

Human Rights Impact Assessments of Free Trade Agreements: What is the State of the Art?

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A. Introduction

This outline paper provides an overview of existing practice related to conducting human rights impact assessments (HRIAs) of trade agreements and addresses key methodological issues in conducting future assessments. It draws extensively upon previous published work by this author.¹

B. What is a Human Rights Impact Assessment?

Impact Assessments are an increasingly widely-adopted tool for evaluating the effect of policies, programmes and regulatory interventions across a wide range of fields. HRIAs measure “the impact of policies, programmes, projects and interventions on human rights.” (Human Rights Impact Resource Centre)

HRIAs are also increasingly utilised to assess the impact of policies, programmes, projects, legislation and other interventions on human rights. Just as policymakers consider environmental, social or economic impacts by conducting impact assessments to explore those issues, we conduct HRIAs because we want to ‘build attention to human rights into the project cycle’ (Landman, 2007, 128) AND/OR we want to legitimise our actions.

HRIAs must involve some form of evidence-based analysis. No ‘one size fits all’ model for conducting HRIAs, and no guarantees that HRIAs will be robust, meaningful and change policy outcomes.

C. In What Areas have HRIAs been undertaken?

HRIAs have been used to allow policymakers to take into account the human rights impact of laws, policies, programmes in a wide range of fields including in the economic sphere:

- Development programming
- Various government policy and legislative initiatives, particularly in relation to women and children’s’ rights
- Operations of multinational corporations
- International Trade Agreements
- Government Spending Decisions

There is no single existing blueprint for undertaking HRIAs. Methodologies have been developing over the last decade in a variety of fields. There will always be variation in practice depending on:

- The range of subjects assessed – both the particular issues involved (e.g. health, education, etc.) and the type of subjects analysed (a project, a policy, a piece of legislation, a budget etc.)
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- The different actors involved in carrying out the assessment (governments, businesses, civil society actors)
- When the assessment takes place – before or after the policy or practice comes into force (*ex ante/ex post* assessments)
- The time, resources and quality of data available

But we can also learn from HRIAs across a wide variety of fields in relation to e.g. evidence gathering techniques, consultation processes, use of human rights indicators, how to institutionalise HRIA processes etc.

D. What is an HRIA of a Trade Agreement and why should it be undertaken?

An HRIA of a Trade Agreement seeks to assess how *the legal obligations of that agreement* will affect (negatively and positively) the human rights of people in the States concerned.

An HRIA therefore an empirical study of the actual or potential human rights impacts of the trade agreement itself, based on the normative framework of human rights. It is not suited to engagement in an ideological discussion about the purposes of, or overall justifications of the neo-liberal trade agenda. Nor is it an appropriate tool for passing judgment on whether a country *should be* eligible for a trade agreement. HRIAs *can* help focus debate around concrete issues and solutions rather than ideological battles, and narrow the gap between entrenched interests.

There are a number of interconnected reasons for undertaking HRIAs of trade agreements as opposed to simply economic or ‘social’ impact assessments:

- The impact of trade agreements can be measured according to legal obligations entrenched in international legal instruments rather than partial and sometimes seemingly arbitrary ‘social’ principles (e.g. core EU ‘themes’ like poverty, health and education and equity).
- Many existing impact assessments of trade agreements under-explore or marginalize the impact of trade agreements on the most vulnerable and disadvantaged persons and particular groups who might suffer (or benefit) as a result (e.g. women, ethnic minorities). A human rights-based approach to international trade “shifts the perspective from aggregate values – from the benefits of trade for the country as a whole – to the impacts of trade on the most vulnerable and ... insecure”².

E. Existing Practice in HRIAs of Trade Agreements

There is a great deal of existing practice across HRIAs in many different fields that is relevant to undertaking HRIAs in the trade field (see above). But particularly relevant in the field of trade are:

- Thailand Human Rights Commission – In 2006, the Thailand National Human Rights Commission (TNHRC) produced what was widely reported as the first HRIA of an international trade agreement. TNHRC considered the human rights implications of the free trade agreement that Thailand was negotiating with the US. The draft report covers four substantive areas – agriculture, environment, intellectual property, services and investment – as well as the process of negotiation and the apparent lack of public participation
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and dissemination of information in this process. It is an *ex ante* assessment, in that it assesses the potential future impact of the Thailand-US bilateral trade agreement.

