

Research Paper

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Human Rights Impact Assessment of Trade Agreements



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Summary

- The idea that trade agreements should be subject to human rights impact assessments has been gathering momentum in recent years. This idea springs from concern – particularly on the part of trade unions and civil society organizations – that states are not presently doing enough to anticipate and address the human rights-related risks associated with, or consequent upon, their trading arrangements with other countries.
- Proponents of human rights impact assessment of trade agreements argue that these specialized processes can offer perspectives on trade that are not available from other forms of assessment. They can do this, it is argued, by directing attention to a special set of regulatory issues connected to the protection of individual and collective rights and by providing an alternative lens through which to analyse social, economic and scientific data, so shifting the focus from aggregated impacts to impacts on the most vulnerable in society.
- While these are laudable aims, *ex ante* human rights impact assessments have struggled to provide compelling analyses of the relationships between trade agreements and the enjoyment of different human rights, let alone a clear roadmap for policymakers and trade negotiators as to what should be done.
- This research paper considers why this is so. Beginning with a review of developing practice in this area, it goes on to identify a number of significant methodological, political and process-related challenges which will need to be addressed if human rights impact assessment of trade agreements is to emerge as a robust and credible policy tool for states.
- It is argued that there is a need for greater realism about what *ex ante* assessment processes can achieve on their own. In reality, the circumstances in which it can confidently be predicted that human rights violations are likely to flow *directly* from a trade agreement are very few. Even for other possible adverse impacts that might be predicted (which may lead to a deterioration in the ability of people to enjoy their human rights over time), the facts, contingencies and causal links between them will in many cases be too unclear at the time of negotiation of the agreement to allow for a detailed and bespoke set of safeguards to be written into the text of the agreement itself.
- Nevertheless, these processes provide a potentially important platform for stakeholder dialogue on trade policy, as well as an evidence-based starting point for longer-term human rights risk mitigation efforts by the states concerned. The paper concludes with some preliminary observations as to how human rights issues identified in *ex ante* processes might be followed up, either pursuant to the terms of a particular trade agreement itself or through complementary processes.

1. Introduction

The idea that trade agreements should be subject to human rights impact assessment has been gathering momentum in recent years. From the perspective of civil society organizations and other human rights advocates, human rights impact assessment of trade agreements is seen as a potential way of enhancing human rights compliance by states¹ and embedding human rights considerations in the policymaking process. It is also seen as providing a platform for stakeholder participation and ensuring an evidential basis on which advocates and communities can engage in debates about trade policy, both generally and in relation to specific trading agreements.²

Box 1: What is a human rights impact assessment?

Human rights impact assessment is an emerging practice that aims to identify and analyse (and, in some cases, monitor over time) the impacts of different policies, programmes, projects and other interventions on the ability of people to enjoy their human rights. In other words, it is a tool intended to inform decision-making as to the best ways to mitigate negative impacts and enhance positive impacts.

Human rights impact assessments are used in various contexts,³ and methodologies vary depending on the specific aims of the exercise. They can take place in advance of the implementation of a project, policy or intervention (i.e. *ex ante* assessments). Or they can be conducted afterwards, for instance as part of a monitoring programme (i.e. *ex post* assessments). This research paper is concerned with the practice of *ex ante* human rights impact assessments.

The scrutiny presently applied to trade agreements by civil society organizations (and by human rights and anti-poverty campaigners in particular) is linked to a wider conversation taking place within UN agencies and international campaigning networks about how to distribute the benefits of globalization more fairly between different nations and different groups in society.⁴ A number of commentators have pointed to recent political events – the outcome of the referendum on EU membership in the UK, the election of Donald Trump as president of the US, and the rise of populist

¹ Hunt, P. and MacNaughton, G. (2006), *Impact Assessments, Poverty and Human Rights: A Case Study Using The Right to the Highest Attainable Standard of Health*, Colchester: World Health Organization, p. 13, http://www.who.int/hhr/Series_6_Impact%20Assessments_Hunt_MacNaughton1.pdf (accessed 9 Jan. 2019).

² Bakker, S., Van Den Berg, M., Duzenli, D. and Radstaake, M. (2009), 'Human Rights Impact Assessment in Practice: The Case of the Health Rights of Women Assessment Instrument (HeRWAI)', *Journal of Human Rights Practice*, 1(3): pp. 436–58, at p. 442, doi: <https://doi.org/10.1093/jhuman/hup017> (accessed 9 Jan. 2019). See also Harrison, J. (2011), 'Human Rights Measurement: Reflections on the Current Practice and Future Potential of Human Rights Impact Assessment', *Journal of Human Rights Practice*, 3(2): pp. 162–87, at pp. 164–67, doi: <https://doi.org/10.1093/jhuman/hur011> (accessed 9 Jan. 2019); and Kirkpatrick, C. and George, C. (2006), 'Methodological issues in the impact assessment of trade policy: experience from the European Commission's Sustainability Impact Assessment (SIA) programme', *Impact Assessment and Project Appraisal*, 24(4), pp. 325–34, at p. 327, doi: <https://doi.org/10.3152/147154606781765110> (accessed 9 Jan. 2019).

³ Human rights impact assessments are used, for example, by: (a) governments as a policy tool to help predict the likely impacts of new policy proposals for the enjoyment of human rights generally and/or by certain groups in society (e.g. *ex ante* studies carried out as part of a wider regulatory impact assessment); (b) companies (e.g. as part of human rights due diligence exercises carried out in advance of a new investment or business relationship); (c) international financial institutions as part of due diligence to identify human rights risks related to projects seeking finance; (d) development agencies wishing to measure the human rights impacts of their development funding and programmes within recipient countries; and (e) non-governmental organizations in various contexts, including with respect to new governmental policy or regulatory proposals, in support of their human rights advocacy work on behalf of affected communities and stakeholders.

⁴ On the challenges involved in achieving a fairer distribution of the benefits of globalization, see World Commission on the Social Dimension of Globalization (2004), *A Fair Globalization: Creating Opportunities for All*, Geneva: International Labour Organization, www.ilo.org/public/english/wcsdg/docs/report.pdf (accessed 8 Jan. 2019).

politics in Europe and elsewhere – as evidence of a backlash against globalization.⁵ The uncertainties arising from these developments have generated intense public interest in the content and implications of trade deals, particularly around the themes of preservation of environmental, health and safety, and social protections.⁶

This uncertainty and anxiety is helping to fuel calls for governments to do more to understand the social, environmental and human rights consequences of trade agreements before they sign them. Proponents of human rights impact assessment of trade agreements argue that human rights-based approaches have a number of analytical advantages over more established social and environmental approaches, not only in their ability to highlight important issues that would otherwise be obscured (such as freedom of expression and privacy), but in their ability to ‘[shift] the focus from aggregate welfare ... [requiring] ... impacts to be disaggregated to specifically focus on the most vulnerable, poor and otherwise disadvantaged whose rights are often the most likely to be violated’.⁷

Since the late 1990s,⁸ various UN treaty bodies and UN agencies (notably the Office of the United Nations High Commissioner for Human Rights – OHCHR) have called for human rights impact assessments to be carried out prior to the conclusion of trade agreements.⁹ Some technical guidance has been developed to encourage states in this direction. In 2011, the then UN Special Rapporteur on the right to food, Olivier De Schutter, published a set of guiding principles on human rights impact assessments of trade and investment agreements in a report to the UN Human Rights Council.¹⁰ More recently, the International Labour Organization (ILO) has published guidance focusing on the relationship between trade and labour.¹¹ In a separate development, a specially constituted intergovernmental working group, operating pursuant to a mandate from the UN Human Rights Council,¹² is presently exploring whether human rights impact assessment of trade agreements should be part of a future treaty regime on business and human rights.¹³

⁵ Stiglitz, J. (2017), *Globalisation and its Discontents Revisited: Anti-Globalisation in the Era of Trump*, New York: W. W. Norton & Company; Saval, N. (2017), ‘Globalisation: the rise and fall of an idea that swept the world’, *Guardian*, 14 July 2017, <https://www.theguardian.com/world/2017/jul/14/globalisation-the-rise-and-fall-of-an-idea-that-swept-the-world> (accessed 9 Jan. 2019); and Odell, M. (2016), ‘Globalisation and rapid changes sparked populist backlash, says Obama’, *Financial Times*, 15 November 2016, <https://www.ft.com/content/cdab5192-ab55-11e6-9cb3-bb8207902122> (accessed 9 Jan. 2019).

⁶ Monbiot, G. (2017), ‘Chlorinated chicken? Yes, we really can have too much trade’, *Guardian*, 25 July 2017, <https://www.theguardian.com/commentisfree/2017/jul/25/chlorinated-chicken-trade-britain-us-food-standards-globalisation> (accessed 9 Jan. 2019).

⁷ Harrison (2011), ‘Human Rights Measurement: Reflections on the Current Practice and Future Potential of Human Rights Impact Assessment’, p. 167. ⁸ *Ibid.*, p. 165.

⁹ Since 2003, the Office of the United Nations High Commissioner for Human Rights (OHCHR) has on several occasions recommended the use of human rights impact assessment techniques ‘to gauge the extent to which trade liberalization can promote and protect human rights’. See OHCHR (2003), *Report of the High Commissioner for Human Rights on Human Rights, Trade and Investment*, UN Doc. E/CN.4/Sub.2/2003/9, Geneva: OHCHR, at para 63, <https://documents-dds-ny.un.org/doc/UNDOC/GEN/G03/148/47/PDF/G0314847.pdf?OpenElement> (accessed 9 Jan. 2019). See also Economic and Social Council (2017), *General Comment No. 24 (2017) on State Obligations under the International Covenant on Economic, Social and Cultural Rights in the context of business activities*, UN Doc. E/C.12/GC/24, Geneva: Economic and Social Council, at para 13, p. 32, <http://docstore.ohchr.org/SelfServices/FilesHandler.ashx?enc=4slQ6Q6SmlBEDzFEovLCuW1a0Szab0oXTdlmnsJZZVQcIMOUuG4TpS9jwIhCJcXiuZ1yrkMD%2F3j8YF%2B5Xo4mYx7Y%2F3L3zvM2zSubw6ujlnCawQrJx3hIK8Odk6DUwG3Y> (accessed 9 Jan. 2019).

¹⁰ UN General Assembly (2011), *Report of the Special Rapporteur on the right to food, Olivier De Schutter: Guiding principles on human rights impact assessments of trade and investment agreements*, UN Doc. A/HRC/19/59/Add.5, Geneva: Human Rights Committee, https://www.ohchr.org/Documents/HRBodies/HRCouncil/RegularSession/Session19/A-HRC-19-59-Add5_en.pdf (accessed 9 Jan. 2019) (‘2011 De Schutter Principles’). These Guiding Principles are not, however, legally binding, and, while they were prepared following a certain amount of stakeholder involvement and input, the level of consultation with different interest groups was not as deep and extensive as, say, the similarly named UN Guiding Principles on Business and Human Rights and so therefore may not reflect the same degree of consensus.

¹¹ International Labour Organization (ILO) (2017), *Handbook on Assessment of Labour Provisions in Trade and Investment Arrangements*, Geneva: ILO, https://www.ilo.org/wcmsp5/groups/public/---dgreports/---inst/documents/publication/wcms_564702.pdf (accessed 9 Jan. 2019). For another related initiative, see United Nations Development Programme (UNDP) (2012), *HUMAN DEVELOPMENT IMPACT ASSESSMENT OF TRADE POLICY: A Toolkit*, New York: UNDP, <http://www.undp.org/content/dam/undp/library/Poverty%20Reduction/Trade%2C%20Intellectual%20Property%20and%20Migration/HUMAN%20DEVELOPMENT%20IMPACT-Trade%20policy%20toolkit.pdf> (accessed 7 Nov. 2018).

¹² General Assembly (2014), *Resolution adopted by the Human Rights Council: 26/9 Elaboration of an international legally binding instrument on transnational corporations and other business enterprises with respect to human rights*, UN Doc. A/HRC/Res/26/9, Geneva: Human Rights Council, <https://undocs.org/A/HRC/RES/26/9> (accessed 9 Jan. 2019).

¹³ See further United Nations Human Rights Council (2018), ‘Open-ended intergovernmental working group on transnational corporations and other business enterprises with respect to human rights’, <https://www.ohchr.org/en/hrbodies/hrc/wgtranscorp/pages/igwgonc.aspx> (accessed 9 Jan. 2019).

A further, high-profile multilateral initiative is encouraging states to reflect on the role of trade – not as a potential problem for human rights compliance, but as a driver of it. The UN’s Sustainable Development Goals (SDGs),¹⁴ adopted by the UN General Assembly in 2015, provide a key reference point for efforts by states, international organizations and non-governmental organizations (NGOs) to achieve greater alignment between trade, sustainable development and human rights objectives. The SDGs encourage states to tackle sustainable development in a holistic and integrated way, and in a manner that respects the need for balance between its economic, social and environmental aspects.¹⁵ Significant emphasis is placed on the role of trade in achieving these goals,¹⁶ which are underpinned by international human rights standards.¹⁷

Box 2: Human rights impact assessment of trade agreements and the Sustainable Development Goals (SDGs)

Although human rights impact assessment of trade agreements is not explicitly mentioned in the text of the SDGs themselves, it has potential relevance to the target set out at 17.10 of the SDGs to ‘promote a universal, rules-based, non-discriminatory and equitable multilateral trading system’, and at 17.14 to ‘enhance policy coherence for sustainable development’.¹⁸ In the latest edition of its handbook on sustainability impact assessments (SIAs) of trade agreements (see further Box 4 below), the European Commission expresses the expectation that consultants responsible for carrying out impact assessments of EU trade agreements will draw from the SDGs at the detailed analytical stage of each assessment,¹⁹ although decisions about how the SDGs should best be integrated into impact assessment methodologies in practice are left to individual assessments and practitioners.

Thus far, the calls for human rights impact assessment of trade agreements have been answered most decisively by the European Commission, which since 2012 has extended its sustainability impact assessment (SIA) processes to include human rights issues arising from proposed trade agreements.²⁰ The EU is arguably a special case, with constitutional arrangements that may require human rights impact assessments of trade agreements as a matter of EU law.²¹

Nevertheless, other parties negotiating trade agreements may be encouraged to follow suit. In the UK, for instance, the secretary of state for international trade in July 2018 announced proposals for public and parliamentary scrutiny of future UK trade agreements following the withdrawal of the UK from

¹⁴ The Sustainable Development Goals refer to the 17 goals, with supporting targets, adopted by the UN General Assembly on 25 September 2015 as part of the 2030 Agenda for Sustainable Development. See General Assembly (2015), *Resolution 70/1: Transforming our world: the 2030 Agenda for Sustainable Development*, UN Doc. A/Res/70/1, New York: UN General Assembly, http://www.un.org/en/development/desa/population/migration/generalassembly/docs/globalcompact/A_RES_70_1_E.pdf (accessed 9 Jan. 2019).

¹⁵ *Ibid.*, pp. 1–2.

¹⁶ See further World Trade Organization (WTO) (2018), *Mainstreaming trade to attain the Sustainable Development Goals*, Geneva: WTO, https://www.wto.org/english/res_e/publications_e/sdg_e.htm (accessed 9 Jan. 2019).

¹⁷ See Danish Institute for Human Rights (2017), *Human Rights and the SDGs: Pursuing Synergies*, <https://www.universal-rights.org/urg-policy-reports/human-rights-sustainable-development-goals-pursuing-synergies/>. However, for a more critical view, see Williams, C. and Blaiklock, A. (2016), ‘Human Rights Discourse in the Sustainable Development Agenda Avoids Obligations and Entitlements – Comment on “Rights Language in the Sustainable Development Agenda: Has Right to Health Discourse and Norms Shaped Health Goals?”’, *International Journal of Health Policy and Management*, 5(5), pp. 387–90, doi: 10.15171/IJHPM.2016.29 (accessed 9 Jan. 2019).

¹⁸ These ambitions are set out under Goal 17: ‘Strengthen the means of implementation and revitalize the Global Partnership for Sustainable Development’.

