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**Human rights impact assessments: A pertinent tool for
informing and improving trade governance?**

Author

3D → Trade – Human Rights – Equitable Economy

Abstract

The session addressed how to conceptualise and implement human rights impact assessments (HRIAs) of trade agreements, compared them with other types of assessments and assessed the potential of HRIAs to inform and shape trade policy and agreements.

Marceau highlighted that while international trade has contributed to economic growth, this had often fallen short of achieving progress in poverty reduction and development. The panel discussed whether HRIAs of trade agreements could help trade to contribute to those goals more effectively and consistently. The current confusion and lack of engagement between the human rights and trade law discourse was emphasized and the potential that HRIAs could have for bridging this gap was highlighted. The panel also discussed how other types of impact assessment provide lessons for the design and conduct of HRIAs and prevent poorly constructed or biased studies that could be counterproductive. The need for more methodological work, supported by UN-bodies, was underscored. Key benefits, risks and limitations of the tool were also discussed, including a brief comparative examination of the methodology of sustainability impact assessments (SIAs). In conclusion, the link between trade and human rights was re-emphasized and the need for further work to improve understanding on linkages between the WTO and human rights, such as through HRIAs, was underscored.

Part I: Presentations by the panellists

Gabrielle Marceau, Counsellor at the Office of the WTO Director General

Although international trade does render economic benefits, this has not always translated into poverty reduction and equitable development. This panel will explore the benefits and risks of HRIAs as a practical tool to better understand and manage the linkages between trade and human rights. It will provide a substantive overview of and practical experience with HRIAs, what their value is and how to design them for effective use.

¹ Session organised by 3D in collaboration with the Office of the High Commissioner for Human Rights

James Harrison, Professor of Law, University of Warwick

Previously, the debate mostly focused on how international trade law prevented states from taking sanctions against other states committing human rights violations. Currently, the focus has shifted, with the recognition that international obligations may have potential impacts on States' own populations, potentially leading to violations of the right to health, to food, to housing, etc. However, there is little engagement and no consensus about the precise linkages between these two areas of law. Trade specialists often do not understand the obligations to which human rights give rise to or argue that the nature of the obligations are so vague and unclear that they are not relevant in trade.

Previous experience with economic, environmental and SIAs of trade agreements indicates that for a HRIA to be effective, it should:

- use core human rights principles and obligations, as manifested in comprehensive qualitative and quantitative indicators
- properly take into account complicated causality issues and examine other causes for human rights violations
- use participatory and interdisciplinary approaches
- limit findings to impacts of specific provisions of an agreement, identified through scoping studies
- arrive at concrete conclusions and recommendations that specify who needs to take what action to remedy the identified violations.

When conducted with due regard to these factors, HRIAs are more effective than other approaches in identifying potential trade and human rights conflicts in a more nuanced and defined way. This would ensure that policy-makers confront issues that would not normally be part of their agenda and provide a strong basis for concrete suggestions for alternative strategies more attuned to the needs of the extreme poor and marginalized, thus helping to make conflicts manageable and enhance mutual understanding. However, HRIAs will only render results if they succeed in engaging trade policy decision makers. Poorly constructed assessments have either no influence or worse, could be utilised to short-circuit debates about the human rights impacts of trade agreements. Also, the input of relevant UN agencies in undertaking further methodological work is crucial to realise the potential of HRIAs as a powerful tool for guiding the inter-dynamics between trade and human rights.

Sanya Reid Smith, Legal Advisor, Third World Network in Geneva

The HRIA conducted in 2006 by the National Human Rights Commission (NHRC) of Thailand investigated the likely human rights impacts in four areas (agriculture, environment, intellectual property rights (IPRs) and services and investment) of the free trade agreement (FTA) then being negotiated with the US. Besides the methodological challenges described in Harrison's work, the following issues are noteworthy:

- The importance of access to negotiated texts and other binding understandings (footnotes, etc.) incurred during negotiations that do not appear in the final text (complying with human rights obligations of transparency and participation)
- The need to assess the above, before an agreement is final, to prevent human rights abuses, as withdrawals are difficult and may carry ongoing obligations (e.g. investor

protection obligations imported from bilateral investment treaties) that have an impact on human rights.

For example, the effects of stronger IPRs take up to 15 years before they level, as shown by estimations made with the WHO-model. Thus, HRIAs need to have a long-term perspective. The NHRC concluded that an eventual agreement would affect many economic, social and cultural rights instead of furthering Thailand's development. It recommended that the negotiated text be disclosed to the public and that public hearings with affected populations be held.

Often, negotiating texts for FTAs are based on templates from the developed country, amounting to a yes/no decision of the developing country, with little room for adjustments, even if a HRIA indicates possible negative effects. When flanking measures are possible, budgets may be lacking or measures may not have the desired effect. For example, the SIAs carried out under the Euro-Mediterranean Association Agreements found that there would be adverse effects on poverty, hunger, education and health, both in the short and long term. Mitigating these effects would be costly, technically difficult and the prevention of adverse effects was not guaranteed. However, (developing) countries can improve their negotiating process, which was done in Thailand after the HRIA. Also, developed countries have to refrain from imposing trade obligations that violate human rights in partner countries; HRIAs could be a useful guiding tool to avoid such situations.

