



FACULTY OF LAW
Lund University

Thu Duong

Human Rights Impact Assessment
of
Trade Agreements
Analysis and Critiques of Methodology

JAMM04 Master Thesis

International Human Rights Law
30 higher education credits

Supervisor: Maria Green

Term: Spring 2015

Contents

| | |
|--|-----------|
| Summary | 1 |
| Preface | 3 |
| Abbreviations | 5 |
| 1. Introduction | 6 |
| 1.1 Overview | 6 |
| 1.2 Purpose and research question | 7 |
| 1.3 Delimitations | 8 |
| 1.4 Methodology and Theory of the paper | 8 |
| 1.5 Thesis Structure | 10 |
| 2. Chapter I: Human Rights and Trade Agreements | 12 |
| 2.1 Linking human rights and international trade | 12 |
| 2.1.1 <i>Human rights and trade regime: A history of isolation</i> | 12 |
| 2.1.2 <i>The discourse on the relationship between human rights and trade</i> | 14 |
| 2.2 Linking human rights and trade agreements | 17 |
| 2.2.1 <i>Linking human rights to trade agreements</i> | 17 |
| 2.2.2 <i>The challenges of engaging human rights perspectives into the context of trade agreements</i> | 19 |
| 3. Chapter II: Overview of Human Rights Impact Assessment | 22 |
| 3.1 Impact Assessment | 22 |
| 3.1.1 <i>Overview of Impact Assessment</i> | 22 |
| 3.1.2 <i>Typology of Impact Assessment</i> | 25 |
| 3.1.2.1 Utility-based categorization of Impact Assessments | 25 |
| 3.1.2.2 Impact-type-based categorization of Impact Assessment. | 25 |
| 3.2 Human Rights Impact Assessment (HRIA) | 29 |
| 3.2.1 <i>Definition and background</i> | 29 |
| 3.2.2 <i>Typology of Human Rights Impact Assessments</i> | 34 |
| 3.2.3 <i>Essential elements of human rights impact assessments</i> | 39 |
| 4. Chapter III: Human Rights Impact Assessment of Trade Agreement | 55 |
| 4.1 Overview of human rights impact assessment in trade agreements | 55 |
| 4.1.1 <i>The growing interest in Human Rights Impact Assessment in Trade Agreements</i> | 55 |
| 4.1.2 <i>Reasons for undertaking Human Rights Impact Assessments of Trade Agreements</i> | 58 |
| 4.2 Human Rights Impact Assessment of trade agreements: main approaches and methodologies | 59 |
| 4.2.1 <i>Approaches</i> | 59 |
| 4.2.2 <i>Methodologies of human rights impact assessment of trade agreements.</i> | 62 |
| 4.2.2.1 Overview of available methodologies | 62 |

| | |
|--|-----------|
| 4.2.2.2 Methodologies | 64 |
| 5. Chapter IV: Human Rights Impact Assessment of Trade Agreement | 72 |
| 5.1 Critiques of the existing methodology for HRIA of Trade Agreements | 73 |
| 5.1.1 <i>The narrow approach of HRIA methodology undermines human rights cross-cutting principles</i> | 74 |
| 5.1.2 <i>Lack of participation in earlier impact assessment steps compromises the validity of HRIA</i> | 76 |
| 5.1.3 <i>Lack of transparency of trade agreement negotiation affects the feasibility and quality of HRIA</i> | 77 |
| 5.1.4 <i>Timing of HRIA affects the utility of HRIA</i> | 79 |
| 5.2 An alternative approach to the existing methodology of HRIA of trade agreements | 80 |
| 5.2.1 <i>An alternative approach: Integration of human rights into other impact assessments</i> | 80 |
| 5.2.2 <i>The pros and cons of the integrated approach</i> | 81 |
| 5.3 Conclusion – Seeking the best approach to HRIA of trade agreements | 85 |
| Bibliography | 88 |

Summary

The profound impacts on human rights brought about by international and regional trade agreements have increasingly been recognized by scholars in the fields of human rights and trade, as well as international organizations and civil societies. Most notably, the intersection between human rights and trade has been reaffirmed by the United Nations, evidently in the reports by the United Nations High Commissioner for Human Rights dated back to the early 2000s.¹

Discourse on human rights impacts of trade agreements has recently developed further. Examples to this development can be found in the latest debate on two major international free trade agreements - the Transatlantic Trade and Investment Partnership (TTIP) between the European Union and the United States and the Trans-Pacific Partnership (TPP), both of which are being negotiated. They have attracted significant publicity and ignited public debates regarding their potential impacts on human rights in the countries that are partners to the agreements. Opponents to these trade agreements have expressed concerns on their potential human rights impacts and called for thorough human rights impact assessments to be conducted on the agreements.

Human rights impact assessment (HRIA) has been identified by many as the most relevant tool to examine the impacts that trade agreements may have upon human rights. While it has been developed and utilized rather extensively in the private sector to measure human rights impacts of business operation, HRIA to measure the impacts of trade agreement remains underdeveloped regarding its methodology despite the growing human rights concerns and extending scope of impacts of international free trade agreements in the recent years.

The gap between the expanding need for HRIA of trade agreements and the limited available methodologies has prompted this thesis to analyze the existing methodologies of HRIA of trade agreements. By carefully identifying their contributions as well as shortcomings, the thesis will then determine the best approach to assess the human rights impacts resulted from international trade agreements.