- Simon Walker, 'Assessment of CAFTA: The Impact of Intellectual Property Protection on the Right to Health and Related Rights in Costa Rica' It considers the impact of the intellectual property provisions of the Central American Free Trade Agreement on the right to health in Costa Rica. It is an *ex ante* assessment which utilises economic modelling, causal-chain analysis and expert judgment to assess impact on the right to health. The book provides the most detailed methodological guidance on conducting HRIAs of trade agreements that has been produced.
- Civil Society Human Rights Impact Assessments of Trade Agreements – A number of HRIAs have been produced which analyse the human rights impact of trade liberalisation on the right to food of agricultural producers in a range of different countries. These studies utilise the same basic methodological approach – they combine macro-level analysis of domestic food production, foreign importation and related state policies (of both domestic and external state actors) with micro-analysis at the community level. Human rights analysis combines the findings on the macro- and micro-level and evaluates them from the perspective of the right to food (e.g. *The Impact of Trade Liberalisation on the right to food of farming communities in Ghana, Honduras and Indonesia* (2007); *Right to Food of Tomato and Poultry Farmers, Ghana* (2007); *Right to Food of Milk and Honey Farmers, Zambia* (2008); *The Right to Food of Milk and Maize Farmers in Uganda*; (2009). There is also a civil society impact assessment of the India-EU trade agreement (2012) and an HRIA on the Impact of UPOV on the right to food in Kenya, Philippines and Peru (ongoing).
- The Canada-Colombia Free Trade Agreement Human Rights Reporting Process: Side agreement to the main trade agreement requiring both parties to report each year to their national legislatures on 'the effect of the Free Trade Agreement between Canada and the Republic of Colombia on human rights in the territories of both Canada and Colombia'.
- The EU-Peru and EU-Colombia Free Trade Agreements: The EU has instituted a new human rights reporting process in its recent trade agreements with Colombia and Peru. There is also consideration of integrating human rights into its sustainability impact assessment process.

Olivier De Schutter has produced *Guiding Principles for undertaking HRIAs of international trade agreements* which will assist with future practice.

Issues that have already been seriously considered in HRIAs/HRIA methodologies include:

- whether agricultural liberalisation commitments of an FTA have caused influxes of foreign foodstuffs and what negative and positive impacts this may have on domestic populations (Canada-Colombia, PACER-plus, Thailand, ngos).
- whether intellectual property provisions of an FTA have had an impact on access to medicines (or seeds/food) on domestic populations (CAFTA, Thailand)
- whether trade agreements have been negotiated in a way that respects the participatory rights of populations affected by the agreements (CAFTA, Thailand).

There is as yet no HRIA of an investment chapter of a trade agreement. Such a study would provide significant methodological challenges – In particular this is because there is a large

academic literature which discusses whether investment agreements actually have any impact on investment flows and there is great disagreement on whether this is in fact the case – so what impacts are we measuring?

HRIAs can take the form of both *ex ante* assessments (undertaken before or during the negotiation of trade agreement, or prior to implementation), and *ex post* assessments (undertaken on a trade agreement after a period of implementation). *Ex ante* assessments present more complex methodological challenges. But there are a number of examples of robust *ex ante* HRIAs (e.g. CAFTA study). Ideally, HRIAs should be cyclical with ongoing monitoring and review of impacts.

F. Key Steps in Undertaking an HRIA of a Trade Agreement

Although there is no single methodology for HRIAs, most have some key features in common. There will in practice be some overlap between steps. But each of the stages are set out individually and in turn below for ease of reference:

1. Screening
2. Scoping
3. Evidence gathering
4. Consultation/Participation
5. Analysis
6. Conclusions and Recommendations
7. Publication/Reporting
8. Monitoring and review

1. Screening

'Screening' is the process of deciding whether a particular policy is suitable for a full impact assessment, and screening out policies where an HRIA is not considered appropriate or necessary. A trade agreement contains a vast array of provisions that are potentially subject to an HRIA (e.g. trade in goods, trade in services, investment, intellectual property, sanitary standards, technical barriers etc.).