John Clarke, Deputy Permanent Representative of the Delegation of the European Commission (EC) to the International Organisations in Geneva

The EC has been legally obliged to carry out SIAs of all its major trade policies and negotiations for the past ten years. SIAs analyse potential impacts within the EU as well as in partner countries and propose flanking measures to mitigate adverse effects and to amplify the benefits of an agreement. They are undertaken by independent consultants before the start and during the lifetime of a negotiation. The results are factored into the design of the negotiations and often determine their level of ambition. Under the methodology, a number of potential outcomes are selected and tested. Through the course of a SIA, there is a high degree of transparency and stakeholder involvement and consultation. SIAs allow identifying potential negative outcomes of different policy scenarios.

The EC has not carried out HRIAs specifically, as an appropriate methodology remains to be developed. Also, the EC considers that there is no automatic link between trade agreements and human rights, but depends on the agreement content and how it is implemented. Nevertheless, SIAs do identify possible human rights challenges, notably by looking at issues of decent work, gender equality, food security, access to essential medicines and the right to development.

It is important to integrate SIAs into the negotiating process early so that they help design the negotiating mandate, assess the economic, social and environmental consequences of particular policy options and provide information within a useful timeframe and in a way that can be used by the legislator. SIAs are one among many public processes during negotiations, and policy directives and negotiating mandates are public. Concluded agreements become public, with a 3-9 months period of reflection and consultation.

Simon Walker, PhD candidate, Utrecht University

A key benefit of the HRIA methodology over other approaches is that it offers a rigorous analytical framework of legal norms and standards. However, such a rigorous approach requires more data collection and analysis, which can cause HRIAs to be time consuming and unwieldy. While a SIA focuses on process and outcome indicators, HRIAs added value is that they also take into account local institutions and accountability mechanisms, which offer the potential to influence the negotiation and implementation of agreements. Experience from the Costa Rican Constitutional Court illustrates the potential relevance of human rights accountability mechanisms in the context of trade negotiations. Also, the human rights framework is comprehensive – it covers civil, political, economic, social and cultural rights, many of which could potentially be affected by a trade agreement. The human rights analysis therefore starts broadly, narrowing down the issues and explaining why specific areas (rights) are excluded. On the other hand, a SIA looks at a predetermined set of indicators, the choice of which is not always clear and which risks excluding some potential social impacts from the outset.

A risk of HRIAs is that they can become politicised. Human rights language is convincing for some and threatening for others. Also, because they are based on clear normative standards, HRIAs are more likely to hold specific actors accountable compared to other means of assessing the impact of trade. In this regard, the relative ambiguity and flexibility of an SIA might provide a more comfortable space for e.g. governments.

There is no definitive conclusion on whether benefits outweigh risks, as this will depend on the specific situation. HRIAs are more likely to yield tangible results when they take place in an environment where there is an active and open civil society, an existing system of legal protection of human rights and functioning institutions that provide legal protection and remedies for human rights violations. Human rights practitioners and academics might be comfortable with the methodologies, while civil society organisations and national human rights institutions might use them as lobbying tool and governments might be less keen.

Part II: Discussion

Isolda Agazzi (Alliance Sud) – Which specific rights and trade provisions should HRIAs focus on? Would this make HRIAs easier and shorter? What other HRIAs have been executed so far?

Harrison – Several resources document HRIA methodologies, such as Walker’s book and www.humanrightsimpact.org. The other study was prepared by the Ecumenical Advocacy Alliance (EAA) analysing the impact of the liberalisation of the rice market in Ghana, the Philippines and Honduras. The study uses both macro-economic analysis and participatory studies. The HRIA methodology is generally stronger than that of SIAs because it looks at a wide range of impacts instead of at a set of predetermined issues.

Reid-Smith – A cross-cutting look at trade agreements is necessary. For example, the right to health might be affected from several chapters of an agreement, e.g. through agriculture, as lower tariffs lead to loss of tax revenues and lost incomes for farmers competing against imports. Like effects could come from industrial goods and services liberalisation, e.g. privatisation of water services leading to higher prices, etc. Usually, governments approach negotiations in ‘silos’, with teams on agriculture, IPRs, etc. Although they are more aware nowadays, a comprehensive approach is still lacking.

Mary Footer (University of Nottingham) – Are cultural rights, specifically the rights related to local and indigenous communities and traditional knowledge covered in HRIAs?

Walker – Cultural rights are one of the areas that an HRIA would assess. For example, they can be looked at in terms of non-discrimination as well as under soft law (Declaration on the rights of indigenous peoples).

Paolo Ghisu (ICTSD) – Can you give examples where SIAs have influenced trade policy?

