

ETI Briefing

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FREEDOM OF ASSOCIATION AND COLLECTIVE BARGAINING

FOA and Collective Bargaining
Guidance Document

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FOA and Collective Bargaining Guidance Document

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1 Introduction

The fundamental objective of the ETI Base Code and other ethical trading codes is to ensure respect for the dignity of workers throughout the supply chain. That requires realisation of their fundamental rights at work. Section 2 of the ETI Base Code provides for freedom of association and the right to bargain collectively. Suppliers, purchasers and social auditors often have difficulty understanding why these fundamental rights are important, what they entail in practice and how to assess progress towards their attainment. This briefing document seeks to explain clearly what freedom of association and the right to collective bargaining mean and why they are at the heart of the ETI alliance and its aims and objectives.

2 Why Freedom of Association and Collective Bargaining?

“The fundamental principle of freedom of association and the right to collective bargaining is a reflection of human dignity. It guarantees the ability of workers, and employers, to join and act together to defend not only their economic interest but also civil liberties such as the right to life, security, integrity and personal and collective freedom. It guarantees protection against discrimination, interference and harassment. As an integral part of democracy it is also key to realising the fundamental rights set in the ILO Declaration.

Research and analysis have demonstrated that respect for freedom of association and the right to collective bargaining also plays an important part in sound economic development. It has a positive effect on economic development by ensuring that the benefits of growth are shared, and promoting productivity, adjustment measures and industrial peace. In a globalised economy, freedom of association and the right to collective bargaining in particular provide a connecting mechanism between social goals and the demands of the market place.

Consequently, the real debate cannot and should not be on whether to respect these principles and rights, but on how best to respect and make use of them.” (Introduction to the 2004 Global Report under the Follow-up to the ILO Declaration on Fundamental Principles and Rights at Work, “Organising for social justice”)

Against the power of employers, the individual worker has almost no bargaining power. Producers are tempted to reduce costs by driving down the terms and conditions of employment. Long hours, low pay and poor working conditions, especially deteriorating health and safety standards - quite apart from being in breach of the ETI code and, more importantly, the internationally agreed labour standards on which the code is based - are a recipe for low investment, high turnover of labour, poor quality, low productivity and short term supply contracts.

Workers can best strengthen their negotiating position by uniting and bargaining collectively with employers. That is how workers throughout the world, wherever they are free to organise in trade unions, have improved their wages and conditions of employment. The rights to organise and to bargain collectively are recognised in United Nations and ILO Conventions and Declarations as fundamental and universally applicable human rights. All workers, everywhere, without distinction - and wherever they find themselves in global supply chains - should be able to exercise these rights in full freedom.

Companies should understand that world-class quality, productivity and competitiveness, requires a world-class workforce, with world-class skills and world-class rights and conditions. Similarly, regardless of whether there is a large pool of available labour or skills shortages, workers have a strong interest in successful companies and good employers.

Without them, there is no sustainable or decent employment, nor the tax base to fund quality public services and the enforcement of law. Whatever the state of the labour market, collective bargaining enables workers and management to solve disputes where their interests differ and to work together to make enterprises succeed. These two objectives are not incompatible, indeed, collective bargaining provides a mechanism for adapting employment conditions and systems of work to improve performance and meet ever-changing demands whilst preserving and enhancing labour standards. It is the best mechanism to ensure fair shares of the success as well as to negotiate equitable agreements when the economy takes a downturn.

Independent and effective organisation in the workplace, in trade unions that link workers throughout companies or sectors, is the most efficient mechanism for identifying violations and achieving practical, sustainable solutions. With the necessary conditions and resources – which such trade unions are best placed to provide – organised workers can address, and in collective dialogue with receptive employers, resolve labour standards issues themselves. They are also in a much better position than external social auditors to identify labour standards problems and can do so without the cost, disruption and distortions generated by repetitive social audits. Moreover, unlike social auditors, trade unions can negotiate with employers sustainable agreements for improvement that do not rely on temporary business arrangements between retailers and suppliers.

