

A Paper of Indonesia for Global Justice (IGJ) For the Intergovernmental Working Group on Transnational Corporations and Other Business Enterprises with Respect to Human Rights

Legally Binding Treaty's Rules Related to Trade and Investment Agreement

Background

This paper position was compiled in response to the revised draft legally binding instrument on business activities and human rights, issued by The Chairman of the OEIGWG in July 2019. The compilation of this paper position has become a very important step for civil society groups, especially in Indonesia, to provide direct intervention in the discussion process of the 5th session of OEIGWG that would be included in the text discussion.

This paper position will specifically criticize the importance of the legally binding instrument on business activities and human rights related to trade and investment agreements. Considering that the presence of the revised draft has reduced the substance of the discussion on trade and investment agreements as an instrument that facilitates human rights abuses by transnational corporations. Meanwhile, the reference used in this paper position to respond the first draft on the legally binding treaty namely:

1. The Guiding Principles on HRIAs of Trade and Investment Agreements, The Report of the Special Rapporteur on the Right to Food, Olivier De Schutter Olivier de Schutters, A/HRC/19/59/Add.5 , 19 December 2011.
2. A Paper of Simon Mark Walker: The Future of Human Rights Impact Assessments on Trade Agreements.
3. The Position Paper of Indonesia Focal Point, 25 September 2019.
4. The Global Campaign Submissions.

Problem Context

Human rights abuses by transnational corporations could not be separated from the role of international trade and investment agreements ratified by the state. International trade and investment agreements have perpetuated *capital violence* through *judicial violence* as a form of state compliance commitment to the agreement rules.

The trade and investment liberalization rules stipulated in the agreement have created economic and social injustice from transnational corporate business activities that carry out: *monopolistic practices in important economic sectors (especially health and food); commercialization of public basic rights through privatization activities; and legalization of living space deprivation and economic resources protected by the Constitution.*

The forms of judicial violence that perpetuate capital violence from the implementation of international trade and investment agreements can be grouped into the following categories:

Trade agreements can limit government capacity to promote HRs.

1. Trade agreements lead to a 'race to the bottom' in HRs protection as countries try to compete on global markets.
2. Trade agreements limit the use of trade measures to improve the enjoyment of HRs abroad.
3. Trade law conflicts with HRs law.
4. Enforcement of trade agreements is stronger than HRs enforcement which could lead to a prioritization of trade law over HRs law.

5. Trade agreements and trade institutions fail to respect the right to take part in the conduct of public affairs.
6. Trade values threaten HRs values.

Therefore, it is inseparable between the practice of human rights abuses by transnational corporations and the implementation of international trade and investment agreements that facilitate the business activities of transnational corporations. Thus, it is duly for the Legally Binding Treaty to include specific rules regarding trade and investment agreements that could bind state obligations and be respected by other non-state actors.

Proposal to the First Draft on the Legally Binding Treaty Related to Trade and Investment Agreements

We see that there are several articles in the first draft that should be intervened with the formulation of international trade and investment agreements. The articles (but not limited to) such as:

1. Preamble
2. Article 3: Scope
3. Article 5: Preventions
4. Article 10: Mutual Legal Assistance
5. Article 11: International Cooperation
6. Article 12: Consistency with International Law

The substance of the intervention formulation regarding to the international trade and investment agreements in legally binding treaty consists of the following legal reasons:

1. The Primacy of Human Rights International Law on Trade and Investment Agreements

- In the current framework of neoliberal policies, human rights law remains subordinate to trade and investment law. It is a form of *capital violence* through *judicial violence* as part of state compliance commitment to the rules stipulated in international trade and investment agreements.
- The form of judicial violence of international trade and investment agreements needs to be reaffirmed in the legally binding treaty text. This is to show the causal links between human rights abuses on transnational corporations facilitated by the rules of international trade and investment agreements. The judicial violence category of international trade and investment agreements could be seen again in the above problem context section.

2. State Obligations on HRs In the Context of Trade and Investment Agreements

- Under international human rights law, States are the primary 'duty-bearers' of human rights. The international human rights law imposes dual obligations – namely an obligation to refrain from certain acts that violate human rights (freedom from the State) and an obligation to take certain steps to ensure human rights (freedom through the State).
- States parties to International Covenant on Civil and Political Rights (ICCPR) have undertaken obligations 'to respect' and 'to ensure' civil and political rights emphasizing not only obligations of forbearance but also obligations to ensure the conditions necessary to enjoy rights. Similarly, in relation to economic, social and cultural rights, ICESCR requires States both to avoid discrimination in relation to these rights as well as to take steps towards their progressive realization. The Committee on Economic, Social and Cultural Rights has referred to a typology of obligations to clarify States duties, noting that States' parties to the Covenant must not only refrain from interfering with rights (the duty to respect), but also to prevent violations by third parties (duty to protect) and to take appropriate measures towards the full realization of rights (duty to fulfill).

- State Obligations on trade and investment agreements should be formulated in the legally binding treaty text, specifically to ensure there are steps to prevent violations by third parties (duty to protect) and to take appropriate measures towards the full realization of rights (duty to fulfill).

