

# IMPROVING THE METHODOLOGY FOR MEASURING SOCIAL AND HUMAN RIGHTS IMPACTS OF TRADE AGREEMENTS

## EU'S SUSTAINABILITY IMPACT ASSESSMENT METHODOLOGY COMPARED TO DE SCHUTTER'S HUMAN RIGHTS IMPACT ASSESSMENT METHODOLOGY

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### ABSTRACT

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 improve regulatory trade options. The EU has already commissioned several trade SIAs as part of its trade negotiations. 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. Against this background, the paper examines current the sustainability impact assessment (SIAs) methodology of the EU from a human rights perspective. It explores how the 'Guiding Principles on Human Rights Impact Assessments of Trade and Investment Agreements' by Prof. De Schutter, former UN Special Rapporteur on the Right of Food, can be put into practice and applied to improve SIA methodology.

### Keywords

Human rights impacts of trade agreements – sustainability impact assessment methodology – human rights impact assessment methodology – trade agreements of the EU – Economic Partnership Agreements EPA



## 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.<sup>1</sup> 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<sup>2</sup> 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.<sup>3</sup> 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.<sup>4</sup> First states have agreed to conduct HRIAs of free trade agreements (FTAs).<sup>5</sup> In 2011, Guiding Principles on Human Rights Impact Assessments of Trade and Investment Agreements were presented at the

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<sup>1</sup> The Treaty on European Union (EU, Consolidated Version of the Treaty on European Union of October 26, 2012 [official journal of the European Union, C326/13]; cited: TEU) 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 TEU, and EU Commission, Mainstreaming sustainable development into EU policies: 2009 Review of the European Union Strategy for Sustainable Development of July 24, 2009 (COM(2009) 400 final).

<sup>2</sup> EU Commission, Handbook for Trade Sustainability Impact Assessment (EU External Trade, 2006). (cited: Trade SIA Handbook 2006)

<sup>3</sup> All the conducted trade SIAs can be found at <http://ec.europa.eu/trade/analysis/sustainability-impact-assessments/assessments/>, last consulted on 8 September 2014.

<sup>4</sup> See e.g. High Commissioner for Human Rights, The Impact of the Agreement on Trade-Related Aspects of Intellectual Property Rights on human rights (UN Commission on Human Rights, Sub-Commission on Economic, Social and Cultural Rights, 2001, E/CN.4/Sub.2/2001/13); NORAD, Norwegian Agency for Development Cooperation, Handbook in Human Rights Assessment, State obligations, Awareness & Empowerment (Oslo: NORAD, 2001); Harrison, James, The Human Rights Impact of the World Trade Organisation (Portland: Hart Publishing, 2007); Walker, Simon, The Future of Human Rights Impact Assessments of Trade Agreements (Antwerp: Intersentia, 2009).

<sup>5</sup> See e.g. for the Canadian Government regarding the FTA between Canada and Colombia: CCIC, Canada's Coalition to End Global Poverty, The Canada-Colombia Free Trade Agreement, Human Rights Impact Report (Briefing Note, 2012).

19th Session of the United Nations Human Rights Council.<sup>6</sup> 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.<sup>7</sup> They do not have the high legitimacy of other guidelines such as the UN Guiding Principles on Business and Human Rights,<sup>8</sup> 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 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.

## **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)<sup>9</sup>, the 1966 International Covenant on Economic, Social and Cultural Rights (ICESCR)<sup>10</sup>, the 1979 Convention on the Elimination of All Forms of Discrimination against Women (CEDAW)<sup>11</sup>, the 1989 Convention on the Rights of the Child (CRC)<sup>12</sup>, 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 TEU. 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

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<sup>6</sup> UN Guiding Principles on human rights impact assessments of trade and investment agreements, report of the Special Rapporteur on the right to food, Olivier de Schutter of December 19, 2011 (A/HRC/19/59/Add.5). (cited: Guiding Principles on HRIA 2011)

<sup>7</sup> Guiding Principles on HRIA 2011; Berne Declaration, Canadian Council for International Co-operation & Misereor, Human Rights Impact Assessment for Trade and Investment Agreements, Report of the Expert Seminar of June 23-24, 2010 (Geneva: 2010).