¹⁹ See European Commission (2016), *Handbook for trade sustainability impact assessment* (2nd ed.), Brussels: European Commission, p. 17, http://ec.europa.eu/trade/policy/policy-making/analysis/policy-evaluation/sustainability-impact-assessments/index_en.htm#_methodology (accessed 9 Jan. 2019).

²⁰ See Box 4 below.

²¹ Bürgi Bonanomi, E. (2017), ‘Measuring Human Rights Impacts of Trade Agreements – Ideas for Improving the Methodology: Comparing the European Union’s Sustainability Impact Assessment Practice and Methodology with Human Rights Impact Assessment Methodology’, *Journal of Human Rights Practice*, 9(3): pp. 481–503, at pp. 484–85, <https://doi.org/10.1093/jhuman/huy001> (accessed 9 Jan. 2019); Case C-263/14, *Parliament v Council*, ECLI:EU:C:2016:435, para 47; and Case C-104/16, *Council v Front Polisario*, AG Opinion (13 September 2016), ECLI:EU:C:2016:677, paras 254–69. See also the European Ombudsman’s finding of ‘maladministration’ in European Ombudsman (2014), ‘Decision in case 1409/2014/MHZ on the European Commission’s failure to carry out a prior human rights impact assessment of the EU-Vietnam free trade agreement’, para 11, <https://www.ombudsman.europa.eu/en/decision/en/64308> (accessed 7 Nov. 2018).

the EU. This will include pre-negotiation public consultation and a ‘scoping assessment’, the results of which would be made publicly available. The creation of a new Strategic Trade Advisory Group is also envisaged, which ‘will be made up of 14 experts drawn from different groups such as business, civil society and unions, with an interest in our future trading relationships and their impact on the UK – from the workplace to consumer choice and the environment’.²²

The relationship between trade agreements and human rights is, however, multifaceted and complex. Understanding and addressing these complexities is made all the more difficult at present by the fact that the political debate surrounding trade, globalization and human rights has become extremely polarized. Stark differences of opinion can be found – for instance, between representatives of government and business on the one hand, and many NGOs on the other – as to whether trade liberalization is good or bad for human rights. At a more structural level, international lawyers continue to debate whether human rights law and trade law enjoy some synergies, or whether they are fundamentally opposed.²³

With respect to the balance of risks and benefits, it is certainly arguable that trade agreements can have *positive* effects on human rights (and a number of the SDGs are predicated upon this idea), for example by reducing prices and increasing the availability of basic goods and services. Indeed, in the area of agriculture, the poorest countries can benefit from trade agreements that offer them access to export markets, and that stop developed countries from subsidizing commodities that developing countries also produce (thereby depressing world prices and, correspondingly, the latter’s export earnings).²⁴

On the other hand, trade liberalizing measures can involve costs to state parties, in terms of loss of employment (due to foreign competition), loss of tariff revenues (hence reducing financial resources for social security, poverty relief and development) or, perhaps, social and political disruption.²⁵ Particular concerns have been raised about the implications of patent provisions in the Agreement on Trade-Related Aspects of Intellectual Property Rights (known as the ‘TRIPs’ Agreement) for access to essential medicines (potentially engaging the right to health),²⁶ and for agricultural production and research (potentially engaging the right to food).²⁷

The World Trade Organization (WTO) system contains a number of flexibilities which can be used to help resolve the tensions that might otherwise exist between trading commitments and the human rights obligations of the states concerned. These flexibilities – replicated in free-trade agreements (FTAs) – may include safeguard measures, anti-dumping duties and countervailing duties, and ultimately rights

²² UK Department of International Trade (2018), ‘Liam Fox delivers Parliament and the public a central role in post-Brexit UK trade agreements’, <https://www.gov.uk/government/news/liam-fox-delivers-parliament-and-the-public-a-central-role-in-post-brexit-uk-trade-agreements> (accessed 7 Nov. 2018). For an NGO view of how social, environmental and human rights impact assessment processes could be built into UK trade policy post-Brexit, see Amnesty International UK (2018), *The Trade Bill Briefing*, London: Amnesty International UK, <https://publications.parliament.uk/pa/cm201719/cmpublic/trade/memo/tb17.pdf> (accessed 7 Nov. 2018). See also Trade Justice Movement (undated), ‘Democracy and transparency in trade matters to us all’, <https://www.tjm.org.uk/trade-issues/democracy-and-transparency> (accessed 7 Nov. 2018).

²³ Ibrahim, A. (2013), ‘International Trade and Human Rights: An Unfinished Debate’, *German Law Journal*, 14(1), pp. 321–37 (accessed 9 Jan. 2019). For further perspectives on the relationship between human rights law and international trade law, see Petersmann, E. (2012), ‘Human Rights and International Economic Law’, *Trade, Law and Development*, 4(2), pp. 283–314, doi: <https://doi.org/10.1093/ejil/chn041> (accessed 9 Jan. 2019); Bartels, L. (2009), ‘Trade and Human Rights’ in Bethlehem, D., Van Damme, I., McRae, D. and Neufeld, R. (eds) (2009), *The Oxford Handbook of International Trade Law*, New York and Oxford: Oxford University Press, pp. 583–92; and Joseph, S. (2011), *Blame it on the WTO? A Human Rights Critique*, New York and Oxford: Oxford University Press.

²⁴ World Bank (2005), *World Development Report 2006: Equity and Development*, New York: World Bank/Oxford University Press, p. 212, <http://documents.worldbank.org/curated/en/435331468127174418/pdf/322040World0Development0Report02006.pdf> (accessed 7 Nov. 2018).

²⁵ Bartels (2009), ‘Trade and Human Rights’, p. 579.

²⁶ *Ibid.*, p. 592. Also Bartels, L. (2017), ‘International Economic Law and Human Rights: Friends, Enemies or Frenemies?’ in *European Yearbook of International Economic Law*, 7, pp. 485–492, at p. 485, doi: https://doi.org/10.1007/978-3-319-29215-1_19 (accessed 9 Jan. 2019).

²⁷ Bartels (2009), ‘Trade and Human Rights’, p. 592.

of renegotiation. In the WTO system, developing-country trading partners have the benefit of additional flexibility, for instance to impose import restrictions to protect infant industries or subsidize vulnerable producers. In addition, a number of exceptions in the WTO system (again, the model for most regional trade agreements) are potentially relevant to the ability of trading partners to respond to emerging human rights-related challenges, including exceptions relating to ‘public morals’²⁸ and also measures necessary to protect human life and human health.²⁹

However, the range of human rights that could potentially be engaged by the economic and social changes that trade agreements may bring about, together with the limitations in the way in which some exceptions have been interpreted,³⁰ means that these flexibilities may not correspond exactly to future needs. The central purpose of *ex ante* human rights impact assessment in this context, therefore, is to reduce the risks of future inconsistencies between trade-related and human rights-related goals by providing decision-makers and negotiators with a tool for anticipating future adverse scenarios and ensuring that they are addressed, either in the negotiated text itself (e.g. through enhanced flexibility in some areas or through arrangements for subsequent monitoring), or through appropriate flanking measures.

In practice, though, human rights impact assessments are not yet fulfilling this need. This research paper is both an exploration of why this might be so, and a re-evaluation of the role and prospects of *ex ante* human rights impact assessments of trade agreements in light of the challenges that have been encountered thus far. While it is by no means comprehensive as a survey of existing state practice (not least because of its focus on EU policy), it is intended to help reframe and reinvigorate the discussion about the role and usefulness of these processes at a time when trade agreements are increasingly the subject of public debate.

The paper is structured as follows. Chapter 2 reviews some notable attempts to carry out human rights impact assessments of trade proposals thus far, both by the European Commission (in relation to proposals for new agreements between the EU and third-party states) and further afield (by a range of actors including national human rights institutions, civil society organizations, UN agencies and academic researchers). Chapter 3 outlines the various legal, political, methodological and process-related challenges that frequently arise in respect of human rights impact assessment of trade agreements. It lays out a number of options that states could consider for strengthening these processes. It also points out the fundamental need for greater realism among policymakers and stakeholders about what *ex ante* assessments can achieve on their own. Chapter 4 offers a preliminary exploration of the different ways in which *ex ante* human rights processes might be better integrated into longer-term human rights risk management strategies by the states concerned, either pursuant to the terms of given trade agreements themselves, or through complementary processes. Finally, Chapter 5 concludes that it is perhaps with respect to the shaping of effective mechanisms for ongoing monitoring of human rights-related risks arising from or connected with trade agreements that *ex ante* human rights impact assessments have potentially the most valuable role to play. *Ex ante* human rights impact assessments are no substitute for ongoing efforts by states to identify and respond to human rights-related risks as they emerge; such efforts ideally should be based on regular and systematic *ex post* monitoring of human rights risks by trading partners. The chapter recommends that *ex ante* human rights impact assessments should be designed and implemented with this in mind.

²⁸ See GATT Art XX(a) and GATS Art XIV(a).

²⁹ See GATT Art XX(b) and GATS Art XIV(b). See further Bartels (2009), ‘Trade and Human Rights’, pp. 582–85.

³⁰ *Ibid.*, p. 585.

2. Putting Ideas into Practice

The past two decades have seen a number of important developments in the field of human rights impact assessment of trade agreements, although take-up by states outside the EU remains very low and practice is still fragmented. The rapid development of EU policy and practice in this area is due to a unique set of legal and political drivers. Also significant in shaping EU practice has been ongoing campaigning by civil society organizations (focusing in particular on how to render sustainability impact assessment processes more relevant to decision-making and improve the quality of stakeholder consultation),³¹ and the greater influence given to the European Parliament following the adoption of the Treaty of Lisbon in 2007.³²

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Box 3: *Ex ante* and *ex post* human rights impact assessments

While the focus of this research paper is on *ex ante* processes, it is worth noting the related practice of *ex post* human rights impact assessment of trade agreements, in which an assessment is made of the human rights implications of economic, social or environmental impacts that have occurred *in fact*. These studies are conducted after a period of ‘bedding in’ of a new trade agreement and can take place on an ad hoc basis (e.g. studies carried out by NGOs, national human rights institutions or academics) or pursuant to a special arrangement (e.g. under treaty) between state trading partners, or pursuant to the terms of the trade agreement itself (e.g. by a monitoring mechanism established under the trade agreement to assist with its implementation).

For instance, since 2012, Canada and Colombia have carried out periodic reviews of human rights issues raised by the Canada–Colombia free-trade agreement. These reviews are conducted pursuant to a special treaty between the trading partners.³³ Under this agreement, each party agrees to conduct a human rights impact assessment in relation to the effects of the agreement not only in its own territory but also in the territory of the other party.³⁴ The practical implementation of this legal commitment has been criticized, however, for its inadequate description of the relevant human rights issues, for failures to engage sufficiently with relevant stakeholders and, in more recent assessments, for a failure to provide clear explanations of the causal links between human rights issues and the relevant trade measures.³⁵

³¹ Kirkpatrick and George (2006), ‘Methodological issues in the impact assessment of trade policy’, p. 326.

³² Harrison J., Barbu, M., Campling, L., Ebert, F., Martens, D., Marx, A., Orbie, J., Richardson, B. and Smith, A. (2018), ‘Labour Standards Provisions in EU Free Trade Agreements: Reflections on the European Commission’s Reform Agenda’, *World Trade Review* 17(3), pp. 1–23, doi: doi.org/10.1017/S1474745618000204 (accessed 9 Jan. 2019); and Van den Putte, L. and Orbie, J. (2015), ‘EU Bilateral Trade Agreements and the Surprising Rise of Labour Provisions’, *International Journal of Comparative Labour Law and Industrial Relations*, 31(3), pp. 263–83, at p. 264 (accessed 9 Jan. 2019).

³³ The Agreement Concerning Annual Reports on Human Rights and Free Trade Between Canada and the Republic of Colombia was signed on 27 May 2010. Links to the annual reports can be found at Embassy of Canada to Colombia (undated), ‘Agreement Concerning Annual Reports on Human Rights and Free Trade between Canada and the Republic of Colombia’, www.canadainternational.gc.ca/colombia-colombie/bilateral_relations_bilaterales/hrft-co_2012-dple.aspx?lang=eng (accessed 9 Jan. 2019).

³⁴ Art 1(1) of Agreement Concerning Annual Reports on Human Rights and Free Trade Between Canada and the Republic of Colombia.

³⁵ Rochlin, J. (2014), ‘A Golden Opportunity Lost: Canada’s Human Rights Impact Assessment and the Free Trade Agreement with Colombia’, *International Journal of Human Rights*, 18(4–5), pp. 545–66, at pp. 551–54, doi: doi.org/10.1080/13642987.2014.917627 (accessed 9 Jan. 2019).

2.1 Development of human rights impact assessment of trade agreements (non-EU)

Outside the EU, human rights impact assessments of trade agreements have largely been initiated not by states but by other actors, notably national human rights institutions, civil society organizations, academic institutions and also (though to a much more limited extent) UN agencies. The lack of a clear, tried-and-tested methodology proved a significant challenge for these early efforts, such as a pioneering attempt in 2006 by the National Human Rights Commission of Thailand to conduct an assessment of the proposed Thailand–US FTA.³⁶ This assessment was done in response to complaints by Thai civil society organizations about some specific aspects of the proposed agreement, such as access to medicines and the use of genetically modified organisms in agriculture.³⁷ However, the resulting document, which appears to have been shared only with a few UN agencies and civil society actors,³⁸ reportedly made ‘only sporadic reference’ to human rights.³⁹

In 2009 an unofficial, *ex ante* impact assessment of the effect of the intellectual property provisions of the proposed Central America-Dominican Republic-United States Free Trade Agreement (CAFTA-DR) on access to medicines in Costa Rica was conducted by Simon Walker.⁴⁰ Walker used the opportunity to propose a more rigorous, step-by-step methodology for conducting these kinds of processes, with built-in opportunities for stakeholder engagement. The methodology consisted of seven steps:

- Step 1: Preparation
- Step 2: Screening
- Step 3: Scoping
- Step 4: Analysis
- Step 5: Conclusions and recommendations
- Step 6: Publication and reporting
- Step 7: Monitoring and review⁴¹

This step-by-step process, or variations upon it,⁴² has been widely adopted. There is now a high degree of consensus, across a broad range of stakeholders, of its value as a ‘good practice’ framework.⁴³ Its influence can be seen in advocacy work by civil society organizations since that time, such as the 2010 Scoping Study on Designing a Human Rights Impact Assessment for the Pacific Agreement on

³⁶ See Harrison (2011), ‘Human Rights Measurement: Reflections on the Current Practice and Future Potential of Human Rights Impact Assessment’, p. 169. Negotiations were suspended in 2006 and have not resumed. See [bilaterals.org](https://www.bilaterals.org/?-US-Thailand) (2012), ‘US-Thailand’, <https://www.bilaterals.org/?-US-Thailand> (accessed 9 Jan. 2019).

³⁷ Harrison (2011), ‘Human Rights Measurement: Reflections on the Current Practice and Future Potential of Human Rights Impact Assessment’.

³⁸ Walker, S. (2009), *The Future of Human Rights Impact Assessments of Trade Agreements*, Brussels: Intersentia, p. 6.

³⁹ Harrison (2011), ‘Human Rights Measurement: Reflections on the Current Practice and Future Potential of Human Rights Impact Assessment’, p. 177.

⁴⁰ Walker (2009), *The Future of Human Rights Impact Assessments of Trade Agreements*, pp. 123–24.

⁴¹ For a detailed explanation of the aims of each of these seven steps (and the key activities involved), see Walker (2009), *The Future of Human Rights Impact Assessments of Trade Agreements*, pp. 89–102.

⁴² See Harrison, J. and Stephenson, M. (2010), *Human Rights Impact Assessment: Review of Practice and Guidance for Future Assessments*, Edinburgh: Scottish Human Rights Commission, <https://fian-ch.org/content/uploads/HRIA-Review-of-Practice-and-Guidance-for-Future-Assessments.pdf> (accessed 9 Jan. 2019) in which a similar (though eight-step) methodology is proposed which merges ‘preparation’ and ‘screening’ but proposes two additional steps: ‘consultation’ and ‘evidence gathering’. See also Walker (2009), *The Future of Human Rights Impact Assessments of Trade Agreements*, pp. 89–102, in which a nine-step methodology is outlined. By way of comparison, the 2011 De Schutter Principles propose a six-step methodology, excluding preparation and reporting (which are absorbed in the screening and conclusions phases respectively) and including an additional step, namely ‘evidence gathering’, which includes consultation of relevant right-holders. Further variations of this model can be found in the successive iterations of guidance for sustainability impact assessment practitioners issued by the European Commission, discussed further in Section 2.2.

