



Indonesia for Global Justice

HUMAN RIGHTS IMPACT ASSESMENT TOOL ON THE FREE TRADE & INVESTMENT AGREEMENTS

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FOREWORD

In some arenas, civil societies have been paying attention towards broader impact of FTA (free trade agreements). Even more so, the current model of economic cooperation is no longer simply on regulating narrow terms of trade cooperation such as export-import on goods and services. It also widely covers economic and social aspect and have a direct impact on the lives of the people of Indonesia –even the very idea and practice of sovereignty of a nation is at stake.

The comprehensive economic cooperation has become a new model of trade agreements in the 21st century. Sometimes this mega-FTA model is called as a WTO Plus agreements. This model applies an economic liberalisation which effectively far exceeds the liberalization practice under the WTO regime. In addition, the Mega-FTA includes several rules relating to the "Singapore Issues" that have not yet been agreed upon at the WTO, such as government procurement, competition rules and monopoly prohibitions (especially related to BUMN), trade facilitation, E-commerce. Some examples of Mega-FTAs such as: ASEAN Regional Comprehensive Economic Partnership (RCEP), Comprehensive Economic Partnership Agreements (CEPA), and Comprehensive and progressive agreements for Trans-Pacific Partnership (CP-TPP).

The facts that the FTAs negotiation is behind closed door putting adverse barriers to legitimate interest of various groups and entities and participation of public broadly. A Joint Briefing paper of IGJ, SOMO, and TNI has respond to this issues and stated:

“Negotiations on free trade and investment agreements generally take place largely behind closed doors, with little access for civil society and the millions of people who will be directly affected by these deals. This ‘democratic deficit’ poses a threat to the protection of human rights. This lack of transparency and democratic scrutiny violates fundamental human rights, most significantly the human right of every citizen to take part in the conduct of public affairs, as established in Article 25(a) of the International Covenant on Civil and Political Rights. UN independent experts and special rapporteurs have repeatedly voiced their concerns about the potential impact of trade and investment agreements on the rights to life, food, water and sanitation, health, housing, education, science and culture, improved labour standards, an independent judiciary, a clean environment and the right not to be subjected to forced resettlement.9They continue to strongly recommend that all current negotiations about bilateral and multilateral trade and investment agreements should be conducted transparently with the consultation and participation of all relevant stakeholders, including labour unions, health professionals and others”.

Series of recommendations has been put by civil society groups towards state. Those demands an impact assessment of human rights to ensure that the state protects human rights in regard of FTA and investment agreements. It is vital that an in-depth assessment of the FTAs impact on human rights is conducted prior to and in the ongoing development of negotiations. The human rights impact assessment should be conducted to form the basis of the negotiations.



The HRIA's findings must be submitted to competent democratic institutions for adoption/ratification. From the monitoring of the impacts of the FTAs, it is essential to do the mapping of the impact of the agreement towards the capacity of the state to perform its human rights obligations. This would include also matters of environmental impacts, of sustainable development agendas, of the international standard on human rights. Adverse impacts should lead to a review of the agreement, and, if necessary, to cancellation of (part of) the agreement.

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EXECUTIVE SUMMARY

Human rights impact assessment (HRIA) have gained interest in assessing and evaluating the impact of Free Trade Agreement (FTA). There are 10 agreements on FTA which aimed at liberalizing trade between two nations or unions in a reciprocal basis. The agreement affects not only trade in general, many decisive part of life of those nations, communities, vulnerable groups, and intergenerational justice. We believe that those proliferation of agreements might ruthlessly limit public agenda to develop, promote and prior to national public interest.

The most fundamental part of a human rights impact assessment, and hence, makes the assessment distinctively different with other assessment is on the framework and process in which State (should) perform their obligation as international law put them into it. The report of UN Special Rapporteur on the Right to Food (then, Olivier de Schutter), Addendum, Guiding principles on human rights impact assessments of trade and investment agreements, A/HRC/19/59/Add.5, 19 December 2011 put this importance:

5.1. Human rights impact assessments are distinct in that they examine the intended and unintended impacts of trade and investment agreements on the ability of the States parties to these agreements to respect, protect and fulfil human rights...They therefore should be based explicitly on the normative content of human rights, as clarified by the judicial and non-judicial bodies that are tasked with monitoring compliance with human rights obligations. (page 11)

The objective of this guide is to assess the possible impact of FTA on the Human Right Issues in Indonesia. Our assessment considers policy approach, institutional approach, and vulnerability aspect in the process of developing indicators of HRIA. This guide set the primacy of state in international norm, the rights holder, and its related accountability bound towards business enterprises. This guide should also call the attention of states, i.e. in the government, their representative body, and the judicial entities to perform their necessary obligations. (In the context of Indonesia, this should be towards Government, House of Representative, and highest instance of judicial bodies).

The HRIA, at its best, should

“ 3.....They are also intended as an operational tool that may be useful for human rights treaty bodies and the special procedures of the Human Rights Council, to the extent that their mandate includes assessing the consistency of trade and investment agreements with the human rights undertakings of States. In addition, these guiding principles could serve as a source of inspiration for companies carrying out human rights due diligence, in order to identify, prevent, mitigate and account for the human rights impacts of their activities, particularly in the negotiation and conclusion of investment agreements with the host States in which they invest. Since the preparation of human rights impact assessments is a way for the State to discharge its human rights obligations, by ensuring that it does not conclude agreements that make it more difficult or impossible for the State to comply with such obligations, it is recommended that the process of preparing human rights impact assessments be stipulated in legislation, rather than left to the ad hoc choices of the Executive (The

report of A /HRC/19/59/Add.5, UN Special Rapporteur Report on Right to Food, page 3)

1. INTRODUCTION

1. This set of Human Right Impact Assessment is a work of assessment towards protection of human rights in relation with business and transnational commercial activities”. This set is called “Human Rights Impact Assessment in relation with business and transnational commercial activities” or HRIA hereinafter. The HRIA is developed along the line of the procedure of international standard-setting on human rights. A human rights standard setting process will ask first a context of development of norm in international setting or in a context of reciprocity trans-national context. This will include also on the context of how a member state develop their human rights institution.
2. One particular attention in which this HRIA is driving into is on the context of proliferation of various free trade agreements. This proliferation deeply affects the rule of law in Indonesia (and supposedly in many other countries) and the context of institutio of rights. This HRIA process acknowledge the complexity of one or more type or running of this agreements. In any event, the respond into trade agreement is a necessity for one country, for various legal systems, and for international community for human rights to be realised. The argument based on “ideology”, in which the cold war era gave, is, in many ways, will not help to explain why trade agreement posed direct challenge towards them. The challenges of deprivation of rural population, depletion of natural resources, stark inequality, marginalisation towards women, urban poverty, pollution of water bodies and sea, “all are in fact or potentially related with the fundamental aspect of free trade agreement where state is too weak to govern their citizens.¹
3. A standard setting on human rights has been evolving over the years in which rights holder and international community build the process for more and better human rights protection. The process of standardisation of human rights norm, and its oversight and enforcement process give a clear framework on how to frame it.
4. This HRIA process takes 3 (three) important development in the process. One is on the process of “the open-ended intergovernmental working group on transnational corporations and other business enterprises with respect to human rights”. Two, the report of the UN Special Rapporteur on Right to Food (then Prof. Olivier de Schutter) on “Guiding Principles on human rights assessments of trade and investment agreements” (addendum of report, 19 December 2011, A/HRC/19/59/Add.5) –hereinafter “UN SR Right to Food on Guiding Principle”. It should be noted the development of several

¹Among many reports, the report of “Report of the Special Rapporteur on the right to food, Olivier De Schutter, Building resilience: a human rights framework for world food and nutrition security (A/HRC/9/23, 8 September 2008) is very strong in looking into the absence or the weakness of the state in performing their obligation, both domestically and together with others in international community.

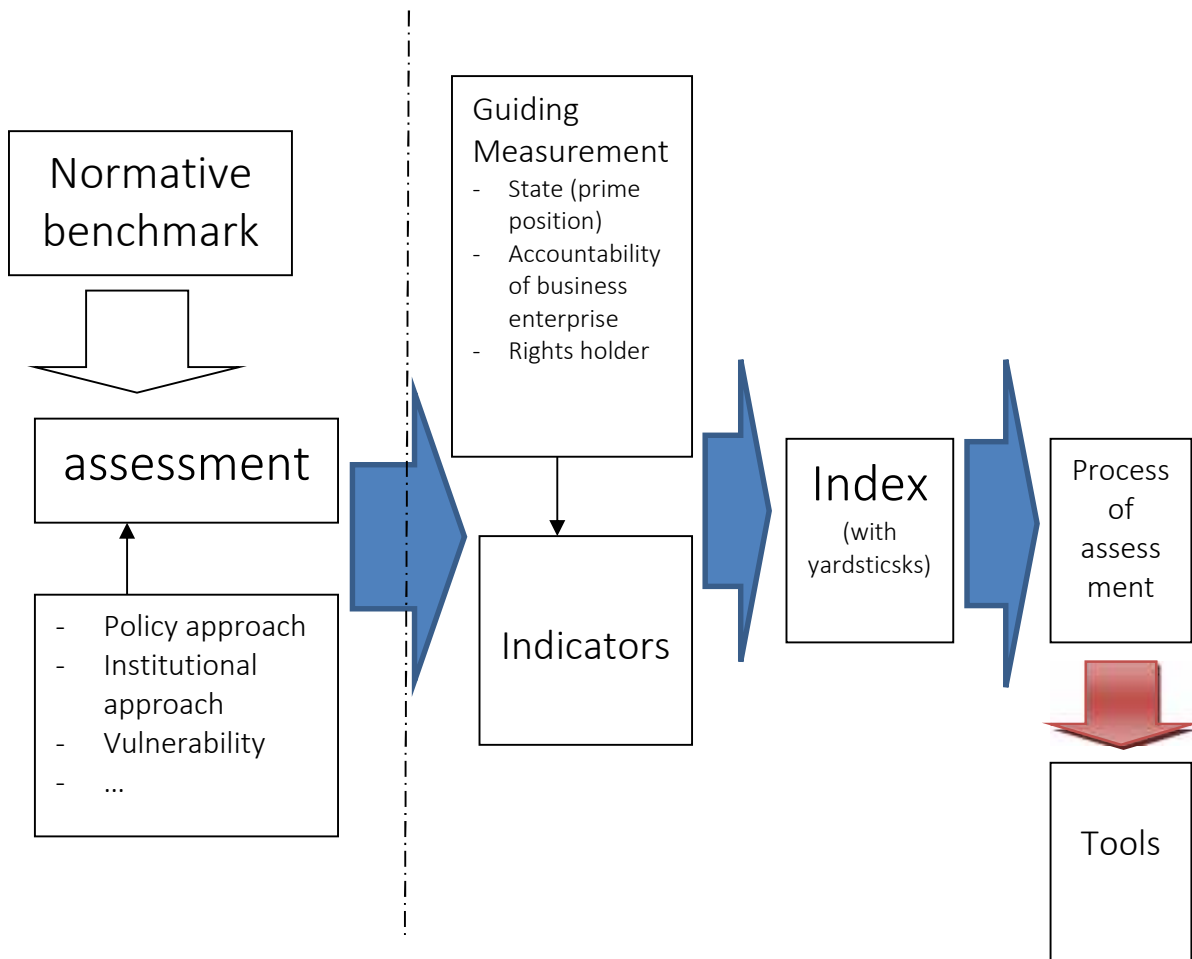
international norms which comes out of UN Human Rights Council in responding food crisis 2007-2008 and its long-term impact which have significance towards the subject.

