

# A Binding Treaty?

Within the UN system, there are strong calls for a Binding Treaty to regulate corporate human rights impacts. Unions favour this approach over so-called 'soft law' approaches to human rights

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 transnational corporations ('TNC's) 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 and the Global Union Federations have participated in the IGWG's first two meetings and actively engaged in the process of developing a meaningful treaty on business and human rights ('*Binding Treaty*').

There are numerous possibilities for the form and content of a Binding Treaty. Some proponents have called for a soft touch option covering non-financial reporting by TNCs, while others have advocated for a wide-ranging treaty providing for civil and criminal remedies in national and international courts. The unions favour a strong Binding Treaty that can effectively realign the normative asymmetry between the legally enforceable rules that protect corporate interests through Investor-State Dispute Settlement provisions and arbitration tribunals, and the soft law approaches to TNCs obligations to respect human rights. However, it is important that any such treaty should build upon the United Nations Framework for Business and Human Rights adopted in 2008 and on the UN Guiding Principles for Business and Human Rights ('UNGP's) adopted in 2010. Any process to develop a Binding Treaty must not become an excuse for governments or business enterprises to fail to implement the UNGPs.

The following essential elements need to be included in a Binding Treaty to help address existing governance gaps.

## Inclusion of international labour standards within the scope of a Binding Treaty

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. For example, an ITUC study found that 94 percent of the workforce of 50 major TNCs is hidden, without direct employment relationships, which makes them extra vulnerable to exploitation and abuses.

It is clear that global supply chains cannot and will not be sustainable unless they are based on the principles of Decent Work. A Binding Treaty should therefore include all internationally recognised human rights, including fundamental workers' and trade union rights, as defined by relevant international labour standards.

In this regard, the global labour movement has also been engaged in a parallel process at the International Labour Organisation (ILO) with the aspiration of achieving an international standard on decent work in global supply chains. If such a standard is achieved, there may be significant areas of overlap with a Binding Treaty. However, these parallel and intrinsically linked processes can be complementary and mutually reinforcing. A possible ILO Convention in this area will focus on labour standards in much greater detail beyond the scope of a Binding Treaty, which may be limited to fundamental labour rights.

The ILO has in its own right called on the IGWG to clearly ensure that its work builds on and does not prejudice existing international standards on human rights in business operations, including international labour standards.

## A Binding Treaty should apply to TNCs and all other business enterprises

Although Resolution 26/9 covers TNCs and other business enterprises, a preambular footnote qualifies *other business enterprises* as those with a *transnational character*. While the importance given to the responsibilities of TNCs is welcome, it should not mean that corporations, including state-owned enterprises and local businesses, which can equally have an impact on human rights, should be excluded from a Binding Treaty. A Binding Treaty should be applicable to all business enterprises regardless of size, sector, operational context, ownership and structure in order to avoid accountability gaps. This would also be consistent with the UNGPs and other international instruments including the OECD Guidelines for Multinational Enterprises.

## Human rights due diligence in global supply chains

A Binding Treaty should oblige States to adopt regulatory measures that require business to adopt and apply human rights due diligence policies and procedures. While there has been a recent trend towards human rights due diligence reporting by corporations, a Binding Treaty should go further and elaborate the steps that corporations need to take in

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order to fulfil due diligence requirements and establish that a breach of these requirements gives rise to civil, criminal or administrative liability. This would be an effective way of building on the due diligence standards contained in UNGPs. For example, in relation to civil liability, drafters of a Binding Treaty should move away from the separate entity doctrine and embrace the corporate *duty of care* approach adopted by a number of common law jurisdictions. In this regard, civil remedies in national courts should cover both violations of domestic tort law *and* violations of international human rights law.

### Extraterritorial jurisdiction for human rights abuses

International law is not well equipped to address cross-border corporate human rights violations. This is primarily because the international legal order has traditionally been based on the principle of sovereign States holding human rights abusers to account within their own borders. Further, 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 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. This would require the recognition of the need for the extraterritorial application of any Binding Treaty. At present, international law only allows States to engage in moderate exercises of jurisdiction over the conduct of their corporations in other States. A Binding Treaty should explicitly require States to exercise extraterritorial jurisdiction.

The possibility for victims of rights abuses 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. Extraterritorial jurisdiction is crucial for these victims. In fact, the duty of the State to provide access to remedies in the home state court of TNCs for human rights violations occurring in a host state has already been recognised in the UNGPs. This approach has also been backed up by numerous recommendations of the UN Treaty Bodies and other international instruments including the Maastricht Principles on the Extraterritorial Obligations on the Extraterritorial Obligations of States in the Area of Economic, Social and Cultural Rights.

### A strong and effective enforcement mechanism to accompany the Binding Treaty

A Binding Treaty must include access to a complementary international mechanism to oversee compliance. This public mechanism will need to be more ambitious than an Optional Protocol to a Binding Treaty with the usual individual and collective complaints machinery. What is required is 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 created via the likes of the Permanent Court of Arbitration, the International Court of Arbitration at the International Chamber of Commerce and the World Bank's International Center for Settlement of Investment Disputes.

Similarly, the international labour movement has also advocated for the creation of a mediation and arbitration centre at the ILO for transnational labour disputes. It is also seeking revisions to the ILO's Tripartite Declaration of Principles Concerning Multinational Enterprises and Social Policy, including the development of a complaint-based monitoring mechanism. Again, these should be seen as a complementary process to the Binding Treaty.

In addition to the essential elements that need to form the basis of a Binding Treaty, there are a number of other issues that the IGWG will need to consider. Chief among these is whether a Binding Treaty should place direct obligations on corporations. While academics and legal practitioners disagree on whether corporations can be subjects of international law, it is widely accepted that human rights are not rooted to any particular agent, including the State. Also, as current investment and trade treaties grant corporations remedial rights, it would only be appropriate that a Binding Treaty should impose duties on corporations. These corporate obligations will have to be in addition to and not in lieu of state obligations.

Needless to say, there is still a long way to go in the process of developing a Binding Treaty. While the first meetings of the IGWG were dedicated to exploring the possible content, scope and general character of the proposed instrument, the third session to be held from 23 to 27 October 2017 will focus on the key elements and/or a draft text. The international labour movement will remain at the disposal of the IGWG and States in particular when it comes to workers' rights. Governments and the business community will also need to effectively participate in next year's meeting and make meaningful and constructive contributions which would allow the IGWG to develop a Binding Treaty.

A parallel process is also underway at the ILO to create a standard on decent work in global supply chains. These processes can be complementary and mutually reinforcing

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