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EU Trade Agreements and Their Impacts on Human Rights

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Foreword

The European Union's (EU) trade policy has always had a strong influence on both economic development and the human rights situation in the EU's partner countries, particularly in developing countries. EU trade policy includes multilateral trade agreements, a range of bilateral trade agreements, and the Economic Partnership Agreements that the EU has been and still is negotiating with countries in Africa, the Caribbean, and the Pacific (ACP) and in other regions of the world.

In May 2011, the German Federal Ministry for Economic Cooperation and Development (BMZ) presented its strategy on human rights. This strategy includes a commitment to further developing appropriate methodologies for assessing human rights risks in development-related policies. The present study, commissioned by the BMZ, contributes to this objective. Specifically, it offers guidance for stakeholders who are seeking to improve their knowledge of how to assess, both *ex ante* and *ex post*, the impact of Economic Partnership Agreements on human rights in general and on economic, social, and cultural rights, including poverty reduction and the right to food, in particular, in ACP countries. The mandate for this study was issued based on the observation that human rights impacts are not yet adequately addressed in the trade sustainability impact assessments (trade SIAs) that the European Commission conducts when negotiating trade agreements. Indeed, up to now, these trade SIAs have not systematically examined human rights impacts; they have not focused specifically on disadvantaged groups; and they have not adequately included a range of other benchmarks relevant to human rights impact assessments (HRIAs).

The EU itself has identified a need for action in this regard. In June 2012 it presented an *Action Plan on Human Rights and Democracy* that calls for the inclusion of human rights in all impact assessments and in this context explicitly refers to trade agreements. Since then, the EU has begun to slightly adapt its SIA methodology and is working to define more adequate human rights–consistent procedures. It is hoped that the present study, completed on 5 July 2013, can contribute to this process and, as a result, to improved human rights consistency of future trade options.

EU Trade Agreements and their Impacts on Human Rights: Position Paper[1]

by Dr. iur. Elisabeth Bürgi Bonanomi, Attorney at Law[2]

commissioned by the German Federal Ministry
for Economic Cooperation and Development (BMZ)

For more than ten years, the EU has conducted *ex ante* trade sustainability impact assessments (trade SIAs) prior to the conclusion of a trade agreement. The EU 'Handbook for Trade Sustainability Impact Assessment' (Trade SIA Handbook) explains how trade SIAs should be conducted. In recent years, trade SIAs have been criticised by human rights advocates. They have argued that current trade SIA methodology and practice fail to yield an adequate assessment of how a given trade agreement will impact on human rights. In response, they have developed methodologies for conducting *ex ante* human rights impact assessments of trade agreements (trade HRIAs). The most concise, experience-based, and innovative trade HRIA framework is provided by the 'Guiding Principles on Human Rights Impact Assessments of Trade and Investment Agreements', which were presented at the UN General Assembly by the UN Special Rapporteur on the Right to Food, Olivier de Schutter.

The EU and its member states are committed to advancing the protection of human rights, which also applies to their external relations, including trade policy. Hence, the study informing this position paper measures current trade SIA methodology and practice against the Guiding Principles on HRIA, and explores how trade SIAs could be complemented in order to better capture human rights impacts. The study, in particular, shows that the Trade SIA Handbook does not yet require the assessment of human rights impacts. As a result, past trade SIAs – with the exception of the most recent reports – do not refer to the normative human rights framework. As a consequence, they are less precise and effective than trade HRIA would be. However, the findings also show that trade SIA and trade HRIA methodology can be combined. The upcoming new generation of trade SIAs provides a good basis for further developing the methodology for human rights–sensitive trade SIAs, which is thus recommended.

As a first step, it is suggested to revise the Trade SIA Handbook and to develop a proper methodology of human rights–sensitive trade SIAs that encompasses all elements mentioned below and is based on existing trade SIA experience. This would not only require an in-depth assessment of current HRIA theory, but also an evaluation of first experiences with the new generation of trade SIAs. These new trade SIAs provide interesting insights into what elements of human rights impact assessments could look like and where the difficulties may lie. The experiences of NGOs who are conducting human rights impact assessments should be evaluated, as well. The process of drafting such a revised and expanded handbook could stimulate ongoing trade SIAs and help to open up policy processes needed to improve the effectiveness of these assessments.

The study suggests how to systematically integrate human rights considerations into trade SIAs. The following elements particularly address current deficits:

- Human rights–sensitive trade SIAs derive their legitimacy primarily from the duty of states to comply with their human rights obligations.

- When conducting human rights–sensitive trade SIAs, researchers must try to identify 'most optimal regulatory options' which best do justice to the underlying objectives. Accordingly, they should start by considering a wide but credible range of trade options. This may include options which have not yet been put on the table, regardless of whether they are in line with the trade liberalisation agenda. This search for options should not be hindered by regulatory constraints, such as those contained in Art. XXIV of the GATT. Also, the likelihood of recommended policy measures being realised needs to be examined.

[1] The position paper complements the study on 'EU Trade Agreements and their Impacts on Human Rights' of 5th of July 2013 commissioned by the German Federal Ministry for Economic Cooperation and Development (BMZ). This position paper does not include references to literature and does not highlight direct quotes. Please consult the full study for references.

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- Human rights–sensitive trade SIAs must be part of an iterative process. Hence, trade agreements must include specific provisions for *ex post* monitoring and foresee the possibility of *ex post* amendments in cases where this is necessary to ensure compliance with human rights obligations.

- Human rights–sensitive trade SIAs must look at the 'whole picture' in order to enable policymakers to balance the identified trade-offs. This implies a broad analysis of likely benefits and costs both at home and in the partner country.

- Human rights–sensitive trade SIAs must examine the *de facto* impacts of trade agreements. The aim is to assess whether trade agreements, by the dynamics they are expected to trigger, will assist or hinder trade partners in fulfilling their human rights obligations. In this context, researchers must view the trade agreement they are assessing as one component of a broader economic policy.

- The depth of analysis must be proportionate to available time and financial resources. Analysis should be more in-depth where threats to human rights are most intense. The principle of non-discrimination, moreover, requires an assessment of whether the trade agreement will disproportionately affect members of a particular group.

- Economic, social, and cultural rights, in particular, are subject to progressive realisation by states to the maximum of their available resources. Accordingly, human rights–sensitive trade SIAs must assess whether trade agreements will undermine financial sustainability.

- Human rights–sensitive trade SIAs must take a human rights approach to balancing the identified trade-offs. This requires that certain limits defined by the human rights framework are not exceeded and that inacceptable trade-offs are rejected.

- Human rights–sensitive trade SIA methodology should comprise a consistent framework for combining quantitative and qualitative methods. Indicators and data have to be disaggregated, and the search for indicators must be informed by existing trade experience. Also, the quality of engagement, particularly with social partners, needs to be improved; this requires an effective integration of trade SIA results into the negotiation process.

- The findings of the trade SIAs should effectively feed into the policy process. The EU must find a way to overcome the dual mechanism of conducting confidential, competition-driven impact assessments which inform the negotiation mandate, on the one hand, and trade SIAs which inform the public debate, on the other.

- Independence of the experts tasked with preparing the assessment is a key prerequisite. Internal and external consultation processes must be shaped so as to not constrain experts' independence.

- Human rights–sensitive trade SIAs conducted by the EU will always remain limited, as one trade partner passes judgement on the other from their own perspective. Hence, ways must be sought to complement this process by parallel mechanisms of international governance to develop multi-country, human rights–sensitive trade SIAs.