⁴³ Harrison (2011), ‘Human Rights Measurement: Reflections on the Current Practice and Future Potential of Human Rights Impact Assessment’, p. 172.

Closer Economic Relations (PACER-Plus) between Pacific island countries and Australia and New Zealand, commissioned by the Australian Council for International Development and the Institute for Human Security;⁴⁴ and the 2011 Right to Food Impact Assessment of the proposed EU–India FTA commissioned by MISEREOR and other civil society actors.⁴⁵

This assessment analysed the potential impacts (both positive and negative) that likely CFTA provisions could have on those groups identified as most vulnerable, namely women, young people and rural food producers.

The *ex ante* assessment of the Africa Continental Free Trade Area (CFTA), commissioned in 2015 by the UN Economic Commission for Africa, the Friedrich Ebert Stiftung Foundation and OHCHR,⁴⁶ deserves particular mention for its ambitious scope (i.e. in terms of the number of countries covered and the range of human rights included in the assessment) and for what it potentially reveals about current thinking. This assessment analysed the potential impacts (both positive and negative) that likely CFTA provisions could have on those groups identified as most vulnerable, namely women, young people and rural food producers. It focused on the human rights identified at the screening stage as being most pressing in the African trading context (i.e. the right to an adequate standard of living, the right to work and social security, the right to food, and women's rights).⁴⁷ And it scrutinized three economic sectors: informal cross-border trade, the agricultural sector (in relation to the right to food) and the agro-manufacturing sector (in relation to the right to work).⁴⁸ Beyond this, the assessment looked at whether the negotiating process was human rights-consistent (i.e. whether the relevant stakeholders were invited to participate).⁴⁹

In their final report, the assessment practitioners were careful to explain the limits to what such an exercise could achieve, identifying as particularly difficult the problem of showing a causal link between a trade agreement and social and economic changes (an issue taken up further in the next chapter of this research paper). The assessment process was undertaken, as they put it:

... with the awareness that pathways of cause and effect are not easily discernable: establishing a causal link between a specific trade intervention and a human rights outcome is a difficult task. For these reasons this HRIA [human rights impact assessment] does not embark on the precarious task of seeking to establish a causal chain. Rather it sets out to ask whether the CFTA sets out measures that can reasonably be expected to progressively improve the enjoyment of human rights and in particular the right to food, the right to work and women's rights. It proceeds from the assumption that getting the relevant trade intervention right is one amongst several necessary conditions for respecting, protecting and fulfilling human rights.⁵⁰

⁴⁴ Morgan, W., Sami, R., Rowland, C. and Legge, D. (2010), *Human rights and trade in the Pacific: A scoping study on designing a Human Rights Impact Assessment for PACER-Plus*, Melbourne: La Trobe University, https://www.latrobe.edu.au/_data/assets/pdf_file/0015/240135/ACFID-IHS-WP-01-Morgan-et-al.pdf (accessed 5 Dec. 2018).

⁴⁵ Paasch, A., Chemnitz, C., Sengupta, R., Ramdas, S., Bhutani, S., Asher, M. and Hoffmann, R. (2011), *Right to Food Impact Assessment of the EU-India Trade Agreement*, Aachen: MISEREOR, Berlin: Heinrich Böll Foundation, Penang: Third World Network, Andhra Pradesh: Anthra and Prague: Glopolis, pp. 11–13, https://www.twn.my/title2/FTAs/General/RFIA/RFIA_Final.pdf (accessed 9 Jan. 2019).

⁴⁶ United Nations Economic Commission for Africa (UNECA) and Friedrich Ebert Stiftung (FES) (2017), *The Continental Free Trade Area (CFTA) in Africa – A Human Rights Perspective*, July 2017, p. 41, http://www.fes-globalization.org/geneva/documents/2017/2017_07_CFTA_HRIA_Publication.pdf (accessed 12 Dec. 2018).

⁴⁷ *Ibid.*, p. 47.

⁴⁸ *Ibid.*, pp. 41–42, 61–117.

⁴⁹ *Ibid.*, pp. 118–28.

⁵⁰ *Ibid.*, p. 44.

Nevertheless, the authors felt able to make several recommendations for consideration by trade negotiators (including a list of goods to be excluded from liberalization because of their potential negative impact on the right to food,⁵¹ and the insertion of a safeguard clause for food security measures).⁵² They also offered a series of recommendations to governments for measures aimed at improving policy coherence and resilience.⁵³

2.2 Human rights impact assessment as part of sustainability impact assessment: the development of the European Commission's approach

The European Commission has adopted an 'integrated' approach to human rights impact assessment of trade agreements. This entails human rights issues being evaluated as part of a wider process that also takes account of social, economic and environmental issues under the broad heading of 'sustainability impact assessment' (SIA). EU policy on SIAs can be traced back to 1999 and the run-up to the WTO Ministerial Conference in Seattle, a period when civil society campaigns around the social and environmental impacts of trade and globalization had reached a level of intensity that appeared, to EU officials, to require a clear policy response.⁵⁴

Initially based on US practice with respect to environmental assessments of trade policies,⁵⁵ SIA practice with respect to the identification and evaluation of human rights impacts has evolved over time. For instance, first-generation SIAs, such as the 2002 EU–Chile Association Agreement SIA, incorporated an examination of labour rights and gender equality into their social analysis, but did not engage in a discussion of the effects of the trade agreement on human rights more generally.⁵⁶ By comparison, more recent SIAs carried out under later guidance (see Box 4 below) have discussed human rights impacts separately, allocating a specific section to a 'human rights analysis'.⁵⁷ The SIA conducted in support of negotiations on a plurilateral Trade in Services Agreement (TiSA), for example, bases its analysis on quantitative data and qualitative studies and input from civil society. It identifies the rights at risk (e.g. right to health, right to access to healthcare, right to education, right to work, right to protection of personal data) and the potential impacts (directly or indirectly trade-related, positive or negative, major or minor etc.) of the trade agreements on the identified rights.⁵⁸ However, the content of those rights, and precisely how the trade agreement may affect enjoyment of them, is not the subject of detailed legal analysis as part of this process.⁵⁹

⁵¹ Ibid., p. 95.

⁵² Ibid., p. 96.

⁵³ For a summary of key recommendations, see UNECA (2017), *Building a Sustainable and Inclusive Continental Free Trade Area: Nine Priority Recommendations from a Human Rights Perspective*, Geneva: UNECA, https://www.uneca.org/sites/default/files/PublicationFiles/policy_brief_building_sustainable_and_inclusive.pdf (accessed 7 Nov. 2018).

⁵⁴ Kirkpatrick and George (2006), 'Methodological issues in the impact assessment of trade policy', p. 325.

⁵⁵ Ibid., p. 326.

⁵⁶ PLANISTAT-LUXEMBOURG and CESO-CI (2002), *Sustainable Impact Assessment (SIA) of the trade aspects of negotiations for an Association Agreement between the European Communities and Chile (Specific agreement No 1) – Final Report (revised)*, Brussels: European Commission, pp. 203–05, http://trade.ec.europa.eu/doclib/docs/2010/may/tradoc_146109.pdf (accessed 7 Nov. 2018).

⁵⁷ Ecorys (2017), *Trade SIA in support of negotiations on a plurilateral Trade in Services Agreement (TiSA) – Final Report*, pp. 90–108, <http://www.trade-sia.com/tisa/wp-content/uploads/sites/7/2014/02/TiSA-Final-Report.pdf> (accessed 7 Nov. 2018).

⁵⁸ Ibid.

⁵⁹ Walker, S. (2018), 'Human Rights in the Trade and Sustainability Impact Assessment of the EU–Tunisia Free Trade Agreement', *Journal of Human Rights Practice*, 10(1): pp. 103–24, at pp. 113–14, doi: <https://doi.org/10.1093/jhuman/huy007> (accessed 15 Jan. 2019). On the relevance and importance of legal analysis, see further the discussion in Section 3.1 below.

Box 4: Key milestones in the development of the EU's approach to SIAs

2006: The European Commission systematizes a methodology for consultants in a *Handbook for Trade Sustainability Impact Assessment* in 2006.⁶⁰

2012: Following the adoption of the 2012 EU Strategic Framework and Action Plan on Human Rights and Democracy, the European Commission is required to incorporate human rights in all impact assessments, including SIAs of trade agreements.⁶¹

2015: As part of its implementation of the 2012 EU Strategic Framework and Action Plan, the Commission drafts guidelines for integrating a human rights impact analysis in the existing SIAs' framework.⁶²

2016: Additional, more detailed methodological guidance appears with the adoption by the European Commission of a second edition of its *Handbook for trade sustainability impact assessment*, which contains specific guidance on the inclusion of a human rights dimension in the impact assessment.⁶³

SIAs are conducted for the EU by external consultants who use economic modelling techniques⁶⁴ to make predictions about the likely effects of a trade intervention on domestic economies and communities. Data reflecting the economic, social and environmental situation and policies of the EU and its prospective trading partner prior to the conclusion of the trade agreement are used to develop a 'baseline scenario'. Through analysis of a 'liberalization scenario' against the 'baseline scenario', practitioners seek to quantify changes in production in particular sectors, changes in welfare indicators, changes in the returns of the factors of production (e.g. labour, capital, land), and changes in imports and exports by sector.⁶⁵ Within the SIA process, this is now complemented by quantitative and qualitative social and environmental information-gathering and analysis to help build up a more detailed picture of the likely economic, social, human rights and environmental impacts of the agreement in question.⁶⁶

Following the 2015 guidelines and the 2016 second edition of the EU's SIA handbook (see Box 4 above), consultants engaged to carry out SIAs on behalf of the Commission now follow a nine-step process (i.e. preparation, screening, scoping, evidence-gathering, consultations, analysis, conclusions and recommendations, publication, monitoring and evaluation). This methodology has similarities with the seven-step process adopted by Walker in his 2009 assessment of CAFTA-DR, although with two key elements (i.e. 'evidence-gathering' and 'consultations') highlighted as specific steps.

⁶⁰ European Commission (2006), *Handbook for Trade Sustainability Impact Assessment*, Brussels: European Union, http://trade.ec.europa.eu/doclib/docs/2006/march/tradoc_127974.pdf (accessed 15 Jan. 2019).

⁶¹ Council of the European Union (2012), *EU Strategic Framework and Action Plan on Human Rights and Democracy*, Luxembourg: Council of the European Union, https://www.consilium.europa.eu/uedocs/cms_data/docs/pressdata/EN/foraff/131181.pdf (accessed 15 Jan. 2019). See also Walker (2018), 'Human Rights in the Trade and Sustainability Impact Assessment of the EU-Tunisia Free Trade Agreement', p. 104.

⁶² European Commission, Directorate-General for Trade (2015), *Guidelines on the Analysis of Human Rights Impacts in Impact Assessments for Trade-Related Policy Initiatives*, http://trade.ec.europa.eu/doclib/docs/2015/july/tradoc_153591.pdf (accessed 7 Nov. 2018). See also Walker (2018), 'Human Rights in the Trade and Sustainability Impact Assessment of the EU-Tunisia Free Trade Agreement', p. 104.

⁶³ European Commission (2016), *Handbook for trade sustainability impact assessment* (2nd ed.), pp. 21–23.

⁶⁴ The most widely used method is known as 'computable general equilibrium' modelling, or CGE, a quantitative tool for conducting assessments of how economies may react to changes in policy, technology and other exogenous factors or shocks.

⁶⁵ Europe Economics (2016), *CGE Modelling of Free Trade Agreements*, London: Europe Economics, http://www.europe-economics.com/userfiles/library/CGE_modelling_of_FTAs.pdf (accessed 5 Dec. 2018).

⁶⁶ For a description of how this analysis was undertaken in the context of a specific assessment exercise, see Walker (2018), 'Human Rights in the Trade and Sustainability Impact Assessment of the EU-Tunisia Free Trade Agreement', p. 105.

In terms of deliverables, first-generation SIAs consisted of a standalone final report. However, these assessments (and the terms of reference which shaped them) made little (if any) provision for stakeholder consultation.⁶⁷ More recent SIAs have involved the production of several reports (i.e. inception report, interim or midterm report, and final report) issued progressively to allow (at least in principle) for appropriate stakeholder consultation.⁶⁸ Recommendations to the Commission are not legally binding. However, it is customary for SIA processes to be followed by a position paper in which the European Commission sets out its views with respect to the findings and policy recommendations presented in the final report.⁶⁹

More than 20 SIAs of bilateral and multilateral trade agreements have so far been completed, and at the time of writing four are ongoing.⁷⁰

⁶⁷ See, for example, the sustainability impact assessment prepared for the EU–Chile Association Agreement in 2002, PLANISTAT-LUXEMBOURG and CESO-CI (2002).

⁶⁸ See European Commission (2006), *Handbook for Trade Sustainability Impact Assessment*, p. 13 and pp. 25–30.

⁶⁹ *Ibid.*, p. 13 and p. 30.

⁷⁰ To access the full list of completed and ongoing SIAs of EU trade agreements, see European Commission (undated), ‘Sustainability Impact Assessments’, http://ec.europa.eu/trade/policy/policy-making/analysis/policy-evaluation/sustainability-impact-assessments/index_en.htm (accessed 7 Nov. 2018).

3. Challenges

Experiences with human rights impact assessments of trade agreements have thrown up a number of challenges which need to be properly understood and addressed if practice is to improve and if take-up by states outside the EU is to increase. These comprise mainly methodological challenges (particularly around the question of establishing causation between a trade agreement and human rights impacts – see Section 3.1.2 below); political sensitivities where the assessment process in question seeks to examine human rights impacts in other states (see Section 3.2 below); and a host of difficult process-related challenges and dilemmas relevant to the robustness, efficiency, fairness and inclusivity of the process (see Section 3.3 below).

3.1 Methodological challenges

Although the basic steps of human rights impact assessment are reasonably well established, the fact that few governments or state agencies outside the EU have even attempted such an exercise in relation to trade proposals means that there is not yet a broad base of state practice from which we can draw ‘good practice’ lessons.⁷¹

For human rights impact assessments it is necessary to carry out a further step, which is to explain these findings in human rights terms. However, the differentiation between the social and environmental analysis and the *human rights* part of the assessment is not always clear.

Many of the methodological challenges associated with human rights impact assessment of trade agreements are inherent to the process rather than subject to the particular scenarios being assessed. The complexities of domestic economies, their interconnectedness and their vulnerability to both domestic and external factors mean that there are limitations to economic modelling as a tool for forecasting future events. Extrapolating from economic modelling outputs to draw conclusions about likely social or environmental effects is also an inexact science for similar reasons. For human rights impact assessments it is necessary to carry out a further step, which is to explain these findings in human rights terms. However, the differentiation between the social and environmental analysis and the *human rights* part of the assessment is not always clear.

⁷¹ By way of comparison, the practice of human rights impact assessment in the corporate sphere has had the benefit of a growing body of guidance and commentary on matters such as human rights indicators, design and implementation of baseline studies, methodologies for conducting stakeholder engagement, remedial strategies and tracking performance over time. See, for example, Danish Institute for Human Rights (undated), ‘Human rights impact assessment guidance and toolbox’, <https://www.humanrights.dk/business/tools/human-rights-impact-assessment-guidance-and-toolbox> (accessed 15 Jan. 2019); Global Compact Network Netherlands, Oxfam and Shift (2016), ‘Doing business with respect for human rights’, <https://www.businessrespecthumanrights.org/> (accessed 15 Jan. 2019); and The Corporate Human Rights Benchmark (2018), *2018 Key Findings: Apparel, Agricultural Products and Extractive Companies*, <https://www.corporatebenchmark.org/sites/default/files/documents/CHRBKeyFindings2018.pdf> (accessed 21 Jan. 2019). On the other hand, it must be recognized that while the human rights impacts of business activities, projects, investments and relationships are often reasonably foreseeable (i.e. to the extent that they can be determined by human rights due diligence), practitioners working in the trade context encounter a unique set of very difficult methodological challenges arising from the scale of the challenge and the difficulties establishing causation in this context, which are discussed further below.