2. KEY QUESTIONS

Key questions for the process of Human Rights Impact Assessment are as follow:

- On what foundation a proper human rights impact assessment should be developed?
- How this would apply towards free trade agreements
- How the assessment should be developed in several fields or extents?

3. FRAMEWORK OF PROCESS



4. DEVELOPING A SET OF ANALYSES

Setting the context

Human Rights Impact Assessment towards protection of human rights in relation with business and commercial activities, hereinafter HRIA, is defined as a process towards analysis and resolution on towards human rights standards in relation with business and transnational commercial activities. The human rights standard(s) in discussion is the one which is defined by international norm and the setting as that state develop in their own jurisdiction. The assessment would recognize the very notion that state still is the subject of the law that obligate them to govern their subjects, including in the context of human rights. The state would operate their obligation into set of norms, institutions, policy, resource, reach, and interrelation. This context refer to the modern understanding of state –hence to govern. Each state has her own foundation which is based on their ethical foundation of their existence –usually enshrined in the constitution. In transnational dynamics, state would increase their presence and capacity on governing. She would come into agreement (including adopting) a set of norms and reciprocal activities that deemed fit to their ethical foundation. The dynamics of domestic and transnational activities will confront the state to adjust or modify as to perform their obligation better.

In the field of human rights, the principles and setting are standardized by human rights instrument of the United Nations, and, in rather scattered ways, by various standards coming from regional arrangement and court ruling. State invariably responds to this as they conduct their activities with others. Increasingly, in a globalized world, activities of non-state actors and rights holder have transnational dimension and impact. When nations come into agreement on the context of aggression, crimes against humanity, slavery, piracy, trafficking, they setting the interrelation between other parties of international norm. Then, come the matter of corruption, environmental destruction, tax evasion, money laundering, poverty and hunger in the context of globalization, migration; those are matters that has strong transnational dimension. State will use their position as high contracting party to renew and improve the norm, institution, and policy that enable them to govern, this assessment come into discussion as a look back into various event and dynamics in the world. Some of them are quite obvious, such as financial crisis and food crisis (2007-2008), phenomenon land grabbing, adverse impact of the free trade agreement. Other rather come from steady incremental acts, including from growing oversight towards financial activities (such as Basel II on banking supervision, the OECD standardization towards tax evasion), from aging population that affecting financial exposure (insurance and others), from monoculture (e.g. contract farming). All of these are worthy to discussion to develop an analysis and activities on human rights situation of any or several states.

Box 1.

Looking into the set of assessment out of UN Human Rights Council 1:
Report of the Special Rapporteur on the right to food, Olivier De Schutter, Addendum

Guiding principles on human rights impact assessments of trade and investment agreements, A/HRC/19/59/Add.5, 19 December 2011

The principles:

I. The duty to prepare human rights impact assessments of trade and investment agreements

1. All States should prepare human rights impact assessments prior to the conclusion of trade and investment agreements

II. The purpose of preparing human rights impact assessments of trade and investment agreements

2. States must ensure that the conclusion of any trade or investment agreement does not impose obligations inconsistent with their pre-existing international treaty obligations, including those to respect, protect and fulfil human rights

III. The link between human rights impact assessments of trade and investment agreements and the conclusion of such agreements

3. Human rights impact assessments of trade and investment agreements should be prepared prior to the conclusion of the agreements and in time to influence the outcomes of the negotiations and, if necessary, should be completed by ex post impact assessments. Based on the results of the human rights impact assessment, a range of responses exist where an incompatibility is found, including but not limited to the following:

- (a) Termination of the agreement;
- (b) Amendment of the agreement;
- (c) Insertion of safeguards in the agreement;
- (d) Provision of compensation by third-State parties;
- (e) Adoption of mitigation measures.

IV. The methodology of human rights impact assessments of trade and investment agreements

4. Each State should define how to prepare human rights impact assessments of trade and investment agreements it intends to conclude or has entered into. The procedure, however, should be guided by a human rights-based approach, and its credibility and effectiveness depend on the fulfilment of the following minimum conditions:

- (a) Independence;
- (b) Transparency;
- (c) Inclusive participation;
- (d) Expertise and funding; and
- (e) Status.

5. While each State may decide on the methodology by which human rights impact assessments of trade and investment agreements will be prepared, a number of elements should be considered:

- (a) Making explicit reference to the normative content of human rights obligations;
- (b) Incorporating human rights indicators into the assessment; and
- (c) Ensuring that decisions on trade-offs are subject to adequate consultation (through a participatory, inclusive and transparent process), comport with the principles of equality and non-discrimination, and do not result in retrogression.

V. Balancing priorities and human rights impact assessments of trade or investment agreements

- 6. States should use human rights impact assessments, which aid in identifying both the positive and negative impacts on human rights of the trade or investment agreement, to ensure that the agreement contributes to the overall protection of human rights

VI. Key steps in preparing a human rights impact assessment

- 7. To ensure that the process of preparing a human rights impact assessment of a trade or investment agreement is manageable, the task should be broken down into a number of key steps that ensure both that the full range of human rights impacts will be considered, and that the assessment will be detailed enough on the impacts that seem to matter the most:
 - (a) Screening;
 - (b) Scoping;
 - (c) Evidence gathering;
 - (d) Analysis;
 - (e) Conclusions and recommendations; and
 - (f) Evaluation mechanism.

Human Rights Impact assessment (HRIA)

The process will set an assessment based on human rights norm and its related institution, policy, and interrelation. The human rights in discussion covers:

1. International norm on human rights mainly International Covenant on Civil and Political Rights and International Covenant on Economic (for this, it is important to look to all general comments as set by the committees governing those 2 set of rights –see annex 1)
2. Other declaration and convention towards human rights, including on women, labor, migrant workers, children, disabled, rural population (in the process of negotiation)
3. Principles and/or guidance in supporting existing standards: this include Siracusa Principle (on limitation and derogation), Limburg Principle, Maastricht Guideline, Paris Principle on human rights institution
4. UN key report and resolution: Building Resilience (Report of UN Special Rapporteur on Right to Food, A/HRC/9/23, 2008), Human rights and Poverty (A /65/259, 2010), resolution on independent expert on the promotion and democratic and equitable international order (A/HRC/RES/18/6, 2011), UN Guiding Principles on Business and Human Rights (Ruggie Principle) (2011), resolution on human rights and transnational corporations and other business enterprises (A/HRC/RES/17/4, 2011), Guiding

principles on human rights impact assessments of trade and investment agreements (Report of the UN Special Rapporteur on Right to Food, Olivier de Schutter) (A/HRC/19/59/Add.5)

5. The state's constitution and ruling towards human rights
6. Relevant regional arrangement and court ruling on human rights

Addressing Situation

For this assessment to work, the addressed situation should be properly defined. The suggestion towards that would be, including:

1. How business and transnational commercial activities affecting state and rights holder in their exercise of human rights protection; in what form and shape; in which locus
2. Did state develop her role and capacity towards addressing human rights in relation with the situation; in domestic level and/or in international level
3. Did rights holders develop their initiatives and advocacy to protect their rights, and capacity state to improve herself

Expected Result

Basically, having develop this line of process, it this would be basically normative assessment –meaning, an assessment that start from norm (international and national). However, it should be said that the norm in discussion already underwent various series of inquiries and verifications to be able to stand as a referred norm. The assessment would have a result that “explain” a human rights situation more into the context of:

1. Business and transnational commercial activities in question
2. State
3. Rights holder

As per name, the assessment would not conduct a legal action or punitive conclusion (as this would fall into other process).

Some comparative analyses

The assessment could be helped also by relevant studies to explain various parts which is not self-revealing when one utilised human rights tools. These studies are proved seminal in its own field, and its influence towards the field of human rights. Further, these studies will be important for adequate process of the assessment. Several are as follows (non-exhaustive)

1. Studies on entitlement (among other, Amartya Sen, studies on welfare state, various studies on Rights-based development)
2. The work on Poverty (among other by Amartya Sen, Esther Duflo) (perhaps with some utilitarian flavour)
3. The work of “Development and Freedom” (Soedjatmoko, 1980)
4. Various research on tax evasion and regulatory arbitrage
5. Rulings from Indonesian Constitutional Court (Mahkamah Konstitusi),

5. GUIDING PRINCIPLES

HUMAN RIGHTS IMPACT ASSESSMENT

TOWARDS PROTECTION OF HUMAN RIGHTS IN RELATION TO FREE TRADE AGREEMENT, INCLUDING BUSINESS AND TRANSNATIONAL COMMERCIAL ACTIVITIES

1. Foundation of human rights impact assessment

Human Rights Impact Assessment towards protection of human rights in respect with business and commercial activities, including on investment and free trade agreement, hereinafter HRIA, is defined as a process towards analysis and resolution towards assessing human rights standards in relation with investment and free trade agreement. The standard in this assessment is based on international norm and on the setting as a state develop in their own jurisdiction on the progressive realisation of rights. The assessment would recognise the very foundation that state still is the subject of the law that obligate them to govern their subjects, including on human rights. The state would discharge or perform their obligation into set of norms, institutions, policy, resource, delivery. This state has her own foundation which is based on their ethical foundation of their existence –usually enshrined in the constitution. In transnational dynamics, state would relate their presence and capacity on governance to the other subjects. She would come into agreement (including adopting) a set of norms and reciprocal activities that deemed fit to their ethical foundation. The dynamics of domestic and transnational activities will confront the state to adjust or modify on the performance their obligation.

In the development of norm and progressive realisation of human rights, the principles and setting are standardised by human rights instrument of the United Nations, and, in rather dynamic ways, by various standards coming from various law making, regional arrangement and court ruling. State responds to this development as she engages various parties and ramification of it. State will use their position as high contracting party to renew and improve the norm, institution, and policy that enable them to govern for the progressive realisation of rights.