This thesis first starts off by establishing the link between human rights and trade, which serves as the basis to argue for the necessity of a HRIA of Trade Agreements. The interaction between human rights and trade has been a source of burgeoning scholarly discussions, which will be reviewed in this

¹ The United Nations High Commissioner for Human Rights has produced a number of reports on the issue of human rights and globalization, trade and investments, as well as the impacts of free trade agreements on human rights. These reports can be found at the UNHCHR website at: <http://www.ohchr.org/EN/Issues/Globalization/Pages/ReportsHC.aspx>, accessed 1 May 2015

thesis to reaffirm the linkage between human right and trade. The thesis will then address the values that HRIA can bring in comparison to other impact assessments.

Once the linkage between human rights and trade is clear, and the values of HRIA are identified, the existing approaches and methodologies of HRIA of trade agreements will be analyzed and evaluated on the basis of the proclaimed “added values” of HRIAs that are discussed earlier. The thesis argues that existing methodologies of HRIA of trade agreements do not live up to several key cross-cutting human rights principles that they claim to embody and they fail to deliver the added values that HRIA promised.

By offering critiques of existing methodologies of HRIA of Trade Agreements and examining the most prominent alternative approach to HRIA of Trade Agreements – the integrated impact assessment – while taking into consideration the time and resource limit of this thesis project, the thesis advocates for the former approach, arguing that while it is largely flawed, the existing methodologies are mostly constrained by resource availability which can be resolved, while the alternative approach entails much higher risks of watering down fundamental human rights principles and rendering HRIA meaningless. Methodologies of HRIA of Trade Agreement leave a lot to be desired, however, for the time being, they can be improved and operational given the right attentions at the right time and place.

Preface

This thesis is submitted as the conclusion to my Master Program in International Human Rights Law at Lund University, marking my academic, professional and personal growth in the last two years.

Prior to taking the Master Program in International Human Rights Law at Lund University, I have worked briefly in the field of commercial and trade law, in which at the time I honestly did not find either inspiration or interest. Rather, I was inspired to pursue the area of international human rights law and never thought I would take an interest in trade law again. Having had a professional background in development in Vietnam, I was keen on human rights and the right to development. I had the chance to study with Professor Maria Green who provided me with great guidance and inspiration. Her multi-faceted perspectives on human rights and development issues motivated me to rethink my position on the role of international trade on human rights, leading to my acknowledgement that my initial complete rejection of trade's role might have been biased. On the other hand, my experience working in the field with development projects that claimed to adopt the right-based approach presented me with the persisting question of how one can measure the impacts that an intervention can have upon human rights and human development in general, especially when human rights have been criticized for their lack of effective implementation. The concern of finding tangible evidence of human rights intervention is partially responsible for my choice of human rights impact assessment as the focus of my topic.

Later, I was fortunate to have Professor Maria Green as my supervisor for the thesis. I am immensely grateful to have received her guidance from the very early stage of the thesis project when I was struggling with formulating the topic and structure to the finished work. Without her instruction, suggestions, constructive criticism and tremendous encouragements, I would not have been able to reach this point. I would also like to thank Professor Radu Mares for spending time to discuss the topic with me, providing me with important information that shaped my thesis.

I would like to express my gratitude to the Swedish Institute for granting me the SI Study Scholarship for my master program in the last two years, enabling the completion of this work. Your generosity has given me the access to this high quality educational opportunity. The acknowledgement will not be complete without mention the support I received from the Danish Institute for Human Rights where I did an internship in my last semester in terms knowledge gains as well as the literature resources valuable to my thesis research.

I want to credit my beloved parents for their love and support throughout my journey. Words cannot express how grateful I am. Furthermore, I would like to thank the good friends I have back home and the ones I have made here

during the last two years. You have made this a truly memorable experience for me.

Lastly, I would like to thank my mentor, Nicholas Booth, who inspired me to pursue studying international human rights law – you are the one who started it all.

Lund, August 2015.

Abbreviations

| | |
|----------|--|
| CSOs | Civil Society Organizations |
| EIA | Environmental Impact Assessment |
| EU | European Union |
| GATT | General Agreement on Tariffs and Trade |
| HRBA | Human Rights Based Approach |
| HRIA | Human Rights Impact Assessment |
| IA | Impact Assessment |
| IAIA | International Association for Impact Assessment |
| SEA | Strategic Environmental Assessment |
| SIA | Social Impact Assessment |
| TPP | Trans-Pacific Partnership |
| TRIPS | Agreement on Trade-Related Aspects of Intellectual Property Rights |
| TTIP | Transatlantic Trade and Investment Partnership |
| UN OHCHR | United Nations Office of the High Commissioner for Human Rights |
| UN | United Nations |
| UNEP | United Nations Environment Programme |
| WTO | World Trade Organization |

1 Introduction

1.1 Overview

The intersection between trade and human rights have received increasing attention lately. In 2003, the Office of the High Commissioner for Human Rights (OHCHR) presented a comprehensive report on human rights, trade and investment to the Fifth Ministerial Conference of the World Trade Organization in Cancún, Mexico taking place in September of the same year.² The report established that talk about the intersection of human rights and trade has its roots in the states' obligations under international human rights law and human rights' benefits in promoting economic growth and prosperity in combination with trade. To link human rights and trade, the OHCHR promoted a human rights approach to trade that is “normatively based on international human rights standards and operationally directed to promoting and protecting human rights.”³

Trade agreements that facilitate global trading expansion undoubtedly have profound impacts, positive and negative, on human rights situations where they operate. Studying the link between human rights and trade unveiled various ways in which trade agreements can affect human rights. Measuring the potential and real impacts of trade on human rights is essential to maximize the prosperity that trade agreements can bring and to minimize the adverse impacts such agreements can have on human rights. Human rights impact assessment (HRIA) has emerged as the leading tool for evaluating and mitigating the impacts that trade in general and trade agreements in particular can have on human rights.

