

ASIAN TASK FORCE ON BINDING TREATY

Annex

Key addressed articles of the Chairman Text of the Legally Binding Instrument with relevance on NAM role in the negotiation.

This annex will respond to the discussion into the 2019 draft text which is arising from fifth session of OEIGWG, with understanding that the discussion need further clarification, supporting reference, to put into framework of human rights, and confirmation. The annex will be especially paying attention to the contribution made by Non-Aligned Movement (Grouping), and support the NAM Grouping in negotiation of the text of the Legally Binding Instrument.¹

1. Formulation of “host” or “hosting” and “home”
2. Formulation on “transnational” or “transnational in character” - confirming the mandate of resolution of 26/9
3. Discussion on scope and jurisdiction on and over transnational corporation, including on liability, “business relation”, and human rights abuses and violations
4. Discussion on abuse and violation

¹ Member of Asian Task Force, ATF hereinafter, attended and actively lobbied delegates during fifth session of OEIGWG, 14-18 October 2019. In most of their activities, they were part of Global Campaign, and also working together with other NGO group including Treaty Alliance.

1. formulation of “host” and “home”

The formulation of “host” and “home” countries is important to strengthen the purpose of this instrument. This also addresses matters stipulated in the article, also 1, 4, 6, 7, 9, 14

The delegation of Egypt contributed this formulation: *report of the fifth session, para 63*

Some other delegations argued for strengthening the provision to make it clear that States had an obligation to regulate companies both in home and host States.

Relevant source of normative content includes

Principles and Guidelines, supported by practical guidance, on the human rights protection of migrants in vulnerable situations, A/HRC/37/34, Principle 5, no. 3:

“Prohibit border governance measures that cause human rights violations or abuses or make them more likely. Prohibit excessive use of force and dangerous border control practices, such as water-hosing and use of dogs against migrants”

Principles and practical guidance on the protection of the human rights of migrants in vulnerable situations, Report of the United Nations High Commissioner for Human Rights A/HRC/37/34, 3 January 2018, para 9:

“[i]t is clear that movement that places people in precarious situations is a serious human rights concern (A/HRC/31/35, 27). Where migrants fall outside the specific legal category of “refugee”, it may be especially important to ensure that their human rights are respected, protected and fulfilled...(para 8). All persons, including non-nationals, have rights under international human rights law and related standards, and it is important to ensure that these rights are upheld. Where persons are entitled to specific protection under international instruments, it is equally important to guarantee these specific protections.

General comment No. 24 (2017) on State obligations under the International Covenant on Economic, Social and Cultural Rights in the context of business activities, para 27:

“Although article 14 of the Covenant does refer to compulsory primary education having to be provided by a State “in its metropolitan territory or other territories under its jurisdiction”, such a reference is absent from the other provisions of the Covenant. Moreover, article 2 (1) refers to international assistance and cooperation as a means of fulfilling economic, social and

cultural rights. It would be contradictory to such a reference to allow a State to remain passive where an actor domiciled in its territory and/or under its jurisdiction, and thus under its control or authority, harmed the rights of others in other States, or where conduct by such an actor may lead to foreseeable harm being caused. Indeed, the Members of the United Nations have pledged “to take joint and separate action in cooperation with the Organization” to achieve the purposes set forth in article 55 of the Charter, including “universal respect for, and observance of, human rights and fundamental freedoms for all without distinction as to race, sex, language, or religion”. This duty is expressed without any territorial limitation, and should be taken into account when addressing the scope of States’ obligations under human rights treaties. Also in line with the Charter, the International Court of Justice has acknowledged the extraterritorial scope of core human rights treaties, focusing on their object and purpose, their legislative history and the lack of territorial limitation provisions in the text.⁷⁰ Customary international law also prohibits a State from allowing its territory to be used to cause damage on the territory of another State, a requirement that has gained particular relevance in international environmental law...”

