

UK Working Group for the UN Binding Treaty on Transnational Corporations and Human Rights

Common Position Paper for UK government/parliamentary advocacy

September 2018

Why do we need a binding instrument for transnational corporations and other enterprises with regard to human rights?

Daily, too many transnational corporations (TNCs) cause harm, directly or indirectly, to ordinary people – they exploit workers and destroy the environment, avoid taxes, deny access to essential medicines and people’s right to health and devastate communities through mining and extraction. They can do this with almost complete impunity because they have gained unprecedented power and influence over governments and decision makers.

Too many TNCs take advantage of loose regulatory frameworks in developing countries, global corrupt practices, and powerful legal rules and norms that were put in place to protect corporate interests; often through well organised and highly resourced corporate lobby groups. Current global trade, investment and financial regimes enable TNCs to operate with lack of accountability or fear of consequences for their actions.

There are now 3,400 trade and investment **binding** treaties and agreements that protect transnational investments¹, including through secret courts² which allow TNCs to sue governments without regard to their impact on people and the environment.

Whilst initiatives such as the United Nations Guiding Principles on Business and Human Rights³ and the International Labour Organisation’s (ILO) Roadmap on Decent Work⁴ in Global Supply Chains⁵ are very

¹ UNCTAD, 2017

² These secret private arbitration centers on which trade lawyers sit, implement the Investor-State-Disputes-Settlement agreements for each trade agreement

³ https://www.ohchr.org/Documents/Publications/GuidingPrinciplesBusinessHR_EN.pdf

⁴ Decent work sums up the aspirations of people in their working lives. It involves opportunities for work that is productive and delivers a fair income, security in the workplace and social protection for families, better prospects for personal development and social integration, freedom for people to express their concerns, organize and participate in the decisions that affect their lives and equality of opportunity and treatment for all women and men. See <https://www.ilo.org/global/topics/decent-work/lang--en/index.htm>

⁵ https://www.ilo.org/ipec/Action/CSR/clp/news/WCMS_567493/lang--en/index.htm

important complementary tools, they are **not binding** legal instruments. The result is that profit is nearly always prioritised over people and the environment.

The impact on equalising measures such as the ILO's labour standards, which are directly correlated with inequality, is stark. For example the world's biggest 50 TNCs only employ 6% of their workers in a direct employment relationship but rely on a hidden workforce of over 116 million, mainly female and often precarious, workers. These hidden workers seldom have access to a living wage, while the average Chief Executive Officer pay of the largest 50 TNCs has gone up 997% since 1978⁶. Most global supply chain (GSC) workers experience conditions that fall far short of decent work.

The power and reach of TNCs stretches across markets and categories of workers: They simultaneously affect public sector and private sector workers, as well as social and informal economy workers. GSCs not only encompass the process of the transnational manufacturing of goods and products but also increasingly the transnational delivery of services traditionally deemed under public control – such as utilities, healthcare and social services⁷. Until now, corporate lobbying has ensured that global guidelines and policies urging corporations to uphold the rights of ordinary people are voluntary and not legally enforceable.

The United Nations Human Rights Council (UNHRC) put forward an historic proposal to begin a process that could hold TNCs and other business enterprises to account for corporate abuses with the Resolution 26/9 of June 2014⁸, this was a promising development. There have been intense discussions since then, which led to the third Open-Ended Intergovernmental Working Group (OEIGWG)⁹ agreement in October 2017 to start negotiating a treaty on TNCs and other business enterprises with respect to human rights.

The “Zero Draft”

The process of negotiating the Treaty began this year when in July the Zero Draft text¹⁰ was released four months before the 4th Session of OEIGWG which will take place in October. The **Legally Binding Instrument to Regulate, in International Human Rights Law, the activities of TNCs and other Business Enterprises** draft is a positive step that moves the process further forward.

It incorporated some concerns presented in the four Informal Consultations, as well as several other bilateral and multilateral meetings held by the Permanent Mission of Ecuador on behalf of the Chairmanship of the OEIGWG. It highlights issues concerning civil and criminal liability and contains a broad definition of business domiciliation, potentially allowing claimants to choose the most conducive legal system.