The fact that states are subject to human rights obligations under international law suggests the need for some kind of legal analysis – certainly, this is the case when assessments are done by states or on their behalf. The nature and scope of the legal analysis required obviously depend on what the assessment is for; a question that, despite its fundamental importance, is not yet entirely settled.

An understanding of the legal issues involved is also a necessary part of developing a robust approach to the key question of causation. If the intention is to provide policymakers with reassurance that implementation of a particular trade agreement will not lead to *human rights violations* by the states concerned, then the links between the trade agreement and possible future harm will need to be analysed against the relevant legal tests for causation. However, if the intention is to enable policymakers to identify possible strategies for mitigating the risks of *adverse impacts to people's ability to enjoy their human rights* (a different, though related, question), then the analysis will be more directed towards understanding the nature and sources of different types of risk, the mitigating options open to the relevant states, their feasibility and likely effectiveness. Either way, it is only possible to distinguish between the impacts that are *bound to* result from an agreement and the impacts that are actually the result of *policy choices by a government concerned* when one has a detailed understanding not only of what the trade agreement *obliges* the trading partners to do (and not to do), but also of the flexibilities that are built into the agreement to allow states to take mitigating action if needed.

Human rights impact assessment methodologies would benefit from greater clarity about what the assessment exercise is designed to achieve.

This section focuses on these two related issues. It argues, first of all, that human rights impact assessment methodologies would benefit from greater clarity about what the assessment exercise is designed to achieve (as well as from greater realism about what *can* be achieved). The second part of this section is concerned with the difficult issue of causation. The discussion focuses particularly on the role of specialist legal analysis, not only for explaining and interpreting a state's human rights obligations under international law, but also for the purposes of producing an analysis (likely to be more of value to negotiators than is currently the case) that clearly distinguishes between three different categories of risk: first, the human rights risks that flow from the fact of an agreement having been entered into; second, the human rights risks that arise from the agreement and that can (and should) be managed by taking advantage of whatever exceptions and flexibilities are made available pursuant to the agreement; and, third, the likely effects of the agreement on human rights, given economic and political realities.

3.1.1 A legal or policy tool?

It is not possible to judge the success or otherwise of human rights impact assessment processes without clarity as to what they are for. However, for human rights impact assessment of trade agreements this clarity of purpose has not quite arrived, despite calls from a number of quarters for greater use of these methodologies and processes. Although human rights impact assessment

in this context has been billed as a potentially valuable ‘legal compliance tool’ for states,⁷² the focus of assessments in practice has been to identify social and economic impacts which *may* have a positive or negative impact on *enjoyment*, by different people and communities, of their human rights.⁷³

Of course, the two exercises are not necessarily mutually exclusive, as there will come a point at which a diminution of levels of human rights enjoyment can raise the prospect of human rights violations. However, it is important to recognize the differences between, on the one hand, an exercise that aims to identify and quantify the risks of future human rights *violations* on the part of the prospective trading partners; and, on the other, an exercise that is primarily concerned with rising or falling levels of human rights *enjoyment*. In the former exercise, the proposed terms of a trade agreement are examined to see what effect their implementation may have on the ability of the respective trading partners to comply with their existing human rights obligations under international law. The latter approach uses ‘baseline’ economic, social and environmental data as its starting point and main frame of reference, rather than a detailed analysis of the relevant state’s human rights commitments.

It is important to understand the implications of these different approaches in terms of both their inputs (i.e. resources and analysis) and outputs (i.e. findings and policy recommendations). Obviously, both approaches rely on the ability of assessment practitioners to predict, with a reasonable degree of confidence, the likely economic, social and environmental effects of a trade agreement. In practice, though, the sheer number and range of variables involved – which include not only a spectrum of potential economic responses, but also the extent to which governments are able to respond to these effects through policy adjustments and flanking measures – mean that predictions can often only be tentative.⁷⁴

Using economic modelling techniques to determine changing levels of human rights enjoyment is challenging enough. However, using the outcomes of these techniques to try to identify and quantify the risks of future human rights *violations* arising from a trade agreement is particularly problematic. Reductions in levels of enjoyment of human rights, though undesirable from a policy perspective and potentially concerning from a legal one, do not *necessarily* amount to a breach of international human rights law by the state concerned. This is because an adverse impact on the ability of a person to enjoy a human right does not necessarily imply a human rights *violation* any more than an improvement in a human rights situation necessarily implies *compliance*.

Whether, when and how a violation of a legal standard has occurred (or might occur in future) is a legal question. Therefore, an *ex ante* human rights impact assessment that focuses on the likelihood of human rights *violations* (as opposed to one based on an assessment of whether economic and social conditions are likely to improve or deteriorate) must draw from legal analysis if it is to provide a clear and convincing narrative of which future violations are likely as a result of the trade agreement and why. The starting point of any such analysis, as noted above, is the set of human rights obligations to which the relevant state is subject, whether by virtue of its specific treaty commitments or because of customary international law. Legal analysis is then used to determine which standards are at risk

⁷² 2011 De Schutter Principles, para 2, p. 3.

⁷³ Berne Declaration, Canadian Council for International Co-operation and MISEREOR (2010), *Human Rights Impact Assessments of Trade Agreements: Reflections on Practice and Principles for Future Assessments*, Geneva: Berne Declaration, Canadian Council for International Co-operation and MISEREOR, pp. 22–40, https://www2.ohchr.org/english/issues/food/docs/report_hria-seminar_2010.pdf (accessed 15 Jan. 2019).

⁷⁴ Bürgi Bonanomi (2017), ‘Measuring Human Rights Impacts of Trade Agreements’, pp. 17–18. For further comments about the usefulness and potential limitations of economic modelling in the context of *ex ante* assessment of trade proposals, see Australian Government Productivity Commission (2010), *Bilateral and Regional Trade Agreements*, Canberra: Australian Government Productivity Commission, pp. 291–95, <https://www.pc.gov.au/inquiries/completed/trade-agreements/report/trade-agreements-report.pdf> (accessed 5 Dec. 2018).

of being breached, whether the conditions for legal responsibility are satisfied (which includes, in this context, an examination of whether the harm is actually the consequence of the trade agreement or some other cause),⁷⁵ and the point at which a breach will be deemed to have occurred.

The fact that many of the human rights likely to be affected (e.g. the right to food, the right to an adequate standard of living and the right to health) are progressive and programmatic in nature poses further challenges for assessment practitioners. This is not to imply that the content of these rights lacks substance.⁷⁶ The key point here is that the enjoyment of human rights *in fact* can be a matter of degree. Moreover, the extent to which people can enjoy their rights in practice will often depend on the availability and allocation of resources, which in turn will be influenced not only by future political choices but by a range of other contingencies, not least of which will be the future performance of domestic economies. All these factors combine to make it extremely difficult to predict exactly when, and in what circumstances, a future human rights violation associated with a trade agreement may occur.

There is a special set of cases, of which it is important to be aware, in which the content of the relevant human rights obligations is sufficiently precise, and the impacts on the enjoyment of those rights are sufficiently clear and direct, that the conclusion and implementation of a trade agreement will inevitably place the state with territorial jurisdiction (or *both* states in the case that those human rights obligations have extraterritorial scope) in violation of its (or their) human rights obligations. This would be the case where a trade agreement violated a people's right of self-determination, for instance because it amounted to an unlawful assertion of sovereignty over occupied territories by one of the states concerned,⁷⁷ or to recognition of an illegal state of affairs by its trading partner,⁷⁸ or because it imposed obligations on third parties (i.e. people under occupation) to which they could not be said to have consented;⁷⁹ or because it had the potential to permanently deprive people in disputed territories of their resources without proper compensation.⁸⁰

In most cases the economic and political contingencies will be such that these kinds of assessments are unlikely to (and cannot be expected to) provide a 'yes or no' answer to the question of whether future violations are likely.

Relatively speaking, though, the cases in which it will be possible to make confident predictions about future human rights *violations* associated with a trade agreement (even leaving aside the difficult issue of causation, discussed further in Section 3.1.2) are few. This is not to suggest that the exercise should not be done. In situations where the signing or implementation of a trade agreement is *bound* to violate a human rights obligation with a high degree of probability, that agreement should not be concluded. However, in most cases the economic and political contingencies will be such that these kinds of assessments are unlikely to (and cannot be expected to) provide a 'yes or no' answer to the question of whether future violations are likely.

⁷⁵ See further Section 3.1.2 below.

⁷⁶ Saul, B., Kinley, D. and Mowbray, J. (2014), *The International Covenant on Economic, Social and Cultural Rights: Commentary, Cases and Materials*, New York and Oxford: Oxford University Press.

⁷⁷ Case C-266/16, *Western Sahara Campaign UK*, ECLI:EU:C:2018:118 (27 February 2018), para 63.

⁷⁸ *Ibid.*, paras 143–46.

⁷⁹ Case C-386/08, *Brita GmbH v Hauptzollamt Hamburg-Hafen*, ECLI:EU:C:2010:91, Judgment of the Court (Fourth Chamber) of 25 February 2010, para 52; Case C-104/16 P, *Council v Front Polisario*, Judgment of the Court (Grand Chamber), 21 December 2016, para 106.

⁸⁰ Case C-266/16, *Western Sahara Campaign UK*, ECLI:EU:C:2018:118 (27 February 2018), para 37; Case C-266/16, *Western Sahara Campaign UK*, ECLI:EU:C:2018:1, Opinion of Advocate General Wathelet, 10 January 2018, paras 130–34.

On the other hand, an analysis that focuses on the likely effects of a trade intervention on levels of *enjoyment* of human rights has the potential to yield a list of impacts which over time ‘could possibly’, depending on a range of variables (and including the policy responses of the states concerned), lead to future human rights violations.⁸¹ This clearly has potential value, both from a legal compliance perspective *and* as a policy tool. In any case, whether human rights *violations* are the likely result or not, enjoyment of human rights should not suffer a regression as a result of the implementation of a trade agreement. Thus, establishing a baseline scenario, and seeking to model the human rights-related impacts as a result of a trade intervention, can, if done well and with appropriate follow-up, be a useful risk-management exercise. The challenges associated with developing a successful and inclusive process, and of arranging appropriate follow-up, are considered further in Section 3.3 and Chapter 4 below.

3.1.2 Developing a robust approach to the difficult question of causation

The question of ‘causation’ (i.e. establishing a causal link between a trade agreement and a given impact) tends to be dealt with only very loosely in human rights impact assessment methodologies. However, it is highly problematic in the context of human rights impact assessment of trade agreements because of the interrelatedness of different aspects of domestic economies, the interconnectedness of the global economic system, the range and unpredictability of cross-border and domestic political factors that can affect governmental decision-making (and hence the way in which a trade agreement is implemented), and the complexity of trade agreements themselves.

Trade agreements contain both obligations and exceptions. On the ‘obligations’ side, they seek to prevent parties from discriminating against imports of goods (and sometimes services) into their markets by means of quotas and customs duties. They may also aim to ensure that trading partners do not seek a market advantage by unfairly lowering the costs of production, for instance through subsidies to certain industries.

However, trade agreements also contain a number of exceptions which can potentially be invoked by states requiring the flexibility to respond to emerging human rights-related challenges. Here, exceptions relating to the protection of ‘public morals’, and to the protection of human life and human health, are of key importance.⁸² However, other exceptions are also relevant in this context, such as those that permit states (via ‘countervailing measures’) to block imports of subsidized products if such imports threaten to damage domestic industry; and those that permit restrictions of imports (via ‘safeguard measures’) in the event of an unexpected and potentially damaging import surge. Under preferential arrangements, developing countries will often have the benefit of additional flexibilities, which may, for instance, enable the subsidization of vulnerable producers or the imposition of import restrictions to protect infant industries.⁸³

A legally robust analysis of the human rights risks posed by a trade agreement must take into account both the *obligations* likely to be included in a proposed trade agreement and the *exceptions* these obligations are likely to be subject to.

⁸¹ Ibid.

⁸² See, respectively, GATT Art XX(a), GATS Art XIV(a), GATT Art XX(b) and GATS Art XIV(b). For a discussion of flexibilities in trade agreements and the regulatory scope they provide to state parties to address human rights-related concerns, see further Bartels (2009), ‘Trade and Human Rights’, pp. 582–85.

⁸³ Bartels (2009), ‘Trade and Human Rights’, p. 582; GATT Art XVIII; and WTO Agreement on Agriculture, Art 6(2).

On the other hand, a failure to appreciate the meaning and importance of flexibilities in trade agreements, and then to analyse them properly, can distort the analysis of causal links between the trade agreements themselves and the human rights impacts that flow from their implementation. Without a proper understanding of these flexibilities, certain effects can be presented as *required by* an agreement whereas in actual fact they may depend on policy choices by the governments concerned.

There are cases, of course, in which theoretical policy choices may not be available in reality. Governments, particularly in developing countries, may be constrained by political factors, power imbalances between trading partners, or perhaps by requirements imposed by international financial institutions. In these circumstances, it is important that human rights impact assessments do not blur the distinction between what a trade agreement *requires* the parties to do and the *likely effects* of the agreement, given economic and political realities.

A robust and credible human rights impact assessment will seek to engage – properly and in an informed way – with the various options available to states when it comes to implementing a trade agreement, including the different ways in which flexibilities under that agreement may be used in practice. Examples can be found where practitioners have sought to do this. For example, Walker’s study of the effects of the intellectual property provisions of CAFTA-DR on the right to health in Costa Rica concludes that, at most, the relevant intellectual property provisions in CAFTA-DR might raise the price of pharmaceuticals in Costa Rica, but that even in this eventuality domestic policy measures could be adopted to mitigate the worst effects.⁸⁴

However, there is also a need for realism in many cases about the extent to which causal links can in fact be drawn. This is recognized by the authors of a study of the effects of the International Convention on the Protection of New Varieties of Plants (UPOV) on the right to food in Africa, who commented that:

The clear identification of cause-effect relationships appeared to be particularly challenging in the present assessment, given the long and complex causal chains between UPOV-like PVP laws and realization of the right to food. Consequently, ambitions in terms of generating strong evidence along the complete causal chain had to be lowered.⁸⁵

This is not to suggest that trying to predict the human rights impacts of trade agreements is a hopeless task. It is possible to foresee, for instance, that the obligations in a trade agreement might ‘create [...] obstacles to the implementation of the State’s policy measures and programmes’ due to their effects on a country’s budget⁸⁶ because obligations to reduce customs duties will have a measurable fiscal impact that is unlikely to be offset by internal taxation.⁸⁷ And it may be possible to foresee, with a reasonable amount of confidence, that new patent protections are likely to raise prices of medicines, or that foreign competition for markets may lead to factory closures and job losses, or that the removal of subsidies will cause sudden rises in consumer costs, or that the opening up of more lucrative foreign markets may result in shortages of low-cost products at home.

⁸⁴ Walker (2009), *The Future of Human Rights Impact Assessments of Trade Agreements*, p. 176.

⁸⁵ Braunschweig, T., Meienberg, F., Pionetti, C. and Shashikant, S. (2014), *Owning Seeds. Accessing Food. A Human Rights Impact Assessment of UPOV 1991 based on case studies in Kenya, Peru and the Philippines*, Zurich: The Berne Declaration, p. 44, https://www.publiceye.ch/fileadmin/doc/Saatgut/2014_Public_Eye_Owning_Seeds_-_Accessing_Food_Report.pdf (accessed 12 Dec. 2018).

⁸⁶ 2011 De Schutter Principles, para 5.2, p. 11.

⁸⁷ Baunsgaard, T. and Keen, M. (2010), ‘Tax Revenue and (or?) Trade Liberalization’, *Journal of Public Economics*, 94(9–10): pp. 563–77, doi: <https://doi.org/10.1016/j.jpubeco.2009.11.007> (accessed 15 Jan. 2019).