HRIA is a newly developed tool. Its most developed form perhaps can be found in the tools for measuring the human rights impact of business operation in the private sector. On the other hand, HRIA of trade agreements has not measured up to its sibling. Though the importance of conducting HRIA of trade agreements has been reinstated by a wide range of actors, its methodologies remain underdeveloped during the last decade. Echoing calls for the usage of HRIA of trade agreements are not matched by its methodological development.

Discussion on methodologies of HRIA of trade agreements has not gone further than accepting the works initiated by Oliver De Schutter and developed by Simon Walker and James Harrison *as they were* despite the time lapse and new developments in the area. As of 2014, expert seminars and workshops still quoted the same studies and methodologies to call for implementation of HRIA of trade agreements without giving them a critical look. Thus, it is about time to analyze the existing methodologies of HRIA of

² United Nations Office of the High Commissioner for Human Rights, “*Human Rights and Trade*”, 5th WTO Ministerial Conference in Cancun, Mexico, 10-14 September 2003.

³ *Ibid*

Trade Agreement, reconsidering their values and shortcomings in order to push forward their improvements.

1.2 Purpose and research question

The purpose of this thesis is to examine in detail the existing methodology of Human Rights Impact Assessments of Trade Agreements, identifying the added value they can contribute and evaluating their shortcomings in order to determine the best approach to assess the human rights impacts resulted from international trade agreements. To address this research question, the thesis will proceed to solve three sub-questions.

Firstly, it is necessary to show how human rights concerns fit into the arena of trade agreements. In this regard, there are two issues that need to be examined:

- How does the trade regime interact with the human rights regime?
- What is the linkage between human rights and trade agreements?

Secondly, I will move on to discuss impact assessments and human rights impact assessments, arguing for the benefits that human rights impact assessments bring to the table in comparison with other impact assessments. The sub-questions for this discussion is:

- What is human rights impact assessment?
- What added values does human rights impact assessment have in comparison with other impact assessments?

Once the linkage between human rights and trade is clear; and the values of human rights impact assessment are established, I will analyze the existing approaches and methodologies of human rights impact assessments of trade agreements. For this purpose, I set out two sub-questions:

- How did human rights impact assessment come into the arena of trade agreements?
- What are the existing approach and methodology?

Lastly, the thesis will evaluate the current methodology of HRIA of trade agreements. At the same time, it also considers the most prominent alternative approach to the existing methodology. After evaluating both of them, I will finally conclude with my view on what is the best approach for HRIA of trade agreements. There are three sub-questions to answer in this chapter:

- What are the critiques of the current methodology of HRIA of trade agreements?

- What are the pros and cons of integrated impact assessment – the alternative to HRIA of trade agreements?

- How do we establish the best methodology of HRIA of trade agreements?

1.3 Delimitations

The thesis' main focus is HRIA for trade agreements. The trade agreements that are examined in connection with HRIA will be discussed in general, covering trade agreements of bilateral or multilateral nature involving two or more states.

HRIA of trade agreements will be analyzed on the basis of its methodology. The methodology evaluated is limited to a general methodology that can be adapted to specific HRIA of trade agreements. The analysis and critiques are based on how the HRIA is conducted and whether the method employed is satisfies a number criteria that are set prior to the analysis. Thus, substantive issues of the HRIA such as discussions on content of specific human rights affected by trade agreements are not included in the scope of this thesis. Such substantive issues differ from one trade agreement to the other, making it impossible to analyze them thoroughly within the limitation of this work.

1.4 Methodology and Theory of the paper

Human rights impact assessment is a fairly recent development in the field of impact assessments. Using human rights impact assessment to address human rights concerns arose from international trade agreements is an even more recent practice, dating back less than a decade ago. The topic has been discussed, though not always extensively, by a wide range of actors, including the UN bodies, civil society organizations (CSOs), national human rights institutions (NHRIs) and academic scholars.

This paper will apply a methodology of conducting a desk-based research for a literature review of the topic and its relevant issues. The discussion on impact assessments and human rights impact assessment has mostly been driven by academic scholars who have contributed to establish a framework for the HRIA instrument. The United Nations, especially the Office of the High Commissioner for Human Rights and the UN Special Rapporteurs, has played an important role in initiating the discourse, and in reaffirming the necessity of establishing a coherent framework and practice for HRIA of trade agreements. In addition, CSOs and NHRIs have contributed to set up concrete impact assessment tools as well as provided constructive criticisms on the topic.

The discussion on the linkage between human rights and trade draws its materials mostly from a number of academic authors who have had significant contributions to the discourse of human rights and trade. Most notable among them are Thomas Cottier, Andrew Lang and especially the

scholar exchange between Ernst-Ulrich Petersmann and Philip Alston who illustrated well the potential conflicts between the two fields.