1 Introduction

The European Union (EU) and its member states are important trade partners of many countries, including developing countries. In order to achieve reliable trade conditions and dismantle trade distortions, the EU has negotiated a range of multilateral, plurilateral and bilateral trade agreements. These trade agreements not only influence the economy of the EU and its trade partners, but also impact on their society and environment. In response to civil society's harsh criticism of the international trade regime for being biased, the EU decided to conduct so-called 'trade sustainability impact assessments' (trade SIAs) prior to conclusion of each trade agreement, as part of the EU's sustainable development policy.[1] The purpose of *ex ante* sustainability impact assessments of trade agreements is to anticipate the impacts a drafted trade agreement will have on society, the environment, and the economy of the negotiating parties and, on this basis, to identify complementary measures for mitigating negative effects. The *Handbook for Trade Sustainability Impact Assessment* of the EU Commission (European Commission, External Trade 2006b; referred to as Trade SIA Handbook throughout the rest of this text) explains how to conduct trade SIAs and provides a detailed methodology. The EU has already commissioned several trade SIAs as part of its trade negotiations.[2] Generally these trade SIAs were initiated only after the negotiating mandate had been provided. In addition, the EU carries out 'ordinary' impact assessments (IAs) prior to launching negotiations in order to assess whether negotiations should be initiated at all. The present study, however, focuses exclusively on trade SIAs.

In recent years, these trade SIAs of the EU have been criticised by human rights advocates. They have argued that current trade SIA methodology and practice fail to yield an adequate assessment of how a given trade agreement will impact on human rights; moreover, they have pointed out that trade SIAs failed to address fundamental challenges faced by poor countries, such as, for example, weak productive capacity, vulnerability to external shocks due to limited diversification, high unemployment, and lack of infrastructure. Much of the criticism has centred on the right to food, since the vulnerable small-scale farming sector is under pressure in many countries. In response, several methodologies to conduct so-called 'human rights impact assessments' (HRIAs) of government actions have been developed (e.g. ECOSOC 2001; NORAD 2001; Harrison 2007; Walker 2009). First states have agreed to conduct HRIAs of free trade agreements (FTAs) (e.g. the Canadian Government regarding the FTA between Canada and Colombia; see CCIC 2012). In 2011, Guiding Principles on Human Rights Impact Assessments of Trade and Investment Agreements were presented at the 19th Session of the United Nations Human Rights Council (United Nations 2011b; referred to as Guiding Principles on HRIA throughout the rest of this text). These Guiding Principles were prepared by the UN Special Rapporteur on the Right to Food, Olivier de Schutter, after a process of consultation among experts (Berne Declaration et al 2010). They do not have the high legitimacy of other guidelines such as the UN Guiding Principles on Business and Human Rights (United Nations 2011a; also known as Ruggie Principles), since they have not been adopted after a thorough and intense participatory process as the latter have; however, the sophistication of their content nonetheless lends them weight. As a consequence, a new generation of EU trade SIAs has started to integrate human rights to a certain extent.

The present study measures current trade SIA methodology and practice against existing trade HRIA methodology, and explores how trade SIAs could be complemented in order to better capture human rights impacts. Since the Guiding Principles on HRIA offer a concise, experience-based and innovative trade HRIA framework, they will provide the trade HRIA benchmarks for this analysis. It is important to note in this context that the two impact assessment methodologies share some similarities, since both must cope with the many challenges involved in policy appraisals. However, HRIAs allow for more precise questions and for considering a broader range of policy options.

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1 The Treaty on European Union mentions *sustainable development* as an overarching long-term goal of the EU's guiding internal and external actions; see Preamble to, as well as Art. 3 and Art. 21 of the Consolidated Version of the Treaty on European Union of 26 October 2012 (European Union 2012) and the 2009 Review of the European Union Strategy for Sustainable Development (Commission of the European Communities 2009).

2 For an overview of trade SIAs conducted to date, see http://ec.europa.eu/trade/analysis/sustainability-impact-assessments/assessments/ (last accessed on 14 January 2014).

2 Human Rights Obligations of the EU to Its Trade Partners

Why are human rights impacts of trade agreements relevant to the EU? This section gives an overview of the EU's human rights obligations in general, as well as the more specific obligation of the EU to consider the human rights impacts of its trade agreements.

2.1 The EU's human rights obligations in general

The EU is bound by human rights obligations both of its member states and of its own. EU member states are parties to several international human rights treaties: they all have ratified the 1966 International Covenant on Civil and Political Rights (ICCPR; United Nations 1966a), the 1966 International Covenant on Economic, Social and Cultural Rights (ICESCR; United Nations 1966b), the 1979 Convention on the Elimination of All Forms of Discrimination against Women (CEDAW; United Nations 1979), the 1989 Convention on the Rights of the Child (CRC; United Nations 1989), and various conventions of the International Labour Organisation (ILO). The human rights codified in these treaties form part of the constitutional framework of each member state. Fundamental rights resulting from the Member States' constitutions, in turn, constitute general principles of EU law. In addition, the EU confirmed the value of "the principles of liberty, democracy and respect for human rights and fundamental freedoms" in the preamble to the Treaty on European Union (TEU; European Union 2012). According to Art. 2 of the TEU, the Union is "founded on the values of respect for human dignity, […] and respect for human rights". Art. 6(1) of the TEU concedes legal value equal to that of the TEU to the Charter of Fundamental Rights of the European Union of 7 December 2000 (European Union 2000). Finally, the TEU states the Union's intention to accede to the European Convention for the Protection of Human Rights and Fundamental Freedoms (Council of Europe 1950; Art. 6(2) TEU).

The TEU stresses in particular that the EU's foreign policy should promote human rights. According to Art. 3(5) TEU, the EU shall contribute to the protection of human rights, not least in "its relations to the wider world". Art. 21 of the TEU specifies that the "Union's action on the international scene […] seeks to advance in the wider world: […] the universality and indivisibility of human rights and fundamental freedoms […]". This extraterritorial concern for human rights is consistent with the current human rights doctrine, which increasingly calls for states to comply with human rights not only in their domestic but also in their foreign policies. Extraterritorial obligations are derived, *inter alia*, from Art. 2 and Art. 11 of the ICESCR (see, e.g., CESCR General Comment No. 12 on the Right to Adequate Food and CESCR General Comment No. 15 on the Right to Water; CESCR 1999, 2003). Recently, international law experts have drafted the Maastricht Principles on Extraterritorial Obligations of States in the area of Economic, Social and Cultural Rights (ETO) in an attempt to clarify the scope of extraterritorial obligations (ETO Consortium 2012).

2.2 The EU's obligation to consider the human rights impacts of its trade agreements

Since the EU and its member states are committed to advancing the protection of human rights in their external relations, this also applies to their trade policy. Hence the EU has a duty to negotiate trade agreements that promote, rather than hinder, the implementation of human rights standards by providing for an 'enabling environment'. This, in turn, presumes that the expected impacts of a trade agreement on human rights are assessed prior to conclusion of the negotiations. The HRIA methodology provides an instrument for doing so, thereby contributing to human rights–focused, informed and inclusive decision-making. If such assessment is duly undertaken, the EU can be said to have acted with utmost care to minimise the risk of such inconsistencies (Guiding Principles on HRIA, IV.4.7.).

This commitment of the EU has been reiterated in two recent EU documents. The EU's 2011 *Joint Communication on Human Rights and Democracy at the Heart of EU External Action – Towards a More Effective Approach* (European Commission, High Representative of the European Union for Foreign Affairs and Security Policy 2011) emphasises the need for tailor-made approaches to human rights–relevant policies, including trade policy: "The EU's trade partners are very different and the way in which coherence with human rights

objectives is ensured needs to reflect this diversity" (ibid, pp 11–12). Thus, impact assessments are needed to ensure human rights consistency (ibid, p 19). The 2012 *EU Strategic Framework and Action Plan on Human Rights and Democracy* (Council of the European Union 2012) calls for action to "insert human rights in Impact Assessment, as and when it is carried out for […] trade agreements that have significant economic, social and environmental impacts" (ibid, para I, 1). First attempts in this direction are now being made in the context of the upcoming new generation of trade SIAs (see section 3).