United Nations Convention against Transnational Organized Crimes, General Assembly resolution 55/25 of 15 November 2000, article 13.no.2

“Following a request made by another State Party having jurisdiction over an offence covered by this Convention, the requested State Party shall take measures to identify, trace and freeze or seize proceeds of crime, property, equipment or other instrumentalities referred to in article 12, paragraph 1, of this Convention for the purpose of eventual confiscation to be ordered either by the requesting State Party or, pursuant to a request under paragraph 1 of this article, by the requested State Party.” ()

2. formulation on “transnational” or “transnational in character” –confirming the mandate of resolution of 26/9

Discussion as in the Report of the Fifth Session A/HRC/43/55

para 22:

“Some delegations called for greater reliance on the language of Council resolution 26/9, suggesting that the revised draft make greater use of the term “transnational corporations and other business enterprises” as defined in the resolution.”

para 40:

“The Chair-Rapporteur noted that, in order to strengthen the protection of human rights throughout global supply chains, and in response to the requests of several States and other relevant stakeholders, the scope of the instrument, as covered in article 3, had been expanded to cover all business activities, including, inter alia, those of a transnational character, and all human rights...”

Para 70:

“...a few delegations called for the article to be better aligned with Council resolution 26/9 and for there to be a greater focus on transnational corporations.”

The transnational context is mandated by resolution 26/9,

“obligations and primary responsibility to promote and protect human rights and fundamental freedoms lie with the State, and that States must protect against human rights abuse within their territory and/or jurisdiction by third parties, including transnational corporations”

and refers to primacy of human rights in international norm and mechanism, and other relevant international standards. They serve as source and normative content fundamental for the formulation of “transnational”. This includes (non-exhaustive):

United Nations Convention against Transnational Organized Crimes, General Assembly resolution 55/25 of 15 November 2000, article 3, scope of application:

“an offence is transnational in nature if:

- (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.”

Addis Ababa Action Agenda, para 105

“Regulatory gaps and misaligned incentives continue to pose risks to financial stability, including risks of spillover effects of financial crises to developing countries, which suggests a need to pursue further reforms of the international financial and monetary system. We will continue to strengthen international coordination and policy coherence to enhance global financial

and macroeconomic stability. We will work to prevent and reduce the risk and impact of financial crises, acknowledging that national policy decisions can have systemic and far-ranging effects well beyond national borders, including on developing countries.”

3. Discussion on scope and jurisdiction on and over transnational corporation, including on liability, “business relation”, and human rights abuses and violations.

Discussion as in the Report of the Fifth Session A/HRC/43/55

para 63

One delegation questioned the added value of the first sentence of article 5 (1), noting that States already regulated the activities of companies within their territory and jurisdiction. Some other delegations argued for strengthening the provision to make it clear that States had an obligation to regulate companies both in home and host States.

The contribution by the delegation of Egypt is restate –reference to part 1 of this annex.

3.1. Both victims and state, by of the Instrument,, have jurisdiction (also in the meaning of “adjudicative jurisdiction”) on and over transnational corporation and other business enterprises with transnational character).

Report of Fifth Session, para 13

The first expert argued that article 7 should permit jurisdiction wherever corporation has an operational presence, either prohibit or significantly restrict the use of *forum non conveniens*, and include a provision covering *forum necessitatis*.

Relevant sources of normative content:

Committee on the Elimination of Discrimination against Women, General Recommendation no.34 on the rights of rural women, CEDAW/C/GC34, 4 March 2016, para 13:

“States parties should regulate the activities of domestic non-State actors within their jurisdiction, including when they operate extraterritorially. GR 28 (2010) on the core obligations of States parties under article 2, reaffirms the requirement under article 2(e) to eliminate discrimination by any public or private actor, which extends to acts of national corporations operating extraterritorially. States parties should uphold extraterritorial obligations with respect to rural women, inter alia, by: not

interfering, directly or indirectly, with the enjoyment of their rights; taking regulatory measures to prevent any actor under their jurisdiction, including private individuals, companies and public entities, from infringing or abusing the rights of rural women outside their territory; and, ensuring that international cooperation and development assistance, whether bilateral or multilateral, advance the rights of rural women outside their territory..."