Literature on impact assessments in general has been consolidated by the International Association for Impact Assessment (IAIA), a leading global network on best practice in the use of impact assessment for informed decision making regarding policies, programs, plans and projects.⁴ IAIA provides an impressive breadth of studies regarding impact assessments in general as well as specific impact assessments. Its definition of impact assessment has been widely quoted by academic authors and practitioners in the field. IAIA established the International Principles for Social Impact Assessment which scholars often refer too. The works by IAIA have been commonly accepted and quoted, providing basic understanding of impact assessments. Furthermore, literature on the two long established impact assessments, Environment Impact Assessment (EIM) and Social Impact Assessment (SIA) are complemented by resources from the United Nations Environment Programme as well as writings by Frank Vanclay, a prominent scholar of SIA.

HRIA and HRIA of trade agreements are very recent phenomena in the field of human rights. As a result, the number of comprehensive studies on HRIA and HRIA of trade agreements have been limited, coming from only a handful of sources and authors. After conducting an extensive literature reviews, I have identified sources that are comprehensive and/or heavily cited in writing on HRIA. Descriptive study and analysis of HRIA in this thesis will refer extensively the Study on Human Rights Impact Assessment commissioned by the Nordic Trust Fund and the World Bank in 2013. This is perhaps the most comprehensive literature review study regarding HRIA, providing a good overview of HRIA's current state and being a helpful source of guidance for this thesis to draw from.

In the field of HRIA of trade agreements, the initial guiding principles were established by the former UN Special Rapporteurs, Oliver De Schutter. However, there have not been many scholars who explore the topic, except for two main contributors who have written extensively on HRIA, and whom the thesis refers to often: Simon Walker and James Harrison. Simon Walker is the key author in HRIA of trade agreement, having established a detailed methodology which is the thesis' main focus of methodology and analysis. James Harrison has contributed in forms of academic articles and a study on HRIA of trade agreement for the Scottish Human Rights Commission (SHRC). Works from other scholars in this field are limited and when they write about HRIA, it's almost certain they refer to Walker and/or Harrison. Due to this concentration of literature on Walker and Harrison, the thesis inevitably must draw a lot of knowledge and insights from their works. In addition, some institutions have been leading the research and development HRIA toolkits aiming to facilitate the application of HRIA. The most notable

⁴ Main website of the International Association for Impact Assessment: <<http://www.iaia.org/>>, accessed 1 May 2015

developments have been done by Nomogaia⁵ and the Danish Institute for Human Rights⁶. Though their tools are intended for corporate and business operation, principle elements of HRIA can be drawn from them.

Throughout the thesis, I will rely on a number of cross-cutting human rights principles as the basis for my analysis, evaluation and critiques. These principles include: universality, indivisibility, interdependence and interrelated; equality and non-discrimination, participation and transparency and access to information. These principles are inherently associated with the human rights based-approach (HRBA). The thesis will also clarify the role of these human rights principles and the HRBA in the discussion on HRIA.

1.5 Thesis Structure

The thesis consists of four chapters, excluding this introduction. The first chapter on trade and human rights seeks to address the question of how human rights impact assessment fits into the context of trade agreements. A brief overview of the debate on the relevance of human rights in trade will be given to reach the conclusion that the linkage between trade and human rights is strong and needs to be address. I then move to explore the link between human rights and trade agreements in terms of impacts the latter can have upon the former, arguing for the emergence of HRIA as a tool to address such issues. Finally, I will address the challenges of engaging human rights perspectives into the context of trade agreements.

The second chapter will provide an overview of impact assessments in general. In the development of impact assessments, HRIA emerged as has been credited with a number of added values in comparison with other impact assessments. I will discuss the emergence of HRIA as well as analyze its claimed benefits. Special attentions will be given to elements that are relevant to the evaluation of HRIA of trade agreement in the following chapters.

The third chapter moves on to HRIA of trade agreement and discusses in details the existing methodology of HRIA of trade agreement that has been credited to Simon Walker. Though it will largely describe Walker's step-by-step methodology, the chapter will also reflect my insights and concerns over this methodology where necessary.

In the last chapter, I will evaluate the existing methodology of HRIA of trade agreements against the human rights cross-cutting principles that HRIA is based upon. This chapter lays out several critiques of the current methodology, identifying inconsistency between its approach and the proclaimed values of HRIA. Next, I will discuss the most prominent alternative approach to Walker's methodology of HRIA of trade agreement:

⁵ Nomogaia, "*Human Rights Impact Assessment Toolkit*", <<http://nomogaia.org/tools/>>, accessed 1 May 2015

⁶ Danish Institute for Human Rights, "*Human Rights and Impact Assessment*", <<http://www.humanrights.dk/business/impact-assessment>>, accessed 1 May 2015

the integrated impact assessment. The advantages and disadvantages of this integrated approach will be examined. After having weighed the alternative approach against the existing methodology, I will proceed to conclude that despite its flaws, the existing methodology of HRIA is superior, and that while its shortcomings are serious, it is possible to address them.

2 Chapter I: Human Rights and Trade Agreements

The chapter seeks to address the question of how human rights impact assessment fits into the context of trade agreements.

2.1 Linking human rights and international trade

2.1.1 Human rights and trade regime: A history of isolation

The question on when the relationship between human rights and trade first started generates different answers. It has been argued by Aaronson and Zimmerman that human rights have been the concern for as long as men and women have traded throughout mankind's history starting since the ancient time.⁷ The Age of Exploration saw the notion of the "right to trade" which was supposedly derived from the law of nations. By the nineteenth century, approaches were developed by policy-makers around the world to regulate the behavior of states and citizens at the intersection of trade and human rights.⁸

Despite a seemingly correlated ancient history, the contemporary history of human rights and trades starting from the twentieth century consists of a simultaneous beginning but greatly divergent developments later.