The discussion above does, however, highlight the importance of multidisciplinary assessment teams that combine legal as well as economic, sociological, scientific and public policy expertise. In addition to the personnel required for economic and social modelling, assessment teams should prioritize access to experts in trade law to ensure that the analysis properly reflects, as far as is possible at the time of the assessment,⁸⁸ both the obligations set out in the trade agreement in question and the flexibilities likely to be provided. Where possible, the assessment may be further enhanced by drawing from further fields of expertise, such as public policy studies or international relations, for an accurate picture of the political and economic constraints that will govern how trade agreements are implemented in practice.

3.2 Political sensitivities

Human rights impact assessments of trade agreements are not only concerned with ‘within-territory’ human rights impacts. Depending on the aim of the exercise, some may (and, in the case of EU SIA processes, frequently do) seek to identify and assess the human rights impacts of a trade agreement on the proposed trading partner (i.e. the other state party to the proposed agreement). In some cases, and depending on an assessment of where the principal human rights risks lie (as with SIAs commissioned by the European Commission with respect to developing states), this may be the primary focus and objective of the assessment process.

It should not be implied from this practice, however, that there is any general acceptance by states of legal obligations with respect to human rights abuses, taking place in other states, that might be connected (in one way or another) to the trading arrangements between them. The EU is a special case, having obligations under its own constitutional arrangements to respect human rights in other countries.⁸⁹ Its inclusion of human rights impact assessments in its SIA processes, and the extension of SIA processes to examine human rights impacts in partner countries (in many cases in a great deal more detail than the assessments of possible impacts taking place within the EU itself), should be seen in this light.

The EU is a special case, having obligations under its own constitutional arrangements to respect human rights in other countries.

Beyond this special situation, the legal position is far less clear. While it is accepted that international human rights obligations are not *strictly* territorial,⁹⁰ the extent to which states may have international law obligations with respect to the prevention of human rights abuses (for instance, by business actors) within the territorial boundaries of other states is presently the subject of vigorous academic debate.⁹¹

⁸⁸ Issues relating to the timing of human rights impact assessments are discussed further at Section 3.3.7 below.

⁸⁹ See note 21 above and accompanying text. See Case C-263/14, *Parliament v Council*, ECLI:EU:C:2016:435, para 47; and Case C-104/16 *Council v Front Polisario*, AG Opinion (13 September 2016), ECLI:EU:C:2016:677, paras 254–69.

⁹⁰ There are cases, for example, where courts have held that extraterritorial human rights obligations do exist because of special circumstances that meant that the relevant state had ‘effective control’ over territory or individuals in other states. See International Court of Justice in its *Advisory Opinion on the Legal Consequences of the Construction of a Wall in the Occupied Palestinian Territory* [2004] ICJ Rep. 136.

⁹¹ See Augenstein, D. and Kinley, D. (2013), ‘When human rights ‘responsibilities’ become ‘duties’: the extraterritorial obligations of states that bind corporations’ in Deva, S. and Bilchitz, D. (eds) (2013), *The Human Rights Obligations of Business: Beyond the Corporate Responsibility To Respect?*, Cambridge: Cambridge University Press. But for a contrary view, see Methven O’Brien, C. (2018), ‘The Home State Duty to Regulate the Human Rights Impacts of TNCs Abroad: A Rebuttal’, *Business and Human Rights Journal*, 3(1), pp. 47–73, doi: <https://doi.org/10.1017/bhj.2017.29> (accessed 15 Jan. 2019). See also Ford, J. (2015), *Business and Human Rights: Bridging the Governance Gap*, Research Paper, London: Royal Institute of International Affairs, pp. 17–19, https://www.chathamhouse.org/sites/files/chathamhouse/field/field_document/20150922BusinessHumanRightsFordV2.pdf (accessed 1 May 2018).

The issue of whether such obligations exist is an important one in the context of human rights impact assessment of trade agreements because, if no such obligations exist (and each state retains primary responsibility for protecting, respecting and fulfilling human rights within its own territorial boundaries), then the state carrying out the assessment is effectively making judgments as to another state's levels of human rights compliance rather than its own. Whatever the motivations for conducting extraterritorial assessments (i.e. whether they are carried out as part of a legal compliance exercise or for other reasons), the potential political sensitivities should not be underestimated. Not only are assessment outputs likely to contain critiques of the human rights performance of prospective trading partners, the process itself will often need careful political handling if it is to avoid fuelling concerns, within the trading partner in particular, of neo-colonialism or 'sophisticated unilateralism'.⁹²

3.3 Process-related challenges

For many proponents of human rights impact assessment of trade agreements, the value of the process is not limited to what is achievable in terms of direct policy impact through shaping the trade negotiation. Human rights impact assessment is also seen as a way of providing a platform for stakeholder participation and consultation, and as an evidential basis on which advocates and communities can engage in debates about trade policy both generally and in relation to specific trading agreements.⁹³ These considerations highlight the importance of proper *process*. However, in this regard, as with the substantive methodologies, there are a number of challenges.

3.3.1 The vast scale of the information-gathering exercise

The enjoyment of most (if not all) economic, social and cultural rights can be linked to the performance of domestic economies in one way or another, meaning that the range of human rights that *could* be affected by a trading agreement is wide and diverse. The upshot of this is that the scale of the information-gathering task is potentially vast. Gathering evidence for the purposes of an assessment (both quantitative and qualitative) can take many months of intensive research,⁹⁴ requiring a considerable investment of time and resources and substantial costs.

The logistical challenges are compounded for planned assessments that seek to take account of *extraterritorial* as well as within-territory impacts. Some degree of prioritization is therefore necessary if the task is to be completed at all. For this reason, human rights impact assessment methodologies will usually prescribe a 'scoping and screening' exercise at an early stage, to enable identification of the most salient human rights risks, which will then form the focus of the subsequent assessment. The selection of issues at this point is key, as it can be difficult in practice for stakeholders to raise new issues at a later stage.

The aim of the scoping and screening exercise is to gain a basic understanding of the human rights context of the countries involved, in order to prioritize the subsequent research and to identify the stakeholders with whom it will be necessary to engage. This is typically a desk-based exercise, in which issues such as human rights commitments, human rights compliance (referring, for example, to any relevant

⁹² That is, where 'more powerful states negotiate provisions that reflect their own unilateral agenda, embedding them within a formally reciprocal structure'. See Harrison et al. (2018), 'Labour Standards Provisions in EU Free Trade Agreements', p. 12.

⁹³ Bakker et al. (2009), 'Human Rights Impact Assessment in Practice', p. 442.

⁹⁴ Harrison (2011), 'Human Rights Measurement: Reflections on the Current Practice and Future Potential of Human Rights Impact Assessment', p. 175.

treaty body or ILO comments on compliance under different international instruments), and legal and constitutional matters (such as independence of the judiciary) will be discussed and noted, perhaps by reference to a pre-agreed template, which may make use of questionnaires, indicators⁹⁵ or both.

3.3.2 Ensuring meaningful and effective stakeholder consultation

Effective and meaningful stakeholder engagement is a crucial element of a ‘rights-based approach’ to human rights impact assessment, i.e. in which human rights principles are used to inform and guide the design of the process as well as the analysis that takes place under it.⁹⁶ It is also vital for ensuring that the process is thorough and credible, for gathering evidence on possible human rights impacts on different groups, and for building public confidence and trust in the policy development and trade negotiation process.

In practice, though, the amount that can be done by way of stakeholder outreach and consultation is inevitably limited by time, budget and resources. As with information-gathering in general, the challenges are compounded significantly where, as a result of the scoping exercise, a decision has been taken to focus on *extraterritorial* risks in particular. SIA processes conducted by consultants engaged by the European Commission have been criticized for the lack of time and resources devoted to engagement with stakeholders in partner countries, which is typically limited to a small number of workshops in capital cities, making it difficult (if not impossible) for stakeholders from more remote areas to contribute meaningfully.⁹⁷ Online ‘calls for information’, publicized through social media such as Facebook and Twitter, can help to expand the reach of information-gathering activities at a reasonably low cost.⁹⁸ This is only ever a partial solution – not all affected stakeholders will necessarily have access to online facilities, for example – but more proactive outreach may well be constrained by budgets and available personnel.

⁹⁵ See Götzmann, N., Bansal, T., Wrzoncki, E., Poulsen-Hansen, C., Tedaldi, J. and Høvsgaard, R. (2016), *Phase 1: Planning and Scoping: Human Rights Impact Assessment Guidance and Toolbox*, Copenhagen: Danish Institute for Human Rights, https://www.humanrights.dk/sites/humanrights.dk/files/media/dokumenter/business/hria_toolbox/phase_1/phase_1_planning_and_scoping_final_jan2016.pdf (accessed 15 Jan. 2019). Note, however, that some concerns have been raised about the growing use of indicators to ‘measure’ levels of human rights compliance. While these quantitative methods are intended to promote objectivity and analytical rigour, their use can lead to misleading conclusions about the extent to which human rights are *actually* being realized within the territory of a state. Moreover, the choices of indicators (which may be driven by bureaucratic considerations, such as ease of data collection and measurement) can obscure or distort conversations at national level about the most effective prioritization of effort and optimal allocation of resources. See further Rosga, A. and Satterthwaite, M. (2009), ‘The Trust in Indicators: Measuring Human Rights’, *Berkeley Journal of International Law*, 27(2): pp. 253–315, doi: <https://doi.org/10.15779/Z38G07R> (accessed 15 Jan. 2019).

⁹⁶ Hunt and MacNaughton (2006), *Impact Assessments, Poverty and Human Rights*, pp. 32–34. See also Ruggie, J. (2007), *Report of the Special Representative of the Secretary-General on the issue of human rights and transnational corporations and other business enterprises – Human rights impact assessments – resolving key methodological questions*, UN Doc. A/HRC/4/74, Geneva: Human Rights Council, <https://www.business-humanrights.org/sites/default/files/reports-and-materials/Ruggie-report-human-rights-impact-assessments-5-Feb-2007.pdf> (accessed 15 Jan. 2019).

⁹⁷ Ergon Associates (2011), *Trade and Labour: Making effective use of trade sustainability impact assessments and monitoring mechanisms*, Final Report to DG Employment, Social Affairs and Inclusion European Commission, September 2011, <https://ergonassociates.net/wp-content/uploads/2012/02/Final-report-from-a-study1.pdf?x74739>; and Gammage, C. (2010), ‘A Sustainability Impact Assessment of the Economic Partnership Agreements: Challenging the Participatory Process’, 3 *Law and Development Review*, 3(1): pp. 107–34, doi: <https://doi.org/10.2202/1943-3867.1071> (accessed 15 Jan. 2019).

⁹⁸ For example, the use of Facebook and Twitter to promote a grassroots consultation in the SIA processes developed for the proposed EU–China Investment Agreement; see Ecorys Nederland, Oxford Intelligence, TNO and Reichwein China Consult (2017), *Sustainability Impact Assessment (SIA) in support of an Investment Agreement between the European Union and the People’s Republic of China Interim Report*, Brussels: European Commission, pp. 173–85, http://trade.ec.europa.eu/doclib/docs/2017/june/tradoc_155638.pdf (accessed 15 Jan. 2019). This is an area where some cross-fertilization between state practice and corporate practice could potentially be extremely beneficial, given the considerable effort and resources presently being devoted to developing techniques for enhancing stakeholder engagement in the context of corporate human rights due diligence activities. See Abrahams, D. and Wyss, Y. (2010), *Guide to Human Rights Impact Assessment and Management*, London: International Business Leaders Forum and International Finance Corporation, pp. 38–42.

3.3.3 Degree of independence of assessment practitioners

It seems widely accepted that human rights impact assessment should be conducted by an independent party, in order to ensure that the process is not merely political cover for decisions already made.⁹⁹ This is not to imply that the assessor must necessarily be fully independent of the state. The 2011 De Schutter Principles envisage that the assessor could be a national human rights institution, a parliamentary committee or a state-appointed expert.¹⁰⁰ The important point is that the assessor should have some degree of independence from the negotiators of the trade agreement.¹⁰¹ While Chapter 2 refers to a number of *ex ante* human rights impact assessments that have been initiated or conducted by civil society or UN actors, the remainder of this chapter focuses on assessments conducted at the behest of governments.

EU practice is to put SIAs of trade agreements into the hands of external consultants chosen by competitive tender.¹⁰² European Commission policy statements on SIAs emphasize the importance of the ‘independence’ of these consultants for a robust and objective assessment process.¹⁰³ However, a number of NGOs and commentators have questioned the level of independence enjoyed by these consultants *in fact*, given the amount of involvement and input by EU officials at the scoping and review stages of the process. Clearly, there is a difficult balance to be struck between considerations of quality control and policy coherence, on the one hand, and the need for a robust and objective assessment process on the other (see Table 1).¹⁰⁴

While allowance needs to be made for the fact that SIAs of trade agreements are still a fairly recent innovation, it is desirable that a strong professional community should emerge, with an identifiable set of professional standards and mechanisms for sharing best practice.¹⁰⁵ At present, and perhaps unsurprisingly given the specialized, complex and challenging nature of the work, the pool of external consultants available and able to provide these services is still quite small. From the perspective of the credibility, effectiveness and cost-effectiveness of human rights impact assessment processes, this is less than ideal. Laws of supply and demand suggest that lack of competition among service providers is likely to push up professional fees and costs. Moreover, the degree of familiarity that can result from this situation can make it difficult to maintain a necessary level of independence and objectivity over time. On the other hand, it could also be argued that the relatively limited number of alternatives available to the Commission reduces the risk of commercial ‘capture’.

In the UK, it has been suggested by NGOs (in the context of discussions about post-Brexit trade policy) not only that human rights impact assessment of future trade agreements should be a statutory obligation, but that a specialist independent authority should be established for the purpose of either conducting or commissioning and overseeing such assessments.¹⁰⁶ Such legislative underpinnings are needed, it is argued, to ensure that assessment processes are robust, predictable and adequately

⁹⁹ Harrison (2011), ‘Human Rights Measurement: Reflections on the Current Practice and Future Potential of Human Rights Impact Assessment’, p. 171; and Bürgi Bonanomi (2017), ‘Measuring Human Rights Impacts of Trade Agreements’, p. 496.

¹⁰⁰ 2011 De Schutter Principles.

¹⁰¹ 2011 De Schutter Principles, para 4.3, p. 10.

¹⁰² European Commission (2016), *Handbook for trade sustainability impact assessment* (2nd ed.), pp. 5, 6 and 9.

¹⁰³ ‘SIAs are carried out by external consultants in a neutral and unbiased manner, under strict rules on the absence of conflicts of interest.’ SIA Key Principles, *Ibid.*, p. 16.

¹⁰⁴ World Organisation Against Torture (2017), ‘Joint statement by European NGOs: No EU trade agreement with Mexico without ex-ante sustainability impact assessment’, <http://www.omct.org/monitoring-protection-mechanisms/urgent-interventions/european-union/2017/12/d24642/> (accessed 16 Jul. 2018); and Walker (2018), ‘Human Rights in the Trade and Sustainability Impact Assessment of the EU–Tunisia Free Trade Agreement’.

¹⁰⁵ Harrison (2011), ‘Human Rights Measurement: Reflections on the Current Practice and Future Potential of Human Rights Impact Assessment’, pp. 181–83.

¹⁰⁶ Amnesty International UK (2018), *The Trade Bill Briefing*.

budgeted for.¹⁰⁷ Although there seems little chance of these specific proposals being adopted in the near future, the wider point – about the need for specialist human rights input into decision-making about whether, when and how to undertake human rights impact assessment in this context – is one that deserves attention.

As noted above, some have suggested that national human rights institutions are an obvious source of this specialist expertise and, as such, deserve to be given a greater role in the process. However, there is a need for realism about the extent to which national human rights institutions can act as assessors themselves.¹⁰⁸ Few would have a mandate that would extend to carrying out this kind of work routinely (i.e. beyond conducting targeted investigations and preparing ad hoc reports). Funding such work may be problematic given that performing services in exchange for financial remuneration may be explicitly prohibited. The scale of the information-gathering and analytical challenges, and the range of specialized skills required (e.g. in economic modelling, sociological analysis and law), means that few national human rights institutions have the resources to act as lead assessors. However, it is worth exploring opportunities for national human rights institutions to play an ancillary role in human rights impact assessments carried out by others, for instance by facilitating stakeholder dialogue and as convenors of roundtables and workshops.