Clarke – As a result of several SIAs, the EC has reduced its ambitions in specific negotiations. For example, it does no longer pursue TRIPS plus provisions. It also has excluded public interest service sectors, such health and water. For instance, in the negotiations with Ghana, the latter requested exclusions in poultry, where the SIA had demonstrated negative effects on the Ghanaian rural population.

Ann Weston (North-South Institute) – Do SIAs use gender-disaggregated data when available? If not, does the EC assist countries in producing that data, without which it is difficult to assess impact on gender and to mainstream gender into policy making in general? Are outcomes and impacts of trade agreements monitored over time?

Clarke – Including gender equality in SIAs is legally required. Gender-disaggregated data is used where available. We are working with the ILO on a programme for developing countries to monitor local labour markets. EC partnership agreements include mechanisms to monitor outcomes over time, usually together with the partner country. However, some countries are reluctant to include any type of monitoring provisions into the agreement.

Sorasak S. Sorakit (WHO), as a former participant in the Thai-USA negotiations, commented that the Thai government's treaty making process foresaw stakeholder consultations, including civil society and business. Complexities had been underestimated at the outset of the negotiations. Therefore, a mechanism was set up to improve the process. However, the treaty making mechanism under the new Thai constitution is partly problematic and has led to boundary problems.

Manzoor Ahmad (FAO) – Is the EC's trade policy really concerned with human rights and not with economic and political considerations, considering for example the EC's GSP plus scheme and the exclusion of food products in specific negotiations?

Clarke – The GSP plus scheme gives additional incentives to countries when they sign and implement specific human rights obligations. It is not inflexible and is reviewed regularly. The question of how the EC uses trade benefits to enhance human rights could be subject of another debate.

Olga Lozano (Research & Opportunities) – Considering that there is a lack of standards for NGOs to conduct impact assessments, could HRIAs help to improve the accountability and responsibility of NGOs?

Harrison – The EAA study is a good example of an HRIA study undertaken by an NGO. Still, there is a need for further guidance from UN-agencies. Another example is the Canadian Council for International Cooperation, which has also worked on a series of studies, in particular concerning investments. Despite the methodological shortcomings, I encourage civil society organisations to engage in HRIAs.

Smith-Reid – encourages statutory national human rights commissions to also undertake HRIAs.

Materneau Chrispin (OHCHR) – How to integrate trade-offs into HRIAs? What if a country decides not to enter into an agreement after a negative HRIA and later is forced to do so because its partners go down that path? How to balance short-term negative impacts against long-term positive effects?

Harrison – Human rights violations resulting from a trade agreement cannot be offset by concessions. Governments are obliged to address human rights violations as they are occurring. HRIAs are part of a broader process to put pressure on governments and other actors to take human rights implications seriously. When an assessment is *ex post*, it is not possible to renegotiate, but domestic policy changes and mitigation measures can be requested. Such *ex post* studies can also be used as a basis for *ex ante* studies in other countries, thus creating further robustness in the methodology.

Reid-Smith – Ideally, HRIAs are done *ex ante*. However, the content of an agreement is not known at this stage, unless the negotiation is based on templates. A staged process is also feasible. As mentioned, many costs will increase over time, while benefits in terms of market access will erode as other countries sign FTAs with the same partners. Countries have withdrawn from FTA negotiations, albeit not necessarily on human rights grounds, e.g. the Southern African Customs Union because of concerns over IPR and access to medicines.

Walker – HRIAs look at the accountability of governments and other actors. They also assess human rights accountability mechanisms. Environmental impact assessments are better in addressing intergenerational issues.

Tom Godwin (UK Mission) – It is very useful for trade people to have this opportunity to exchange views on human rights issues. What is the legal relationship between the two regimes?

Harrison – Human rights bodies call for HRIAs as a way to influence outcomes in trade agreements because they do not have the power to stop them. In reality, the power with regard to the issues discussed lies within the trade law system.

Kevin Koh (OHCHR): What is the perspective of the WTO on human rights and through what channels does this express itself? What is the linkage between the indicator work undertaken by the OHCHR and the HRIA methodology and how to avoid fragmentation?

Walker – There is a clear link. However, the OHCHR indicator framework has been developed for treaty body reporting and would need to be adapted for assessments of trade agreements.

Conclusion

Marceau – The debate on linkages and the collaboration between the two regimes, although still work in progress, has come a long way in the past ten years, as witnessed by today's debate. Also, for example, in the agriculture negotiations, Mauritius has requested more flexibility to fulfil its human rights obligations, while other WTO members say that agricultural subsidies are a human rights violation because it can lead to farmers in developing countries lose their livelihoods. While human rights are not explicitly mentioned

in other areas of the WTO, public morals are, and the Singapore Declaration and others spell out the respect of WTO members for minimum labour standards, stating that comparative advantage cannot be evoked to violate such standards. Human rights law is strongly linked to WTO work, as all WTO member states are also signatories of human rights treaties, which oblige them to respect human rights. Combined with current developments and progress in the existing inter-dynamic between human rights and trade, including with the consideration of approaches – such as HRIAs – there is much potential for stakeholders to contribute to better cohesion and complementarities between the two.