3 ILO Core Conventions

The International Labour Organisation (ILO) is a tripartite UN agency, established in 1919, and governed by representatives from governments, employers and trade unions, from 177 of the UN's 184 member states.¹ It has long recognised the central importance of workers' fundamental rights. In 1944, the ILO Declaration of Philadelphia enshrined the principle of respect for freedom of association as an obligation upon all member States. ILO Conventions 87 on freedom of association and the right to organise, and 98 on the right to organise and collective bargaining followed in 1948 and 1949.

ILO Conventions are only legally binding on member States once ratified. But, in 1998, the ILO adopted its constitutional "Declaration on Fundamental Principles and Rights at Work" which embodies the principles of eight fundamental Conventions, which all member States are required to observe, regardless of ratification, as a condition of membership. They cover the following issues:

- Freedom of association (C87) and right to collective bargaining (C98)
- Elimination of forced or compulsory labour (Cs.29 and 105)
- Abolition of child labour (Cs 138 and 182).
- Equal remuneration (C100) and elimination of discrimination in occupation and employment (C111).

¹ North Korea remains the only significant non-member

The core Conventions on which the Declaration was based are also the subject of a campaign for universal ratification by the ILO.² ILO Conventions, once ratified, are binding on member States, which are required to implement them in law and practice. While they are directed, in that sense, primarily at governments, these obligations cannot be fulfilled without respect for those laws by employers. That is why credible initiatives promoting codes of labour practice, such as the ETI, have based their codes on these Conventions, which set the minimum international standards for core labour rights. Their principles are thus incorporated into the ETI Base Code. The Code derives also from other ILO Conventions, for example on safety and health, and in the area of freedom of association, also from Convention 135 on workers' representatives.

4 ETI Base Code

The ETI Base Code requires that:

“2.1 Workers, without distinction, shall have the right to join or form a trade union of their own choosing and to bargain collectively.

2.2 The employer adopts an open attitude towards the activities of trade unions and their organisational activities.

2.3 Workers' representatives are not discriminated against and have access to carry out their representative functions in the workplace.

5 What Do These Rights Mean?

In the light of the ILO Conventions on which they are based, we can derive the following principles from the Base Code:

- These rights apply to all workers without any exceptions (except the police and armed forces). The use of the term “workers” rather than “employees” means that these rights are not dependant on the existence of formal employment contracts.
- They have the right to establish and join trade unions of their own choosing with a view to furthering and defending their interests.
- Organisations have the right to establish and join federations and confederations, which must also enjoy the same rights. For example, a company-based garment workers' union must be free to affiliate to a sectoral/national union or federation and to a national trade union centre (such as the TUC). The Convention also provides for the right to affiliate with international organisations.

² As of 31 December 2002: C87, 141 ratifications; C98, 152; C29, 161; C105, 158; C138, 120; C182, 132; C100, 160; C111, 158.