UN Declaration the Rights of Indigenous Peoples, Article 28.1

1. Indigenous peoples have the right to redress, by means that can include restitution or, when this is not possible, just, fair and equitable compensation, for the lands, territories and resources which they have traditionally owned or otherwise occupied or used, and which have been confiscated, taken, occupied, used or damaged without their free, prior and informed consent.

UN Declaration on Rights of Peasants and Other People Working in Rural Areas Article 12 no. 1,2,3

"1. Peasants and other people working in rural areas have the right to effective and non-discriminatory access to justice, including access to fair procedures for the resolution of disputes and to effective remedies for all infringements of their human rights. Such decisions shall give due consideration to their customs, traditions, rules and legal systems in conformity with relevant obligations under international human rights law.

2. States shall provide for non-discriminatory access, through impartial and competent judicial and administrative bodies, to timely, affordable and effective means of resolving disputes in the language of the persons concerned, and shall provide effective and prompt remedies, which may include a right of appeal, restitution, indemnity, compensation and reparation.

3. Peasants and other people working in rural areas have the right to legal assistance. States shall consider additional measures, including legal aid, to support peasants and other people working in rural areas who would otherwise not have access to administrative and judicial services."

- 3.2. On liability of transnational corporation, the victims (or "affected communities") and state should exert their claim on or against liability of transnational corporation.**

Part of 3.1. is restated

The liability should apply as administrative, civil, administrative, and criminal. This also implies an obligation by transnational corporations in their relevant business relationship.

Relevant source of normative content

UN Declaration on Rights of Peasants and other People Working in Rural Areas, article 2.5:

States shall take all necessary measures to ensure that non-State actors that they are in a position to regulate, such as private individuals and organizations, and transnational corporations and other business enterprises, respect and strengthen the rights of peasants and other people working in rural areas.

Principles and practical guidance on the protection of the human rights of migrants in vulnerable situations, Report of the United Nations High Commissioner for Human Rights A/HRC/37/34, 3 January 2018, principle 17.7:

“Ensure that non-State actors are accountable This includes non-State actors who may be engaged by States such as private security companies, military contractors, private transport companies, as well as other private actors who participate in: search and rescue activities; the application of entry restriction measures; pre-departure screening; decisions on access to transportation; service provision; and the operation of detention facilities...”

Committee on Economic, Social, Cultural Rights, General comment No. 16: The equal right of men and women to the enjoyment of all economic, social and cultural rights (art. 3), para 20:

“States parties have an obligation to monitor and regulate the conduct of non-State actors to ensure that they do not violate the equal right of men and women to enjoy economic, social and cultural rights. This obligation applies, for example, in cases where public services have been partially or fully privatized”

Committee on Economic, Social, Cultural Rights, General comment No. 18: The right to work (art. 6) para 25:

“...The obligation to protect the right to work includes the responsibility of States parties to prohibit forced or compulsory labour by non-State actors.”

United Nations Convention against Transnational Organized Crimes, General Assembly resolution 55/25 of 15 November 2000, article 10:

“1. Each State Party shall adopt such measures as may be necessary, consistent with its legal principles, to establish the liability of legal

persons for participation in serious crimes involving an organized criminal group and for the offences established in accordance with articles 5, 6, 8 and 23 of this Convention.

2. Subject to the legal principles of the State Party, the liability of legal persons may be criminal, civil or administrative.

3. Such liability shall be without prejudice to the criminal liability of the natural persons who have committed the offences.

4. Each State Party shall, in particular, ensure that legal persons held liable in accordance with this article are subject to effective, proportionate and dissuasive criminal or non-criminal sanctions, including monetary sanctions."

4. Discussion on abuse and violation

Discussion as in the Report of the Fifth Session A/HRC/43/55,

para 5

"Much of the discussion on article 1 centred on the definition in article 1 (2) on "human rights violation or abuse". There were several calls for more precision. Some argued that the provision was far too broad, as it covered "any harm" against "any person". Others questioned what level of harm had to be present to constitute a human rights abuse or violation. There were multiple calls for greater consideration of the distinction between "violation" and "abuse", with a few delegations suggesting that the revised draft refer only to "abuses" throughout the document. Another delegation and a non-governmental organization suggested defining "abuse" and "violation" separately..."

