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 revised Legally Binding Instrument by the Chairmanship of the Open-ended Inter-governmental Working Group (OEIGWG). The revised draft has introduced further conceptual clarity and alignment with the UN Guiding Principles on Business and Human Rights, as highlighted by several parties in previous sessions of the OEIGWG. Indeed, the text that will be subject to further discussions in the upcoming 5th session of the OEIGWG session starting on 14 October 2019 represents a compromise text that attempts to reconcile the variety of views expressed. It incorporates both requirements for preventative measures as well as access to remedy, which are critical components in ensuring effective respect for international human rights law by TNCs and other business enterprises. The introduction of strong provisions on an enabling environment for human rights defenders is a very important evolution of the text and should be further developed to specifically refer to trade unionists in this regard as well. It is our expectation that governments will make substantive contributions to the discussions during the 5th session 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 revised draft:

Preamble includes very important and relevant principles. We welcome, in particular, the reaffirmation of the universal, indivisible, interdependent and inter-related nature of all human rights, as well as the reference to equal and effective access to justice and remedies, which is,

rightly, the core of the Binding Treaty. We are also pleased with the direct reference to ILO Convention 190 on Violence and Harassment in the World of Work. Nevertheless, we believe that the text can be strengthened with the following amendments:

- Recalling *all* International Labour Standards, in addition to the already-referenced fundamental Conventions of the ILO;
- Adding a reference to the ILO Tripartite Declaration of Principles concerning Multinational Enterprises and Social Policy (ILO MNE Declaration) and the Sustainable Development Goals (SDGs);
- 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.

Article 1. Definitions should be expanded in order to provide the clarity needed for full understanding of the Binding Treaty. We would request the following amendments:

- Replacement of the term "victim" with "rights-holder". A central tenet of the Legally Binding Instrument is *prevention* of adverse human rights impacts. Therefore, we would recommend the use of the term *rights-holder* so as to ensure the protection of the rights of individuals and groups of individuals whose human rights are at risk. Human rights defenders, including trade unionists, who defend these rights, should clearly be included in this definition. The Legally Binding Instrument must protect *victims* (who are also rights-holders) and guarantee their right to remedy while trying to prevent individuals or groups of individuals becoming victims in the first place;
- The current definition of *human rights violation or abuse* would appear to limit such violations and abuse to those committed *against* individuals. The definition will need to be expanded to cover human rights violations or abuses *resulting from* business activities in line with the central theme of the Legally Binding Instrument.
- Replacement of the term "contractual" with "business" to capture all relevant relationships as per the UN Guiding Principles on Business and Human Rights in the definitions and throughout the whole text. Any other formulation would be too restrictive.

Article 2. Statement of purpose referring to the objective of strengthening human rights in the context of business activity, ensuring effective access to remedy and international cooperation on these issues reflects our broad expectations of the Legally Binding Instrument. We therefore strongly support this text, including the reference to *fulfilment* of human rights, which brings the Legally Binding Instrument into line with other human rights treaties.

Article 3. Scope brings a balance of focus on cross-border activities of business enterprises while also applying its principal provisions to *other* business enterprises that do not operate across borders. We welcome this approach whereby existing duties of States in relation to domestic

companies operating within their jurisdictions are restated, while also creating new obligations relating to cross-broader activities of companies.

Article 4 on the Rights of Victims should 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.5 on prevention, the Legally Binding Instrument refers to rights and obligations to prevent violations. The term "victim" should be replaced with "rights-holders" throughout.

Moreover, this article includes both state obligations and rights. For the purpose of clarity these should be separated. Art.4 should be preceded by a new article spelling out state obligations.

Art. 4.5 provides a list of remedies. While we understand that this is a non-exhaustive list, we believe that it is important to add private and public apology and, most importantly, reinstatement in employment to this list of remedies. 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.

Art. 4.9. requires States Parties to take adequate and effective measures for human rights defenders. While trade unionists clearly fall under the definition of human rights defenders, it remains important to specifically refer to trade unionists given the enormous risk of threats and retaliation in practice.

Art.4.16 refers to the "reversal of the burden of proof" by national courts. This is usually not a matter that should be left to individual judges but on that is regulated in national legislation. The article should be strengthened and clearly require ratifying States Parties to provide for the "shifting of the burden of proof". This is an important provision with respect to labour rights given that there is a significant imbalance between companies and their workers with regard to access to relevant information.