3.3.4 Ensuring accountability to rights-holders

A rights-based approach to human rights impact assessment also demands that there be accountability to rights-holders for the way that assessments are conducted, and their findings applied. One way of achieving this is to ensure ‘that stakeholders are advised of their rights and obligations [...] and of mechanisms of accountability that are available to them’.¹⁰⁹ Furthermore, ‘[t]hese mechanisms must be accessible, transparent and effective. People must be able to hold duty-bearers accountable for the process of the impact assessment should it fail to respect their human rights.’¹¹⁰

Where a government is directly responsible for the conduct of a human rights impact assessment of a trade agreement, then it is possible that an assessment process may be subject to judicial review. Even so, judicial review comes with a number of practical disadvantages. Aside from the expense and delays that are often associated with court processes, restrictive rules on standing (e.g. requiring applicants to demonstrate a personal interest in the matter) may prove a barrier to legal challenges in some cases (depending, of course, on the specific legal requirements in the relevant jurisdiction and the way these are interpreted by the courts). In many developing countries, there are also serious obstacles generally to access to justice. Moreover, for those seeking to bring about improvements in

¹⁰⁷ The level of discretion enjoyed by the European Commission with respect to the conduct of human rights impact assessment of trade agreements was the subject of a dispute brought to the European Ombudsman in 2014, in which the International Federation for Human Rights and the Vietnam Committee on Human Rights complained of the failure of the Commission to carry out a prior human rights impact assessment of the EU–Vietnam FTA. The Commission had argued that, given that it had previously conducted an SIA concerning the Association of Southeast Asian Nations (ASEAN) countries, which paid special attention to working conditions and associated rights, and which covered Vietnam, there was no need for a separate human rights impact assessment concerning Vietnam. The Ombudsman rejected this argument and held that ‘[the Commission’s] refusal to carry out a prior human rights impact assessment for the EU Free Trade Agreement with Vietnam when negotiations on that agreement were still ongoing ... constitutes maladministration’. See European Ombudsman (2014), ‘Decision in case 1409/2014/MHZ on the European Commission’s failure to carry out a prior human rights impact assessment of the EU-Vietnam free trade agreement’.

¹⁰⁸ 2011 De Schutter Principles, para 4, p. 9.

¹⁰⁹ Hunt and MacNaughton (2006), *Impact Assessments, Poverty and Human Rights*, pp. 32–34.

¹¹⁰ *Ibid.*

human rights impact assessment methodologies and processes, the remedy is likely to be confined to a declaration of whether the action was legal or not, with limited scope for the development of guidance as to how problems might be avoided in future.¹¹¹

Table 1: Who should take charge of the human rights impact assessment? Potential advantages and disadvantages of different approaches

Approach	Advantages	Disadvantages
Government assessment	<ul style="list-style-type: none"> • Better access by stakeholders to decision-makers • Quicker and easier management of political sensitivities that may arise (e.g. with respect to extraterritorial human rights impacts) • Potential for greater and freer flow of information between stakeholders and negotiators • Quicker and easier commissioning of assessment • Better link-up between different phases of assessment (i.e. high-level, detailed and monitoring) 	<ul style="list-style-type: none"> • Lack of independence • Less credibility as an objective assessment • For extraterritorial studies, may be tensions between negotiation functions (partial and confidential) and human rights impact assessment objectives (open, objective, impartial) • Less access to specialized expertise • Greater susceptibility to influence by special interest groups • Resource challenges • Less transparency about how assessments are used
Independent government agency (i.e. responsible for commissioning and oversight)	<ul style="list-style-type: none"> • Greater independence • Credibility • Less susceptibility to influence by special interest groups • Better access to human rights expertise • For extraterritorial studies, more scope and opportunities to manage tensions between negotiation functions (partial and confidential) and human rights impact assessment objectives (open, objective, impartial) 	<ul style="list-style-type: none"> • Less free flow of information between stakeholders and negotiators • Slower, more complex commissioning of assessment • Potentially greater challenges with respect to management of political sensitivities that may arise (e.g. with respect to extraterritorial human rights impacts) • Reduced access by stakeholders to decision-makers • Resource challenges
Independent consultants	<ul style="list-style-type: none"> • Greater independence • Credibility • Capacity to innovate and learn from peers • Access to specialist expertise in key areas such as economic modelling, sociological analysis, scientific data and analysis, and legal expertise • For extraterritorial studies, more scope and opportunities to manage tensions between negotiation functions (partial and confidential) and human rights impact assessment objectives (open, objective, impartial) 	<ul style="list-style-type: none"> • Less free flow of information between stakeholders and negotiators • Slower, more complex commissioning of assessment • Potential challenges with respect to management of political sensitivities that may arise (e.g. with respect to extraterritorial human rights impacts) • Reduced access by stakeholders to decision-makers • Cost
National human rights institution	<ul style="list-style-type: none"> • Access to human rights expertise 	<ul style="list-style-type: none"> • Potential constraint of activities, depending on relevant statutory mandate • Resource challenges • Possible lack of access to specialist expertise in key areas such as economic modelling, sociological analysis, scientific data and analysis

¹¹¹ Harrison (2011), 'Human Rights Measurement: Reflections on the Current Practice and Future Potential of Human Rights Impact Assessment', p. 179.

For this reason, an ombudsman system might be a viable alternative. In the EU, the European Ombudsman is potentially on hand to help resolve problems in the event that a stakeholder is unhappy with the way that processes have been conducted, findings arrived at or comments reflected.¹¹² The European Ombudsman has proved instrumental in gradually improving the European Commission's transparency in trade negotiations, following numerous official requests for access to documents by campaigning groups in respect of the SIA processes for the Transatlantic Trade and Investment Partnership (TTIP).¹¹³ At a domestic level, parliamentary ombudsmen (or their equivalent) may offer another potential route towards the resolution of disputes or complaints arising from SIA processes. However, the remedial possibilities on offer in this context may be limited, potentially amounting to no more than a declaration that proper procedure had not been followed in a given case.

The European Ombudsman has proved instrumental in gradually improving the European Commission's transparency in trade negotiations, following numerous official requests for access to documents by campaigning groups in respect of the SIA processes for the Transatlantic Trade and Investment Partnership (TTIP).

There are also likely to be limits to the extent to which parliamentary ombudsmen would be prepared to second-guess executive action in this context. The negotiation and conclusion of trade agreements is traditionally an area in which there is a high degree of executive discretion. It is important, too, not to overlook the political context in which trade negotiations may be taking place. Parliamentary ombudsmen would be acutely aware of the potential political ramifications (not to mention the commercial and investment ramifications) of a finding that a human rights impact assessment had not fully taken account of certain human rights issues in a prospective partner state, for example.

In some countries, it might also be possible to review the substance of a human rights impact assessment. The 2011 De Schutter Principles express the view that 'courts may ... have a role to play, for instance in hearing claims, based on the conclusions of the human rights impact assessment, as to whether the Executive may sign the agreement or should obtain further improvements, or as to whether it should denounce it'.¹¹⁴ In practice, this will depend on how far the courts in any given jurisdiction are permitted to apply human rights considerations in constraint of executive action. In the EU, at least, this is a possibility, as was seen in the successful challenge before the Court of Justice of the European Union (CJEU) to the EU–Morocco trade agreement.¹¹⁵ On the other hand, for the reasons explained above, such approaches are likely to be successful only in cases where the content of the relevant human rights obligations is very clear and where a direct causal link between the trade agreement and human rights violations can be established.

¹¹² See European Ombudsman (2014), 'Decision in case 1409/2014/MHZ on the European Commission's failure to carry out a prior human rights impact assessment of the EU-Vietnam free trade agreement' for an example of a case where a decision *not* to conduct a human rights impact assessment was referred to the European Ombudsman.

¹¹³ Delimatsis, P. (2017), 'TTIP, CETA, and TiSA Behind Closed Doors: Transparency in EU Trade Policy' in Griller, S., Obwexer, W. and Vranes, E. (eds) (2017), *Mega-Regional Trade Agreements: CETA, TTIP, and TiSA: New Orientations for EU External Economic Relations*, New York and Oxford: Oxford University Press, pp. 232–40.

¹¹⁴ 2011 De Schutter Principles, para 4.3, p. 10.

¹¹⁵ Case C-266/16, *Western Sahara Campaign UK*, para 63.

Box 5: Examples of accountability mechanisms that may be relevant to human rights impact assessment of trade agreements

- Specialized/bespoke complaints mechanism (e.g. for complaints about lack of access to processes)
- Parliamentary ombudsman services
- Judicial review (under administrative law)
- Other form of judicial challenge (e.g. CJEU, see above)
- Freedom-of-information legislation (for access to information about human rights impact assessment processes and the way that outcomes are used and applied, subject to the usual exceptions on public interest, national security and commercial confidentiality grounds)

3.3.5 Finding an appropriate balance between transparency and an effective negotiating strategy

A further set of process-related issues – linked, of course, to the issues of stakeholder consultation and accountability, discussed above – concerns the extent to which information about the trade negotiation process, the proposals under consideration and the outcomes of assessment processes should be subject to public and parliamentary scrutiny, and at what point in time.

Under EU SIA procedures, the reports submitted at the conclusion of each of the three main phases of the assessment process – the inception phase,¹¹⁶ the interim phase and the final phase¹¹⁷ – are all made publicly available, along with the European Commission's comments on these reports.¹¹⁸ In addition, stakeholder meetings are convened to provide further opportunities for public discussion of the findings, although there have been complaints from some quarters about a lack of even-handedness on the part of the Commission when it comes to providing opportunities for 'closed group' discussions of trade proposals (suggesting, it is argued, a greater concern for business than for other interests).¹¹⁹

The fact that the *ex ante* assessment process takes place against the background of (and often in parallel with) a negotiation raises a number of difficult dilemmas for states about how much information to make public about assessment findings, and at what stage. It is inevitable that there will be some unease on the part of the states concerned about making public information that may reveal negotiating strategies, or that may give rise to friction between the negotiating parties.

The practical need for strategy and agility in the negotiating process is what underlies the level of executive discretion traditionally accorded to trade negotiations, and why attempts to introduce greater levels of public and parliamentary scrutiny are likely to be resisted. On the other hand, there is a legitimate argument that, if decisions are being made in this setting that have implications for the enjoyment of human rights (both at home and abroad), it is reasonable and appropriate that people should be able to express their views, through stakeholder engagement processes as discussed above, and via their elected representatives through parliamentary processes.

¹¹⁶ European Commission (2016), *Handbook for trade sustainability impact assessment* (2nd ed.), p 11.

¹¹⁷ *Ibid.*, pp. 11–13.

¹¹⁸ These are usually provided by way of 'position papers'.

¹¹⁹ Walker (2018), 'Human Rights in the Trade and Sustainability Impact Assessment of the EU–Tunisia Free Trade Agreement'.

3.3.6 Integration of human rights impact assessment with other processes

A human rights impact assessment can be structured as a standalone process or, alternatively, conducted as part of an integrated process looking at a wider set of issues (e.g. social, economic and environmental issues). As explained above, the European Commission prefers the second approach, on the basis that '[i]ntegrated impact assessments ... provide the most effective way of making a balanced assessment of the potential impacts of any proposed legislative or non-legislative initiative'.¹²⁰ This approach has much to be said for it in terms of efficiency and coherency of analytical processes. Human rights abuses invariably have a social and economic context. Harms that have their roots in social and economic disadvantage can readily transform into human rights risks if institutional or law enforcement responses are poor, or if access to remedy is not made available. Adverse environmental impacts can have implications for the enjoyment of a range of human rights, including rights to health, rights to water, rights to an adequate standard of living and, in serious cases involving the displacement of people, rights to self-determination. As discussed above, assessing the likelihood and likely severity of a future adverse human rights impact often relies on economic and social modelling, as well as on the scientific knowledge required for environmental impact assessments.

On the other hand, integrated approaches can obscure the fact that human rights impact assessments take place – or at least *should* take place – against the background of the specific set of human rights obligations to which each state concerned is legally subject, by virtue of the treaties it has signed, or because of the operation of customary international law. As James Harrison observes, human rights impact assessments 'must be fundamentally rooted in human rights norms and standards if they are really to be considered human rights impact assessments'.¹²¹

3.3.7 Timing

A final process-related question concerns the timing of an *ex ante* human rights impact assessment of a proposed FTA. Here there is a real dilemma: if the assessment takes place *too early* in a negotiation, before the parties' positions are sufficiently known or developed, the parameters of the investigations may be too vague, or the options too diverse, for the process to be meaningful. On the other hand, if the assessment is carried out *too late*, it may not be possible for negotiators to respond effectively to any issues that emerge.¹²²

Identifying the 'goldilocks' moment at which to carry out a human rights impact assessment of a trade agreement can be difficult. The European Commission considers this moment to be 'soon after the Council of the European Union has formally authorised the Commission to enter into trade negotiations; in general not later than 6 months after the start of negotiations, to ensure that the analysis can usefully feed into the negotiating process at a useful stage'.¹²³ Nevertheless, a number of NGOs have complained about the lateness of delivery of draft final reports (and recommendations) of EU SIA processes. The complaint is that these have arrived too late in the negotiating cycle to have any impact on decision-making or on the content of the trade agreement in question,¹²⁴ raising questions as to whether the process is a meaningful one at all.¹²⁵

¹²⁰ European Commission, Directorate-General for Trade (2015), *Guidelines on the Analysis of Human Rights Impacts in Impact Assessments for Trade-Related Policy Initiatives*.

¹²¹ Harrison (2011), 'Human Rights Measurement: Reflections on the Current Practice and Future Potential of Human Rights Impact Assessment', p. 177.

¹²² 2011 De Schutter Principles, para 3, p. 8.

¹²³ European Commission (2016), *Handbook for trade sustainability impact assessment* (2nd ed.), p. 11.

¹²⁴ The SIA process developed for the EU-US Transatlantic Trade and Investment Partnership (TTIP) was criticized for failing to deliver a draft final report until the 14th round of negotiations – too late, according to civil society organizations, to be taken into account in the negotiations in any meaningful way. See Delimatsis (2017), 'TTIP, CETA, and TiSA Behind Closed Doors'.

¹²⁵ This may be a factor in the 'dwindling stakeholder interest' in SIA processes noted in Ergon Associates (2011), *Trade and Labour: Making effective use of trade sustainability impact assessments and monitoring mechanisms*, p. 6.

On the other hand, the publication of draft recommendations arising from an SIA is the final act of a multi-stage consultation process. As noted above, EU SIA guidelines envisage and encourage stakeholder consultation on inception and interim reports, as well as on the final outcomes of the process.¹²⁶ It is also open to SIA consultants to pass information on specific human rights-related risks to the Commission at other stages in the process if a specific human rights-related issue comes to light which may require an urgent response or discussion, or political handling.

Some commentators and civil society organizations have argued (including in the context of discussions on UK trade policy post-Brexit) that there should be some form of human rights impact assessment *before* the handing down of a negotiating mandate, not after.¹²⁷ Within the EU, some pre-negotiation human rights impact assessment already takes place under the European Commission's 'Better Regulation Agenda',¹²⁸ which requires an assessment to be carried out by the Commission (DG Trade) prior to the formal request to the Council of Ministers for a negotiating mandate. The final outcomes of these preparatory assessment processes (which cover sectoral competitiveness and social, consumer, governance and administrative impacts, as well human rights impacts) are now made publicly available.¹²⁹ Human rights issues typically receive a dedicated chapter, which discusses the background legal context of the countries concerned relevant to human rights, as well as the general human rights situation within the relevant jurisdictions, and may draw from the findings of external reports in respect of specific challenges. A key difference between the pre-negotiation impact assessment and the subsequent SIA process is that the initial impact assessment is a Commission-led and '-owned' process, whereas the SIA process is designed as, and intended to proceed as, an independent assessment.

States face dilemmas in terms of how thoroughly to investigate potential human rights-related risks at this point. On the one hand, it may be too early in the process to be sure that a negotiating mandate, let alone a trade agreement, will materialize, meaning that the time, effort and funding invested in extensive information-gathering and consultation exercises could be wasted. Moreover, it may be too early for an open discussion of the type of terms likely to be proposed (and, indeed, from a strategic perspective there may be some unease about this on the part of governments and their negotiators).