The modern history of trade regime has been associated with immediate post-World War Two era, marked by the adoption of the General Agreement on Tariffs and Trade (GATT) in 1947. Favorable circumstances such as predictable and stable conditions of market access and gradual dismantlement of trade barriers in industrial goods and services were credited with facilitating this development.⁹ The GATT tied countries into a system of multilateral trade rules, aiming to reduce trade barriers and promoting liberalization of trade.¹⁰ It was the driving force behind trade liberalization from its birth in the mid-1942 until it was replaced in the mid-1990s.¹¹ The

⁷ Susan Ariel Aaronson and Jamie M. Zimmerman, *Trade Imbalance: The Struggle to Weigh Human Rights Concerns in Trade Policymaking*, Cambridge University Press, New York, 2008, pg.5.

⁸ *Ibid*, Aaronson and Zimmerman, pg 5.

⁹ Thomas Cottier, Joost Pauwelyn and Elisabeth Burgi, *Linking Trade Regulation and Human Rights in International Law: An Overview*, Human Rights and International Trade, Oxford University Press, 2005, pg. 1.

¹⁰ James Harrison, *The Human Rights Impact of the World Trade Organisation*, Studies in International Trade Law Vol. 10, Hart Publishing, Oxford and Portland, Oregon, 2007, pg. 8.

¹¹ *Ibid*, pg. 9.

World Trade Organisation (WTO) was created in 1995 as a result of the Uruguay Round of trade talk, which expanded significantly the existing global trading rules by the means of numerous new agreements negotiated.¹² The establishment of WTO happened at the end of the Cold War, providing an historical opportunity for a more cooperative world system.¹³

The end of World War Two was, at the same time, marked with an important moment for human rights regime: the adoption of the Universal Declaration of Human Rights in 1948. In the following decades, the human rights regime was greatly enhanced with a growing body of international human rights treaties, most notable among them are the tenth core international human rights instruments.¹⁴ International human rights law has constituted an increasingly important branch of international law.

Interestingly, while the contemporary histories of international human rights and trade started at the same post-Second World War period, their developments have largely been diverged. It has been observed by Cottier that the two areas “evolved in splendid isolation – despite the fact that the concern for human rights started with the need to address slavery, and thus a trade issue, in the nineteenth century.”¹⁵ The organizations dealing with the human

¹² James Harrison, *“The Human Rights Impact of the World Trade Organisation”*, Studies in International Trade Law Vol. 10, Hart Publishing, Oxford and Portland, Oregon, 2007, pg. 8.

¹³ Craig Van Grastek, *“The History and Future of the World Trade Organization”*, World Trade Organization Publications, 2013, pg.11.

¹⁴ The tenth core international human rights instruments are (in periodical order):
21 Dec 1965 International Convention on the Elimination of All Forms of Racial Discrimination (ICERD)

16 Dec 1966: International Covenant on Civil and Political Rights (ICCPR)

16 Dec 1966: International Covenant on Economic, Social and Cultural Rights (ICESCR)

18 Dec 1979: Convention on the Elimination of All Forms of Discrimination against Women (CEDAW)

10 Dec 1984: Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment (CAT)

20 Nov 1989: Convention on the Rights of the Child (CRC)

18 Dec 1990: International Convention on the Protection of the Rights of All Migrant Workers and Members of Their Families (ICMW)

18 Dec 2002: Optional Protocol to the Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment (OP-CAT)

20 Dec 2006: International Convention for the Protection of All Persons from Enforced Disappearance (CPED)

13 Dec 2006: Convention on the Rights of Persons with Disabilities (CRPD)

See their texts and optional protocols at:

Office of the High Commissioner for Human Rights, “The Core International Human Rights Instruments and their monitoring bodies”, OHCHR website,

<<http://www.ohchr.org/EN/ProfessionalInterest/Pages/CoreInstruments.aspx>>, accessed May 1, 2015

¹⁵ Thomas Cottier, *“Trade and Human Rights: A Relationship to Discover”*, Journal of International Economic Law 5(1), 2002, pg 112.

rights regime and the system of trade law were set up within separate frameworks.¹⁶

Drawing from earlier works by Cottier, Harrison observed that for a long period of time prior to the 2002, the linkage between international law and trade was slowly recognized due to the perceptions of international trade law by those who work in and out of the field.¹⁷ To an outsider, trade law seems technical, closely linked with economic analysis. On the other hand, “insiders” of trade law, namely practitioners of the GATT/WTO, tend to retain their comparatively functional legal system of trade, and avoid politicized matters.¹⁸

The lack of linkage discussion between trade law and the rest of international public law contributed to the limited discussion on the relationship between human rights and trade rules for a long time.¹⁹ The highly fragmented structure of classical international law is at fault for the lack of communication and dialogue between human rights and trade, even though these two fields were doing similar tasks of checking on states and imposing fundamental boundaries and positive requirements.²⁰

States ultimately found themselves caught up in the maze of their international legal obligations under international law, dealing with its fragmentations. As economic integration proceeds, trade rules and human rights must interact.²¹ The last decade has witnessed the growing discussion on the linkage between trade and human rights, which will be discussed in the next section.