3. The HRIA on Trade and Investment Agreements

- Legally binding treaty should formulate human rights impact assessment (HRIA) obligations towards international trade and investment agreements. So it is not limited to just carrying out HRIA as a step of due diligence from transnational corporations, but there are causal links when conducting HRIA on trade and investment agreements with the business activity of third party.
- A HRIA must consider the impact of a trade agreement on State's obligations both to refrain from interfering with human rights and to take proactive steps to protect and fulfill human rights. Consequently, an HRIA should measure the impact of a trade agreement on reducing State interference with personal liberties but also the impact on the State's capacity to take positive steps to fulfill human rights.
- A HRIA of trade agreements could provide a link to corporate due diligence. In particular, where an impact assessment of a trade agreement identifies potential risks to the enjoyment of human rights, the assessment could act as a trigger for relevant trading corporations to examine the need for undertaking their own impact assessments in the context of their specific trading activities. Moreover, examining the responsibilities of business enterprises in the context of undertaking HRIAs of trade agreements could be important in setting out recommendations to ensure that the future implementation of the agreement has a positive impact on human rights.
- The methodology for an HRIA on trade agreements should therefore ensure that it examines not only States obligations but also the corporate duty to respect human rights. The purpose of the methodology is to identify and validate, *inter alia*, the cause-effect relationships resulting from possible changes in trade regulation, the behaviour of business enterprises that trade and, in turn, the enjoyment of human rights. The clarification of whether the results of an assessment have legal consequences for business enterprises is important, but should not be determinative. The methodology should be based on the assumption that a business enterprise might be persuaded to change the behaviour, or a government might change a position in trade negotiations, on the basis simply of solid evidence of potential human rights abuse, irrespective of whether legal implications arise.
- Indonesia Focal Point's proposal is to reaffirm of State Obligations on HRIAs obligation: *The UN Human Rights Council under the report of then UN Special Rapporteur on Right to Food, Olivier de Schutter, reiterated this key framework in "Guiding principles on human rights impact assessments of trade and investment agreements" (addendum to report, A/HRC/19/59/Add.5, 19 December 2011. This effectively reaffirms the obligation of the state to: "States shall elaborate, interpret and apply relevant international agreements and standards to which they are a party in a manner consistent with their human rights obligations as applicable to..." (as in article 2.4 of UN Declaration Right of Peasants and Other People Working in Rural Areas).*

4. Extraterritorial Obligations on Trade and Investment Agreements

- States, particularly powerful and wealthy States, can affect the enjoyment of human rights in other States depending on how they negotiate trade agreements. Therefore, the responsibilities of other States parties to trade agreements on the enjoyment of human rights in the country in questions. In conclusion, States are the primary duty bearers of human rights, and other States have certain extra-territorial obligations, such as a duty to cooperate internationally, including in the context of trade. An HRIA of trade agreements should therefore also consider the role of other States in an assessment.

- Therefore, the formulation of the State's extraterritorial obligations on trade and investment agreements should be included in the legally binding treaty text. This is in order to ensure that international trade and investment cooperation does not relinquish the responsibility of home states, especially the more developed countries, for the impacts caused by transnational corporate business activities in the host-state.
- The formulation of the State's extraterritorial Obligations on trade and investment agreements should also be reflected in other international cooperation forms. Specifically, the text formulation reflected in the Indonesia Focal Point proposal, could be considered consistent with the goals of the State's Extraterritorial Obligations formulation, namely:

“Towards the conduct of transnational actor, UN member states should perform their obligation better and in a way which could justifiably hold non-state actor accountable. In this framework, it is necessary that the instrument as a whole and the article of 7 (adjudicative jurisdiction) and 10 (mutual legal assistance) should represent a “extra-territorial obligation”. This falls into typical standard of UN member states under UN Charter and two key covenants. In articulating that, we can refer to the full work of Olivier de Schutter titled “Extraterritorial Jurisdiction as a tool for improving the Human Rights Accountability of Transnational Corporations”

5. Financial Crimes in the Implementation of Trade and Investment Agreements

- The implementation of trade and investment agreements that facilitate transnational corporate business activities can have an impact on the emergence of financial crimes. This is based on the trading preferences accommodated by rules of trade facilitation, rules of origins, and tariff arrangements. The form of financial crimes that arise from trading preferences is known as the Origin Fraud and Transit Fraud. Origin fraud means Traders of business actors falsifying origins for their imports simply by replacing the labels or packagings on their imports with Vietnamese ones to enjoy preferential tax treatment when exporting them to other countries.
- According to WCO Trade crime cause a wide range of economic, social, environmental, or political damage. Even, Global Financial Integrity estimates trade crime places the US\$ 650 billion losses (goods), and US\$ 2 trillion if illicit financial flow are included.
- Therefore, binding treaty should be able to regulate the legal liability of financial crime practices arising from the implementation of trading preferences in international trade agreements. Specifically, the formulation reflected in the Indonesia Focal Point proposal could be the basis to formulate legal liability related to these issues:

On the question of liability (article 6), the text should reiterate the basis and the modalities of non-discrimination as sole framework. The UN charter empowers UN member states and the human rights to foster necessary mechanism for enumeration of rights to take place. Liability is understood only in this framework. At the same time, we have to have a benefit to look into other emerging international law which empower nation states to organise themselves better in present challenges to humanity. This may include the challenges of tax evasion, money laundering, trafficking and terrorism. The transnational nature of those should become necessary reference on how UN member states and the human rights should be formulate and worked out. Necessarily so, the key frame and wording in international norm governing the respond to those (:tax evasion, money laundering, trafficking and terrorism) shall be necessary for the LBI to formulate the liability, and its related modalities.

Indonesia for Global Justice (IGJ) is a member of Indonesia Focal Point. And also part of the Global Campaign and The Treaty Alliance.

Contact Person:

Rachmi Hertanti (IGJ), Email: rachmihertanti@gmail.com