<sup>8</sup> UN Guiding Principles on business and human rights: implementing the United Nations 'protect, respect and remedy' framework, Final Report of the Special Representative of the Secretary-General on the issue of human rights and transnational corporations and other business enterprises, John Ruggie, of March 21, 2011, A/HRC/17/31. (cited: Ruggie Principles 2011)

<sup>9</sup> International Covenant on Civil and Political Rights of December 16, 1966, A/RES/2200A (XXI). (cited: ICCPR)

<sup>10</sup> International Covenant on Economic, Social and Cultural Rights of December 16, 1966, A/RES/2200 A (XXI). (cited: ICESCR)

<sup>11</sup> UN Convention on the Elimination of All Forms of Discrimination Against Women of December 18, 1979, A/RES/34/80

<sup>12</sup> UN Convention on the Rights of the Child of November 20, 1989, A/RES/44/25.

European Union of 7 December 2000. Finally, the TEU states the Union's intention to accede to the European Convention for the Protection of Human Rights and Fundamental Freedoms.<sup>13</sup>

The TEU stresses in particular that the EU's foreign policy should promote human rights. According to Art. 3(5) of the 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.<sup>14</sup> 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.<sup>15</sup>

## **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.<sup>16</sup>

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'<sup>17</sup> 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'<sup>18</sup>. Thus, impact assessments are needed to ensure human rights consistency.<sup>19</sup> The 2012 'EU Strategic Framework and Action Plan on Human Rights and Democracy' 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'<sup>20</sup>. First attempts in this direction are now being made in the context of the upcoming new generation of trade SIAs (see section 3).

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<sup>13</sup> Art. 6(2) of the TEU.

<sup>14</sup> See, e.g., the CESCR General Comment No. 12 on the Right to Adequate Food of May 12, 1999, E/C.12/1999/5; CESCR General Comment No. 15 on the Right to Water of January 20, 2003, E/C.12/2002/11.

<sup>15</sup> Maastricht Principles on Extraterritorial Obligations of States in the area of Economic, Social and Cultural Rights of February 29 (2012).

<sup>16</sup> Guiding Principles on HRIA 2011: IV.4.7.

<sup>17</sup> EU Commission, High Representative of the European Union for Foreign Affairs and Security Policy, Joint Communication to the European Parliament and the Council, Human Rights and Democracy at the Heart of EU External Action – Towards a More Effective Approach, of December 12, 2011 (COM(2011)886).

<sup>18</sup> *Ibid.*, pp. 11–12.

<sup>19</sup> *Ibid.*, p. 19.

<sup>20</sup> *Ibid.*, para I, 1.

### 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 DCFTA (deep and comprehensive free trade agreement) between the EU and Georgia and the Republic of Moldova’, the first ‘new generation’ trade SIA on which a final report has been published.<sup>21</sup> 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 so far. 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 Georgian final report, whose structure is very similar to that of the Moldovan final report.

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.<sup>22</sup> 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.<sup>23</sup> Thus, trade SIAs have been primarily a strategic instrument of the European Commission to improve stakeholder participation.<sup>24</sup> 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’<sup>25</sup>. Hence, trade SIAs of the new generation derive their legitimacy at least partly from human rights obligations, since treaties are required to be ‘deep

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<sup>21</sup> SIA of the EU-Georgia DCFTA; SIA of the EU-Moldova DCFTA; both 2012.

<sup>22</sup> Guiding Principles on HRIA 2011: I.

<sup>23</sup> Trade SIA Handbook, p. 7.

<sup>24</sup> Ibid: p. 9.

<sup>25</sup> SIA of the EU-Georgia DCFTA: p. 76.

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.).

### **3.2. 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'.<sup>26</sup> 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'.<sup>27</sup> 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 DCFTA 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 [...]'.<sup>28</sup> Therefore, the Trade SIA Handbook recommends carrying out trade SIAs in cooperation with third country partners.<sup>29</sup> 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.<sup>30</sup> 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.<sup>31</sup>

### **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.<sup>32</sup> Treaties are

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<sup>26</sup> Guiding Principles on HRIA 2011: II.2.6.

<sup>27</sup> Trade SIA Handbook, p. 15.

<sup>28</sup> Trade SIA Handbook 2006: p. 24.

<sup>29</sup> Ibid: p. 8.

<sup>30</sup> George, Clive, Kirkpatrick, Colin, Sustainability Impact Assessment of Trade Agreements: from public dialogue to international governance, *Journal of Environmental Assessment Policy and Management* Vol. 10, No. 1 (2008), p. 68.