2.1.2 The discourse on the relationship between human rights and trade

The precise history of the trade and human rights debate has not been clear: there have not been enough satisfactory answers on who and what started it, and what factors were decisive to its progress.²² Within the limitation of this paper, I will not attempt to give a comprehensive history overview of the human rights and trade debate or analyze it in depth. Drawing from a survey of literature available on this topic, I will offer a briefing on some key events of the debate and the shift of perspectives concerning human rights and trade.

¹⁶ James Harrison, *The Human Rights Impact of the World Trade Organisation*, Studies in International Trade Law Vol. 10, Hart Publishing, Oxford and Portland, Oregon, 2007, pg. 34.

¹⁷ *Ibid*

¹⁸ *Ibid*.

¹⁹ *Ibid*.

²⁰ Thomas Cottier, *Trade and Human Rights: A Relationship to Discover*, Journal of International Economic Law 5(1), 2002, pg 113.

²¹ *Ibid*.

²² Andrew Lang, *Re-Thinking Trade and Human Rights*, Tulane Journal of International and Comparative Law, Vol 15 no 2, 2007, pg. 336.

According to Lang, one of the most important moments that profoundly influenced the trade and human rights debate was the series of reports by United Nations human rights institutions on the impact of the international trading system on the enjoyment of human rights, which began formally around 1999 in the form of a broad work program on “Globalization and its impact on the full enjoyment of all human rights”.²³ The program’s outcomes included one report by Oloka-Onyango and Udagama which is remembered for its controversy, supposedly setting an adversarial tone to the debate.²⁴ The UN OHCHR has been the most influential contributor to the trade and human rights debate, having released a series of reports that cover a range of topics including agricultural liberalization and the right to food, the liberalization of trade in services, investment liberalization, and the principles of non-discrimination and participation in the context of trade policy; though other UN bodies have also contributed significantly.²⁵ This body of UN works on the trade and human rights debate was a response to civil society’s initiative on the topic. Indeed, civil society organizations have taken an increasingly important role in the trade and human rights debate, contributing in a number of different ways, promoting the debate.²⁶

The debate on trade and human rights has advanced immensely thanks to a large academic literature generated by both human rights and trade scholars, presenting diverse views on the matter.²⁷

When talking about the trade and human rights debate, one cannot fail to mention a particularly interesting and quality exchange known as the Petersmann-Alston debate²⁸ that took part in the *European Journal of International Law* in 2002 between Ernst-Ulrich Petersmann and Philip Alston, prominent scholars in the field of international economic law and international human rights law respectively, representing the highly divided

²³ *Ibid.*

²⁴ *Ibid.*

²⁵ *Ibid.*

²⁶ *Ibid.*, pg 339.

According to Lang, the contributions of NGOs in the trade and human rights debate were represented in a number of ways: “the diffusion of human rights language into the work of NGOs which are primarily interested in trade matters”; “the trend among human rights NGOs to develop expertise and to initiate activities on economic questions” and the growth of “networks mandated to work at the nexus between trade and human rights and to facilitate the conversation” between these two regimes.

²⁷ *Ibid.*

²⁸ The “*Petersmann-Alston Debate*” refers to several articles exchanging views on trade and human rights in 2002 in the *European Journal of International Law*:

Ernst-Ulrich Petersmann, “*Time for a United Nations “Global Compact” for International Human Rights into the Law of Worldwide Organizations: Lessons from European Integration*” *European Journal of International Law*, Vol 13 No.3, 2002, 621-650.

Philip Alston, “*Resisting the Merger and Acquisition of Human Rights by Trade Law: A Reply to Petersmann*”, *European Journal of International Law*, Vol 13 No.4, 2002, 815-844.

Ernst-Ulrich Petersmann, “*Taking Human Dignity, Poverty and Empowerment of Individuals More Seriously: Rejoinder to Alston*”, *European Journal of International Law*, Vol 13 No.4, 2002, 845-851

views on international trade's impacts on human rights.²⁹ The Petersmann-Alston debate is a convincing evidence demonstrating the adversarial tone of trade and human rights debate between two sides of participants: scholars who are utterly convinced that the world trade regime has a mutual basis for human rights and the potential growth of one is a positive sign for the other; and scholars who are equally convinced that human rights and international trade regimes are in an acrimonious relationship.³⁰

The debate started when Petersmann argued that WTO law can integrate human rights law; that certain provisions of WTO law reflect human rights law; and that by construing WTO law to conform human rights law, WTO law can be used to enforce human rights.³¹ Objecting to these arguments, Alston asserted that such adoption of human rights law by the WTO would turn human rights law into a tool in the arsenal of trade law, washing off its universal appeal. The conflicts and debates in human rights law are also neutralized and sterilized.³² Alston argued that Petersmann's proposal would risk detaching human rights from their foundations in human dignity and viewing them "primarily as instrumental means for the achievement of economic policy objectives."³³ Petersmann's right-based trade theory has also drawn critiques from a number of scholars; among them are those of Steve Peers and Robert Howse and Kalypso Nicolaidis of which Alston referred to in his discussion,³⁴ and later work by Deborah Z. Cass.³⁵

Following three influential conferences on trade and human rights organized by the American Society of International Law during 2002-2004,³⁶ it has been recognized that the debate on trade and human rights is complex, addressing

²⁹ Abadir M. Ibrahim, "International Trade and Human Rights: An Unfinished Debate", German Law Journal, Vol 14 No 01, 2013, pg.321.