Attempting to measure the *overall* human rights impact of an agreement is a monumentally complex task, particularly given the potential for long, intermediate and short term impacts. The screening process therefore identifies the key human rights issues that are subject to further analysis in the full assessment study. Some preliminary information gathering and analysis will be required in order to justify the screening decision – about the country itself, the trade agreement in question, and why the proposed sector/issue is worthy of a full assessment (e.g. if deciding to focus on particular agricultural products, look at (predicted) trade volumes, competing crops, food insecurity in the population etc.).

2. Scoping

'Scoping' is the information that is gathered and questions that are asked once the decision to undertake a full HRIA has been made. This stage is termed 'planning' or 'mapping' in some HRIA methodologies. In the trade context, questions will include

- What are the relevant trade measures and how do they operate? For example in relation to intellectual property and access to medicines we will need to know about e.g. patent terms, compulsory licensing arrangements etc.
- What are the human rights obligations of relevant actors (i.e. States who are parties to the agreement and relevant inter-governmental organisations)? This will include both national and international human rights obligations.
- What is the baseline situation in the country (i.e. prior to the trade agreement) with regard to the issue in question? E.g. what is the existing regime for provision of essential medicines, what are the existing patent laws etc.?
- What are the indicators or questions by which a judgment will be made about the human rights impact of the measure in question?
- What potential human rights impacts is the measure in question likely to introduce? This should include consideration of positive and negative impacts. E.g. how will/have reduced tariffs on agricultural products impact (ed) upon urban poor as well as rural farmers?
- What are the potential mechanisms for dealing with any adverse impacts identified? (both domestic - e.g. increased government support, 'amparo'-style remedies, etc. and with respect to the trade agreement/international assistance – e.g. human rights clauses, special products, safeguard measures).

3. Evidence Gathering

Whether an HRIA is *ex post* or *ex ante*, a combination of research sources will be required. Most advanced HRIA methodologies suggest a combination of quantitative and qualitative research methods. HRIAs of trade agreements will need to combine these two types of research. Decisions on appropriate methodologies will depend on the nature of the trade provisions being analysed. Existing HRIAs have utilised various forms of economic analysis, causal chain analysis, expert study and analysis, participatory case studies, questionnaires, focus groups, interviews and observations.

4. Consultation/Participation

By consultation we mean the provision and seeking of advice and information, in relation to the HRIA, whereas by participation we mean that people actually playing an active part in generating ideas as well as the decision-making process. There are some examples of good practice, but the barriers to effective consultation/participation are very context specific and a great deal more work needs to be done to develop guidance and good practice principles that are relevant to people conducting HRIAs of trade agreements in particular contexts.

5. Analysis

This is the stage of the process where a decision is taken over what the human rights impact is. HRIAs must be based on an explicit evaluation of the impact of trade law obligations on relevant, codified human rights obligations that apply to the State in question.

An important part of this analysis stage will also be to test the hypothesis that trade agreements have caused/will cause and the problems or benefits from a human rights perspective against other possible causes. Where there is strong evidence of human rights viola-

tions/improvements occurring, a number of alternative causes may be still possible for their occurrence, (e.g. domestic government policies and practices) and these need to be explored in any HRIA.

6. Conclusions and Recommendation

The formulation of policy-orientated conclusions and recommendations is central to conducting an HRIA. There are four types of conclusions that can be reached:

1. Positive or at least no negative impact found
2. Change the trade measure in question (e.g. bring in safeguard measures, exception clauses, phase-in periods etc.)
3. Bring in additional measures to mitigate the impact (e.g. funds to assist in transition to other types of production, retraining of workers, increase tariffs etc.)
4. Negative impact found, but no action taken
5. Abandon the measures in question or the whole agreement

The HRIA needs to specify the actors required to take action in relation to each recommendation.

7. Publication/Reporting

A report should be produced cataloguing the HRIA process. Publishing that report is vital to the impact assessment process. It ensures that the body responsible can be held to account by rights-holders and other interested actors. Impact assessments should provide a transparent audit trail for those who wish to question the methods or results or redo the analysis with different hypotheses and assumptions.