3 Trade SIA Methodology and Practice Measured Against Trade HRIA Methodology

This section examines whether, by conducting trade SIAs, the EU has already met its commitment to develop a human rights–sensitive impact assessment methodology, or whether current trade SIA methodology and practice would need to be complemented or adjusted. To this end, current trade SIA methodology (derived from the Trade SIA Handbook) and practice will be measured against existing trade HRIA methodology derived from the Guiding Principles on HRIA). With regard to trade SIA practice, this study focuses primarily on the SIAs of the EU–African Caribbean Pacific (ACP) Trade Relations of the Economic Partnership Agreements (SIAs of the EU–ACP EPAs) and on the SIA of the EU–India FTA, as human rights–related criticism has centred around these negotiations in particular.

While these studies were conducted based on the trade SIA methodology as described in the Trade SIA Handbook, a new generation of Trade SIAs is nascent. This includes the most recent *Trade SIA in support of negotiations of a Deep and Comprehensive Free Trade Area (DCFTA) between the EU and respectively Georgia and Moldova* (SIA of the EU–Georgia and EU–Moldova DCFTAs), the first 'new-generation' trade SIA on which a final report has been published (in October 2012).[3] Of the SIAs in support of negotiations of a DCFTA with Armenia, Tunisia, and Morocco, only final inception reports and draft interim technical reports are available at the time of writing of this study (June 2013). Hence, since only one process of the 'new generation' has been finalised, it is difficult to derive any common conclusions. However, all of the processes seem to follow a similar pathway, so it appears safe to make preliminary statements based in particular on the final report on the SIA of the EU–Georgia and EU–Moldova DCFTAs.

The following analysis is structured according to a number of fundamental questions. A first subsection explores the reasons 'why' trade HRIAs and trade SIAs are conducted. The second subsection looks at whether trade HRIAs and trade SIAs focus more on impacts 'at home' or impacts 'abroad'. The third subsection examines the meaning of the term 'impact'. The fourth and fifth subsections explore what types of impacts are assessed: impacts 'of what', and 'on what'? The sixth subsection looks at how trade HRIAs and trade SIAs deal with identified 'trade-offs'. The last subsection, finally, examines 'how' trade HRIAs and trade SIAs are conducted, 'when' they should ideally be conducted, and 'how they feed into' the policy process.

3.1 Why is the assessment undertaken?

As explained above, trade HRIAs are legitimised by the duty of states to comply with their human rights obligations (Guiding Principles on HRIA, I). In contrast, traditionally, neither the Trade SIA Handbook nor general trade SIA practice refer to human rights obligations for their legitimacy. Instead, their legitimacy is based on general policy goals and civil society concerns (Trade SIA Handbook, p 7). Thus, trade SIAs have been primarily a strategic instrument of the European Commission to improve stakeholder participation (ibid, p 9). This has changed slightly with the new generation of trade SIAs. They assess a new generation of free trade agreements which are termed DCFTA, or 'deep and comprehensive free trade agreement'. 'Deep and comprehensive' relates to the fact that "the EU does approach FTAs as part of a constitutional framework to support democracy, political stability and respect for Human Rights" (SIA of the EU–Georgia and EU–Moldova DCFTAs, Final Report, p A72). Hence, trade SIAs of the new generation derive their legitimacy at least partly from human rights obligations, since treaties are required to be 'deep and comprehensive'. From a human rights perspective, it would be desirable for this link to be made more explicit, by using terms such as 'human rights–sensitive trade agreements', for instance. Such a term would explicitly refer to the human rights framework and would not anticipate the degree of trade integration (see section 3.4.).

3 All EU trade SIAs referred to in this study are accessible through the website of the European Commission. The links to the various documents are listed under http://ec.europa.eu/trade/analysis/sustainability-impact-assessments/assessments/ (European Commission, Trade 2001–2014).

3.2 What impacts are assessed? The imperative to adopt a comprehensive perspective

As mentioned above, in the context of trade relations, states have human rights obligations to both "individuals on their territory, and to individuals on the territory of the states with which they conclude a trade or an investment agreement" (Guiding Principles on HRIA, II.2.6.). The Trade SIA Handbook takes a similar approach, stating as one of the key principles that "impacts on third, i.e. non-EU, countries should be analysed together with those on the EU" (ibid, p 15). In trade SIA practice, however, different approaches have been applied. A range of trade SIAs, such as those of the EU–ACP EPAs, focused exclusively on the EU's trade partners, omitting any analysis of impacts on the EU. In contrast, the SIA of the EU–India FTA resulted in a synthesis report on the overall economic, social, and environmental impacts on both partners. The new-generation SIA of the EU–Georgia and EU–Moldova DCFTAs includes very general reflections on the EU, but primarily focuses on the EU's trading partner, in this case on Georgia. However, if trade SIAs are to respond adequately to human rights requirements, trade SIA practice needs to be consistent in assessing human rights impacts both at home and in the partner country. Only such a comprehensive approach can enable a proper balancing of interests and the development of optimal options, which presumes the disclosure of trade-offs (see section 3.6.).

Such a comprehensive perspective comes with limits, since partner countries "are very sensitive to the sovereignty issue of a study which assesses impacts outside the EU": "They often fear protectionist motives on the part of the European Commission […]" (Trade SIA Handbook, p 24). Therefore, the Trade SIA Handbook recommends carrying out trade SIAs in cooperation with third country partners (ibid, p 8). However, even if adequate participation of third country partners is ensured, the inherent problem that one trade partner passes judgement on the other from their own perspective persists. One option that has been suggested to achieve a better balance of perspectives is to develop parallel mechanisms of international governance to develop multi-country trade SIAs (George and Kirkpatrick 2008, p 68). From a human rights perspective, such ideas should be further pursued. At least, trade partners should be assisted in developing their own (human rights–sensitive) SIAs, as the United Nations Environment Programme (UNEP) has done (UNEP 2001).

3.3 The focus on *de facto* impacts and difficulties in dealing with uncertainty and causality

What exactly are the 'impacts' of trade agreements which both trade HRIAs and trade SIAs seek to assess? A look at legal coherence theory can help to facilitate understanding. Legal coherence theory distinguishes between two types of horizontal legal conflicts (e.g. Koskenniemi 2006; Cottier et al 2011; Bürgi Bonanomi 2013). Treaties are 'formally incoherent' if they formally contradict each other, that is, if they shape rights and duties differently. Such formal incoherence is generally removed by exception clauses. 'Substantive coherence', in contrast, asks about the *de facto* impacts of a treaty. Both trade HRIA and trade SIA methodologies aim to ensure that human rights and trade agreements are 'substantively coherent'. Hence they both focus on the *de facto* impacts of trade agreements. They aim to assess whether trade agreements assist or hinder the trade partners in fulfilling their other obligations by the dynamics they might trigger. With regard to human rights, this includes the question of whether the obstacles states face in realising human rights are increased or reduced, and whether the policy space of states remains sufficient for them to meet their human rights obligations (Guiding Principles on HRIA, II. 2.1). The Guiding Principles on HRIA also refer to the Ruggie Principles, which emphasise the need for adequate policy space "when pursuing business-related policy objectives with other States or business enterprises, for instance through investment treaties or contracts" (Guiding Principles on HRIA, II.2.1).