However, the “Zero Draft”, unlike the “Elements Document¹¹” presented by the Presidency of the OEIGWG in 2017, omits many of the proposals formulated during the previous three sessions. This is a concerning lack of continuity in the advances achieved through much dialogue and effort over three intensive years of work.

⁶ ITUC, 2016

⁷ Public Services International, March 2016 *Position Paper on Decent Work in Global Supply Chains*

⁸ <https://www.ihrb.org/pdf/G1408252.pdf>

⁹ <https://www.ohchr.org/EN/HRBodies/HRC/WGTransCorp/Session3/Pages/Session3.aspx>

¹⁰ <https://www.ohchr.org/Documents/HRBodies/HRCouncil/WGTransCorp/Session3/DraftLBI.pdf>

¹¹ https://www.ohchr.org/Documents/HRBodies/HRCouncil/WGTransCorp/Session3/LegallyBindingInstrumentTNCs_OBEs.pdf

Previous efforts to have a legally binding instrument on TNCs with regards to human rights failed and unsurprisingly, the current process faces many challenges. Powerful countries that are home states of large TNCs - the United States of America and many European Union (EU) states, including the United Kingdom, have, in the past, failed to support the Resolution 26/9 process.

Therefore a consensus must be built that ends in a Binding Treaty that retains fundamental principles in the final text – such as the primacy of human rights obligations over trade and investment agreements, protection of all human rights recognized in international instruments and access to justice and effective remedy for the victims of abuses. These principles are indispensable to achieve a real breakthrough in the fight against the violations of human rights. Discussion on these points must be re-introduced in the fourth OEIGWG session in October 2018.

What we want to see in the Treaty

We believe the Treaty must

- Cover all the rights recognised in all existing international human rights treaties in international human rights law: economic, social, cultural, civil, political and labour rights; the right to development, self-determination and a healthy environment; and all the collective rights of indigenous peoples and native communities globally;
- Allow people, with particular attention to enabling women and the most marginalised, whose rights are violated by TNCs to access justice. This should be through effective judicial recourse, not only in their home states, but in all other states that have jurisdiction over the concerned business, including parent-based extraterritorial jurisdiction;
- Contain provisions requiring states to respect, protect and facilitate human rights and access to justice of affected communities as well as of the work of human rights defenders and whistle-blowers;
- Contain a strong international enforcement mechanism;
- Contribute to the attainment of the 17 Sustainable Development Goals.

The Treaty must also **integrate a strong, intersectional gendered approach**. Integrating a gender approach into the Treaty means explicitly recognising and analysing how businesses' activities may have different, disproportionate, or unanticipated impacts on women compared to men. This is inclusive of whether they are workers, producers, consumers, and/or principal providers of unpaid care, as it is a result of their different gender-based social, economic, legal, or cultural roles.

Being intersectional in this approach means recognising and addressing specific impacts and issues that may be experienced by particular groups of rights-holders based on their gender, as well as other aspects of identity, such as age, race, language, religion, caste, sexual orientation, migrant status or geographical location.

Taking an intersectional, gendered approach would need to include

- Mandatory requirements for companies to undertake public and accessible human rights-based gender impact assessments as part of ongoing human rights due diligence. Women from

affected communities, particularly those from the most marginalised groups, should be included in their design scope and implementation;

- Ensuring effective justice and remedial mechanisms are accessible and responsive to the diverse contexts and lived experiences of women;
- Stronger and clearer language on the need to respect, protect, and ensure an enabling environment for women human rights defenders and whistleblowers, taking into account the gender-specific risks and impacts that they face;
- For further details see Feminists for a Binding Treaty Coalition (2017) Integrating a gender perspective into the legally binding instrument on transnational corporations and other business enterprises¹².

What we urge the UK Government to do

There is much work to be done and we urge the UK Government to take a positive approach to this groundbreaking Treaty by

1. Actively support the continuing of the existing process;
2. Productively participating in the negotiations of the Treaty text;
3. Contribute constructively with opinions, proposals and concrete formulations towards the successful conclusion of the negotiations in the framework of Resolution 26/9
4. Pursuing the reintroduction of the missing proposals from the first three OEIGWG sessions during the fourth OEIGWG session so that they appear in the next edition of the draft of the final text.



¹² <https://wilpf.org/wp-content/uploads/2017/10/Jt-statement-gender-into-the-Treaty-October-2017.pdf>