- Such organisations have the right to draw up their own rules and elect their representatives in full freedom, to organise their administration and activities and to formulate their programmes. Public authorities must refrain from any interference that would restrict this right or its lawful exercise.
- While it is generally to the advantage of workers (and their employers) to avoid too many organisations representing workers in the workplace, the employer (or government) cannot insist that workers are members of a particular trade union.
- Employers are also prohibited from preventing workers from belonging to the union of their choice, but trade unions must be free to decide their own democratic rules, and may refuse to accept an application to join if, for example, it does not organise members in that sector.
- Workers must be protected against acts of anti-union discrimination, including refusal to employ them because of their trade union membership, or dismissal or any other prejudice or penalty because of their trade union membership or activities.
- Employers must not interfere in, seek to control, dominate, or finance the formation, constitution, administration, elections or other activities of a trade union or seek to establish non-independent rival bodies, such as “workers’ committees” in order to prevent or hinder free trade union organisation.
- Trade union representatives must not be discriminated against or penalised in any way either because of their status as a trade union representative; or because of their activities as a representative.
- Convention 98 requires the promotion of voluntary collective bargaining. Workers are entitled to bargain collectively, through their trade union representatives, with employers and to reach agreement on terms and conditions of employment.
- The employer should be prepared to bargain collectively with trade unions which represent significant groups of workers on all matters relating to their terms and conditions of employment including pay, working hours, conditions of work, holidays, sick pay, health and safety, training, accommodation and travel arrangements, discipline, termination of employment, working arrangements and other matters. “Significant” does not mean that a majority of the workforce is required and artificial thresholds for recognition are contrary to the principles of the relevant ILO Conventions.
- Denial to trade union representatives of access to workplaces represents a serious violation of freedom of association. Trade union representatives must be allowed sufficient access to the workforce to be able to properly communicate and consult with them on matters concerning their conditions of employment. The trade union representatives and workers should be free to decide who is present at such meetings and, in particular, to require that no management representatives are present.

- Trade union representatives should also have the right of access to workplaces, with due respect for the rights of property and management, so that trade unions can communicate with workers, in order to apprise them of the advantages of trade union membership.
- Many countries give additional rights or protection to trade unions and/or their workplace representatives e.g. relating to information, consultation or health and safety. Where national law offers greater rights or protection the ETI Code requires members to comply with national law:-

“The provisions of this code constitute minimum not maximum standards and this Code should not be used to prevent companies from exceeding these standards. Companies applying this Code are expected to comply with national and other applicable law and, where the provisions of law and this Base Code address the same subject, to apply that provision which affords the greater protection.”

6 Typical Abuses

- **“Paper”, “Tame” or “Yellow” Unions, and Paternalism.**

Some companies will ensure that the workforce are members of a union (or staff association) that management knows will do little or nothing on behalf of those workers. Often the company will pay the workers’ contributions to the union. This allows the company to claim to customers that its workforce is unionised without allowing genuine freedom of association or collective bargaining. A specific example is “Solidarismo” and “Permanent Committees” in Costa Rica, which have been set up and funded by employers. ILO jurisprudence on both is very clear. These organisations cannot be deemed to be equivalent to trade unions and have no capacity to bargain for workers independently of employers.

Such systems are sometimes linked to paternalism, in which the companies unilaterally grants benefits to workers. Paternalism does not represent a sustainable model of industrial relations. Not only does it seek to deny workers’ rights to organise and represent themselves, where material benefits are unilaterally given by the company, and not agreed through negotiation, they can just as easily be removed.

- **Export Processing Zones.**

Many governments seek to exclude trade unions from organising within EPZs, even in countries where workers are free to organise elsewhere. This is always a breach of the ETI code, which makes no exception for EPZs.

- **Access to the Workforce.**

The right to organise requires that trade unions must have access to the workplace to apprise workers of the benefits of trade union membership and to recruit. If unions are not allowed to communicate with the workers, their freedom to choose a trade union is severely curtailed. This can be even worse where workers live in company accommodation – especially commonplace in agriculture or in factory dormitories - to which union recruiters do not have access.

- **Interference with Union Activity.**

Companies can seek to influence union activity in ways which unfairly interfere with these rights. The company may encourage workers to join a particular organisation or vote for certain individuals or provide facilities and resources to the union or individuals concerned in a way which is calculated to influence their ability to effectively represent the interests of their members.

- **Victimisation**

Union organisers and recruiters are often subjected to discrimination, intimidation and, in some cases, violence or even murder. Workers may be deterred from joining trade unions (or penalised for doing so) by the threat of violence against them or their families, dismissal, denial of promotion or earning opportunities or by being ostracised.

- **Refusal to Recognise and Bargain.**

Companies may allow trade union membership but undermine its value by refusing to recognise the union for collective bargaining purpose, or by refusing to engage in such bargaining on some or all issues.