In a globalised world, human rights norm and practices are affected by transnational dynamics. Agreements dealing with aggression, crimes against humanity, slavery, piracy, trafficking are responding a very serious offences and grave violation of rights. Agreements dealing with corruption, environmental destruction, tax evasion, money laundering, poverty and hunger in the context of globalization, migration are responding to offences those are matters that has strong transnational dimension. Some of them are quite impactful, such as financial crisis and food crisis (2007-2008), phenomenon land grabbing, adverse impact of the free trade agreement.. Other rather come from steady incremental acts, including from growing oversight towards financial activities (such as Basel II on banking supervision, the OECD standardization towards tax evasion), from aging population that affecting financial exposure (insurance and others), from monoculture (e.g. contract farming). All of these has been exposing state on how they performs their obligation.

Exercising human rights impact assessment should obligate the state to improve the performance of their obligation, towards their subject, and to towards the dynamics of domestic and transnational law and regulation.

2. Guiding principles

Principle 1

A human rights impact assessment is to address discrimination

The very basis of human rights protection is to address discrimination. A discrimination is impacting individual, alone or in association or community, in regard of their background. A discrimination could also take place in a long, regressive way which cause marginalisation towards individual or communities (“affected communities”), or hampering them from enjoying basic rights.

“In human rights law, discrimination constitutes any distinction, exclusion, restriction or preference or other differential treatment that is based on any ground such as race, colour, sex, language, religion, political or other opinion, national or social origin, property, birth or other status, and which has the purpose or effect of nullifying or impairing the recognition, enjoyment or exercise by all persons, on an equal footing, of all rights and freedoms. It also includes any action or omission that, whether intended or not, disproportionately affects members of a particular group, in the absence of a reasonable and objective justification, thus constituting de facto discrimination” (p. 2.5. Guiding principles on human rights impact assessments of trade and investment agreements, Report of the Special Rapporteur on the right to food, Olivier De Schutter A/HRC/19/59/Add.5)

The state should perform their obligation in human rights protection so as this is called anti-discriminatory measures.

§ UN General Comment no. 14 and 36 ICCPR on right to life, UN General Comment no. 8 of ICCPR on non-discrimination on civil and political rights, UN General ICESCR Comment no. 20 on non-discrimination on economic, social, cultural rights)

Principle 2

A obligation of and by a state is the very foundation of human rights protection

State, as subject of international law, shall develop a framework of human rights protection. State shall deliver a process on the protection by a progressive normative development and progressive realisation in social-economic field, especially where TNCs are increasingly dominant in provision of key services and livelihood.

“In order to eliminate de facto discrimination, States may be under an obligation to adopt special measures to attenuate or suppress conditions that perpetuate discrimination. In human rights law, such measures are legitimate to the extent that they represent reasonable, objective and proportionate means to redress de facto discrimination and are discontinued when substantive equality has been sustainably achieved.” (p. 2.5. Guiding principles on human rights impact assessments of trade and investment agreements, Report of the Special Rapporteur on the right to food, Olivier De Schutter A/HRC/19/59/Add.5)

Human rights impact assessments are a tool for States negotiating trade or investment agreements to ensure that the conclusion of such agreements will not lead these States to violate their human rights obligations or to be unable to fulfil such obligations. Therefore, provided the results of the assessments are taken into account, States may be said to have acted with all due diligence to minimize the risk of such inconsistencies...they must then feed into the decision-making process that leads to the conclusion and approval of the trade or investment treaty concerned (ex ante assessments), or that leads to the decision whether or not to denounce such treaty or to withdraw from it (ex post assessments). (p. 4.7. Guiding

principles on human rights impact assessments of trade and investment agreements, Report of the Special Rapporteur on the right to food, Olivier De Schutter A/HRC/19/59/Add.5)

This obligation includes in taking precautionary principle in dealing with commercial relation by relevant parties

“the human rights impact assessment should measure the potential impact of the trade or investment agreement on human rights outcomes and on the capacity of States (and non-State actors, where relevant) to meet their human rights obligations, as well as on the capacity of individuals to enjoy their rights.” (p.2.1. Guiding principles on human rights impact assessments of trade and investment agreements, Report of the Special Rapporteur on the right to food, Olivier De Schutter A/HRC/19/59/Add.5)

§ UN General ICESCR Comment no. 3 on nature of states parties’ obligation, UN General ICESCR Comment no. 9 on domestic application of the Covenant, UN General Comment no. 31 ICCPR on the nature of the general legal obligation imposed on states to the covenant, UN general comment no. 24 on State obligations under the International Covenant on Economic, Social and Cultural Rights in the context of business activities, UN general Comment no 33 on Obligations of States parties under the Optional Protocol to the International Covenant on Civil and Political Rights

Principle 3

The right of affected communities and citizen in defending their right, effectively participating and contributing to human rights impact assessment, is fundamental

the right of everyone, individually or in association with others, as family or as community; rights holder or their representative (p. 7.3. Guiding principles on human rights impact assessments of trade and investment agreements, Report of the Special Rapporteur on the right to food, Olivier De Schutter A/HRC/19/59/Add.5)

The advocacy and public role of affected communities and citizen are fundamental in addressing their own vulnerabilities in relation with increasing dominant position of commercial entities, and in a contest of decisionmaking in public sphere.

§ UN General Comment no. 14 and 36 ICCPR on right to life, UN General Assembly Declaration on the Right and Responsibility of Individuals, Groups and Organs of Society to Promote and Protect Universally Recognized Human Rights and Fundamental Freedom, ILO conventions, CEDAW, CRC, International Convention on the Protection of the Rights of All Migrant Workers and Members of Their Families, UN Declaration on the rights of Indigenous Peoples, UN Declaration on the Rights of Disabled Persons, UN Declaration on the Rights of Peasants and Other People Working in Rural Areas.

Principle 4

The assessment will take into consideration the interaction, even contest, among rights holder and state (state-obligation), in regard of commercial entities and their activities in relation with investment and free trade agreement.

The foundation and the delivery of substantive due process, access to justice and fair contest in public sphere are the basis of human rights protection.

§ UN general comment no. 24 on State obligations under the International Covenant on Economic, Social and Cultural Rights in the context of business activities, UN general comment no. 25 ICCPR on participation in public affairs and the right to vote, UN general comment No. 32 ICCPR on right to equality before courts and tribunals and to a fair trial

Principle 5

An assessment should look into normative framework developed by state discharging their obligation. This will bring a closer look into dynamics of international norm impacting or interacting with the domestic norm, then, into its impact. The opposite also take place i.e. that a state brings their obligation on human rights protection in transnational process. This constitute an extraterritorial obligation by state,

“Extraterritorial obligations arise when a State party may influence situations located outside its territory, consistent with the limits imposed by international law, by controlling the activities of corporations domiciled in its territory and/or under its jurisdiction, and thus may contribute to the effective enjoyment of economic, social and cultural rights outside its national territory.” (p. 28. UN general comment no. 24 on State obligations under the International Covenant on Economic, Social and Cultural Rights in the context of business activities)

§ UN general comment no. 24 on State obligations under the International Covenant on Economic, Social and Cultural Rights in the context of business activities, ILO conventions, CEDAW, CRC, International Convention on the Protection of the Rights of All Migrant Workers and Members of Their Families, UN Declaration on the rights of Indigenous Peoples, UN Declaration on the Rights of Disabled Persons, UN Declaration on the Rights of Peasants and Other People Working in Rural Areas.

Principle 6

A human rights impact assessment is based on key norms, and be transmitted into assessment of structural, of process, of outcome. The assessment will set attention to minimum requirement, and to the progressive realisations.

“...a minimum core obligation to ensure the satisfaction of, at the very least, minimum essential levels of each of the rights is incumbent upon every State party...it must be noted that any assessment as to whether a State has discharged its minimum core obligation must also take account of resource constraints applying within the country concerned...obligates each State party to take the necessary steps “to the maximum of its available resources”. In order for a State party to be able to attribute its failure to meet at least its minimum core obligations to a lack of available resources it must demonstrate that every effort has been made to use all resources that are at its disposition in an effort to satisfy, as a matter of priority, those minimum obligations.” (p. 10. UN CESCR general comment no. 3 on the nature of States parties’ obligations)

Progressive realisations constitute “...an obligation to move as expeditiously and effectively as possible towards that goal...to the maximum of their available resources clearly requires Governments to do much more than merely abstain from taking measures which might have a negative impact” but to address structural barrier, to develop as expeditiously as possible specific and continuing measures upon it. (UN general comment ICESCR no. 3 on the nature of States parties’ obligations, UN general comment ICESCR no. 5 on persons with disabilities)

2.1. ...First, States must respect human rights. They are thus precluded from entering into trade or investment agreements that would require them to adopt certain measures, such as

lowering a tariff or strengthening intellectual property rights, that would result in an infringement of human rights they have agreed to uphold.

2.3 Second, States should protect human rights. They must therefore ensure that they will not be precluded from the possibility of controlling private actors whose conduct may lead to violating the human rights of others, for example as a result of an excessively high level of protection of foreign investors established on their territory or because of a broad understanding of the prohibition of imposing performance requirements on such investors.

2.4 Third, States should fulfil human rights. This requires that States refrain from concluding trade and investment agreements that will render impossible the adoption of policies that move towards the full realization of human rights, insofar as it relates to rights that are subject to progressive realization by States to the maximum of their available resources. While taking into consideration the unique country context, this requires that the fiscal and economic sustainability of trade and investment agreements be carefully examined. States should refrain from concluding agreements that would affect their public budgets or balance of payments in a way that would impede the full realization of human rights, making the fulfilment of human rights impossible or delayed.

(p. 2. Guiding principles on human rights impact assessments of trade and investment agreements, Report of the Special Rapporteur on the right to food, Olivier De Schutter A/HRC/19/59/Add.5)

§ UN CESCR general comment no. 3 on the nature of States parties' obligations; Guiding principles on human rights impact assessments of trade and investment agreements, Report of the Special Rapporteur on the right to food, Olivier De Schutter A/HRC/19/59/Add.5

Principle 7

An assessment will, invariably, encourage the cooperation among parties of different legal regimes. In the practices in international law, there has been various cooperations on this matter, such as mutual legal assistance, capacity building, technical support, and many others.