Researchers mandated to assess the probable impacts of a trade agreement at an *ex ante* stage face two major difficulties. Since future changes are difficult to predict, they need to define the probability of an expected change. This is a difficult task, given the "limitations of quantitative and qualitative methods in capturing dynamic effects" (Guiding Principles on HRIA, IV.4.3.). In order to achieve the most accurate possible assessment, researchers must keep in mind the 'whole picture' and look not only for risks, but also for new opportunities that are likely to emerge (e.g. Trade SIA Handbook, p 16). This is true for both trade SIAs and trade HRIAs.

Such analysis of probable risks and opportunities requires dealing with questions of causality. Even in *ex post* assessments, it often remains unclear to what extent a certain change can be traced back to the trade agreement in question.[4] A central premise is, hence, to recognise that any assessment will always result in estimations rather than exact findings; but that, nonetheless, policymaking cannot do without such assessments. In addition, trade agreements must be viewed as one element of a broader economic policy. Systemic thinking requires that the dynamics the agreement might trigger be explored in the context of the trade policy in which it is embedded. This is often lacking in current trade SIA practice, including, as it seems, in trade SIAs of the new generation.[5]

3.4 The impact of what is assessed?

3.4.1 The imperative to consider a wide but credible range of options

Prior to conducting an impact assessment, there is a need for clarifying 'of what' the impacts shall be assessed. Which option of trade regulation will be scrutinised? Are there several trade options whose impacts need to be assessed? In the case of *ex ante* impact assessment, it is important to consider that negotiations have not yet been concluded, and that no final draft is available for assessment. According to general impact assessment theory, impact assessments are meant to contribute to identifying 'most optimal regulatory options' (Gehne 2011; Bürgi Bonanomi 2013). This refers to those options that best do justice to the underlying objectives. The European Commission's 2009 *Impact Assessment Guidelines* explicitly point out the need to consider "a wide but credible range of options", since this "will force you to think 'out of the box'" (ibid, p 29). Such thinking in different options is also a core component of trade HRIA methodology (Guiding Principles on HRIA, II.2.1.). In order to achieve a human rights–enabling option, "several possible outcomes of a negotiation" should be examined at the scoping stage of the HRIA (ibid, VI.7.2.).

In contrast, trade SIA theory implicitly suggests merely assessing the tabled draft or an option corresponding to other free trade agreements of the EU. In practice, if trade SIAs examine the impacts of several regulatory options, these options are generally close to each other and in line with the trade liberalisation agenda. In the trade SIA of the EU–India FTA, for example, the impacts of three liberalisation scenarios were assessed: of a "limited FTA"[6] , of a "broad FTA"[7] , and of a "broad plus FTA"[8] (see 2009 Final Report, pp 440–441). Other trade scenarios, which, for example, would have offered the trade partners more flexibility, did not come into consideration. This also applies to the new generation of trade SIAs. The SIA of the EU–Georgia and EU–Moldova DCFTAs compares only two scenarios. It holds that "[…] the impact of the DCFTA is analysed by comparing a specified liberalisation/integration scenario encompassing the DCFTA, with a baseline scenario that assumes no DCFTA in place" (Final Report, p A13). Hence, no further scenarios (including scenarios of partial trade integration) are assessed for whether they would result in less negative human rights impacts.

3.4.2 Full versus limited range of available responses

Whether a 'wide but credible range of trade options' is considered also depends on the responses that are available in the event that the assessment predicts negative impacts. Here again, trade HRIA and trade SIA theory and practice differ. The Guiding Principles on HRIA suggest choosing among the following responses if negative impacts on human rights are expected: the draft under negotiation should be "terminated", "amended", "safeguards" should be inserted, "compensation" provided, or "mitigation measures" adopt-

4 For example, Ergon stated in an *ex post* study on the FTA between the EU and Chile that "Chile has concluded a large number of bilateral trade agreements, making it particularly difficult to isolate the effects of the EU–Chile AA from those of other agreements" (Ergon 2011, p 8).

5 The SIA of the EU–Georgia DCFTA assumes that a potential reduction in government revenue due to a loss in tariff revenue will be compensated by increased income taxes (SIA of the EU–Georgia and EU–Moldova DCFTAs, Final Report, p A73). However, the overall fiscal dynamics and effects triggered by the DCFTA are not specifically assessed. Given the current weaknesses of the international tax system, such additional assessments would be necessary in order to make well-founded statements.

6 With 90% tariff reductions in both the food and the non-food sector, and 25% reduction in the service sector.

7 With 75% tariff reductions in both the food and the non-food sector, and 75% reduction in the service sector.

8 With 95% tariff reductions in both the food and the non-food sector, 75% reduction in the service sector, and some additional 1% reduction in certain sectors.

ed (Guiding Principles on HRIA, III.3). The optimal response is the one that promises to be most effective; this, in turn, presumes a profound assessment.[9] In contrast, the Trade SIA Handbook emphasises the need to introduce complementary measures to counteract negative impacts. The handbook also uses the term "mitigation and enhancement measures" (M&Es). They should "mitigate potential negative impacts or enhance positive ones" (ibid, p 22). Aid for trade and technical assistance is meant to help in implementing such policies. The possibility of modifying drafted trade agreements and including "suggestions for possible changes in negotiating positions" (ibid, p 22) is envisaged as well, but only within limits.

A look at trade SIA practice confirms that the set of responses available to trade SIAs is limited. The trade SIAs of the WTO negotiations, for example, after having noted some possible negative impacts on the health sector, recommended helping developing countries to build effective health care systems and to set up social safety nets. The trade SIA, however, did not suggest amending TRIPS[10] regulation except for LDCs (Morrissey 2003, p 21). The SIAs of the EU–ACP EPAs, in contrast, proposed amendments to the drafted agreements: they suggested classifying some agricultural products as "sensitive" and adjusting the "rules of origin" (see recommendations 3 and 4 in the 2007 summary of key findings, policy recommendations and lessons learned). However, the European Commission, in its respective position paper pointed out the limits of such proposals, clarifying that although exceptions for sensitive products are possible, they can be conceded only for a limited period of time: "Sensitive products should be liberalised within an appropriate period of time – up to 25 years in exceptional cases […]" (European Commission 2007, p 4). Most other recommendations focused on aid for trade and technical assistance, which were expected to help provide a stable climate for trade and investment (ibid, recommendations 8–11).[11]

Trade SIAs of the new generation seem to be similarly limited in terms of possible responses. Indeed, the SIA of the EU–Georgia and EU–Moldova DCFTAs includes a fairly nuanced framework of recommended mitigation and enhancement measures. It distinguishes between regulatory measures ('the stick') and economic instruments ('the carrot'). The chosen policy measures may either create or not create trade distortions. Trade-distortive measures come into consideration if they are specifically justified (Final Report, p 106). Hence, the recommended policy measures (as listed in the Final Report, pp 107–112) may be addressed within or outside the DCFTA. Those addressed within the DCFTA primarily include measures relating to technical assistance (in particular for standard upgrading); how such commitment could be made effective and comprehensive is not discussed. Regarding the degree of market integration, it is proposed to "allow for phasing in of tariff reductions […] at sector level" (Final Report, p 107). Further options, including the exclusion of certain sectors from market integration, are not considered. The likelihood of the recommended measures being realised is generally not assessed.

This limited set of responses available for trade SIAs reflects the assumptions underlying trade SIA processes: that FTAs are, in general, favourable to sustainable development, and that negative impacts can be adjusted. In contrast to trade HRIAs, which focus on risks, trade SIAs concentrate on opportunities and seek ways to optimally capture the opportunities provided by a new trade agreement (Trade SIA Handbook, p 19). HRIA-informed SIAs would, however, need to weight both risks and opportunities equally.