³⁰ *Ibid.*

³¹ Ronnie R. F. Yearwood, "The Interaction between World Trade Organisation (WTO) Law and External International Law: The Constrained Openness of WTO Law (A Prologue to a Theory)", London: Routledge, 2012, pg.89.

³² *Ibid.*

³³ Philip Alston, "Resisting the Merger and Acquisition of Human Rights by Trade Law: A Reply to Petersmann", European Journal of International Law, Vol 13 No.4, 2002, pg.843.

³⁴ Critiques of Petersmann's theory cited by Alston include:

Steve Peers, "Fundamental right or political whim? : WTO law and the European Court of Justice", in G. de Burca and J. Scott (eds), "The EU and the WTO (2001)".

Robert Howse & Kalypso Nicolaidis, "Legitimacy and Global Governance: Why Constitutionalizing the WTO Is a Step Too Far", in Roger B. Porter et al., eds., Efficiency, Equity, and Legitimacy: The Multilateral Trading System at the Millennium (Washington, DC: Brookings, 2001).

³⁵ Critique of Petersmann's right base trade theory as cited by Yearwood:

Deborah Z. Cass, "The Constitutionalization of the World Trade Organization: Legitimacy, Democracy, and Community in the International Trading System", International Economic Law Series, Oxford University Press, 2005, Chapter 5, 145-176.

³⁶ Andrew Lang, "Re-Thinking Trade and Human Rights", Tulane Journal of International and Comparative Law, Vol 15 no 2, 2007, pg. 340.

a multitude of different problems and revealing profound challenge and questions at different levels.³⁷

The satisfactory conclusion to the debate on the impacts of trade on human rights and vice versa is elusive. Reviewing the recent scholarship on Trade and Human Rights, Aaronson and Zimmerman have outlined several positions regarding this linkage.³⁸ Many policy-makers and trade scholars argue that trade per se and trade agreements inherently enhance human rights, claiming that trade stimulates an export-oriented middle class, of which growing economic influence will promote political freedoms, openness and good governance.³⁹ Other authors have more nuanced view on the impact of trade on human rights while retaining their acknowledgement of trade's benefits on economic growth and political liberalization.⁴⁰

Aaronson and Zimmerman asserted that the interaction between trade and human rights remains unclear as their relationship is highly complex. Although some associations between foreign economic penetration (trade, investment, aid) and the levels of government respect for *some* human rights has been demonstrated by studies, a conclusion on whether the impacts of trade on some rights are positive or negative could not be reached.⁴¹ A correlation between human rights protection and trade enhancement is observed, but the direction of causality has not been uncovered: it remains uncertain if promoting certain human rights enhances trade or if enhanced trade leads to more respect for human rights.⁴² Indeed, a lot more information is needed to clarify the questions regarding the intersection of trade and human rights as their interaction needs more observations spanning over a long period of time.

2.2 Linking human rights and trade agreements

2.2.1 Linking human rights to trade agreements

The debate on how human rights and trade interact is far from concluded as information is still missing. However, the debate has certainly established a widely held view that there is indeed a linkage between human rights and trade.⁴³ The recognition of trade's impacts on human rights enjoyment in both

³⁷ Thomas Cottier, Joost Pauwelyn and Elisabeth Burgi, "*Linking Trade Regulation and Human Rights in International Law: An Overview*", Human Rights and International Trade, Oxford University Press, pg. 3.

³⁸ Susan Ariel Aaronson and Jamie M. Zimmerman, "*Trade Imbalance: The Struggle to Weigh Human Rights Concerns in Trade Policymaking*", Cambridge University Press, New York, 2008, pg.6.

³⁹ *Ibid.*

⁴⁰ *Ibid.*

⁴¹ *Ibid.*

⁴² *Ibid.*

⁴³ Andrew Lang, "*Re-Thinking Trade and Human Rights*", Tulane Journal of International and Comparative Law, Vol 15 no 2, 2007, pg. 336

negative and positive ways has moved the discussion to address more concrete impacts that trade agreements can have on human rights.

Human rights treaty bodies and independent experts have called on governments to assess the impact of trade and investment agreements on the enjoyment of human rights.⁴⁴

In this context, Human Rights Impact Assessment (HRIA) has emerged and assumed the role of a comprehensive tool to address the impacts of trade agreements on human rights. HRIA itself has a rather wide range of usages. The utilities of HRIA in general will be explored in Chapter II of this thesis. HRIA of trade agreements is still being developed. The calls for HRIA of trade agreements from the UN system and civil society have increased over the last decades but not much has been done to establish a practical and effective methodology, which will be the subject of Chapter III.

In this chapter, I will not go at length to analyze the various ways that trade agreements can impact human rights. Instead, I am citing the views and analysis by Simon Walker, who is among the most prominent scholars in HRIA of trade agreement. He has established ten categories of impact that trade agreements have on human rights in his influential cited book on HRIA of trade agreements.⁴⁵ The ten categories are as follow:

- Trade law complements human rights law
- Trade agreements promote the growth and resources necessary for the progressive realization of human rights
- Trade agreements can breach human rights in practice
- Trade agreements can limit government capacity to promote human rights
- Trade agreements lead to a ‘race-to-the-bottom’ in human rights protection as countries try to compete on global markets
- Trade agreements limit the use of trade measures to improve the enjoyment of human rights abroad
- Trade law conflicts with human rights law
- Enforcement of trade agreements is stronger than human rights enforcement which could lead to a prioritization of trade law over human rights law
- Trade agreements and trade institutions fail to respect the right to take part in the conduct of public affairs
- Trade ‘values’ threaten human rights ‘values’⁴⁶

⁴⁴ See the report adopted by the Swiss NGO Berne Declaration, the Canadian Council for International Co-operation, and Misereor, “*Human rights impact assessment for trade and investment agreements. Report of the Expert Seminar*”, June 23-24, 2010, Geneva, Switzerland, pg.2.