§ UN general comment ICESCR no. 2 on international technical assistance measures, UN general comment no. 24 on state obligations under the International Covenant on Economic, Social and Cultural Rights in the context of business activities

6. BUILDING COMPOSITE

The basis for the composite of index

1. The first milestone of this HRIA process is the development of the composite of index. During the series of discussion and legal review, there are three separate input which mainly become the basis of the composite. First on the state obligation, second on the rights institution (and its rights holder), and three the business and transnational activities in question.
2. The process of composite of the HRIA shall define the main obligation of the state, as it has been defined by key human rights instrument, i.e. ICCPR and ICESCR. The state obligation has a fundamental position as the subject in international law. It has to be a standard to build upon and progressively realised. The state and its international setting should be fully based on the principle of non-discrimination. The standard of human rights has a body of knowledge and of law which necessitate for parties and

international community develop inter-state ability to cooperate in improving the realisation of human rights

3. The institution of rights (and its rights holder) will follow how the rights is enumerated and developed into the framework of promotion and protection of human rights. The standard has the basis and the development of body of knowledge and body of law.
4. The business and transnational commercial activities under the consideration is in the fullest sense their meaning, be it in multi-sectors and platforms or in specific sector, where they intersect or fully altering the setting of institution of rights. The development of business and trans-national commercial activities, alternately, could arise from one country (state party) towards the other. In the case of Indonesia, the rulings of Indonesian Constitutional Court will especially has an important setting to attend to. This should also apply in which non-Indonesian business and transnational commercial activities comes into or with Indonesia. Their rule of law will also affecting the setting of the business and trans-national commercial activities in question.
5. FTA (Free Trade Agreement) is recognised as a frame where states conduct cooperation with purpose to advance the interest of parties. The agreement covers both economic field and non-economic field. The situation of parties reflects on what and how the agreement will foster. This mainly shall taking into consideration the effective governance of the government in question. In which very specific free trade agreement is in question, the development of HRIA process should looking the fine prints, the context, and the contemporary problems associated or caused by the agreement in negotiation or in the full course. The document of UN SR Right to Food on Guiding Principle develop some key input on this:
 - "...While the primary purpose of a human rights impact assessment of a trade and investment agreement is to ensure that the provisions of such agreement shall not be incompatible with the normative content of relevant human rights, it also should include an assessment of whether the process of negotiating the impact of the trade or investment agreement has affected human rights." (4.1., page 9)
 - "Not all the impacts of the entry into force of a trade or investment agreement can be anticipated. Therefore, ex ante human rights impact assessments should be complemented by human rights impact assessments performed ex post, once the impacts are measurable" (3.3., page 9)

On developing composite, some steps would be needed, as follow:

Step 3

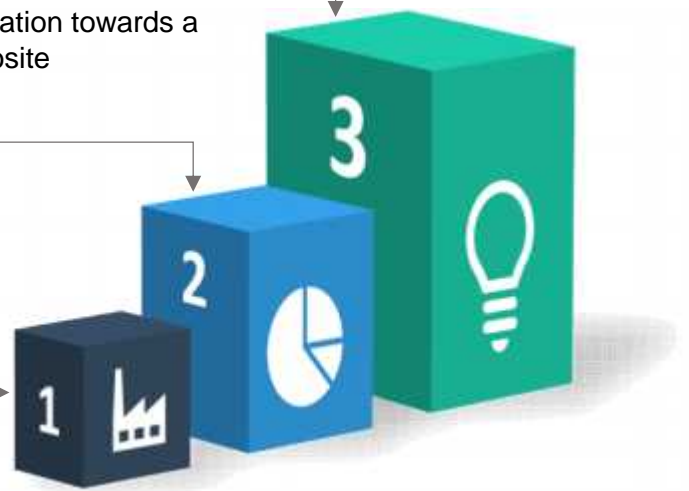
From explanation towards a set of composite

Step 2

Developing a set of possible explanation on the subject

Step 1

Looking into situation of business and transnational commercial activities



STEP 1: Looking into Situation of business and transnational activities

The process on developing composite took all critical issues were discussed on matter conducts of transnational corporations and business enterprises, and into the texts of and proliferation of free trade agreements. The discussion also related to form of obligation in which one state performed (including the subject of sovereignty); whether the state develop their capacity; how rights holder advance and protect the rights in advocacy and citizen's affairs, how they develop their capability to protect themselves.

Education Sector

-) In the right to education, the State is a stakeholder to fulfil the right to education. And citizens are the right holders to education.
-) The right to education is recognized in the Articles 28 and 31 of the Constitution. Included in the Universal Declaration of Human Rights Article 26 and the Covenant on economic, social and cultural rights Article 13, 14, and 15. Indonesia itself has ratified the Covenant. The implementation of the right to education referred in two human rights covenants has been adopted into national law, namely Law No.20/2003 on the National Education System and Law No.23/2002 on Child Protection.
-) As a result of the international agreement: it has directed education as an arena for open investment in the education sector.
-) Liberalization portrait of Indonesia's education: Mega infrastructure project that absorbs the budget and increases the state's debt; Inhibiting access for the underprivileged to access quality education; The emergence of international schools; Industry-oriented education (open investment in senior high of technical and vocational education); Polemic of foreign workers (including lecturers).

National regulatory framework

No	Legality Framework	Information
1	Constitution 1945	Article 28, 31
2	The Universal Declaration of Human Rights	Article 26
3	Covenant on Economic, Social and Cultural Rights (ratified through Law No. 11/2005)	Article 13, 14, 15
4	Law No. 23/2002 on Child Protection	Article 11, 48, 49, 50, 51, 52, 53, 54
5	UU no. 20/2003 on the National Education System	Article 4, 11, 40, 48, 49
6	Convention on the Elimination of All Forms of Discrimination against Women	Article 10
7	SDGs	Aim No. 4

Health & Access to Affordable Medicine

) Rules for patent protection on TRIPS and the policy portraits in Indonesia: Indonesia became a member of the WTO, 1994. Among its implementations was changing the IPR Law which already existed and drafting a new IPR Law in accordance with TRIPS-WTO. Among those related to medicines are changes to the patent law. The high influence / lobbying of multinational (pharmaceutical) companies in drafting the Patent Law / rules regarding Patents and medicines.

Sea and Coastal Area Resources

) The policy of open investment in coastal areas as regulated in Law No.1/ 2014 has encouraged the issuance of national regulations which have opened investors' access to land ownership in coastal areas. Investment in coastal areas besides tourism is also in the mining and plantation sectors.

) Portrait of investment expansion in coastal areas: land conflicts and evictions in coastal areas, loss of fisher-folks access to the sources of livelihood, a shift in consumption patterns, and production exploitation.

) There is an initiative carried out by the State to protect rights holders, which is by issuing the Law on Fisher-folks Protection and Empowerment, but the implementation are still very weak.

) Until now, land conflicts in coastal areas continue to occur without legal certainty for the affected communities. Including the weak role of the state which was defeated by the expansion agenda of investment in coastal areas.

Energy Resources

-) Indonesia as the exporter of raw materials for energy needs in various industrial countries. However, the issue of exporting raw materials does not provide added value for Indonesia. So that national regulations that prohibit the export of concentrates and require processing before exporting are considered to have hampered the trade. Japan has intended to sue Indonesia at the WTO because of this policy. In fact, foreign mining companies have sued Indonesia to ICSID because of the implementation of the Coal and Minerals Mining (Minerba) Act No.4 /2009.
-) Another problem related to the issue of energy is: The problem of land tenure is a major issue in the context of investment, especially in the extractive sector. Land conflicts and criminalization of human rights defenders are the main problems in the investment issues.
-) The portrait of the state role in facilitating investment in extractive sectors: In order to facilitate investment into Indonesia, the government role is very passive in the energy sector because the government's position placing an investment in the national vital objects makes it no longer respecting the human rights issues. The government facilitates the human rights violations with the procedural process; if investments want to control a land, they will make the land under the military control.

Agriculture & Seed Rights

-) *The context of human rights in seed and food:* Farmer's right is very important to ensure the conservation and sustainable use of genetic resources for food and agriculture and the consequences for global food security, today and in the future. Farmers' rights consist of the rights of farmers from all regions of the world, especially in centers of origin and diversity of plants, to store, use, exchange, sell and distribute seed materials; appreciated from the use of plant genetic resources for food and agriculture; participate in decision making at the national level on matters relating to genetic resources and protect their traditional knowledge.
-) Indonesia has ratified the International Treaty on Plant Genetic Resources for Food and Agriculture (ITPGRFA) and was adopted by Thirty Countries in the session of the United Nations Food and Agriculture Organization Conference on November 3, 2001.
-) The verdict of the Constitutional Court on Plant Cultivation System Law No.12/1992 has had an impact on the strengthening the capacity of farmers to develop local seed.
-) In addition, the issue of open investment in the agricultural sector had a broad impact on the lives of farmers and the issue of the right to food in Indonesia.
-) Mono-culture agricultural investment, especially with the development directed towards cash crop, has an impact on the disappearance of local varieties and biodiversity.
-) The mass investment in the agricultural sector has affected the damage and destruction of natural resources in rural areas. As well as leaving no sources and opportunities for future generations.
-) In fact, investment tends to not comparable with the opportunities for labor in Indonesia. The unemployment rate continues to increase along with the increasing investment of giant companies. Malnutrition (Stunting) and food insecurity due to the exploitation of natural resources done by the transnational companies.
-) Moreover, the financial regime or banking sector mostly only serves large entrepreneurs but does not encourage the people's economy.

National Regulatory Framework in the food sector

1. Law No. 12/1992 on Plant Cultivation System
2. Law No.41/2014 on Amendment to Law Number 18/2009 concerning Animal Husbandry and Animal Health
3. Government Regulation (PP) No. 18/2010 on Plant Cultivation
4. Law No.41/2009 on Protection of Agricultural Land and Food Sustainability
5. Law No.13/2010 on Horticulture
6. Law No.18/2012 on Food
7. Law No.23/2014 on Local Government
8. Law No.39/2014 on Plantation
9. Government Regulation (PP) No. 18/2010 on Plant Cultivation
10. Presidential Regulation No.44/2016 on Negative Investment List and Positive Investment List in the Investment Field
11. Minister of Forestry Decree No.1312/Kpts/KP.340/12/2014 on Delegating the Authority for Granting Business Licenses on Agriculture in the Investment Framework to the Head of the Investment Coordinating Board

SMEs & Labour:

National & International Community

- The state or government should make standardize working environment especially for labors in all industry.
- The right holders considered state did not make all rules rigid, comprehensive and tend to be inclined. Thus condition made difficult for domestic industries to compete out. So from the perspective of productivity, it must start from individual training and development for industrial management chains.
- The state should be able to provide all regulation standard in national and transnational capacity in order the ease of access.
- The state has not socialized all information regarding the transnational trade in the form of regulation and the right holder's capacity.
- Regulation for underage workers or labors must be strictly regulated and monitored.