9 That researchers are free to choose among the full range of available responses is demonstrated in a study conducted by a consortium of non-governmental organisations including Misereor and Heinrich Böll Stiftung. This study examined the impacts of the future EU–India FTA on the right to food in India, and found that negative impacts on the right to food were to be expected if the agreement were to be concluded according to the draft. To eliminate the negative effects, the study recommended exempting all tariff lines for poultry and dairy production from tariff cuts, as well as identifying further products that can affect the right to food and allowing for the respective market protection (Paasch et al 2011, p 8).

10 WTO Agreement on Trade Related Aspects of Intellectual Property Rights of 1994 (WTO 1994b).

11 The responses proposed in the SIA of the EU–India FTA follow a similar pattern. In sectors where tariff liberalisation is expected to have painful consequences, the SIA recommended "phasing out of tariff reductions over time". Other tariff scenarios, however, were not considered. Instead, recommendations were again limited to complementary measures and included promotion of "regulatory convergence in the field of technical regulations", "stimulation of social dialogue", financial support of "areas that are dominated by industries that are negatively affected by the FTA", or "investments in infrastructure in India" (see 2009 Final Report, pp 287, 303–304).

3.4.3 Limits set by Art. XXIV of the GATT

The fact that the set of responses available to trade SIA researchers is limited has much to do with Art. XXIV of the GATT[12]. According to this basic provision, separate customs territories can only be established if these territories maintain separate tariffs "for a substantial part of the trade of such territory with other territories". As a consequence, trade preferences must be guaranteed on a reciprocal and 'substantially all trade' basis.[13]

The SIAs of the EU–ACP EPAs provide a good example of how trade SIA responses are linked to the GATT. Researchers started from the assumption that the EPAs require reciprocity, which they assessed as "most challenging for countries where EU imports compete with domestic production" (see recommendation 3 in the 2007 summary of key findings, policy recommendations and lessons learned). They discovered some small scope for asymmetry "both in terms of what is included, and transitional timelines for liberalisation" (ibid). The responses did not, however, go beyond these limits.

In contrast to this trade SIA practice, trade HRIA methodology suggests first examining *in abstracto* which trade option would best allow states to comply with their human rights obligations. Only after this question is resolved does trade HRIA proceed to consider the limits set by the existing regulatory framework and to explore whether and to what extent Art. XXIV of the GATT indeed applies, what the scope of interpretation is, what 'reciprocity' exactly means for a trade relationship between stronger and weaker players with unequal nature of trade exchanges, and whether the GSP-scheme might provide for a better solution. *De lege ferenda* options such as the amendment of Art. XXIV of the GATT might also come into consideration. In this sense, the HRIA on the EU–India FTA concluded that the envisaged trade agreement "must allow for asymmetric treatment of partners" (Paasch et al 2011, p 8).

3.4.4 The impact of what: concluding remarks

Indeed, a human rights–sensitive trade SIA should start by looking for optimal trade options that best do justice to the underlying objectives. This search must be conducted without blinkers, and no premature conclusions must be drawn. The focus needs to be on both the risks and the opportunities of further trade liberalisation. Optimal trade options will be more or less reciprocal, depending on the context. They may also require effective complementary measures to mitigate negative impacts. Only after the cornerstones of optimal options have been identified can the policy process decide which options shall be further pursued and how to deal with limited policy space due to Art. XXIV of the GATT.

3.5 The impact on what is assessed?

Besides identifying the trade options whose impacts shall be examined, there is a need for clarifying 'on what' the impacts shall be assessed. What elements of human rights and the social dimension should the assessment concentrate on? In this point, too, trade HRIA and trade SIA methodologies and practices differ.

3.5.1 Targets and indicators

In each impact assessment, the exact targets must be outlined and measurable indicators identified. In trade HRIA methodology, the human rights framework sets the relevant targets. The focus is primarily on the states' obligation[14] to "ensure that the conclusion of any trade […] agreement does not impose obligations inconsistent with their pre-existing international treaty obligations, including those to respect, protect and fulfil human rights" (Guiding Principles on HRIA, II.2). The Guiding Principles on HRIA define the meaning of the "respect, protect and fulfil" triad in a trade and human rights context.[15] It is derived from "the

12 WTO General Agreement on Tariffs and Trade of 1994 (WTO 1994c).

13 An exception is made for non-reciprocal preferences, which are conceded under the General System of Preferences (GSP) on a non-discriminatory basis.

14 But also the capacity of non-State actors to meet their human rights responsibilities is targeted (Guiding Principles on HRIA, II.2.1.)

15 Accordingly, respecting human rights precludes states "from entering into trade […] agreements that would require them to adopt certain measures […] that would result in an infringement of human rights they have agreed to uphold". Protecting human rights requires that states maintain the ability to control private actors in their activity „whose conduct may lead to violating human rights of others". Finally, fulfilling human rights requires that states "refrain from agreements which will render impossible the adoption of policies that move towards the realisation of human rights" (ibid, II.2.).

normative content of human rights, as clarified by the judicial and non-judicial bodies that are tasked with monitoring compliance with human rights obligations" (Guiding Principles on HRIA, IV.5.1.).

As a result, constraint of policy space needs to be justified by expected human rights improvements. Moreover, since economic, social and cultural rights are subject to "progressive realisation by states to the maximum of their available resources", trade agreements should not undermine financial and economic sustainability; this becomes particularly relevant where tariff revenues have to be cut back (Guiding Principles on HRIA, II.2.4.). State obligations vis-à-vis business enterprises need to be considered as well: according to the Ruggie Principles, "States should maintain adequate domestic policy space to meet their human rights obligations when pursuing business-related policy objectives with other States or business enterprises, for instance through investment treaties or contracts" (United Nations 2011, Principle 9; in connection with Guiding Principles on HRIA, II.2.1.). Finally, since states are bound by the principle of non-discrimination, they are required to work towards a trade agreement that does not "disproportionately affect members of a particular group, in the absence of a reasonable and objective discrimination" (ibid, II.2.5.). They need to consider that, even if the impact on the country as a whole might be positive, the most vulnerable people might be strongly negatively affected.

Once the targets have been outlined, adequate measurable indicators must be identified. The Guiding Principles on HRIA recommend using "structural indicators", "process indicators" and "outcome indicators".[16] Moreover, the use of disaggregated indicators and data is indispensable in order to comply with the principle of non-discrimination.[17] This includes closely looking at both female and male labour and assessing the repercussions the trade policy might have on the care sector (Razavi 2007). The UN has done important preparatory work that can guide human rights–based indicator selection (e.g. United Nations, International Human Rights Instruments 2008; OHCHR 2012).

In contrast to trade HRIAs, trade SIAs derive their targets from international policy goals, since trade SIAs ought to shed "light on how trade policy can contribute to internationally agreed processes on sustainable development, in particular the Millennium Development Goals […]." As a result, in contrast to trade HRIAs, trade SIAs focus primarily on outcome indicators, since international policy goals that are basically outcome-related. Like trade HRIAs, trade SIAs use disaggregated data; however, they do not emphasise nuanced use of these data as proposed by the human rights framework. Instead, trade SIAs seek to establish "country groupings" that are "intended to aggregate information at an appropriate level" (Trade SIA Handbook, pp 33–34).

Trade SIAs of the new generation are slightly different from previous ones in this respect, but limits remain. The SIA of the EU–Georgia DCFTA includes a baseline assessment covering a range of urgent human rights issues in Georgia. Analysis of how the DCFTA will impact on these issues, however, remains limited to questions of 'increase in national income', 'increase and decrease in income equality', or whether 'a race-to-the-bottom of labour standards' might occur. Although these issues are important and need to be addressed from a human rights perspective, the questionnaire should be more precise and relate to further human rights. It should contain precise questions about the state's obligations to respect, protect, and fulfil all human rights, and whether the state's ability to comply with its obligations would be strengthened or weakened by the respective DCFTA (Final Report, pp A68–A71).

