



APWLD submission on the elements for the draft legally binding instrument on transnational corporations and other business enterprises with respect to human rights

Introduction

The Asia Pacific Forum on Women, Law and Development (APWLD) is pleased to be submitting this response to the elements for the draft legally binding instrument on transnational corporations and other business enterprises with respect to human rights (“Draft Elements”), HRC Res. A/HRC/RES/26/9. We also associate ourselves with the submission of ESCR-Net.

Women workers, women farmers, indigenous women, urban poor women and migrant women from Asia Pacific bear the direct and indirect impact of the violations committed by transnational corporations and other business enterprises.

In 2015 APWLD co-convoked (with ESCR-Net and FIDH) an Asia Pacific civil society meeting, representing different constituencies, movements and organisations to outline the demands of Asia Pacific Civil Society for the Legally Binding Treaty.¹ APWLD and its members, as part of the Asia Pacific Treaty Initiative, have engaged in the negotiation process of the treaty to ensure that the voices and perspective as well as the needs of women and people from Asia Pacific are not left out of the process.

General remarks

APWLD welcomes the draft elements and the mandate of the Working Group as part of the continued effort to address the corporate accountability for human rights violations and to redress the grave imbalance between corporate power and the power of people.

We were very pleased to see that the Draft was explicit in its recognition of the primacy of human rights obligations over trade and investments agreements, an overarching principle without which the objective of the treaty cannot be met. We reiterate our belief that the treaty should provide redress for all human rights instruments and obligations. We recommend that the international principle of solidarity underpin the treaty and suggest that the working group draws from the work of the UN Independent Expert on International Solidarity in elaborating on the principle.

Key recommendations

¹ Unity Statement: Asia Pacific Civil Society's Demands for the Legally Binding Treaty on Business and Human Rights
<http://apwld.org/unity-statement-asia-pacific-civil-societys-demands-for-the-legally-binding-treaty-on-business-and-human-rights/>



- While we recognise the draft nature of the elements and that it does not yet fully encompass the full nature and potential of the legally binding treaty, we would like to emphasise the need for further elaboration on the clause of the primacy of human rights obligation over trade and investment agreements. Across Asia Pacific, trade agreements which conflict with both Agenda 2030 for Sustainable Development and various human rights treaties are being pursued. As UN human rights experts have noted, the power trade agreements award to multinational corporations to challenge national policies designed to advance gender equality, including affirmative action policies allowable as 'temporary special measures' in article 4 of CEDAW, environmental protections, fiscal policies, labour rights, public health and public access to basic needs and services is incompatible with state human rights obligations. The treaty must be explicit about the primacy of this convention and the UN Charter over Investor State Dispute Settlement (ISDS) procedures as well as other conflicting obligations in trade agreements, loan agreements or any other competing source of national, regional, bilateral or international law .
- We appreciate that the paper elaborates on the obligation of states to address human rights violations committed outside of their borders by entities domiciled within their jurisdiction and will "reaffirm that State Parties' obligations regarding the protection of human rights do not stop at their territorial borders". Despite the universality of human rights, many States still interpret their human rights obligations as being applicable only within their own borders. Consequently we believe that a more detailed elaboration of State's Extraterritorial Obligations within the treaty can provide clarity on this important obligation of international law. .
- We support the proposal at b.1 to constitute an International Court on Transnational Corporations and Human Rights. On the point that the Draft Elements has raised with regards to judicial mechanism, we do not support the proposal to utilise existing mechanisms for the following reasons
 - Whilst regional courts have played an important role in some regions of the world, there is no human rights court in Asia Pacific, nor in any sub-region of the Asia or Pacific regions. Whilst an ASEAN Human Rights Commission has been established to cover 10 Southeast Asian countries, the commission is entirely unsuitable for the purposes of this treaty. The commission is not independent of governments, does not hold hearings or process complaints and all decisions are made on a 'consensus' basis.
 - The International Court of Justice entertains complaints submitted by State parties and UN agencies. It is imperative that the court be accessible to the people who experience human rights violations. If a specialist arm of the ICJ was constituted, it must have the capacity to accept complaints from rights holders.



current context within Asia Pacific has not allowed for the creation of a specific regional court similar mechanism found in other regions. At the same time, we recognize the limitation of the ICJ that prevents civil society from initiating complaints, and the ICC with delays and lack of conviction.

- At the same we recognize the severe limitations, politically and geographically, of current unbalanced injustice of political and physical accessibility of UN mechanism when they have taken place in bodies and the preference for having multiple locations, accessible in the Global South. venues such as Geneva or New York for grassroots communities from the global south. Therefore we request that the IGWG give in its consideration to options for aof the judicial mechanism accessible to all. to addresses these issue. The corporate abuse of human rights are felt most acutely by those segments of the population that are already in vulnerable situations, and women are frequently more vulnerable due to pre-intersecting discrimination and gendered roles. We reiterate our proposal that the treaty recognise the gendered impact of corporate abuse, and the role of Women Human Rights Defenders' (WHRDs). The Draft lumps women in with other marginalised groups, as a category in need of "special protection" instead of framing it as a critical step towards achieving substantive equality and the enjoyment of women's human rights.
- We propose that the treaty explicitly recognise the right of indigenous peoples to free, prior, and informed consent (FPIC) as a corollary of their internationally-recognised right to self-determination and suggest that the absence of FPIC should be a violation within the treaty's ambit;
- In the elaboration of the context and purpose of the treaty we suggest stronger emphasis is given to the dangers of "corporate capture" of the state and state institutions, to the use of state and non-state armed forces and to human rights defenders (and specifically women human rights defenders). We suggest that these elements all also be addressed in section 3. State Obligations and 4. Preventative Measures.
- APWLD supports the mention of ex-ante Human Rights Impact Assessment (HRIA) prior to the conclusion of trade and investment agreement as a preventative measure. However, this does not remedy the over 2,000 currently enforced Bilateral Investment Treaties (BITs) and Treaties with Investments Provisions (TIPs) that are impacting on the lives of people across the world. Therefore, ex-post HRIA of preexisting trade and investment agreements are also necessary in order to reverse these impacts.

For any questions please contact:



ASIA PACIFIC FORUM ON WOMEN, LAW AND DEVELOPMENT
30 years of advocacy, activism and movement building to advance women's human rights and Development Justice

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