Business and Transnational Activities

- The right holders from furniture industry could not adapt some of regulation which neglecting their local wisdom in transnational interest.
- Regulations related to COR (Certificate of origin) require such a long time appraisal, as so the value of local culture in industries such as furniture must compete with other countries such as China which can even easily duplicate design.
- With the intense competition in the FTA, the marketing costs are higher which can affect labour salary and the quality of products will be sacrificed.

STEP 2:

Developing a set of possible explanation on the subject

Here some points which help to explain the critical areas adversely affect the state obligation in question and the institution of rights in which human rights protection operates especially related to free trade agreements:

1. Land /Tenurial Issues
2. Genetic Resource
3. Basic utilities and Public Services
4. Cooperation (Capacity Building, Transparency, Anti Trust, Risk Management, Transshipment, supply chain security, transit movement, ROO)
5. position of subsidies, including necessary and justified subsidy in agriculture, health care, key energies
6. Release of Goods (National standard need to be reviewed)
7. “Misleading Consumers” should be defined
8. Matters related to Pediatric Studies (Medical Products)
9. problems related to Plant Production & Plant Varieties (UPOV 1991) (including, but not limited to, the context of communities/commons, biodiversities, the institution of registry in government)
10. problems related to governing rule on Intellectual property rights, community endowment (commons), emerging sectors in economy
11. BUMN/ Sub-central levels of government (Tools should be equipped for FTA) –Scale and size of Stated own Enterprises
12. Accounting Rules (Transparency, Finance Report System in each sector) should be accessed for public. Also this tool protects fraud, corruption & Price Ridging.
13. Precautionary Principle
14. Sunset Industry or product (monitoring and assessment on its relevance into the agreement)
15. Non Discrimination : a trade–off shall be assessed by the parties as well as those are impacted by the agreement (the principle of subject of rights)
16. While recognizing the necessity for the state to protect an investment scheme, including towards stability, the state and rights holder shall asses the quality, longevity and impact of assessment
17. A diverse and important rule of SME’s (Small and medium-sized enterprises), community-based small-holders, infant supply chain and e-procurement should be subscribed as valuable in the ecosystem of livelihood of society - as at the same time it meets its safety, security and public necessity.
18. State as party shall govern the dispute settlement among parties (primacy of state obligation)
19. Vulnerable groups
20. Scoping of Standard of treatment: (e.g. case of animal Slaughter); Supply Chain; Unjustified barriers to trade (in terms of single risk management / custom trade facilitation), scientific matters: Commonly agreed standard without discrimination)
21. A frame on custom and trade facilitation
22. Recognising participation of small holders, SME’s, vulnerable groups in supply chain and production shall be recognized

STEP 3: From explanation towards a set of composite

Composite of Index	Variable	Indicators	(possible) proxy
state obligation	Government, i.e. state party, should be able to determine their own public service, while combating fraud, price rigging, corruption.	<ul style="list-style-type: none"> - Transparent and just process of public procurement - Liability to trans-border crime - Quality of public service (when in conflict with commoditised of public goods, the integrity of public service should stand) mainly education, transport, health care, and specific provision on energy - Access to affordable and accountable public goods and services 	<ul style="list-style-type: none"> - the new international human rights norm (enumeration) responding to the context of transnational situation - existing international norm with direct in indirect governance towards the subject - the process of ILB (internationally legally binding) - the key ruling on domestic constitutional protection
	An effective control by state should be available and be recognised (on sustainability and human rights) on the tenorial status of land and natural resources	<ul style="list-style-type: none"> - Effective control towards tenorial protection (proxy: IDM) - a pool of data on the diversity of tenorial norms and practices 	
	Policy space that foster the capability of the state to increase the protection of food system .	<ul style="list-style-type: none"> - A legitimate subsidy is a tool to empower communal family farming where long-standing genetic resource is their key part of livelihood - The protection of indigenous genetic resource - Diversity inside domestic food system 	
	The principle to foresee the adverse impact out of the agreement shall be conducted and/or developed in a long-term fashion. This may include towards the physical and communal harm	<ul style="list-style-type: none"> - Transparnt and predictability of any agreements - Sunset industry and/or product shall be monitored and be assessed taking consideration the adverse impact of 	

Composite of Index	Variable	Indicators	(possible) proxy
		<p>“dirty economy”</p> <ul style="list-style-type: none"> - The applying risk management should carry a safety and security undertakings on addressing risks associated with the environment, communal livelihood, and public service \ - A trade-offs shall be assessed by the parties as well as those who are impacted by the agreement – - A scrutiny against hidden-cost of agreement - a process of oversight towards the scale of goods and services 	
	<p>guide of the design and application of the human rights standard relative to segment(s) in question</p>	<ul style="list-style-type: none"> - the context of criminal liability - the objective of non-profit delivery - measures against the practice of - Accounting rule should be accessible to public to ensure public control over the conduct of implementation - standard: standard wick govern, and how this standard affected by the setting of FTA - the effective control towards food safety (both to domestic goods and services, and to importation) 	
<p>institution of rights</p>	<p>Process of adjudication, exercise of rights, and access to justice</p>	<ul style="list-style-type: none"> - active and effective actions on enumeration of human rights standards - Women rights as principle and standard practice, especially when vulnerabaility defines the 	<ul style="list-style-type: none"> - the new international human rights norm (enumeration) responding to the context of transnational situation - existing international norm with direct in

Composite of Index	Variable	Indicators	(possible) proxy
	Dialogue for cross-adjudication among different jurisdiction (international, organisational, regional)	<ul style="list-style-type: none"> - participation in socio-economic endeavour - Best practices on the development of state's capability - An agreed code on the prevention of trans-border crime - A functioning oversight towards the context of implementation of an agreement - Practices of dispute resolutions 	<ul style="list-style-type: none"> - indirect governance towards the subject - the process of ILB (internationally legally binding) - the key ruling on domestic constitutional protection
	A diverse endowment and control of community over genetic resource	<ul style="list-style-type: none"> - Long standing (traditional) space of practices towards sustainable genetic system - Traditional knowledge (ditambah proxy) 	
	A protocol for the protection of small-holder should be instituted in view of developing decent livelihood, and rights-based interaction	<ul style="list-style-type: none"> - Diverse and important roles of SMEs, community-based small-holders, infant supply-chain, and e-procurement should be subscribed as valuable in the ecosystem of livelihood of society –as, at the same time, it meets safety, security, public necessity - A legitimate specific platform for the small-holders in their exercise of rights 	

7. WORKING ON ASSESSMENT

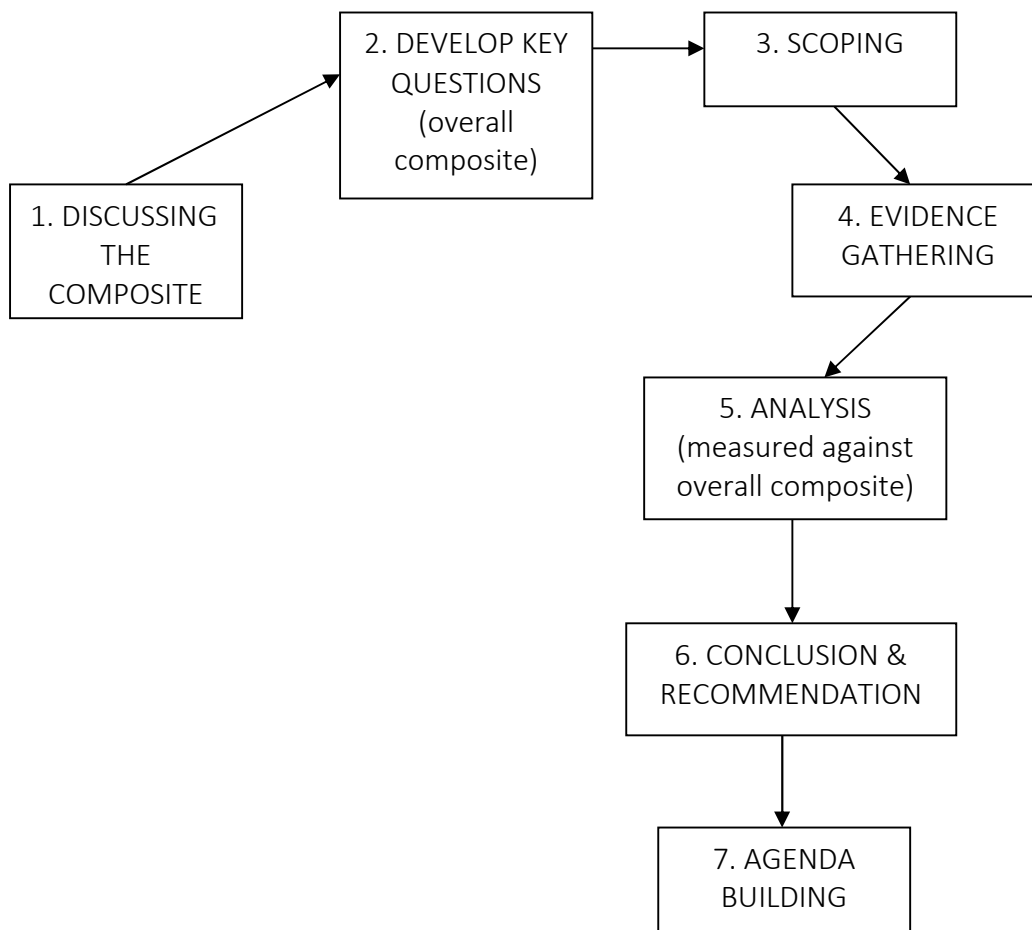
The assessment, in this very sense, is “putting the composite of indeks into the process of assessment”.

To make the assessment impactful, there will need a process of “monitoring, advocacy, training” –so, this guide allot a specified “tools” (see part 8: tools of monitoring, training, advocacy”

The assessment will work on some possible –let’s say- scenarios. The scenario is set so the assessment could make a deliberate process in taking overall, part, or specific attention. This guide will, at its best, to equip the assessment through this scenarios.

The government, higher education, jurists, communities, business entities, rights holder, and different actors could perform the HRIA. The reading of the composite should enable the practical process of assessment.