16 "Structural indicators" help in assessing whether the respective trade agreement will make it more difficult to adapt a regulatory and institutional framework to implement human rights; "process indicators" assist in measuring whether other obstacles are created to the implementation of policy and programs; and "outcome indicators" help examining whether the trade agreement will make it more difficult to make progress in the realization of human rights. For doing so, they measure the effective realization of human rights (Guiding Principles on HRIA, IV.5.2.).

17 "It is essential that these indicators provide information broken down by gender, by disability, by age group, by region and by ethnicity, or on other grounds, based on a contextual, country-level appreciation of the groups that are most vulnerable" (Guiding Principles on HRIA, 5.3)

3.5.2 Priority setting

For both trade SIAs and trade HRIAs, some priority setting will be inevitable due to limited time and resources. Accordingly, both trade HRIA and trade SIA methodologies suggest how to select priorities. Trade HRIA methodology emphasises the need to conduct a broad analysis of likely benefits and costs, not least on the grounds that "all human rights are universal, indivisible and interdependent and interrelated".[18] For practical reasons, however, it is suggested that the depth of analysis should be proportionate to available time and financial resources. The analysis should be more in-depth where threats to human rights are most intense. More specifically, the Guiding Principles on HRIA recommend conducting a preliminary analysis of which human rights of which population groups are most likely to be affected. Depending on the outcome, researchers should then only determine which elements of the agreements shall be subject to a full assessment, and with respect to whom. In most cases, assessment will focus on the most vulnerable groups and on those groups who run the highest risks of exclusion.

Like trade HRIA methodology, trade SIA methodology also calls on researchers to adapt their analysis to the available resources. According to the Trade SIA Handbook, the level of depth and detail should be adapted "to the likely significance of trade measures" (Trade SIA Handbook, p 16). A trade measure is considered significant if the induced change is significant. The Trade SIA Handbook provides criteria for determining the significance of change. These include the "magnitude" and the "reversibility" of an impact (ibid, p 32). Accordingly, researchers should identify 'significant trade measures' at the screening stage. Compared to trade HRIA methodology, which requires focusing primarily on the most vulnerable people, the term 'significance' is less precise and leaves greater scope for priority selection.

In trade SIA practice, this procedure has led to the situation that only certain sectors have come under scrutiny. In the SIAs of the EU–ACP EPAs, for example, although a wide range of sectors were considered at the screening stage, full assessments were carried out only of a few selected sectors. Such analysis is far from providing a comprehensive picture, and leads to a fragmented perception of the policy processes expected to emanate from the assessed trade agreement. Most strikingly, none of the sector studies in these SIAs of the EU–ACP EPAs examined the repercussions of the EPAs on the smallholder farming sector. From a right to food perspective, this would most certainly have been required, given the fact that the smallholder sector is most vulnerable to market integration. Instead, the West African study examined the impacts on the agro-industrial sector. Hence, the selection of priorities depending on their 'significance' comes with a sense of arbitrariness. In trade SIAs of the new generation, the expected "social, environmental and human rights impacts" are one of four main criteria used for sector selection. Hence, human rights impacts play a role, albeit a minor one, in priority setting. From a human rights perspective, this role should be further strengthened.

To a certain extent, governments may also learn from the experiences of companies who have started to conduct HRIAs in order to comply with their corporate responsibility to respect human rights as outlined in the Ruggie Principles, para II. (e.g. Nestlé and Danish Institute for Human Rights 2013). Business companies have also begun to develop methodologies for human rights risk assessments (HRRAs), which they intend to apply prior to HRIAs in order to identify major risks and thereby enable themselves to "carry out human rights due diligence" (Ruggie Principles, para 17) more effectively. Comparing experiences of HRIAs of all kinds of policy and action could serve as an important platform for mutual learning.

3.5.3 The impact on what: concluding remarks

Comparing between trade HRIA and trade SIA in terms of how their respective methodologies deal with the question of *what* a given trade agreement impacts on and *how* it does so, it becomes obvious that trade SIAs are less precise and somewhat random. The focus on internationally agreed policy goals, in particular, is not an equivalent substitute to the human rights approach, although these policy goals may serve as a source of inspiration during the search for indicators. While trade HRIAs focus on state obligations, trade SIAs look at the outcome of economic processes. Hence, according to HRIA theory, the primary focus should be on the most vulnerable people. Regarding the search for indicators, conducting it without blinkers is

18 Art. 5 of the UN Vienna Declaration and Programme of Action of 12 July 1993 (United Nations 1993).

again crucial. A brainstorming exercise, based on a questionnaire informed by trade experience, might help researchers to circle in on the real challenges.[19]

Both trade HRIAs and trade SIAs are subject to an inherent tension between the need to look at the 'whole picture' in order to indicate both positive and negative effects, and the need to set priorities. Although sufficient resources should be provided to allow conducting trade HRIAs and trade SIAs properly, limits to time and funding will always have to be respected. However, with respect to the process of priority setting, it is important to remember that a key objective shared by both trade SIAs and trade HRIAs is to make expected trade-offs transparent (see section 3.6.). Neither 'significance' nor 'exposure to human rights threats' include this integrated perspective. Despite limited resources, such analysis of costs and benefits at a disaggregated level is key and must not be left out. This increase in the comprehensiveness of analysis might require reducing its depth, but not its scope. First attempts in this direction as undertaken in the new generation of trade SIAs need to be strengthened.

3.6 Dealing with identified trade-offs

A key objective of both trade SIAs and trade HRIAs is to put on the table the trade-offs expected to result from the trade agreement in question. But once these trade-offs are tabled, should it be left to policymakers to decide about them? Or should this step of the negotiation process again be guided by certain legally based criteria? Trade HRIA and trade SIA methodologies differ in this question, as well.

Trade HRIA methodology recommends taking a human rights approach to balancing trade-offs. This first presumes that all human rights–related benefits and costs are made transparent and are equally put on the table. But it also requires that certain limits are not exceeded and that inacceptable trade-offs are rejected. The Guiding Principles on HRIA recognise that choices between trade-offs are most delicate but inevitable, since every decision on a trade agreement entails setting priorities. This is very well reflected in Principle V.6.1., which states that difficult choices have to be made "where trade and investment agreements contribute to economic growth and thus may facilitate the ability of the State […] to finance certain public goods […], while at the same time negatively affecting the State's capacity to protect the rights of certain groups […]." Hence, a primary aim of trade HRIAs is "to clarify the nature of such choices, and to ensure that they are made on the basis of the best information available" (ibid, V.6.2.). The decision about trade-offs should be sought in a "open and democratic process" of "effective, free, active and meaningful participation" (ibid, V.6.3.). At the same time, the Guiding Principles on HRIA also condition the balancing of trade-offs in a very innovative way. They set substantive limits to such balancing by applying a human rights approach.[20] In order to enable policymakers to follow these lines, a range of optimal trade options needs to be presented to them (see section 3.4.).

In contrast, the balancing of pros and cons in order to identify most acceptable trade-offs is not to the fore in trade SIA methodology, and human rights–related trade-offs remain undiscussed. This is not least due to the fact that trade SIAs do not primarily strive for thinking in a variety of trade options. Instead, they focus on identifying risks and respective complementary measures to mitigate them (see section 3.4.). Indeed, although the Trade SIA Handbook demands that researchers indicate both positive and negative potential impacts, it provides no nuanced framework for balancing them (Trade SIA Handbook,

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19 Such a questionnaire could include the following questions, among others: If the agreement will result in tariff savings, to whom will the saving gains accrue? How will the agreement impact on tariff revenue losses? How likely will a new effective tax collection system be installed? What is the influence of existing dumping practices? How will the influx of cheap goods impact on the markets? To what extent will the agreement support equitable contract farming arrangements? What is required in order to encourage sustainable investments? What will the adjustment costs amount to – including the costs for new regulation on customs administration, compliance with export standards, and similar issues? How will the agreement impact on the industrialisation policy, particularly in countries depending on commodity export? What impact will it have on the care sector? Will the agreement cover all relevant economic sectors? If aid for trade shall be delivered, to what extent will it be effective? How will the agreement impact on regional market integration? Will the agreement contribute to more stability, or will it bring about more insecurity and hazard? To what extent will the agreement contribute to fiscal and economic sustainability?