Article 5 on Prevention requires States Parties to introduce domestic legislation requiring mandatory human rights due diligence. This is a major step in the right direction. Unions have regularly advocated for a clear state obligation to adopt regulatory measures that require business to adopt and apply human rights due diligence policies and procedures. While the new draft is clearly better aligned with the UN Guiding Principles, there needs to be further conceptual alignment throughout the article, in particular with respect to art.5.2.c. where the text uses the term "monitor" instead of "track", which may potentially be interpreted more narrowly.

Art.5.2.d. refers to communication with stakeholders. This is a critical aspect of preventive measures. However, in addition to stakeholders, the text should also refer to trade unions, who are both involved in ensuring the operation of companies but at the same at continuous risk of adverse impacts. It is also important to recognize in the text under art. 5.3 that meaningful 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.

The introduction of ***Art.5.5*** protecting from undue corporate influence in the implementation of the draft Binding Treaty is important. We welcome that the draft Binding Treaty draws on the WHO Framework Convention on Tobacco Control.

We also welcome that the requirements for preventative measures no longer exclude small and medium sized undertakings. Such enterprises are equally tied into global supply chains but respect for labour rights is often extremely weak. Incentives and other measures to ensure compliance under ***art.5.6*** may be helpful.

Article 6 on Legal Liability provides a sound basis for effectively addressing existing accountability and liability gaps arising from the complex structures of multinational companies and their supply chains dominating the global economy.

Multinational companies should 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. As such, clarity is needed on the concepts of *sufficient control, supervision,* and *foreseeability* of harm as set out in the Article. Moreover, article 6 should be clarified further in relation to the distinction of violations and abuses by companies and States.

Art.6.6 is focused on the "failure to prevent", which may be understood to be limited to omissions without catching the positive actions of companies that may cause or contribute to harm. The article should therefore be broadened to include positive actions in order to cover all dimensions of liability. Moreover, the term "contractual relationship" should be replaced with "business relationship".

The basis for triggering Article 6 should be clearer when specifying whether liability will be established on the basis of control or supervision by, or other connection between, parent companies with regard to their subsidiaries or suppliers.

Article 7 on 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.

Article 8 on Statute of limitations is a critical provision in ensuring that barriers to access to justice can be overcome in practice. However, the article has been weakened in the new draft and requires for civil claims that a "reasonable period of time for the investigation and prosecution of the violation" is granted. The zero draft stipulated that the statute of limitations should not be "unduly restrictive". While both terms are not clear enough, we are disappointed that the text has been watered down on this very important aspect.

Article 9 on Applicable law provides a broad range of options on the law applicable in relevant claims. However, the same provision under the zero draft gave the choice of the applicable law to the "victim" instead of leaving the question open. It is important to go back to the text of the zero draft and ensure that rights-holders have the choice of the applicable law in order to balance the ability of multinationals to choose host countries with weak legal frameworks.

Article 10 on Mutual Legal Assistance among States Parties is crucial for the effective implementation of the Binding Treaty. While strongly supporting the inclusion of this article, we believe that it can be further strengthened with a provision that allows state parties to refuse mutual legal assistance in good faith only. Moreover, 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 11 on 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 12 on Consistency with International Law once again fails to recognize the primacy of human rights obligations over trade and investment agreements. We strongly support the inclusion of such a provision, 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.

Moreover, art.12.6 should be more explicit in ensuring compatibility with the Legally Binding Instruments and other obligations undertaken by States Parties under bilateral or multilateral agreements. We wish to see a new article 12.7 on the obligation to integrate a binding human rights and labour clause in trade and investment agreements with access to remedy.

Article 13 on Institutional Arrangements falls below our expectations. We reiterate our call for a complementary international mechanism to oversee compliance with the Legally Binding Instruments. 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 Binding Treaty.

- It is also essential that civil society organisations and trade union organisations are fully involved in proposing and designating the Committee's experts.

Article 15 on Relationship with Protocols paves the way for the adoption of optional protocols, including the one tabled for the upcoming session of the Inter-Governmental Working Group. While we welcome this provision, we would still propose bringing aspects of the Optional Protocol into Treaty.

Article 16 on Settlement of Disputes provides a much needed mechanism for dispute settlement offering the choice of two fora, namely the International Court of Justice or a mutually agreed arbitration body.