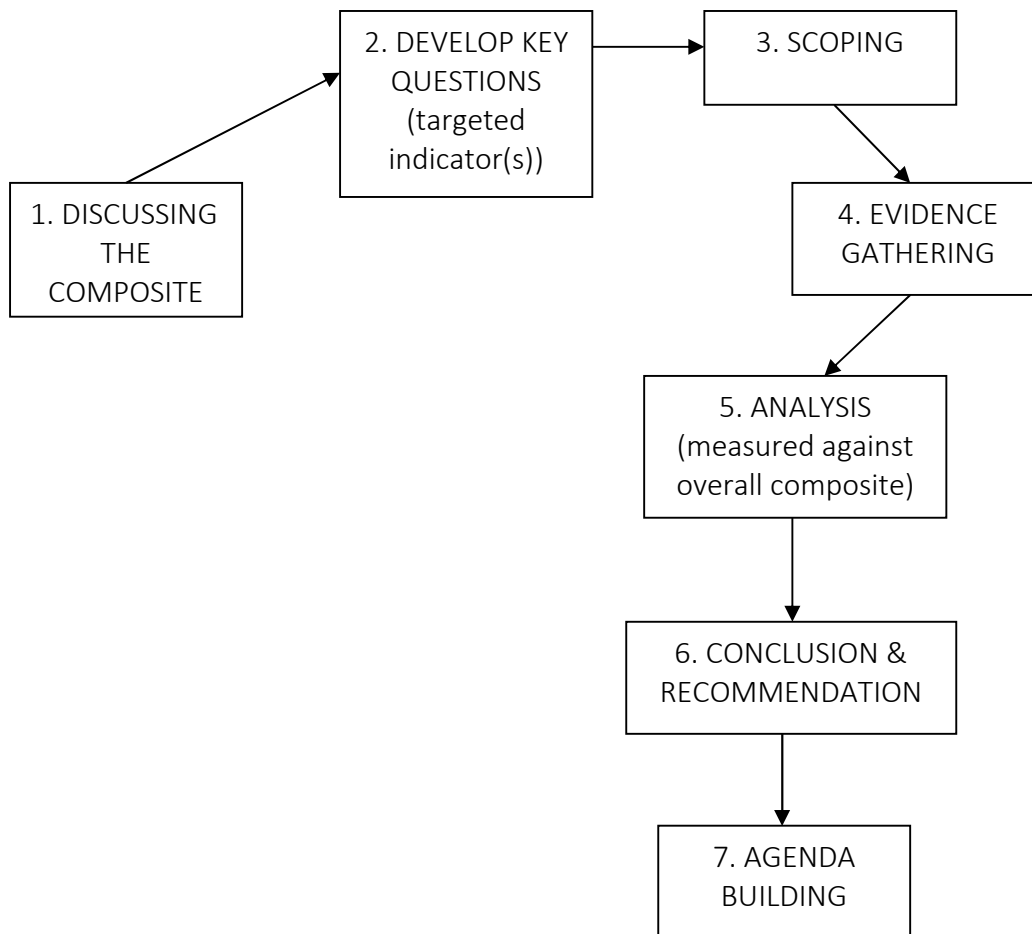
SCENARIO1: OVERALL COMPOSITE



Possible steps

1. Discussing the composite:
The process should go through composite of indicators to be aware of the width and depth of the process
2. Developing key questions:
The question should be set to frame the process of assessment. For this scenario, though any assessments will undergo identical process, the key questions will help the assessment to meet certain expectation of the “assessor”.
3. Scoping:
specifically looking into (finished or negotiated) text or overall country-based situation. On “country-based situation”, it will be necessary that the assessment define time frame (this should be similar into the process of Universal Periodical Review of the UN Human Rights Council). When the reciprocity context is assessed, then, the “country-based situation” should involve all states in the frame of said reciprocity.
4. Evidence Gathering:
“...evidence gathering shall include the use of both quantitative (including economic modelling and regression analysis) and qualitative research (including consultations with rights holders or their representatives, and where feasible using participatory research methodologies), in order to determine the impacts as precisely as possible. The contribution of human rights impact assessments to improving participation and accountability in the process of the negotiation of trade and investment agreements should be kept in mind in defining how evidence shall be gathered: the involvement of the groups affected, directly or through their legitimate representatives, is both a means to inform the process and an end in itself...”
(7.3. the report of A /HRC/19/59/Add.5, UN Special Rapporteur Report on Right to Food, page 14)
5. Analysis:
The analysis should bring the process back to the composite, and will deliver an analysis against those composite. On this, it is necessary to remind the assessor that the objective of the assessment is ultimately on the human rights situation, including the performance of the state obligation, the situation of rights holder, and accountability (model and process) in regard of FTAs and the transnational corporations and business enterprises.
6. Conclusion and recommendation
7. Agenda Building
One of very character of Human Rights Impact Assessment is that the process of assessment should lead to “agenda building”. In this, the “follow up” would lead to “monitoring, advocacy, and training” –thus, this is the purpose of “tools” (part 8.)

SCENARIO 2: TARGETED INDICATOR(S)



Possible steps

1. Discussing the composite:

The process should go through composite of indicators to be aware of the width and depth of the process, then, will make a choice towards one or more indicators. On this, the process intend to look into micro-context of the targeted indicators. This may further expand the assessment process “various combination of indicators”. The composite is not treated as “a la carte indicators”, but to a more specified assessment.

2. Developing key questions:

The question should be set to frame the process of assessment. For this scenario, though any assessments will undergo identical process, the key questions will help the assessment to meet certain expectation of the “assessor”

3. Scoping:

specifically looking into (finished or negotiated) text or overall country-based situation. On “country-based situation”, it will be necessary that the assessment define time frame

(this should be similar into the process of Universal Periodical Review of the UN Human Rights Council). When the reciprocity context is assessed, then, the “country-based situation” should involve all states in the frame of said reciprocity.

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6. Conclusion and recommendation

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One of very character of Human Rights Impact Assessment is that the process of assessment should lead to “agenda building”. In this, the “follow up” would lead to “monitoring, advocacy, and training” –thus, this is the purpose of “tools” (part 8.)

8. ENTRY POINTS

This HRIAs is set to put the composite of indeks into the process of assessment which aim to see the human rights situation, human rights performance of the state, situation of rights holder, accountability (model and process) in regard of FTAs or transnational corporation and business enterprises.

The process, however, start with many “entry points”. Here, this guide offers several entry points to understand the position of HRIAs in the field of human rights, of domestic and international law, of regional and global governance, and in practices of assessment.

1. Standard setting in human rights

The standard setting of obligation of the state is clearly defined by key human rights instrument, i.e. ICCPR and ICESCR. The state obligation has a fundamental position as the subject in international law. It has to be a standard to build upon and progressively realized. The state and its international setting should be fully based on the principle of non-discrimination. The standard of human rights has a body of knowledge and of law which necessitate for parties and international community develop inter-state ability to cooperate in improving the realization of human rights.

The institution of rights (and its rights holder) will follow how the rights is enumerated and developed into the framework of promotion and protection of human rights. The standard has the basis and the development of body of knowledge and body of law.

The business and transnational commercial activities under the consideration is in the fullest sense their meaning, be it in multi-sectors and platforms or in specific sector, where they intersect or fully altering the setting of institution of rights. The development of business and trans-national commercial activities, alternately, could arise from one country (state party) towards the other. In the case of Indonesia, the rulings of Indonesian Constitutional Court will especially has an important setting to attend to. This should also apply in which non-Indonesian business and transnational commercial activities comes into or with Indonesia. Their rule of law will also affecting the setting of the business and trans-national commercial activities in question.

FTA (Free Trade Agreement) is recognised as a frame where states conduct cooperation with purpose to advance the interest of parties. The agreement covers both economic field and non-economic field. The situation of parties reflects on what and how the agreement will foster. This mainly shall taking into consideration the effective governance of the government in question. In which very specific free trade agreement is in question, the development of HRIA process should looking into fine prints, the context, and the contemporary problems associated or caused by the agreement in negotiation or in the full course. The document of UN SR Right to Food on Guiding Principle (the report of A /HRC/19/59/Add.5, UN Special Rapporteur Report on Righth to Food) develop some key input on this:

“...While the primary purpose of a human rights impact assessment of a trade and investment agreement is to ensure that the provisions of such agreement shall not be incompatible with the normative content of relevant human rights, it also should include an assessment of whether the process of negotiating the impact of the trade or investment agreement has affected human rights...” (4.1., page 9)

“...Not all the impacts of the entry into force of a trade or investment agreement can be anticipated. Therefore, ex ante human rights impact assessments should be complemented by human rights impact assessments performed ex post, once the impacts are measurable....” (3.3. page 9)

Human rights standard setting became one of international concerns of the United Nations, as stated by the Secretary-General UN that “UN had from its very inception engaged itself in

elaborating human rights instrument and establishing bench marks against which standard of behavior can be measured". According to International Commission of Jurists "law-making, whether at the domestic or international level, is necessarily a never-ending process. Human rights law must keep pace with changing nature of human needs and aspirations, and with forms of rights violations and understandings reached about their causes"². In this regards, human rights law must respond the dynamic changing of international law prevails, since states are attributable to three obligation i.e. to respect, to protect and to fulfil human rights. In the case of an obligation to respect, the State must refrain from interfering or limiting the implementation of human rights. Then in the case of the obligation to protect, the State is obliged to provide protection without exception to individuals and groups from human rights violations or those that have the potential to violate human rights. And the last is the obligation to fulfil, it can be interpreted that the State must take positive action to facilitate how each individual can implement and enjoy human rights.³

The development and proliferation of FTAs has led to the emergence of various issues related to human rights because many aspects are related to human life. This also encourages the state's awareness to cooperate in protecting human rights. In the multilateral context, states ratified conventions and instruments regarding human rights. In the regional context, group of states develop a specialised frameworks and institutions to advance the standard setting and practice of human rights protection in the region.

2. Competing legal regimes

Human rights impact assessment (HRIA) have gained interest in assessing and evaluating the impact of Free Trade Agreement (FTA). There are agreements of FTA which aimed at liberalising trade between two nations or unions in a reciprocal basis. The agreement affects not only trade in general, but also services, model and practice of intellectual property rights (and its limitation and relation with community and key services of one state), extraction of natural resources, and movement of humans, and other areas. We believed that such agreement might ruthlessly limit public agenda in regard of the capabilities of state in delivering key services, and national public interest.

This guide represents the result of review and analysis of international agreement on human rights in various aspect. In a competing legal regime, we will assess how the process onto international agreement conducted by Indonesia's government will provide effective, efficient, value, integrity and safety in accordance with the all the human rights instrument ratified Indonesia government and international customary law which recognized by international community. This guide should also bring to the attention branch of government to look into the capacity of the state to perform their human rights obligation, and not only onto the context of cost and benefit. Currently, various international agreements are negotiated and implemented with many impacts to the party of the agreement to to the whole global community. This guide is meant to be used as review tool to negotiate the agreement and ratification process. We believe transparency must be in place for for public

²International Commission of Jurists, *supra* note 4, at 20. See also the remarks of Louise Arbour, UN High Commissioner for Human Rights, delivered at the opening of the 61st session of the Commission on Human Rights, March 14, 2005, (suggesting that the process of articulating the contours of rights "can never be complete)" see in the Dinah L Shelton, "Standard-Setting by the United Nations Commission on Human Rights: An Overview from Its Inception in 1947 until the Creation of the Human Rights Council in 2006," accessed January 29, 2019, http://scholarship.law.gwu.edu/faculty_publications.