<sup>31</sup> UNEP, Reference Manual for the Integrated Assessment of Trade-Related Policies (New York and Geneva: United Nations Environment Programme, 2001).

<sup>32</sup> E.g. Koskeniemi, Martti, Study Group of the International Law Commission, Fragmentation of International Law, Difficulties Arising from the Diversification and Expansion of International Law (Yearbook of the International Law Commission, 2006); Cottier, Thomas, Gehne, Katja, et al., Introduction: fragmentation and coherence in international trade regulation: analysis and conceptual foundations, in: Cottier, Thomas, Delimatsis, Panagiotis, *The Prospects of International Trade Regulation: From*

‘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.<sup>33</sup> The Guiding Principles on HRIA (2011) also refer to the Ruggie Principles 2011, 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’<sup>34</sup>.

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’<sup>35</sup>. 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.<sup>36</sup> 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.<sup>37</sup> 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.<sup>38</sup>

### **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

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Fragmentation to Coherence (Cambridge: CUP, 2011), p. 1-65; Bürgi Bonanomi, Elisabeth, Sustainable Development in International Law Making, History, Concept, Institutions, Processes, The example of trade in agriculture (forthcoming, 2015).

<sup>33</sup> Guiding Principles on HRIA 2011: II. 2.1.

<sup>34</sup> Guiding Principles on HRIA 2011, II.2.1.

<sup>35</sup> Guiding Principles on HRIA 2011: IV.4.3.

<sup>36</sup> E.g. Trade SIA Handbook 2006: p. 16.

<sup>37</sup> 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 Associates, Trade and Labour: Making effective use of trade sustainability impact assessments and monitoring mechanisms, Final Report, Executive Summary [Ergon, 2011], p. 8).

<sup>38</sup> 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. 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 (SIA of the EU-Georgia DCFTA: p. 77).

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’<sup>39</sup>. This refers to those options that best do justice to the underlying objectives. The 2009 ‘European Commission 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”’<sup>40</sup>. Such thinking in different options is also a core component of trade HRIA methodology.<sup>41</sup> 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.<sup>42</sup>

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’<sup>43</sup>, of a ‘broad FTA’<sup>44</sup>, and of a ‘broad plus FTA’<sup>45</sup>.<sup>46</sup> 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 DCFTA 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’<sup>47</sup>. 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’ adopted (Guiding Principles on HRIA 2011: III.3). The optimal response is the one that promises to be most effective; this, in turn, presumes a profound assessment.<sup>48</sup> In contrast, the Trade SIA Handbook emphasises the need to introduce complementary measures to counteract negative impacts. The handbook

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<sup>39</sup> Gehne, Katja, *Nachhaltige Entwicklung als Rechtsprinzip, Normativer Aussagegehalt, rechtstheoretische Einordnung, Funktionen im Recht* (Tübingen: Mohr Siebeck, 2011); Bürgi Bonanomi, Elisabeth, *Sustainable Development in International Law Making, History, Concept, Institutions, Processes, The example of trade in agriculture* (forthcoming, 2015).

<sup>40</sup> European Commission, *Impact Assessment Guidelines* of from January 15, 2009 (SEC(2009)92), p. 29.

<sup>41</sup> Guiding Principles on HRIA 2011: II.2.1.

<sup>42</sup> *Ibid.*: VI.7.2.

<sup>43</sup> With 90% tariff reductions in both the food and the non-food sector, and 25% reduction in the service sector.

<sup>44</sup> With 75% tariff reductions in both the food and the non-food sector, and 75% reduction in the service sector.

<sup>45</sup> 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.

<sup>46</sup> SIA EU–India final report 2009: pp. 440–441.

<sup>47</sup> SIA of the EU–Georgia DCFTA: p. 13.