On the other hand, effective stakeholder engagement is an essential aspect of a 'rights-based' process. A truncated process limits the time and opportunity for stakeholder engagement, meaning that stakeholder views on human rights-related risks that may be connected with the trade agreement will not inform pre-project planning and preparation to any degree. Elisabeth Bürgi Bonanomi argues that the *pre-mandate* and *post-mandate* assessments should be merged, on the basis that '[h]uman rights considerations should already play a role in the decision on whether or not to initiate negotiations, and on how to shape the draft which will build the basis for negotiation'.¹³⁰

¹²⁶ See Section 3.3.2. See further European Commission (2016), *Handbook for trade sustainability impact assessment* (2nd ed.).

¹²⁷ Amnesty International UK (2018), *The Trade Bill Briefing*. See also Bürgi Bonanomi (2017), 'Measuring Human Rights Impacts of Trade Agreements', pp. 494–95.

¹²⁸ European Commission (undated), 'Better regulation: why and how', https://ec.europa.eu/info/law/law-making-process/planning-and-proposing-law/better-regulation-why-and-how_en (accessed 23 Jan. 2018).

¹²⁹ *Ibid.* Completed assessments are made available on a dedicated DG Trade website.

¹³⁰ Bürgi Bonanomi (2017), 'Measuring Human Rights Impacts of Trade Agreements', p. 495.

4. *Ex Ante* Human Rights Impact Assessment as a Foundation for Future Monitoring and Risk Management

Although human rights impact assessment of trade agreements is presented as a decision-making tool – potentially leading to a decision to abandon, or seek amendments to, a trade agreement, for example¹³¹ – the circumstances in which it can be confidently predicted that human rights violations will flow *directly* from the implementation of a trade agreement are actually very few.¹³² At the other end of the spectrum, because of the ‘screening’ processes used in human rights impact assessment methodologies to identify the areas most in need of in-depth assessment, categorical determinations of ‘no risk’ tend to be fairly rare also. Much of the discussion of human rights risks in impact assessment reports tends to be of social, environmental and economic impacts which, depending on a range of contingencies, *could possibly* result in a diminution in the ability of certain people to enjoy their human rights in the short, medium and longer term.

For those human rights risks that *could possibly* develop into human rights violations in time without sufficient mitigation on the part of the relevant state (or states), the relevant facts and contingencies will in many cases be too unclear at the time of negotiation of the agreement to allow for a detailed and bespoke set of safeguards to be written into the text of the agreement itself. The precise nature and extent of different risks, and the success or otherwise of different mitigation strategies, will only become apparent over time. To ensure that these strategies are working as they should, and that a situation is not worsening to the extent that breaches of a state’s human rights obligations are a likely or possible consequence, a robust and systematic form of monitoring is necessary.¹³³

This chapter sets out some preliminary observations on how human rights issues identified in *ex ante* processes can be followed up, either pursuant to the terms of the relevant trade agreement itself, or through complementary processes.¹³⁴ While there is much to be said about the various ways in which trade agreements may be made more responsive to human rights issues in general,¹³⁵ the chapter confines itself to monitoring arrangements for human rights risks, as a continuation of the discussion of ways to make *ex ante* processes more meaningful and effective in practice.

¹³¹ The 2011 De Schutter Principles, para 3, p. 8 state that ‘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’.

¹³² See discussion at Section 3.1.

¹³³ The 2011 De Schutter Principles (2011), para 7.6, p. 15 state that ‘appropriate follow-up should be given to the conclusions and recommendations adopted at the final stage of the impact assessment, by organizing a *monitoring and evaluation mechanism* assessing the extent to which these conclusions and recommendations were in fact taken into account’.

¹³⁴ *Ibid.*

¹³⁵ Bartels, L. (2014), *A Model Human Rights Clause for the EU’s International Trade Agreements*, Berlin: German Institute for Human Rights and Aachen: MISEREOR, https://www.institut-fuer-menschenrechte.de/uploads/tx_commerce/Studie_A_Model_Human_Rights_Clause.pdf (accessed 7 Nov. 2018); and Bartels, L. (2014), *The European Parliament’s Role in Relation to Human Rights in Trade and Investment Agreements*, Brussels: European Parliament Directorate-General for External Policies, <http://www.europarl.europa.eu/cmsdata/86031/Study.pdf> (accessed 7 Nov. 2018).

4.1 *Ex post* monitoring through existing treaty mechanisms – legal, structural and political issues to consider

Since the 2008 EU–CARIFORUM Agreement,¹³⁶ trade and sustainable development (‘TSD’) chapters have become a standard feature of EU trade agreements;¹³⁷ all TSD chapters of these agreements include provisions relating to monitoring the effect of a given agreement on sustainable development.¹³⁸ The provisions can vary in strength from recognizing the importance of ongoing monitoring and assessment¹³⁹ to imposing a positive obligation on each of the parties to ‘to review, monitor and assess the impact of the implementation of [the] Agreement on sustainable development in its territory in order to identify any need for action that may arise in connection with [the] Agreement’.¹⁴⁰ The 2011 EU–Korea FTA makes explicit reference to ‘trade-related sustainability impact assessments’.¹⁴¹

Since the 2008 EU–CARIFORUM Agreement, trade and sustainable development (‘TSD’) chapters have become a standard feature of EU trade agreements; all TSD chapters of these agreements include provisions relating to monitoring the effect of a given agreement on sustainable development.

Institutional mechanisms are created under the TSD chapters of EU trade agreements to oversee the implementation of the provisions as they relate to labour, environmental issues and sustainable development. While the exact structures may vary from agreement to agreement depending on the outcome of negotiations, they typically comprise a high-level joint committee (charged with overseeing implementation of chapters relating to trade, labour and sustainable development) plus an annual civil society forum (to facilitate dialogue on sustainable development issues), the membership of which includes domestic consultative mechanisms (referred to as ‘domestic advisory groups’). These domestic advisory groups are established by each party for the purposes of gathering views and advice on sustainable development issues within its own jurisdiction. They are intended to be made up of representatives of business, trade unions and civil society organizations.

By way of illustration, the basic organizational structure of the various mechanisms established to oversee implementation of the sustainable development provisions (including consultation with stakeholder groups) under the 2016 EU–Canada Comprehensive Economic and Trade Agreement (CETA), and the relationships between each mechanism, are set out graphically in Figure 1.

The need for effective social and ‘sustainability’ monitoring mechanisms is recognized in the concluding recommendations of virtually all SIAs conducted since 2012, when human rights risks became a required part of the research and analysis.¹⁴² However, as presently constructed, the ability of the various TSD chapter mechanisms to provide systematic follow-up monitoring of specific human rights risks identified in the course of *ex ante* SIA processes is limited. There are several reasons for this.

¹³⁶ EU–CARIFORUM Economic Partnership Agreement [2008] OJ L/289/L/3.

¹³⁷ Harrison et al. (2018), ‘Labour Standards Provisions in EU Free Trade Agreements’.

¹³⁸ *Ibid.*, p. 7; and Bartels, L. (2012), *Human Rights and Sustainable Development Obligations in EU Free Trade Agreements*, Cambridge: University of Cambridge Faculty of Law, https://papers.ssrn.com/sol3/papers.cfm?abstract_id=2140033 (accessed 7 Nov. 2018).

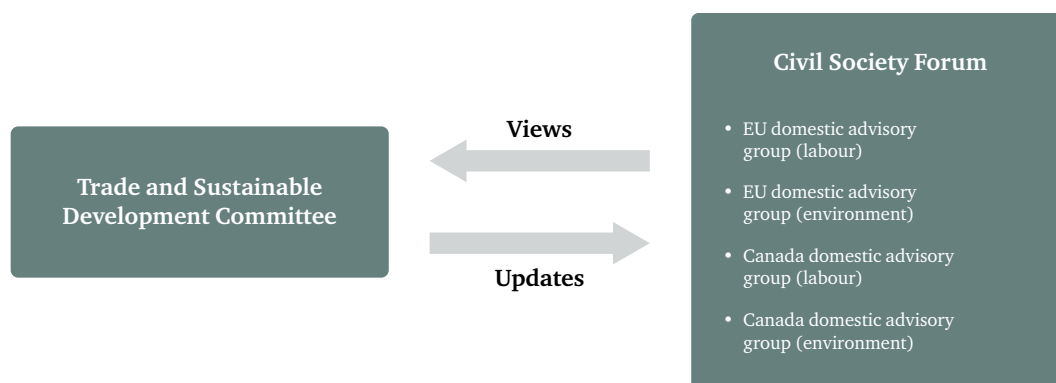
¹³⁹ See, for instance, 2008 EU–CARIFORUM Economic Partnership Agreement, Article 189.1.

¹⁴⁰ 2016 EU–Canada CETA, Article 22.3.3.

¹⁴¹ 2011 EU–Korea FTA, Article 13.10.

¹⁴² See Box 4 above. A full catalogue of the Commission’s completed SIAs can be found on the Commission’s dedicated web page. See European Commission (undated), ‘Sustainability Impact Assessments’, http://ec.europa.eu/trade/policy/policy-making/analysis/policy-evaluation/sustainability-impact-assessments/index_en.htm.

Figure 1: Basic structure of institutional arrangements for oversight of implementation of labour, environment and sustainable development chapters of EU–Canada CETA



Notes: (i) ‘Domestic advisory groups’ are the consultative arrangements established with civil society organizations, trade unions and other stakeholders by each state party under the terms of the trade agreement for the purposes of gathering views and seeking advice on labour and environmental issues. See EU–Canada CETA, Article 23.8.4 (trade and labour) and Article 24.13.5 (trade and environment). (ii) The above figure is limited to displaying the main ongoing institutional arrangements established specifically for the purposes of the chapters of the agreement relating to trade and labour (Chapter 23), trade and environment (Chapter 24), and trade and sustainable development (Chapter 22). It should be noted that further opportunities for consultation and dialogue are provided for, e.g. through the principal Joint Committee (Chapter 26), through dispute resolution provisions included in the chapters on trade and labour (Article 23.9–23.11) and trade and environment (Article 24.14–24.16), and through provisions for bilateral dialogue and cooperation on specific issues (Chapter 25).

4.1.1 Limited scope of mandates of institutional mechanisms established under the trade agreement

While there are certainly substantial overlaps and interlinkages between sustainable development and many different human rights, the institutional mechanisms under the chapters of EU trade agreements relating to trade and sustainable development (referred to in this section as ‘TSD chapters’) are established to focus on labour and environmental issues specifically.

The category of human rights known as ‘fundamental labour rights’ is certainly within the purview of the TSD chapters (and hence their institutional monitoring mechanisms). For instance, under the trade and labour chapter of the 2016 EU–Canada CETA (in what is now a standard provision of EU trade agreements), the state parties commit to ‘ensure [emphasis added] that its labour law and practices embody and provide protection for the fundamental principles and rights at work’, namely ‘(a) freedom of association and the effective recognition of the right to collective bargaining; (b) the elimination of all forms of forced or compulsory labour; (c) the effective abolition of child labour; and (d) the elimination of discrimination in respect of employment and occupation’. Furthermore, the state parties ‘affirm their commitment to respect, promote and realise those principles and rights in accordance with the obligations of the members of the International Labour Organization’.¹⁴³

The upshot of this is that the ability of institutional mechanisms under TSD chapters to address human rights impacts depends on the context in which they arise. For instance, while the issue of gender discrimination *at work* would certainly come within the scope of the institutional mechanisms established or referred to in the various TSD chapters (and specifically the chapter on trade and

¹⁴³ 2016 EU–Canada CETA, Article 23.3.1. See also Article 23.3.2, in which the parties commit to promote specific objectives included in the ILO’s Decent Work Agenda; and Article 23.3.4, in which state parties reaffirm their commitments to implement effectively, within their respective jurisdictions, the ILO Conventions which Canada and EU member states have respectively ratified.

labour), the potential contribution of a trade agreement to an increase in gender inequality *in wider society* may not. For these broader risks, which fall outside the scope of fundamental labour rights, some other monitoring arrangements would need to be agreed. Similar issues arise with respect to environmental rights.

Figure 2: Extent of mandate of TSD chapter institutional mechanisms with respect to human rights, and potential for overlap with ‘fundamental’ human rights covered by ‘essential elements’ clause



Note: Since 1995, the EU has implemented a policy of including an ‘essential elements’ clause in its trading arrangements with third countries, whereby the parties affirm their respective commitments (with some variation from agreement to agreement) to democratic principles, human rights and fundamental freedoms, and the rule of law. This ‘essential elements’ clause provides the legal basis for dialogue between the parties on human rights-related issues, as well as certain measures in cases of serious and persistent violations of human rights.

4.1.2 Lack of a well-defined role for civil society organizations

The second obstacle to effective follow-up of *ex ante* findings derives from the lack of a clear role for civil society within the monitoring system. EU trade policymakers repeatedly emphasize the importance of stakeholder input into monitoring mechanisms as a means of gathering information on impacts from sources close to where they are being felt.¹⁴⁴ However, this role is not spelled out clearly in the terms of the trade agreements themselves. Instead, the role of domestic advisory groups tends to be only vaguely expressed in terms of providing ‘views’ and ‘advice’, and the role of the Civil Society Forum in terms of facilitating ‘dialogue’. This creates obvious problems for the operationalization of civil society mechanisms under TSD chapters.¹⁴⁵ While some flexibility may be necessary to allow parties to tailor their responses to local conditions, this can also result in inconsistencies in approach between different trading partners or in non-action,¹⁴⁶ and can make the effectiveness of the mechanisms vulnerable to changes in government and political priorities.

TSD chapter terms relating to *ex post* monitoring arrangements are similarly vague. For instance, under the 2011 EU–Korea FTA, the parties merely agree to work ‘through their respective participative processes and institutions, as well as those set up under this Agreement, for instance through trade-related sustainability impact assessments’.¹⁴⁷

¹⁴⁴ Orbie, J., Martens D. and Van den Putte, L. (2016), *Civil Society Meetings in European Trade Agreements: Features, Purposes and Evaluation*, The Hague: The Asser Institute, pp. 30–31, http://www.asser.nl/media/3044/cleer16-3_web.pdf (accessed 7 Nov. 2018).

¹⁴⁵ See further Harrison, J., Barbu, M., Campling, L., Richardson, B. and Smith, A. (2018), ‘Governing Labour Standards through Free Trade Agreements: Limits of the European Union’s Trade and Sustainable Development Chapters’, *Journal of Common Market Studies*, Early View, pp. 1–18, at pp. 10–11, doi: 10.1111/jcms.12715 (accessed 12 Dec. 2018).

¹⁴⁶ Harrison et al. (2018), ‘Labour Standards Provisions in EU Free Trade Agreements’, p. 10.

¹⁴⁷ 2011 EU–Korea FTA, Article 13.10.

The lack of a clear role for civil society mechanisms within the monitoring system creates difficult dilemmas for civil society organizations, trade unions and other stakeholders, which, faced with resource constraints of their own, need to consider carefully whether and how best to engage with these mechanisms. If the benefits of engagement are unclear, key stakeholder organizations are likely to direct their time and efforts elsewhere. The problem is potentially compounded by what many stakeholders view as a weak dispute resolution and enforcement system for breaches of commitments made under the TSD chapters.¹⁴⁸

4.1.3 Challenges in converting unilateral findings and recommendations into joint commitments

There are bound to be limits to the extent to which a *joint* monitoring mechanism established under a trade agreement will be prepared to accept the findings and implement the recommendations of an *ex ante* human rights impact assessment process conducted by only one of the state parties, and in which the other state party may have had little or no input. This presents a challenge, not just for the institutional mechanisms established by (or referred to in) the various TSD chapters, but also for the periodic and ad hoc ‘joint assessments’ envisaged in the trade agreement’s terms.¹⁴⁹

As discussed in the previous chapter, human rights impact assessments of trade agreements are not always confined to *within-territory* impacts.¹⁵⁰ On the contrary, assessments of human rights impacts undertaken in the course of EU SIA processes often place far more emphasis on identifying human rights impacts in partner countries than within the EU itself, with all the political sensitivities this may trigger.¹⁵¹ Such sensitivities may prevent these issues from being monitored (i.e. under a joint mechanism) in the manner, or to the extent, that an *ex ante* assessment report might recommend.