- **Denial of Information.**

In order to prevent trade union representatives from bargaining meaningfully some employers refuse to provide them with appropriate information about the matters to be negotiated.

- **Threats which Inhibit Bargaining.**

Some companies (including large multi-nationals) may use the threat to transfer operations elsewhere in order to inhibit unfairly the workers' bargaining position. Such behaviour is not only incompatible with the principles of the ETI Code, but is also an explicit breach of the OECD Guidelines for Multinational Enterprises.

7 Monitoring these Rights: indicators of freedom of association and the right to collective bargaining

Free and Independent Trade Unions.

The best indicator that there is genuine freedom of association is that a significant proportion of the workforce are members of an appropriate independent trade union. The Global Union Federations can help to identify the appropriate unions for an enterprise and the International Confederation of Free Trade Unions can help identify national trade union federations.

- **Collective Agreements.**

- Are there collective agreements in place?
- What do they cover?
- How often are they re-negotiated?

- **Trade Union Membership.**

- What is the level of trade union membership?
- Is union membership confined to certain areas, grades, employment status or nationalities?

- How are union dues collected?
- Are workers able to declare openly the fact that they are union members?
- Do union representatives have access to the workplace and the workforce?

- **Activities.**
 - Are workers allowed to take part in trade union activities at the workplace?
 - Are workplace representatives allowed time and facilities to conduct union business?
 - Does management seek to interfere in union activities?

- **Victimisation.**
 - Are trade union members and their workplace representatives more likely to be dismissed or disciplined?
 - Are they less likely to be promoted or to be recruited into certain jobs or areas?

8 Parallel Means

“2.4 Where the right to freedom of association and collective bargaining is restricted under law, the employer facilitates and does not hinder the development of parallel means for independent and free association and bargaining”.

There are several countries where the establishment of free and independent trade unions is prohibited by law - where either trade unions are banned completely, or where a single organisation is run by the government and not independently by its members. The former is the case in most of the Gulf States, while the latter is the case, for example, in China, Burma, Vietnam, Syria and Cuba.

The trade union organisations which are members of ETI have never believed that it was possible to trade ethically in countries where fundamental workers rights are denied in this systematic manner. However, in recognition of the reality of China’s dominance in global manufacturing, and the unwillingness of ETI member companies and other companies to move their production from China to democratic states, the ETI trade union side agreed article 2.4 of the Base Code. In those countries in which freedom of association is denied by law, **but only in those countries**, the ETI base code requires member companies to facilitate parallel means for independent and free association and bargaining, for example by supporting the establishment of other forms of independent representative structures for workers, such as health and safety committees. Until now, there have been no such examples of sustainable alternative structure in these dictatorships and such limited structures do not comply with any international labour standard.

If an ETI member believes that parallel means may apply to a country from which it is, or is considering, sourcing goods or services, it should obtain guidance from the relevant Global Union Federation and the ETI Secretariat before seeking to apply the parallel means provision.

9 Conclusion

Trade union organisation is not a threat to the success of an enterprise. It offers management and workers the opportunity to work together to improve performance and to share fairly in the benefits of those improvements. That is why, almost without exception, the most successful companies in the developed world have a long history of recognising and working with trade unions.

International law places obligations on all governments to protect these fundamental rights. Use by companies of corporate codes of labour practice, or multistakeholder codes, such as the ETI's, are not a substitute for good law or for social dialogue. Where companies use them to support good law and promote social dialogue between employers and free trade unions, they can play a positive role. Where companies exploit bad law as an excuse for violations of workers' rights and artificial suppression of wage costs or seek to establish alternative management systems which deny the right to organise and bargain, their role is always negative. The dignity of all workers is dependent on respect for their fundamental human rights at work: their rights to be fully involved in improving their wages and working conditions and in the success of the enterprises and industries in which they work. Only with full enjoyment of the rights to Freedom of Association and Collective Bargaining can workers throughout the supply chain shape their own future.