<sup>48</sup> That researchers are free to choose among the full range of available responses is demonstrated in a study conducted by Misereor, the Heinrich Böll Stiftung, *et al.* 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 (Misereor, Heinrich Böll Stiftung, Third World Network, Anthra, Glropolis, Ecofair Trade Dialogue, *Right to Food Impact Assessment of the EU–India Trade Agreement* [2011], p. 8).

also uses the term ‘mitigation and enhancement measures’ (M&Es). They should ‘mitigate potential negative impacts or enhance positive ones’<sup>49</sup>. 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’<sup>50</sup> 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<sup>51</sup> regulation except for LDCs.<sup>52</sup> 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’.<sup>53</sup> 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 [...]’.<sup>54</sup> Most other recommendations focused on aid for trade and technical assistance, which were expected to help provide a stable climate for trade and investment.<sup>55</sup>

Trade SIAs of the new generation seem to be similarly limited in terms of possible responses. Indeed, the SIA of the EU–Georgia DCFTA 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.<sup>56</sup> Hence, the recommended policy measures<sup>57</sup> 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’<sup>58</sup>. 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.

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<sup>49</sup> Ibid: p. 22.

<sup>50</sup> Ibid: p. 22.

<sup>51</sup> WTO Agreement on Trade Related Aspects of Intellectual Property Rights of 1994. (cited: TRIPS)

<sup>52</sup> Morrissey, Oliver, Willem te Velde, Dirk, Sustainability Impact Assessment of Proposed WTO Negotiations, Market Access with particular reference to Pharmaceuticals, Non-Ferrous Metals and Textiles and Clothing, Final Report (London: ODI, 2003).

<sup>53</sup> SIAs of the EU–ACP EPAs, summary of key findings 2007: 3<sup>rd</sup> and 4<sup>th</sup> recommendation.

<sup>54</sup> EU Commission, Position Paper, Sustainability Impact Assessment of EU–ACP Economic Partnership Agreements of November 16, 2007, p. 4.

<sup>55</sup> Ibid: 8<sup>th</sup>–11<sup>th</sup> recommendation. 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’ (SIA EU–India final report 2009: p. 287, pp. 303–304).

<sup>56</sup> SIA of the EU–Georgia DCFTA: p. 106.

<sup>57</sup> As listed in SIA of the EU–Georgia DCFTA: pp. 107 – 112.

<sup>58</sup> SIA of the EU–Georgia DCFTA: p. 107.

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.<sup>59</sup> HRIA-informed SIAs would, however, need to weight both risks and opportunities equally.

### 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.<sup>60</sup> 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.<sup>61</sup>

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’<sup>62</sup>. They discovered some small scope for asymmetry ‘both in terms of what is included, and transitional timelines for liberalisation’<sup>63</sup>. 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’.<sup>64</sup>

### 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.

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<sup>59</sup> Trade SIA Handbook 2006: p. 19.

<sup>60</sup> WTO General Agreement on Tariffs and Trade of 1994.

<sup>61</sup> An exception is made for non-reciprocal preferences, which are conceded under the General System of Preferences (GSP) on a non-discriminatory basis.

<sup>62</sup> SIAs of the EU–ACP EPAs, summary of key findings 2007: 3<sup>rd</sup> recommendation.

<sup>63</sup> *Ibid.*

<sup>64</sup> Misereor, Heinrich Böll Stiftung, Third World Network, Anthra, Glropolis, Ecofair Trade Dialogue, Right to Food Impact Assessment of the EU–India Trade Agreement (2011), p. 8.

### 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<sup>65</sup> 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’<sup>66</sup>. The Guiding Principles on HRIA define the meaning of the ‘respect, protect and fulfil’ triad in a trade and human rights context.<sup>67</sup> It is derived from ‘the normative content of human rights, as clarified by the judicial and non-judicial bodies that are tasked with monitoring compliance with human rights obligations’<sup>68</sup>.

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<sup>69</sup>. 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’<sup>70</sup>. 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’<sup>71</sup>. 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’.<sup>72</sup> Moreover, the use of disaggregated indicators and data is indispensable

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<sup>65</sup> But also the capacity of non-State actors to meet their human rights responsibilities is targeted (UN Guiding Principles 2011: II.2.1.)

<sup>66</sup> Guiding Principles on HRIA 2011: II.2.

<sup>67</sup> 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.).

<sup>68</sup> Guiding Principles on HRIA 2011: IV.5.1.

<sup>69</sup> Guiding Principles on HRIA 2011: II.2.4.

<sup>70</sup> Principle 9 of the Ruggie Principles 2011 in connection with Guiding Principles on HRIA 2011: II.2.1.

<sup>71</sup> Guiding Principles on HRIA 2011: II.2.5.