Nevertheless, as mentioned above, a commitment to continue to ‘review, monitor and assess the impact of the implementation of ... [a trade agreement] ... on sustainable development in its territory’ is a standard provision in EU trade agreements.¹⁵² Will the EU look to expand the scope of these monitoring processes? Present policy is for *ex post* evaluations of trade agreements to take place ‘after the trade agreement has entered into force, commitments have been phased in and sufficient time has passed to gather a robust body of data and evidence’,¹⁵³ the purpose of which is ‘to analyse the observed economic, social, human rights and environmental impacts’.¹⁵⁴ Thus far, one such evaluation of a trade agreement has been carried out under the Commission’s Better Regulation Agenda,¹⁵⁵ relating to an agreement between the EU and South Korea.¹⁵⁶ *Ex post* evaluations for a further three sets of trading arrangements have been earmarked for completion during 2019.¹⁵⁷

¹⁴⁸ Harrison et al. (2018), ‘Labour Standards Provisions in EU Free Trade Agreements’, p. 7.

¹⁴⁹ See, for example, 2016 EU–Canada CETA, which contemplates (at Article 22.3.3) that ‘the parties may carry out joint assessments’ which are to be ‘conducted in a manner that is adapted to the practices and conditions of each Party, through the respective participative processes of Parties, as well as those processes set up under this Agreement’.

¹⁵⁰ See Section 3.2 above.

¹⁵¹ *Ibid.*

¹⁵² See, for example, 2016 EU–Canada CETA, Article 22.3.3. See also 2011 EU–Korea FTA, Article 13.10, which refers specifically to ‘trade-related sustainability impact assessments’.

¹⁵³ European Commission (2016), *Handbook for trade sustainability impact assessment* (2nd ed.), p.8.

¹⁵⁴ *Ibid.*

¹⁵⁵ See European Commission (undated), ‘Better regulation: why and how’, https://ec.europa.eu/info/law/law-making-process/planning-and-proposing-law/better-regulation-why-and-how_en (accessed 7 Nov. 2018).

¹⁵⁶ See European Commission (2018), ‘Countries and regions: South Korea’, <http://ec.europa.eu/trade/policy/countries-and-regions/countries/south-korea/> (accessed 7 Nov. 2018).

¹⁵⁷ The three sets of trading arrangements prioritized for *ex post* evaluation during 2019 are the EU’s trade agreement with Peru, Colombia and Ecuador; the Economic Partnership Agreement (EPA) between the EU and its Member States and the CARIFORUM Member States; and the trade chapters of the EuroMediterranean Association Agreements with six Southern Mediterranean partners (Algeria, Egypt, Jordan, Lebanon, Morocco and Tunisia). See European Commission, DG Trade, *Management Plan 2018*, p. 25, https://ec.europa.eu/info/sites/info/files/management-plan-trade-2018_en.pdf (accessed 18 Jan. 2019). Further information about the European Commission’s programme of *ex post* evaluations of trade agreements can be accessed via European Commission (2018), ‘*Ex post* evaluations’, <http://ec.europa.eu/trade/policy/policy-making/analysis/policy-evaluation/ex-post-evaluations/> (accessed 15 Jan. 2019).

4.2 Preliminary observations for strengthening the links between *ex ante* human rights impact assessment and monitoring

There is scope for improvement in the institutional arrangements for monitoring of human rights risks identified in *ex ante* assessment processes, although there is unlikely to be a ‘one size fits all’ solution. Various factors – such as the structure, scope and aims of the agreement, and the extent to which and way in which different human rights standards are referred to – will likely have a bearing on the monitoring solutions eventually adopted by the state parties. Nevertheless, the remainder of this chapter sets out a few preliminary observations on the structural, organizational and strategic issues that may need more attention in future.

4.2.1 Better institutional and substantive link-up between *ex ante* and *ex post* assessment processes

For *ex ante* assessment processes to be effective and worthwhile, there must be, at a minimum, provision for adequate follow-up of the human rights risks connected with implementation of the trade agreement that are identified as requiring mitigation. This is made difficult where there is institutional compartmentalization: for instance, between the specialists involved in commissioning and overseeing *ex ante* assessments and those responsible for overseeing implementation of the agreement.¹⁵⁸ It is worth considering, therefore, whether there is scope for greater clarity in provisions relevant to implementation monitoring as to the make-up of different institutional mechanisms, for instance in terms of the expertise and institutions required to be represented.

Also worth considering is the extent to which provisions relating to the monitoring of human rights risks could be enhanced in future to include an express requirement for parties to continue to monitor human rights risks identified in the course of *ex ante* assessment processes. This is not to diminish, however, the political challenges that could arise in relation to findings with respect to *extraterritorial* human rights risks by one or other of the parties.¹⁵⁹ At a more organizational level, it will be important for experiences and insights gained from *ex post* monitoring processes to be fed back into *ex ante* processes, to the extent that this is capable of improving the quality of forecasting and analysis in *ex ante* processes in future.

4.2.2 Strategies for making greater use of pre-signing leverage

Is it possible to make greater use of pre-ratification conditions to ensure that *ex ante* processes take place, to a mutually agreeable standard and in accordance with a mutually agreed methodology?¹⁶⁰ Based on those findings, and the joint review that would ideally follow (see Section 4.2.3 below), it may also be possible at this early stage to secure additional and stronger commitments with respect to future monitoring of human rights risks (see Section 4.2.4 below) to complement the implementation monitoring arrangements for the agreement more generally. This kind of leverage may only exist, however, where there is a demonstrable preparedness on the part of the state parties to move beyond standardized formulations, and to pursue an ambitious set of standards and an ambitious monitoring regime in light of the risks identified.¹⁶¹

¹⁵⁸ Harrison et al. (2018), ‘Labour Standards Provisions in EU Free Trade Agreements’, pp. 9–10.

¹⁵⁹ See further discussion at Section 3.2 above.

¹⁶⁰ Harrison et al. (2018), ‘Labour Standards Provisions in EU Free Trade Agreements’, p. 9.

¹⁶¹ *Ibid.*

4.2.3 Joint *ex ante* assessments and action plans

As discussed in Chapter 3 above, *ex ante* assessments that seek to investigate human rights risks within the jurisdiction of the trading partner give rise to significant practical and political challenges. However, there are issues that potentially lend themselves to joint study, such as the human rights impacts of implementation of a trade agreement on cross-border supply chains. Unilateral assessment processes may benefit from structured liaison or joint review processes, for instance to ensure that there is a common understanding with respect to underlying economic assumptions.

Joint *ex ante* human rights impact assessments potentially overcome the major challenge, described in Section 4.1.3 above, of converting unilateral findings and recommendations into a mutually agreed basis for action. They have the potential to generate, theoretically at least, an agreed action plan that could form the basis for a more robust system of human rights risk monitoring. However, they also require considerable political commitment and resources, and there is a question as to their feasibility in the context of a trade negotiation where, in addition to the inevitable time and political pressures, there are likely to be limits to the information that negotiating parties are prepared to share.

4.2.4 Bespoke approaches to monitoring

Is there scope for more tailored approaches to human rights monitoring in trade agreements to reflect the unique sets of human rights issues likely to be raised in different jurisdictions and in the contexts of specific trading partnerships?¹⁶² While standardized approaches have a number of benefits, particularly in terms of predictability, negotiability and ease of administration, they also have disadvantages in that they can prevent parties from making the most of the leverage they possess to negotiate more ambitious terms (see Section 4.2.2 above). A further difficulty with standardized approaches is that they make it difficult to respond to specific items of concern identified in *ex ante* processes, thus severely reducing, for the reasons discussed above, the usefulness of *ex ante* processes in policy terms, as well as public confidence in them as a genuine consultative and fact-finding exercise. Bespoke monitoring regimes, on the other hand, informed by a robust *ex ante* risk assessment process (whether unilateral, joint or a combination of both – see Section 4.2.3), have the potential to greatly improve both the institutional and substantive link-up of different aspects of the risk management cycle (see Section 4.2.1).

4.2.5 More open systems for raising complaints

Although there is provision in trade agreements for mechanisms to enable views and advice to be collected from stakeholder groups, providing a more formalized role for these different groups in the enforcement of aspects of trade agreements relevant to human rights may have positive effects on both the quality of monitoring and on the extent and depth of stakeholder engagement (see further Section 4.2.6 below). The feasibility and negotiability of the inclusion of a more diverse range of complaints and dispute resolution options in trade agreements seem worthy of consideration. In addition to the usual questions relating to ‘standing’ (i.e. the question of which persons and organizations would be entitled to bring a complaint), future work could consider issues of scope (e.g. whether complaints should be confined

¹⁶² European Commission Services have signalled an intention to move in this direction. A ‘non-paper’ produced in February 2018 proposes that in future the Commission will seek to: ‘identify, consider and address priorities for each partner country throughout the whole cycle of an FTA, starting with the content-scoping phase of a future agreement. In addition to pursuing the negotiation of a “standard” TSD chapter, this may include further specific issues of relevance for a given partner.’ European Commission Services (2018), *Feedback and way forward on improving the implementation and enforcement of Trade and Sustainable Development chapters in EU Free Trade Agreements*, Brussels: European Commission Services, p. 7, http://trade.ec.europa.eu/doclib/docs/2018/february/tradoc_156618.pdf (accessed 7 Nov. 2018).

to issues of compliance with agreement terms, or should extend to other issues such as commitments under human rights action plans) and the optimal dispute resolution methodologies for different types of complaint, drawing, for instance, from mediation as well as more adversarial models.¹⁶³

4.2.6 Clearer roles for civil society organizations, trade unions and other stakeholders

As noted above, lack of clarity about the role of civil society organizations, trade unions and other stakeholders in the monitoring of human rights-related aspects of trade agreements can undermine effective monitoring of human rights risks in a number of ways. Not only does this affect the ease and efficiency with which information can be shared (and thus increase the cost and resource burden for relevant organizations and stakeholder groups), it also contributes to scepticism about the aims and benefits of these mechanisms and to gradual disengagement by stakeholder groups. The European Commission has expressed a willingness to address this with improved processes and resources, and with a new ‘implementation handbook’ to promote best practices.¹⁶⁴ However, a potentially productive new avenue of inquiry might concern the extent to which greater clarity over the roles of different types of stakeholders in relation to human rights risk evaluation and monitoring can be provided in the terms of an agreement itself – for instance, through clearer rights for domestic advisory groups to initiate and participate in dispute resolution processes (see Section 4.2.5 above) and by giving these groups an explicit and proactive role in relation to follow-up of dispute resolution process outcomes.

4.2.7 Towards a comprehensive system of *ex post* monitoring of human rights risks

As discussed above, the EU approach to human rights and trade has created a monitoring lacuna in respect of human rights risks that fall outside the scope of the TSD chapters. This raises the question of the feasibility of a more comprehensive monitoring arrangement for human rights risks, covering potentially *all* internationally recognized human rights.¹⁶⁵ In principle, such a mechanism could provide the platform for more systematic and robust follow-up monitoring of human rights risks than is possible under trade agreements at present. However, there are a number of legal, practical and structural issues to consider. These include personnel and access to expertise, stakeholder engagement arrangements, the place of such a mechanism in the wider ‘family’ of monitoring and consultative mechanisms provided for under the terms of a particular trade agreement, and its role in the enforcement of human rights-related commitments under the trade agreement (e.g. whether it could receive and consider complaints).

¹⁶³ Harrison et al. (2018), ‘Labour Standards Provisions in EU Free Trade Agreements’, pp. 19–20.

¹⁶⁴ European Commission Services (2018), *Feedback and way forward on improving the implementation and enforcement of Trade and Sustainable Development chapters in EU Free Trade Agreements*, p. 9.

¹⁶⁵ Bartels (2014), *A Model Human Rights Clause for the EU’s International Trade Agreements*; and Bartels (2014), *The European Parliament’s Role in Relation to Human Rights in Trade and Investment Agreements*.

5. Conclusion

For some time now, many different actors (including UN agencies and civil society organizations) have been calling for more widespread and more formalized use of *ex ante* human rights impact assessment of trade agreements. This is seen as a way both to develop policymakers' awareness of the links between trade policy and the realization of human rights, and to create space and impetus for human rights perspectives to be considered and addressed as part of trade negotiation processes. So far, the European Commission has been the only state-based institution to take up this challenge in earnest, largely as a response to political pressure. The European Commission now routinely requests the preparation of SIAs, which are intended to include an assessment of the human rights impacts of proposed trade agreements (alongside other social, economic, environmental and sustainability issues). However, SIAs have been criticized for failing to provide clear and compelling analyses of the relationships between trade agreements and enjoyment of different human rights, let alone a clear roadmap for policymakers and trade negotiators as to what should be done.

What is needed to move things forward? Human rights impact assessments in this context are complex and costly. Greater uptake is unlikely until the benefits are clear to see, and the lack of tried-and-tested methodologies poses huge challenges for first movers.

As this research paper has shown, a number of challenges associated with *ex ante* human rights impact assessment of trade agreements are inherent to the exercise, rather than being limited to the facts of any given trade agreement being assessed. These processes are, at present, ill equipped to provide a proper risk analysis of the likelihood of future human rights violations arising from state parties' implementation of an agreement. This may be due, in part, to a lack of attention in assessment methodologies to the legal implications of different aspects of a particular proposed trade agreement – in particular, the flexibilities provided under 'public morals' exceptions; or flexibilities to protect domestic industries. However, even if the problem of lack of legal rigour could be overcome, significant problems would remain due to the difficulties with (and in many cases the impossibility of) forecasting how trade agreements will be implemented in practice – including, importantly, how flexibilities in a trade agreement will be used in practice (and, indeed, the political and economic constraints that will determine *how* these might be used).

In reality, there are likely to be very few circumstances in which an *ex ante* human rights impact assessment will be able to determine, with a reasonable degree of confidence, that a proposed trade agreement is bound to result in human rights violations. But this is not the only question posed by human rights impact assessment processes. As this research study has shown, insights into the conditions and trends that *could possibly* lead to a deterioration in the ability of people to enjoy their human rights (whether or not this may ultimately result in human rights violations) are also of value to policymakers working to develop strategies for mitigation of human rights risks that may flow from new trading arrangements and commitments.

Even so, the inherent difficulties with respect to economic modelling and forecasting, not to mention the time and resources involved in gathering relevant facts and carrying out the necessary stakeholder consultation, suggest a need for greater realism about what *ex ante* human rights impact assessment can achieve in practice. This is not to suggest that the practice should be abandoned. Although some

stakeholder groups have become frustrated with these processes of late, most see value in persevering. Supporters of these processes take the view that, even if the findings involve a degree of speculation, the processes nevertheless have value as a way of drawing attention to issues that might otherwise go unnoticed or unappreciated (such as impacts on particularly vulnerable groups of people, or impacts that are discriminatory between men and women), and of raising awareness among policymakers about human rights issues more generally.

It is important to recognize that human rights impact assessment methodologies are still at an early stage of development. Practitioners readily acknowledge the need for improvement, particularly with respect to improving the quality and comparability of baseline data and developing techniques for more meaningful and effective stakeholder engagement. As this research paper has shown, there are many difficult dilemmas to address in designing a suitable assessment methodology and process – particularly around the timing and transparency of assessment processes against the background of interstate trade negotiations. Time and experience may help to resolve these dilemmas. The experience of the European Commission shows how, with leadership and close cooperation between policymakers and practitioners, improvements in methodologies and processes can be achieved over time.

However, it may be that the real value of *ex ante* human rights impact assessment ultimately lies not in standalone processes but in providing the groundwork for a much longer-term programme of risk mitigation exercises, ideally based on ongoing and systematic *ex post* monitoring of human rights risks. At present, this potential is not being realized. This research paper has set out some preliminary observations as to why this may be the case, including lack of institutional or substantive link-up between *ex ante* and *ex post* assessment processes, and the challenges in translating the outcomes of unilateral *ex ante* processes into strategies for joint action by the state parties concerned. The extent to which, and the various ways in which, these challenges might be addressed in the terms of trade agreements themselves are questions that deserve further exploration.

About the Author

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Cover image: Tea pickers walk at dawn through the tea plantations of Munnar, Kerala, on 7 May 2017.

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