Para 46

"Several delegations and non-governmental organizations made specific textual suggestions. For instance, it was suggested that each provision refer only to "abuses", or to "violations and abuses", as there was some inconsistency in the terminology used in that article and the terminology used in the rest of the revised draft legally binding instrument..."

Part of 1,2, 3 are restated

In any relevant business relation, violation and abuse under the instrument impose a jurisdiction of the instrument against corporation and the state therein.

4.1. application on violation and abuse as "direct" and "indirect"

Relevant source of normative content:

General comment No. 16: The equal right of men and women to the enjoyment of all economic, social and cultural rights (art. 3), para 12:

12. Direct discrimination occurs when a difference in treatment relies directly and explicitly on distinctions based exclusively on sex and characteristics of men or of women, which cannot be justified objectively.

13. Indirect discrimination occurs when a law, policy or programme does not appear to be discriminatory, but has a discriminatory effect when implemented. This can occur, for example, when women are disadvantaged compared to men with respect to the enjoyment of a particular opportunity or benefit due to pre-existing inequalities. Applying a gender-neutral law may leave the existing inequality in place, or exacerbate it.

4.2. application on violation and abuse as discrimination

Relevant source of normative content:

Human Rights Committee, General Comment no.18 on non-discrimination, including para 6:

“...shall mean any distinction, exclusion or restriction made on the basis of sex which has the effect or purpose of impairing or nullifying the recognition, enjoyment or exercise by women, irrespective of their marital status, on a basis of equality of men and women, of human rights and fundamental freedoms in the political, economic, social, cultural, civil or any other field.”

Committee on Economic, Social, Cultural Rights, General Comment no.20, on non-discrimination, including para 7:

“...discrimination constitutes any distinction, exclusion, restriction or preference or other differential treatment that is directly or indirectly based on the prohibited grounds of discrimination and which has the intention or effect of nullifying or impairing the recognition, enjoyment or exercise, on an equal footing, of Covenant rights.⁶ Discrimination also includes incitement to discriminate and harassment.”

4.3. applying reference to violation and abuse

“Abuse” may arise from non-state actor as incidents or a process directing against person or group of persons (victims and affected communities)

Relevant Source of normative content:

UN Declaration on Rights of Peasants and Other People Working in Rural Areas, article 18.5

5. States shall protect peasants and other people working in rural areas against abuses by non-State actors, including by enforcing environmental laws that contribute, directly or indirectly, to the protection of the rights of peasants or other people working in rural areas.

“Violation” states a whole process of discrimination in which state, by commission or by omission, is the carrier of obligation where it happen, and involve abuses in it.

Relevant source of normative content:

Committee on Economic, Social, Cultural Rights, General comment No. 14: The right to the highest attainable standard of health (art. 12), para 50:

50. Violations of the obligation to respect are those State actions, policies or laws that contravene the standards set out in article 12 of the Covenant and are likely to result in bodily harm, unnecessary morbidity and preventable mortality. Examples include the denial of access to health facilities, goods and services to particular individuals or groups as a result of de jure or de facto discrimination; the deliberate withholding or misrepresentation of information vital to health protection or treatment; the suspension of legislation or the adoption of laws or policies that interfere with the enjoyment of any of the components of the right to health; and the failure of the State to take into account its legal obligations regarding the right to health when entering into bilateral or multilateral agreements with other States, international organizations and other entities, such as multinational corporations.

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Contact person:

1. Joseph Purugganan, josephp@focusweb.org
2. Tony Salvador, deleontony62@gmail.com
3. Henry Thomas Simarmata, henrythomas.advisory@gmail.com
4. Rachmi Hertanti, rachmi.hertanti@gmail.com
5. Jaybee Garganera, jaybee.garganera@gmail.com
6. Mary Ann Manahan, meannemanahan@gmail.com
7. Manja Bayang, manjabayang@gmail.com
8. Teguh Maulana, maulanamuhammadteguh@gmail.com