<sup>72</sup> ‘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 2011:IV.5.2.).

in order to comply with the principle of non-discrimination.<sup>73</sup> This includes closely looking at both female and male labour and assessing the repercussions the trade policy might have on the care sector.<sup>74</sup> The UN has done important preparatory work that can guide human rights–based indicator selection.<sup>75</sup>

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’.<sup>76</sup> 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’.<sup>77</sup>

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.<sup>78</sup>

### 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’.<sup>79</sup> 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.

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<sup>73</sup> ‘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 2011: 5.3)

<sup>74</sup> Razavi, Shakra, *The Political and Social Economy of Care in a Development Context: Conceptual Issues, Research Questions and Policy Options* (UNRISD, 2007).

<sup>75</sup> E.g. UN Human Rights, Office of the High Commissioner, *Human Rights Indicators, A Guide to Measurement and Implementation* (New York and Geneva: UN, 2012), HR/PUB/12/5.

<sup>76</sup> Trade SIA Handbook 2006: pp. 33-34-

<sup>77</sup> Trade SIA Handbook 2006: pp. 33-34.

<sup>78</sup> SIA of the EU-Georgia DCFTA: pp. 68-71.

<sup>79</sup> Art. 5 of the UN Vienna Declaration and Programme of Action of July 12, 1993 (A/CONF.157/23).

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’<sup>80</sup>. 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.<sup>81</sup> 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 2011, para II.<sup>82</sup> 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’<sup>83</sup> 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

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<sup>80</sup> Trade SIA Handbook 2006: p. 16.

<sup>81</sup> Ibid: p. 32.

<sup>82</sup> E.g. Nestle, Danish Institute for Human Rights, Talking the Human Rights Walk; Nestle’s experience Assessing Human Rights Impacts in its Business Activities, 2013.

<sup>83</sup> Ruggie Principles 2011: 17.

blinkers is again crucial. A brainstorming exercise, based on a questionnaire informed by trade experience, might help researchers to circle in on the real challenges.<sup>84</sup>

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 unacceptable 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’<sup>85</sup>. The decision about trade-offs should be sought in a ‘open and democratic process’ of ‘effective, free, active and meaningful participation’<sup>86</sup>. 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

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<sup>84</sup> 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?

<sup>85</sup> Guiding Principles on HRIA 2011: V.6.2.

<sup>86</sup> Ibid: V.6.3.

applying a human rights approach.<sup>87</sup> 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.<sup>88</sup> This seems to remain true for the new generation of trade SIAs. While both the SIA of the EU-Georgia DCFTA and the SIA of the EU-Moldova DCFTA 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’<sup>89</sup>. 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’<sup>90</sup>. Moreover, ‘all stakeholders should be given an opportunity to take part in the analysis of issues and impacts’<sup>91</sup>. 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’<sup>92</sup>. However, the EU Commission impinges on the assessment on several occasions. It is assigned the task of setting up an internal

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<sup>87</sup> Ibid. 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<sup>87</sup>; (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.<sup>87</sup>

<sup>88</sup> Trade SIA Handbook 2006: pp. 19–20.

<sup>89</sup> Guiding Principles on HRIA 2011: IV.4.6.

<sup>90</sup> Trade SIA Handbook 2006, p. 8.

<sup>91</sup> Ibid, p. 8.

<sup>92</sup> Trade SIA Handbook 2006, p. 8.

consultation process to guide the experts and ‘ensure relevance’.<sup>93</sup> Accordingly, the EU Commission is present as a stakeholder in the inception phase, the mid-term phase and the final phase.<sup>94</sup> 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’<sup>95</sup>. In principle, consultants have a responsibility to integrate contributions from stakeholders.<sup>96</sup> Moreover, ‘Standard Guidelines for Consultation of Civil Society’<sup>97</sup> guide the consultation process. 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’<sup>98</sup>. 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: 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.).

### **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’<sup>99</sup>. This implies that, ideally, the assessment should be presented to the parliament.<sup>100</sup> 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’<sup>101</sup>. 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’.<sup>102</sup>

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

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<sup>93</sup> ‘A steering committee involving representatives of different Commission departments and EU negotiators should ensure the relevance of the Trade SIA process.’ (Trade SIA Handbook 2006, p. 8).

<sup>94</sup> Ibid, p. 12.

<sup>95</sup> Trade SIA Handbook 2006, p. 12.