20 Principle V.6. lists a set of criteria to be considered: (1) long term economic and social benefits should be prioritised over short-term benefits; (2) negative impacts on human rights should only be accepted if complementary measures are available, but only if they are really effective; (3) trade-offs which would "result in or exacerbate unequal and discriminatory outcomes" should be ruled out ; (4) the selection of trade-offs should never result in a "deprivation of the ability of people to enjoy the essential content of their human rights"; (5) implementation of the trade agreement resulting in a retrogressive level of protection of human rights can only be justified "by reference to the totality of human rights". Altogether, losses and gains should be "shared across groups", and those benefiting should compensate for the protection of those who are negatively affected.

pp 19–20). This seems to remain true for the new generation of trade SIAs. While the SIA of the EU–Georgia and EU–Moldova DCFTAs contain interesting statements with respect to who might win and who might lose out, it refrains from assessing whether the identified trade-offs are acceptable from a human rights perspective. Neither does it examine whether the recommended policy measures to cope with negative human rights impacts are likely to be realised or not (see section 3.4.2.).

3.7 How is the assessment conducted? Independence of experts and quality of consultation

Trade HRIA and trade SIA methodologies also deal with the question of *how* the assessment should be conducted. Both trade HRIA and trade SIA methodologies hold that the assessment process should be guided by recognised governance principles. The Guiding Principles on HRIA refer to human rights–based governance principles. According to principle IV.4, the principles of (a) independence, (b) transparency and (c) inclusive and non-discriminatory participation should be respected. The team of researchers tasked with preparing a trade HRIA "should be composed of relevant experts", and sufficient funding should be provided "in order to prepare a high-quality assessment" (Guiding Principles on HRIA, IV.4.6.). Parliamentary oversight should be ensured, and accountability provided. The Trade SIA Handbook also states that trade SIAs "should be based on transparency and include external consultations" (Trade SIA Handbook, p 8). Moreover, "all stakeholders should be given an opportunity to take part in the analysis of issues and impacts" (ibid, p 8). However, in trade SIA practice, there are a number of open questions regarding the implementation of some of these principles.

Independence of the experts tasked with preparing the assessment is a key prerequisite for both trade HRIAs and trade SIAs. The Trade SIA Handbook holds that "Trade SIAs should be carried out by external consultants selected by public tendering procedures." This should ensure that "consultants are independent". They should work "in a transparent and rational manner and base their findings on scientific evidence" (Trade SIA Handbook, p 8). However, the EU Commission impinges on the assessment on several occasions. It is assigned the task of setting up an internal consultation process to guide the experts and "ensure relevance".[21] Accordingly, the EU Commission is present as a stakeholder in the inception phase, the mid-term phase and the final phase (ibid, p 12). Such involvement risks to constrain experts' independence.

External consultation is a further key element of both trade HRIAs and trade SIAs. This is particularly true for trade SIAs, whose main objective is to "build an open process of consultation around trade policy, creating a basis for an informed discussion" (Trade SIA Handbook, p 12). In principle, consultants have a responsibility to integrate contributions from stakeholders (ibid, p 26). Moreover, "Standard Guidelines for Consultation of Civil Society" guide the consultation process (Trade SIA Handbook, pp 49–51). In practice, however, criticism has been raised concerning the effectiveness of external trade SIA consultation. The 2011 study by Ergon concluded that the quality of engagement, particularly with social partners, needs to be improved in trade SIAs. After having conducted a range of interviews with social partners of the EU, the authors reported that "many contractors and stakeholders believed that Brussels consultation meetings had become stale, partly as a result of dwindling stakeholder interest" (Ergon 2011, p 6). A main reason was that the trade SIA process was perceived as having little influence on negotiation outcomes, and that it remained unclear whether and how their views were taken into account by the researchers (ibid, p 4). Hence, it needs to be considered that effective participation of stakeholders will always depend on effective integration of trade SIA results into the negotiation process (see section 3.8.).

21 "A steering committee involving representatives of different Commission departments and EU negotiators should ensure the relevance of the Trade SIA process." (Trade SIA Handbook, p 8).

3.8 When should the assessment be conducted? Feeding into a dual policy process

In order for impact assessments to be effective, they should immediately feed into the respective trade negotiations. According to the Guiding Principles on HRIA, a trade HRIA should be prepared "prior to the conclusion of the agreements" and "in time to influence the outcomes of the negotiation" (principle III.3.). This implies that, ideally, the assessment should be presented to the parliament (ibid, IV.4.). Feeding assessment results into the negotiation process is also a key element of trade SIA theory. Here, this is expected to partly happen via the consultation process that has been initiated by the trade SIA. According to the Trade SIA Handbook, the EU Commission bears a particular responsibility for integrating assessment results into EU policy: "A commitment to do so is at the core of the Trade SIA process" (Trade SIA Handbook, p 13). This responsibility is understood as part of the EU's sustainable development agenda: "The credibility of the EU's pursuit of sustainable development goals depends on how the Trade SIA analysis is used to influence trade policy making and trade negotiations" (ibid, p 13).[22]

In practice, however, integration of assessment results in the negotiation process has been limited. George and Kirkpatrick, who examined *inter alia* the effectiveness of the trade SIAs of the WTO Doha round and the SIA of the Euro-Mediterranean Free Trade Area, observed difficulties in "integrating the studies into the decision-making process in practice" (George and Kirkpatrick 2008, p 67).[23] Most importantly, they found that integration of assessment results into the policy process was hampered by the fact that the EU Commission follows a dual system which comes with contradictions and ambiguities. While the public debate is informed by the trade SIAs, "the mandate for Europe's trade negotiators is based on separate impact assessments whose findings are confidential" (ibid, p 19). According to the EU Commission, these confidential impact assessments are needed "in order for trade policy to help create jobs and drive growth, economic factors must play a primary role" (European Commission, External Trade 2006a, p 11). As a result, George and Kirkpatrick held that trade SIAs create "potential conflicts with a negotiating process that is necessarily confidential and gives priority to the EU's economic interests" (George and Kirkpatrick 2008, p 84). They hence concluded that current trade SIAs have "yet to have a major direct influence on the ECs negotiating positions" (ibid, p 84). As a response, it is recommended to overcome this dual mechanism and integrate the two impact assessment processes. Human rights considerations should already play a role in the decision on whether or not to initiate negotiations. This is also valid for the new generation of trade SIAs.

3.9 Remaining issues: gathering evidence and *ex post* monitoring

General impact assessment theory requires that researchers break the assessment process down into a number of key steps. Both trade HRIA and trade SIA methodologies follow this approach and recommend stages of screening, scoping, gathering evidence, analysis, conclusions and recommendations, and evaluation. Many components of these stages have already been discussed in the previous sections. Two aspects, however, remain to be looked at more closely: the question of quantitative and qualitative research tools, and the process of '*ex post* monitoring'.

22 Thus, the EU Commission is equipped with an important policy instrument to foster integration of results: after extensive in-house consultation, the EU Commission, led by DG Trade, issues a 'position paper' on the trade SIA findings, in which it includes points of agreement and disagreement. Position papers should explain "how the findings will be taken into account in the development of policy for negotiations" (Trade SIA Handbook, p 40). These position papers are made publicly available.