³OHCHR, "International Law," 2019, <https://www.ohchr.org/en/professionalinterest/Pages/InternationalLaw.aspx>.

in order protecting the national interest, public interest and addressing the problem of imbalance capabilities among parties.

The context where human rights norm grows is exactly where international community develop the framework of the role of international law which properly govern the relation and connectivity among parties. The international conduct by one actor or party may adversely affect the whole world without exception. However, there are transnational practices which manipulate real value of a business and the service to society. This would include hidden cost, tax evasion and regulatory arbitrage. This should be managed since it may directly or indirectly pose a challenge in the protection of human rights. On this, international communities should look into the setting of norm and regulation which include matter of environment⁴, various recognitions on individual and collective rights on woks, resource and tenure, food security⁵, labour/workers⁶, health⁷, education, to name a fundamental few. This setting is surely fundamental in ensuring that human rights are protected, enjoyed, and fulfilled.

Box 3: dynamics in transnational setting

Referring to transnationalism in the current context are most likely not only carried out by the state but also non-state actors both corporate and individuals and even political movement groups. States in the context of transnationalism are not the actors but as a facilitator and regulator that provide instruments to encourage actors, for instance corporations to be able to engage with other entities in other countries. This raises new problems when many problems are related to the potential threat of human rights violations that can be caused by such activities. For example, states are involved in the establishment of trade agreements or investments agreement with other states or regions, which in fact the state is facilitating both individuals and entities from within the states and from abroad to conduct transnationalism both in terms of production and markets.

Non State Actors, in this regards Trans-Multi-National Corporations driven changes in so many aspects which leads to situations what we called as globalisation paradox. It is argued that reduction trade barriers and flowing investment in the borderless world expected to boost economic growth by creating more jobs, raising life quality, and reducing poverty. But the fact is that there are far greater hidden costs that must be paid for because they were not previously calculated by the actors involved. This hidden cost cannot be mitigated simply because it involves many things that are vital to the lives of many humans. One of the hidden costs is related to the implementation of human rights related to free trade agreements both goods and services. Although some developed countries such as European Union members have implemented several human rights-related requirements related to unilateral trade preferences (GSP plus Scheme) then also in their FTA agreement templates such as

⁴Paris Deal, Kyoto Protocol

⁵FAO Regime

⁶ILO Regime

⁷WHO Regime

CEPA where human rights are included in the standards that must be adhered to by the parties. However, of course in equality in inequality it is common when there are different interpretations of human rights for each country by considering various aspects both in terms of sovereignty and national interests.

The construction of free trade and investment agreements besides being associated with the potential for human rights violations also has other hidden cost potentials such as an increase in transnational crime that has the potential to harm the state and civil society. This transnational crime can be in the form of real crimes that bring victims, but it can also be seen in the form of the silent crime without victims where the victims are not seen directly or even are not aware of the occurrence of crime. According to article 3 paragraph 2 of the United Nations Conventions Against Trans organized Crimes (UNTOC), a crime will be considered a transnational crime if it meets the following conditions:

- (a) It is committed in more than one State;
- (b) It is committed in one State but a substantial part of its preparation, planning, direction or control takes place in another State;
- (c) It is committed in one State but involves an organized criminal group that engages in criminal activities in more than one State; or
- (d) It is committed in one State but has substantial effects in another State.

Others, on the process of “Internationally Legally Binding Instruments” in regard of transnational corporation and business enterprises sets a process for further develop a norm and framework for promotion and protection of human rights in international level. This process is one manifestation of the state's obligation to actively develop a process of order based on lasting peace and social justice. International cooperation on this will be necessary for an adequate and necessary framework on the subject.

Zero Draft of ILB

- A. Panel I. Implementation of the Guiding Principles on Business and Human Rights: a renewed commitment by all States
- B. Panel II. Principles for an international legally binding instrument on transnational corporations and other business enterprises with respect to human rights
- C. Panel III. Coverage of the instrument: transnational corporations and other business enterprises — concepts and legal nature in international law
- D. Panel IV. Human rights to be covered under the instrument with respect to activities of transnational corporations and other business enterprises
- E. Panel V. Obligations of States to guarantee the respect of human rights by transnational corporations and other business enterprises, including extraterritorial obligation
- F. Panel VI. Enhancing the responsibility of transnational corporations and other business enterprises to respect human rights, including prevention, mitigation and remediation
- G. Panel VII. Legal liability of transnational corporations and other business enterprises:

what standard for corporate legal liability and for what conduct?

H. Panel VIII. Building national and international mechanisms for access to remedy, including international judicial cooperation, with respect to human rights violations by transnational corporations and other business enterprises — OHCHR accountability and remedy project ...

9. TOOLS OF MONITORING OF ADVOCACY OF TRAINING

To carry the assessment (the HRIA, Human Rights Impact Assessment) in any given context, it need tools which has basic framework and have the possibility to develop that process into more complex process and setting. The indicators (of the index) is the foundation for the tools to be applied. The tools are quite unique since it will take the situation in question to be assessed. It is safely assume that the tools pursue the application of the indicators into specific context and time frame. Situation of human rights in, for example, in Hungary and in Indonesia should inform different context when this tools are to be applied.

It is reminded that “human rights assessment” has a very specific framework. The indicators fully subscribe and develop the human rights norm and standard, including best practices from field work/advocacy.

The impact assessment also has a very specific target which is the context of human rights situation in regard of impact and conduct of business and transnational activities, including the context of free trade agreement.

The key component of the tools are:

1. The performance of the state obligation
The indicators set the point-to-point obligation, the institutional context, and the impact of the performance
2. The process of advocacy by rights-holder
The space, ability, and intensity of activism and programmatic or judicial process of rights holder in defending and advancing human rights in a context of situation or text (of FTA)
3. Accountability process
The indicators should lead to accountability process where performance of state obligation and the act by rights holder develop process for accountability toward the part of transnational and business activities and transnational-international agreement (of free trade)



4. Agenda building

The accountability process will translate into follow up activities or implementation process with a set of time frame, field, and participants.

The use of these tools

Who can carry this human rights impact assessment

Each of tools should be practically usable by government, rights holder (community, individual, professions, rural population, survivors), research entities, national human rights institution. Each tools, however, have different target.

The scope

The scope should indicate the framework on addressing the situation in question, and one kind of targeted result they want. (hence, this will imply the impact the assessment may want)

Time frame

On carrying assessment, the time frame is important to do the scope and targeted result of the assessment. Any of time frame should be able to present the result in any best way possible. Hence, the should not arbitrarily decide which one is legitimate, and which one is not.

Suggested steps

- (a) Screening;
- (b) Scoping;
- (c) Evidence gathering;
- (d) Analysis;
- (e) Conclusions and recommendations; and
- (f) Evaluation mechanism.

The suggested steps is taking the model which is developed in the “Report of the Special Rapporteur on the right to food, Olivier De Schutter, Addendum, Guiding principles on human rights impact assessments of trade and investment agreements” A /HRC/19/59/Add.5, 19 December 2011. The steps are important to develop a proper process of assessment. However, the practitioners should define their own way to “translate” the index into assessment. As long as the assessment is open, transparent, and presented properly, then, the practitioners are the proper holder of the justification of their assessment.

1. TOOLS OF MONITORING

Targeted result

The tools is to monitor the context of human rights situation in regard of business and transnational activities including of the free trade agreement. The “situation” implies a context of time and scope which is beyond one case or one actor. The index should give a wider set of points to look.

Type of activities

The activities may take one or more of these ones: research, investigative journalism, programmatic work, national and international seminar, focus group discussion, community-based research, comparative studies (non-exhaustive).

SCREENING	<ul style="list-style-type: none"> - Baseline or preliminary observation towards targeted situation or group, or text in question - The frame, conduct, or impact of one or more given economic sector(s) or free trade agreement (FTA) - For transnational or interparty context of FTA: governing rules and regulation (including jurisprudence and key report) - The context or potential of the index towards targeted situation or group
SCOPING	<ul style="list-style-type: none"> - The guiding question for monitoring - Time frame - The choice of indicators (of the index) and the framework to develop indicator-based assessment - The targeted situation or group, or text in question (:FTA)
EVIDENCE GATHERING	<ul style="list-style-type: none"> - The choice of activities with its related justification (including on the pre- and after-monitoring) - The use of framework to gather data, confirmation, programmatic and/or judicial context, text (of FTA) and its related comment or researchs.
ANALYSIS	<ul style="list-style-type: none"> - The choice of activities with its related justification: analysing process - Looking into targeted situation, or group, or text (of FTA)
CONCLUSION AND RECOMMENDATIONS	<ul style="list-style-type: none"> - Accountability process, or model, or redress - “Agenda building” which will involve the follow up, or implementation of the conclusion and recommendations
AGENDA BUILDING	<ul style="list-style-type: none"> - A mechanism (of evaluation) with certain type of activities and time frame on managing the case making for agenda building

2. TOOLS OF ADVOCACY

Targeted result

The tools is to do an advocacy for one case or one issue in the context of human rights situation in regard of business and transnational activities including of the free trade agreement. The “advocacy” implies a handling of case or issue with an objective on maximising the impact of the case/issue, and doing an extrapolation the case in process towards broader context of human rights situation or group, or text (of FTA). This will differ with “monitoring” in respect that the advocacy involves a series of short-term and hectic

pursuit with immediate impact. While the term of “advocacy” varies, this tools intend to look into this pursuit.

Type of activities

The activities may take one or more of these ones: inquiry, fact-finding, community based activism, court case, investigative journalism, law making, examination towards court decision.