<sup>96</sup> Ibid, p. 26.

<sup>97</sup> Trade SIA Handbook 2006: annex.

<sup>98</sup> Ergon Associates, Trade and Labour: Making effective use of trade sustainability impact assessments and monitoring mechanisms, Final Report, Executive Summary (Ergon, 2011), p. 6.

<sup>99</sup> Guiding Principles on HRIA 2011: III.3.

<sup>100</sup> Ibid: IV.4.

<sup>101</sup> Trade SIA Handbook 2006, p. 13.

<sup>102</sup> Ibid, p. 13. 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 2006, p. 40). These position papers are made publicly available.

the WTO Doha round and the SIA of the Euro-Mediterranean FTA, observed difficulties in 'integrating the studies into the decision-making process in practice'<sup>103</sup>.<sup>104</sup> 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'<sup>105</sup>. 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'<sup>106</sup>. 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'<sup>107</sup>. They hence concluded that current trade SIAs have 'yet to have a major direct influence on the ECs negotiating positions'<sup>108</sup>. 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'.

#### **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<sup>109</sup>. Trade SIA methodology also emphasises the importance of using both qualitative and quantitative assessment techniques.<sup>110</sup>

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<sup>103</sup> George, Clive, Kirkpatrick, Colin, Sustainability Impact Assessment of Trade Agreements: from public dialogue to international governance, *Journal of Environmental Assessment Policy and Management* Vol. 10, No. 1 (2008), p. 1.

<sup>104</sup> 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' (ibid, p. 17). 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. 18).

<sup>105</sup> Ibid: p. 19

<sup>106</sup> European Commission, *Global Europe: Competing in the World. A Contribution to the EU's Growth and Jobs Strategy*. Communication from the Commission to the Council, the European Parliament, and the Committee of the Regions EC: Brussels (2006), p.11.

<sup>107</sup> George, Clive, Kirkpatrick, Colin, Sustainability Impact Assessment of Trade Agreements: from public dialogue to international governance, *Journal of Environmental Assessment Policy and Management* Vol. 10, No. 1 (2008), p. 18.

<sup>108</sup> Ibid, p. 18.

<sup>109</sup> Guiding Principles on HRIA 2011: VI.7.

<sup>110</sup> Trade SIA Handbook 2006, 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’<sup>111</sup>. 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’<sup>112</sup>. Regarding the new generation SIAs of the EU-Georgia DCFTA and of the EU-Moldova DCFTA, 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.<sup>113</sup> 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.<sup>114</sup> Trade SIA methodology is familiar with this concept of an iterative process as well.<sup>115</sup> 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’<sup>116</sup>.

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’<sup>117</sup>. 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

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<sup>111</sup> Ergon Associates, Trade and Labour: Making effective use of trade sustainability impact assessments and monitoring mechanisms, Final Report, Executive Summary (Ergon, 2011), p. 5.

<sup>112</sup> *Ibid.*, p. 6.

<sup>113</sup> SIA of the EU-Georgia DCFTA, p. 70; SIA of the EU-Moldova DCFTA, p. 69.

<sup>114</sup> Guiding Principles on HRIA 2011: III.3.3.

<sup>115</sup> Trade SIA Handbook 2006, p. 23

<sup>116</sup> *Ibid.*, p. 23.

<sup>117</sup> Ergon Associates, Trade and Labour: Making effective use of trade sustainability impact assessments and monitoring mechanisms, Final Report, Executive Summary (Ergon, 2011). P. 13.

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.<sup>118</sup> 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.<sup>119</sup> To deal with such questions more thoroughly, however, would go beyond the scope of this study.

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<sup>118</sup> 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 (see Bürgi Bonanomi, Elisabeth, Sustainable Development in International Law Making, History, Concept, Institutions, Processes, The example of trade in agriculture [forthcoming, 2015]). Legal principles can also guide the balancing of interests and trade-offs in a three-dimensional context (see Gehne, Katja, Nachhaltige Entwicklung als Rechtsprinzip, Normativer Aussagegehalt, rechtstheoretische Einordnung, Funktionen im Recht [Tübingen: Mohr Siebeck, 2011]). In this respect, however, many questions still remain to be resolved, and innovative methodologies need to be developed and tested.

<sup>119</sup> Guiding Principles on HRIA 2011: III.3.3.

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