23 The authors named three reasons for these limits: First, some studies were only concluded in the final phase of negotiations. In fact, regarding liberalisation of trade in industrial products, "bilateral agreements between the EU and most of the partner countries were concluded prior to the SIA study" (George and Kirkpatrick 2008, p 83). In these cases, the declared aim of the trade SIAs was to identify accompanying mitigation and enhancement measures. Secondly, the authors attributed little value to recommendations made in the EU Commission's position papers because they "tend to be non-specific, such as raising the awareness of EC delegations" (ibid, p 84).

3.9.1 Gathering evidence: quantitative versus qualitative research tools?

The Guiding Principles on HRIA emphasise the importance of using both quantitative and qualitative research tools while gathering evidence. Quantitative tools include "economic modelling" and "regression analysis", whereas qualitative research tools include "participatory research methodologies". Although future impacts can only be estimated, the aim is to assess them "as precisely as possible" by using an adequate mix of tools (Guiding Principles on HRIA, VI.7.). Trade SIA methodology also emphasises the importance of using both qualitative and quantitative assessment techniques (Trade SIA Handbook, p 18).

In trade SIA practice, such a mix of qualitative and quantitative methods has not always been applied as recommended. The above-mentioned study by Ergon, for example, concluded that economic modelling was the main component of the trade SIA process despite "known limitations associated with economic modelling" (Ergon 2011, p 5). By contrast, qualitative research techniques, such as stakeholder interviews and use of secondary sources, were not sufficiently employed. The study also found that "there is no consistent framework for combining quantitative and qualitative methodologies, which risks compromising the quality and consistency of analysis across SIAs" (ibid, p 6). Regarding the new-generation SIA of the EU–Georgia and EU–Moldova DCFTAs, a considerable number of stakeholder consultations were conducted when screening for main human rights impacts. A specific survey was conducted among key stakeholders, in which they were asked to comment on the current human rights situation in Georgia and Moldova, and on the expected effects of the DCFTA on human rights in Georgia and Moldova. Further, specific discussions were held with local human rights experts and human rights–related NGOs. It would be worth evaluating and further developing these and earlier experiences of qualitative analysis in trade SIAs.

3.9.2 Differences in *ex post* monitoring: an iterative process?

Presentation of an *ex ante* impact assessment of a trade agreement does not mean that the process of assessing impacts is completed. On the contrary, according to general impact assessment theory, an appropriate follow-up mechanism needs to ensure evaluation of the actual impacts once the trade agreement has entered into force. It examines to what extent the expected impacts have indeed materialised, to what degree recommended complementary measures have been implemented, and whether they have been effective. General impact assessment theory understands impact assessments as part of an iterative process, since impacts cannot be anticipated for sure. Trade HRIA methodology follows this understanding and promotes *ex post* impact assessments. Even after a trade agreement has entered into force it should remain possible to include additional safeguard clauses, to declare the agreement as void, or to guarantee a right to denunciate its application (Guiding Principles on HRIA, III.3.3.) Trade SIA methodology is familiar with this concept of an iterative process as well (Trade SIA Handbook, p 23). In contrast to trade HRIA methodology, however, the Trade SIA Handbook does not suggest amending a trade agreement *ex post* if incompatibilities are found at this later stage. Instead, it suggests listing "recommendations on how the agreement may be applied in practice" (ibid, p 23).

In practice, *ex post* trade SIAs have so far remained in the realm of wishful thinking, since earlier trade agreements did not foresee such a procedure. This seems to be slowly changing. The 2011 Ergon study states that "whereas earlier agreements (such as the EU–Chile AA) did not make specific provision for monitoring sustainability impacts or civil society dialogue mechanisms, such concepts have become a standard inclusion in more recently concluded agreements" (Ergon 2011, p 13). This development comes with the establishment of a focal point for monitoring sustainability impacts of the agreements. These frameworks, however, still do not include the possibility of amending the trade agreement if human rights needs suggested doing so. This remains valid with the new generation of trade SIAs.

4 Conclusion and Outlook

The arguments provided in the present study indicate that the trade HRIA framework is more consistent than the trade SIA framework. The study shows that it would be feasible to conduct human rights–sensitive trade SIAs by systematically including core elements of HRIA methodology, and that such an augmentation of trade SIAs would sharpen their contours and strengthen their legitimacy. The upcoming new generation of trade agreements include some interesting first attempts to capture human rights impacts. However, these attempts do not yet follow a proper methodology that would enable integrating human rights concerns comprehensively. It is hence suggested, as a first step, to revise the Trade SIA Handbook and to develop a proper methodology of human rights–sensitive trade SIAs that encompasses all elements mentioned below and is based on existing trade SIA experience. This would not only require an in-depth assessment of current HRIA theory, but also an evaluation of first experiences with the new generation of trade SIAs. The experiences of NGOs who are conducting human rights impact assessments should be evaluated, as well. The process of drafting such a revised and expanded handbook could stimulate ongoing trade SIAs and help to initiate the policy processes needed to improve the effectiveness of these assessments.

When developing a methodology for HRIA-informed trade SIAs, consideration must be given to the fact that trade HRIAs look at the various dimensions of sustainable development from a human rights perspective. Accordingly, they may disregard certain elements that are relevant to sustainable development, but not to human rights. Trade SIAs, by contrast, are meant to look at all dimensions of sustainable development in a comprehensive way. This is an immense task and inevitably comes with some concessions regarding depth of analysis. Taking into account impacts on the social, as well as the economic and environmental dimensions of sustainability in a comprehensive way entails balancing more interests.[24] In such an exercise, more trade-offs will come into focus. This requires resolving difficult questions of hierarchy, such as whether human rights obligations prevail over other treaty obligations (Guiding Principles on HRIA, III.3.3.). To deal with such questions more thoroughly, however, would go beyond the scope of this study.

24 What is valid for human rights, is valid for the other thematic dimensions, too. Regarding the economic and the environmental dimensions, researchers can also make use of sophisticated legal frameworks of international law that can guide them in formulating more precise and better targeted questions (Bürgi Bonanomi 2013). Legal principles can also guide the balancing of interests and trade-offs in a three-dimensional context (Gehne 2011). In this respect, however, many questions still remain to be resolved, and innovative methodologies need to be developed and tested.

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CDE Working Papers present reflections on sustainable development issues of concern to researchers, development experts, and policymakers around the world.

The European Union's (EU) trade policy has a strong influence on economic development and the human rights situation in the EU's partner countries, particularly in developing countries. The present study was commissioned by the German Federal Ministry for Economic Cooperation and Development (BMZ) as a contribution to further developing appropriate methodologies for assessing human rights risks in development-related policies, an objective set in the BMZ's 2011 strategy on human rights. The study offers guidance for stakeholders seeking to improve their knowledge of how to assess, both *ex ante* and *ex post*, the impact of Economic Partnership Agreements on poverty reduction and the right to food in ACP countries. Currently, human rights impacts are not yet systematically addressed in the trade sustainability impact assessments (trade SIAs) that the European Commission conducts when negotiating trade agreements. Nor do they focus specifically on disadvantaged groups or include other benchmarks relevant to human rights impact assessments (HRIAs). The EU itself has identified a need for action in this regard. In June 2012 it presented an Action Plan on Human Rights and Democracy that calls for the inclusion of human rights in all impact assessments and in this context explicitly refers to trade agreements. Since then, the EU has begun to slightly adapt its SIA methodology and is working to define more adequate human rights–consistent procedures. It is hoped that readers of this study will find inspiration to help contribute to this process and help improve human rights consistency of future trade options.