SCREENING	<ul style="list-style-type: none"> - Baseline or preliminary observation towards targeted situation or group, or text in question - The frame, conduct, or impact of one or more given economic sector(s) or free trade agreement (FTA) - For transnational or interparty context of FTA: governing rules and regulation (including jurisprudence and key report) - The context or potential of the index towards targeted situation or group
SCOPING	<ul style="list-style-type: none"> - The guiding question for training (tailor-made) - Time frame - The choice of indicators (of the index) and the framework to develop indicator-based training - The targeted situation or group, or text in question (:FTA)
EVIDENCE GATHERING	<ul style="list-style-type: none"> - The use of case-making to gather and mobilise data, confirmation, programmatic and/or judicial context in relation with targeted situation or group - The work on maximising the impact and extrapolation of the training
ANALYSIS	<ul style="list-style-type: none"> - The process, result, and justification of the training: analysing process - Looking into targeted situation, or group, or text (of FTA)
CONCLUSION AND RECOMMENDATIONS	<ul style="list-style-type: none"> - Capabilities on working on accountability process, or model, or redress - The “Agenda building” which will guide and/or refresh monitoring, advocacy, empowerment.
AGENDA BUILDING	<ul style="list-style-type: none"> - A mechanism (of evaluation) with certain type of activities and time frame to look into the link of training and the process agenda building

3. TOOLS OF TRAINING

Targeted result

The tools is to immerse the indicator with capabilities building on the part of practitioners or participants. The training is to develop necessary knowledge and skills in doing monitoring, advocacy, or self-organising process.

Type of activities

The activities may take one or more of these ones: short and intensive training, forum/townhall meeting, dynamics group, case-study, academic process.

SCREENING	<ul style="list-style-type: none"> - Baseline or preliminary observation towards targeted situation or group, or text in question - The frame, conduct, or impact of one or more given economic sector(s) or free trade agreement (FTA) - For transnational or interparty context of FTA: governing rules and regulation (including jurisprudence and key report) - The context or potential of the index towards targeted situation or group
SCOPING	<ul style="list-style-type: none"> - Case-making - The choice of indicators (of the index) and the framework to develop indicator-based case-making
EVIDENCE GATHERING	<ul style="list-style-type: none"> - The choice of format and model of training with its related justification - The use of training to gather and mobilise data, confirmation, programmatic and/or judicial context in relation with targeted situation or group - The work on maximising the impact and extrapolation of the training
ANALYSIS	<ul style="list-style-type: none"> - The process, result, and justification of the case: analysing process - Looking into targeted situation, or group, or text (of FTA)
CONCLUSION AND RECOMMENDATIONS	<ul style="list-style-type: none"> - Accountability process, or model, or redress - “Agenda building” which will involve the follow up, or implementation based on the case-making
AGENDA BUILDING	<ul style="list-style-type: none"> - A mechanism with certain type of activities and time frame towards agenda building

ANNEX 1

UN General Comment as key reference

UN General Comment on the International Covenant of the Civil and Political Rights

Title	Symbol/Title	Publication date
General comment No. 35- Article 9 (Liberty and security of person)	CCPR/C/GC/35	15 Dec 2014
General comment No. 34 - Article 19: Freedoms of opinion and expression	CCPR/C/GC/34	12 Sep 2011
General comment No.33: Obligations of States parties under the Optional Protocol to the International Covenant on Civil and Political Rights	CCPR/C/GC/33	25 Jun 2009
General Comment No. 32: Article 14: Right to Equality before Courts and Tribunals and to Fair Trial	CCPR/C/GC/32	23 Aug 2007
General Comment No. 31 [80] Nature of the General Legal Obligation Imposed on States Parties to the Covenant	CCPR/C/21/Rev.1/Add.13	26 May 2004
General Comment No. 30 - Reporting Obligations of States parties under article 40 of the Covenant	CCPR/C/21/Rev.2/Add.12	18 Sep 2002
General Comment No. 29: States of Emergency (article 4)	CCPR/C/21/Rev.1/Add.11	31 Aug 2001
General Comment No. 28 - Article 3 (The equality of rights between men and women) (Replaces general comment No. 4)	CCPR/C/21/Rev.1/Add.10	29 Mar 2000
General Comment No. 27: Freedom of movement (Art.12)	CCPR/C/21/Rev.1/Add.9	01 Nov 1999
General Comment No. 26: Continuity of obligations	CCPR/C/21/Rev.1/Add.8/Rev.1	08 Dec 1997
General Comment No. 25 - The right to participate in public affairs, voting rights and the right of equal access to public service (Art. 25)	CCPR/C/21/Rev.1/Add.7	27 Aug 1996
General Comment No. 24 - Issues relating to reservations made upon ratification or accession to the Covenant or the Optional Protocols thereto, or in relation to declarations under article 41 of the Covenant	CCPR/C/21/Rev.1/Add.6	11 Nov 1994
General Comment No. 23: The rights of minorities (Art. 27)	CCPR/C/21/Rev.1/Add.5	26 Apr 1994
General Comment No. 22: The right to freedom of thought, conscience and religion (Art. 18)	CCPR/C/21/Rev.1/Add.4	27 Sep 1993

Title	Symbol/Title	Publication date
General Comment No. 21 - Humane treatment of persons deprived of their liberty (Article 10) - Replaces general comment 9 (Annex VI, B)		13 Mar 1993
General Comment No. 20 - Prohibition of torture, or other cruel, inhuman or degrading treatment or punishment, Article 7 (Replaces general comment No. 7)		30 Sep 1992
General Comment No. 19 - Protection of the Family, the Right to Marriage and Equality of the Spouses (Article 23)		27 Jul 1990
General Comment No. 18 - Non-discrimination (Thirty-seventh session, 1989)		10 Nov 1989
General Comment No. 17 - Rights of the child, (Article 24)		29 Sep 1989
General Comment No. 16 - Article 17 (The right to respect of privacy, family, home and correspondence, and protection of honour and reputation)		28 Sep 1988
General Comment No. 15 - The position of aliens under the Covenant		30 Sep 1986
General Comment No. 14 - The right to life (Art. 6)		01 Jan 1985
General Comment No. 13 - Administration of justice (Article 14)		13 Apr 1984
General Comment No. 12 - Article 1 (The right to self-determination of peoples)		12 Apr 1984
General Comment No. 11 - Prohibition of propaganda for war and inciting national, racial or religious hatred (Art. 20)		29 Jul 1983
General Comment No. 10 - Article 19 (Freedom of opinion and expression)		28 Jul 1983
General Comment No. 9 - Humane treatment of persons deprived of liberty (Art. 10)		30 Jul 1982
General Comment No. 8 - Article 9 (Right to liberty and security of persons)		30 Jun 1982
General Comment No. 7 - Article 7 (Torture or cruel, inhuman or degrading treatment or punishment) [General comment No. 7 has been replaced by general comment No. 20]		30 May 1982
General Comment No. 6 - Article 6 (The right to life)		30 Apr 1982
General Comment No. 5 - Derogations		31 Jul 1981

Title	Symbol/Title	Publication date
(Art. 4) General Comment No. 4 - Article 3 (Equal right of men and women to the enjoyment of all civil and political rights) [General comment No. 4 has been replaced by general comment No. 28]		30 Jul 1981
General Comment No. 3 - Article 2 (Implementation at the national level) [General comment No. 3 has been replaced by general comment No. 31]		29 Jul 1981
General Comment No. 2 - Reporting guidelines [Has been superseded by CCPR/C/66/GUI, Consolidated guidelines for State reports under the International Covenant on Civil and Political Rights, dated 29 September 1999]		28 Jul 1981
General Comment No. 1 - Reporting Obligation [General Comment No. 1 has been replaced by General Comment No. 30]		27 Jul 1981

UN General Comment on the Economic, Social and cultural Rights

Title	Symbol/Title	Publication date
General Comment No. 24 on State Obligations under the International Covenant on Economic, Social and Cultural Rights in the Context of Business Activities	E/C.12/GC/24	10 Aug 2017
General comment No. 22 (2016) on the right to sexual and reproductive health (article 12 of the International Covenant on Economic, Social and Cultural Rights)	E/C.12/GC/22	01 May 2016
General comment No. 23 (2016) on the right to just and favourable conditions of work (article 7 of the International Covenant on Economic, Social and Cultural Rights)	E/C.12/GC/23	26 Apr 2016
[Observación general Nº 21: Derecho de toda persona a participar en la vida cultural (artículo 15, párrafo 1 a), del Pacto Internacional de Derechos Económicos, Sociales y Culturales]	E/C.12/GC/21/REV.1	16 Mar 2010
General comment No. 21: Right of everyone to take part in cultural life	E/C.12/GC/21	21 Dec 2009
General Comment No. 20: Non-discrimination in economic, social and cultural rights	E/C.12/GC/20	02 Jul 2009
General Comment No. 19, The right to social security (art. 9)	E/C.12/GC/19	04 Feb 2008
[Observation générale n° 16: Droit égal de	E/C.12/2005/4/Corr.1	16 Mar 2006

Title	Symbol/Title	Publication date
l'homme et de la femme au bénéfice de tous les droits économiques, sociaux et culturels - Rectificatif]		
General Comment No. 18: Article 6 of the International Covenant on Economic, Social and Cultural Rights	E/C.12/GC/18	06 Feb 2006
General Comment No. 17: The right of everyone to benefit from the protection of the moral and material interests resulting from any scientific, literary or artistic production of which he or she is the author	E/C.12/GC/17	12 Jan 2006
General comment No. 16: The equal right of men and women to the enjoyment of all economic, social and cultural rights (art. 3 of the International Covenant on Economic, Social and Cultural Rights)	E/C.12/2005/4	11 Aug 2005
General Comment No. 15: The right to water	E/C.12/2002/11	20 Jan 2003
General comment No. 14: The right to the highest attainable standard of health	E/C.12/2000/4	11 Aug 2000
General Comment No. 13 (Twenty-first session, 1999), The right to education (article 13 of the Covenant)	E/C.12/1999/10	08 Dec 1999
General comment 12: The right to adequate food (Art.11)	E/C.12/1999/5	12 May 1999
General Comment 11: Plans of action for primary education (art.14)	E/C.12/1999/4	10 May 1999
General comment 10: The role of national human rights institutions in the protection of economic, social and cultural rights	E/C.12/1998/25	10 Dec 1998
General comment No 9: The domestic application of the Covenant	E/C.12/1998/24	03 Dec 1998
General comment No. 8: The relationship between economic sanctions and respect for economic, social and cultural rights	E/C.12/1997/8	12 Dec 1997
General comment No. 7: The right to adequate housing (art. 11 (1) of the Covenant): Forced evictions		20 May 1997
General comment No. 6: The economic, social and cultural rights of older persons		07 Oct 1996
General Comment No. 5: Persons with disabilities		01 Jan 1995
General comment No. 4: The right to adequate housing (art. 11 (1) of the Covenant)		01 Jan 1992
General comment No. 3: The nature of States parties obligations (Art. 2, par. 1)		01 Jan 1991
General comment No. 2: International technical		02 Feb 1990

Title	Symbol/Title	Publication date
assistance measures (Art. 22) General comment No. 1: Reporting by States parties		01 Jan 1989

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