding non-judicial remedies in the form of operational level grievance mechanisms, we must underscore the importance of mature industrial relations and collective bargaining in protecting and advancing human rights at work and settling disputes. Of critical importance would be the need to include protection against retaliation against workers (or human rights defenders more broadly), who submit grievances, as well as for any whistleblowers who may come forward to expose malfeasance.

Parent Company Liability: Since the separate entity doctrine has effectively converted TNCs into de facto networks of national level entities, each protected by the corporate veil, local companies are often under-capitalised making them essentially judgment-proof. There is usually no effective remedy at home against the local firm, or abroad against the lead firm, which may have contributed to the violation. TNCs are also usually immune from legal accountability when the violation is caused by a supplier.

A future binding treaty should therefore reflect the complexity and inter-related nature of today's global economy, including the structures of TNCs and their supply chains in order to address the existing accountability gaps with respect to human rights obligations. Therefore, the unions welcome that the Elements refer to a broad concept of *jurisdiction* to allow victims of human rights abuses by TNCs to have access to justice and obtain remediation through either the forum where the harm was caused, or the forum where the parent company is incorporated or where it has a substantial presence. A future binding treaty should provide for parent company-based regulation and access to justice for victims of transnational corporate human rights violations in the *home State* of TNCs. This obligation is broadly based on the principle that states must take all measures that could reasonably be taken, in accordance with international law, in order to prevent private actors from adopting conduct that may lead to human rights violations.

We fully support the recommendation to have States adopt legislative and other adequate measures to facilitate their judiciaries to consider claims concerning human rights violations or abuses alleged to have been committed by TNCs throughout their activities, including those by supply chain entities, irrespective of the mode of creation, ownership or control. Indeed, the unions favour a strong presumption of control where appropriate. Needless to say, the forms of regulation should include the administrative, civil and criminal fields. Indeed, it is paramount that criminal legal liability should cover the acts of those responsible for the management and control of TNCs and those natural persons in charge of decision-making processes.

International Cooperation: The general obligation of international cooperation to assist States to better promote and protect human rights is one running throughout international human rights law. The unions, therefore, support the establishment international cooperation mechanisms on judicial cooperation and the enforcement of judgments.

Implementation: National and international mechanisms are vital to ensure prompt and effective accountability and redress as well as achieve good practices and tackle the challenges in the framework of the agreement. A future binding treaty must include access to an international mechanism to oversee compliance. At the international level, we support the creation of an international tribunal that can adjudicate cases where corporations violate human rights across international borders. This tribunal would develop specific case law in this area *without* replacing the role of national courts. In addition to guaranteeing access to an independent judicial forum for affected people to obtain justice for human rights violations, it will help balance the system of private justice for corporations. Any such Tribunal or Court should be complemented by a Treaty Body that can regularly monitor the application of the instrument and to provide support to States to implement its obligations at national level. In addition, the Treaty 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 organisations representing them, including trade unions and civil society organisations, should have access to these mechanisms. The establishment of such mechanisms are already the practice for existing UN and regional human rights treaties. At the national level, we support the promotion of national human rights institutions and ombudspersons.

We look forward to the upcoming meeting of the IGWG, which will allow member states and relevant stakeholders to discuss and refine the proposals formulates in the Elements.

The International Trade Union Confederation (ITUC) represents 181 million workers in 163 countries and territories and has 340 national affiliates. The ITUC has general consultative status with the ECOSOC.

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The International Transport Workers' Federation (ITF) is an international trade union federation of transport workers' unions. The ITF represents 686 trade unions with 5 million transport workers from 148 countries. It is one of several Global Union Federations allied with the International Trade Union Confederation.

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