8. Monitoring and Review

A human rights impact assessment should not be a one-off policy but an ongoing and dynamic process. This means that at the end of any assessment process a procedure should be put in place for how and when impacts should be assessed again in the future. The HRIA should identify a monitoring and review process to make sure that:

- Recommendations are implemented.
- Impacts of the policy are reviewed over time to see whether predicted impacts have occurred or other unexpected impacts have arisen.
- Indicators are developed to measure future impacts.

G. Key Challenges for The Future

Challenges can be split into the following:

(1) The key methodological/capacity etc. issues to improve the quality of individual assessments

- The development of a professional ethic in relation to HRIA of trade agreements
 - Better and deeper shared understanding of key elements of the HRIA process (e.g. the development and application of human rights indicators, evidence gathering techniques, understanding of causation issues etc.)
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- More cross-fertilisation of practice

(2) The key systemic issues to institutionalise meaningful and robust HRIA processes

- Development of guidelines/principles about how HRIA should be conducted (De Schutter Guidelines good starting point but insufficient by themselves).
- Transparency of practice
- Taking participatory elements of the process seriously
- Effective monitoring and review of individual performance

H. Key Resources

Human Rights Impact Assessments

- Leading ngo studies available at - <http://www.fian.org/programs-and-campaigns/projects/agricultural-trade-and-the-right-to-food>
- Simon Walker, 'Assessment of CAFTA: The Impact of Intellectual Property Protection on the Right to Health and Related Rights in Costa Rica', in 'the Future of Human Rights Impact Assessments of Trade Agreements' (Intersentia, 2009).
- Thailand National Human Rights Commission (Subcommittees), Draft Report on Results of Examination of Human Rights Violations (2006), electronic copy on file with this author

Other Useful Resources

- Human Rights Council, *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.
- Human Rights Impact Resource Centre - <http://www.humanrightsimpact.org/> - containing HRIAs in a range of different fields and extensive methodological guidance

On the Development of Indicators

- Office of the High Commissioner for Human Rights, OHCHR, *Report on Indicators for Promoting and Monitoring Implementation of Human Rights* (6 June 2008) HRMI/MC/2008/3.
- Office of the High Commissioner for Human Rights, OHCHR, *Report on Indicators for Monitoring Compliance with International Human Rights Instruments* (11 May 2006) HRI/MC/2006/7

¹ See Harrison, 'Establishing a Meaningful Human Rights Due Diligence Process for Corporations: Learning from Experience of Human Rights Impact Assessment', *Impact Assessment & Project Appraisal* 31(2), June 2013; Harrison, 'Human Rights Measurement: Reflections on the Practice of Human Rights Impact Assessment and the Potential for Future Enhancement' *Journal for Human Rights Practice* (2011) 3 (2), 162 – 187; Harrison and Stephenson, *Human Rights Impact Assessment: Review of Practice and Guidance for Future Assessments, A Report for the Scottish Human Rights Commission* (2010) available at <http://www.scottishhumanrights.com>; 'Human Rights Impact Assessments of Trade Agreements: Reflections on Practice and Principles for Future Assessments' A Paper for the Expert Seminar on Human Rights Impact Assessments of Trade and Investment Agreements, June 23-24, 2010 Geneva available through UN Office of the High Commissioner for Human Rights website; Harrison, 'Conducting a Human Rights Impact Assessment of the Canada-Colombia Free Trade Agreement: Key Issues.' (2009) A Background Paper for the CCIC Americas Policy Group available at http://www.ccic.ca/files/en/what_we_do/003_apg_2009-02_hr_assess_of_cfta.pdf; Harrison & Goller, 'Trade

and Human Rights: What Does 'Impact Assessment' Have to Offer?' (2008) *Human Rights Law Review*, 8(4), 587-615; James Harrison 'Trade Agreements, Intellectual Property and Access to Essential Medicines: What Future Role for the Right to Health?' (October 23, 2009). in *Global Governance of HIV/AIDS*, Aginam & Harrington, eds., Edward Elgar (2013).

² Olivier de Schutter, 'Mission to the World Trade Organization, Report presented to the Human Rights Council' (A/HRC/10/5/Add.2), 4 February 2009. http://ap.ohchr.org/documents/dpage_e.aspx?m=101, p. 5.