⁴⁵ Simon Walker, “*The Future of Human Rights Impact Assessments of Trade Agreements*”, School of Human Rights Research Series, Vol. 35, 2009.

⁴⁶ *Ibid.*

While these categories deserve more in-depth analysis for possible critiques, due to the limitation of scope of the thesis, I will not attempt to do so. As the main focus of this thesis is the methodology of HRIA of trade agreements, and these categories belong to the methodology in question, I will later address the whole proposal of categories as an approach in his method instead of the substantial individual categories themselves.

2.2.2 The challenges of engaging human rights perspectives into the context of trade agreements

The affirmation that human rights must be considered in the context of trade agreements has been resonated time after time by the UN bodies as well as concerned actors such as civil societies. Recent developments concerning the discussion on the intersection of trade and human rights have advocated for conducting HRIA of trade agreements as a tool to address the impacts of trade agreement on human rights.⁴⁷

Nevertheless, attempts to engage human rights perspectives into the context of trade agreements meet with a number of difficulties. These challenges arise from several reasons. Some of them are linked with the rocky relationship between human rights and trade regimes while others are more of a political nature. Identifying the challenges of engaging human rights perspectives and of addressing human rights concerns in trade agreement regime is conducive as background context to understand the concrete methodological shortcomings of HRIA of trade agreements, which will be discussed in the following chapters.

I have identified two main challenges of engaging human rights perspectives into trade agreement discussion. These challenges respectively stem from the following issue: (1) The isolated history of trade regime; and (2) Negotiators' perspectives in trade agreements. These issues will now be discussed in details.

a. The isolated history of trade regime in relation to human rights

A brief overview of the history of trade regime has been provided in an earlier section of this chapter. As Thomas Cottier puts it, the two areas of human rights and trade “evolved in splendid isolation”, following traditional institutional segregation.⁴⁸ He compared: “for international law, trade regulation was, if at all, not more than one of the small villages off the big highways of human rights”.⁴⁹

⁴⁷ Section 2.1. in this chapter.

⁴⁸ Thomas Cottier, “*Trade and Human Rights: A Relationship to Discover*”, *Journal of International Economic Law* 5(1), 2002, pg 112.

⁴⁹ *Ibid.*

The lack of communication and exchange for a long time in their histories of development between these two areas of international law has resulted in a lot of misunderstandings. This issue is well illustrated when we revisit the Petersmann-Alston debate on trade and human rights that I have discussed in one of the previous sections.⁵⁰ In this exchange, after having been criticized by Alston⁵¹, Petersmann wrote another article to respond to Alston's comments.⁵² In this short rejoinder, Petersmann disputed Alston's opinions by asserting that Alston's comment "systematically misrepresents my (Petersmann's) publications" and imputes "absurd and irresponsible views which I have rejected in more than 200 publications over 30 years." Without attempting to validate the views of neither of the two scholars (which is a task that needs more resources and it falls out of the scope of this paper), I consider it obvious that the heated tone of this debate between them can be attributed to the miscommunications and lack of understandings of each other's view.

Though this debate hardly represents the relationship between human rights and trade regimes at a substantial level, it nevertheless raised the issue of how perceptions could differ significantly between the two areas. Harrison argued that trade rules established a very narrow and technical expertise of which few human right scholars have profound understanding.⁵³ Experts in the field of trade hesitate before human rights because they associate human rights with political matters.⁵⁴ It was claimed that the WTO interprets international law very selectively: "Under the pretext of wanting to depoliticize trade, the WTO tries to distance itself from obligations stemming from what ought to be the primacy of international human rights law over other international treaties."⁵⁵ The reconciliation of divided views and misperceptions perhaps will facilitate mutual understanding and openness across the two fields for better integration of human rights perspective into trade agreement arena.

b. Negotiators' perspectives in trade agreements

The next challenge stems from the negotiators' perspectives in trade agreement negotiations. The 2010 Expert Seminar in Human Rights Impacts Assessments for Trade and Investment Agreements in Geneva unveiled the different perspectives of states regarding human rights and trade

⁵⁰ Section 1.2. in this chapter.

⁵¹ Philip Alston, "*Resisting the Merger and Acquisition of Human Rights by Trade Law: A Reply to Petersmann*", *European Journal of International Law*, Vol 13 No.4, 2002, pg.815-844.

⁵² Ernst-Ulrich Petersmann, "*Taking Human Dignity, Poverty and Empowerment of Individuals More Seriously: Rejoinder to Alston*", *European Journal of International Law*, Vol 13 No.4, 2002, 845-851

⁵³ James Harrison, "*The Human Rights Impact of the World Trade Organisation*", *Studies in International Trade Law* Vol. 10, Hart Publishing, Oxford and Portland, Oregon, 2007, pg. 34

⁵⁴ *Ibid*

⁵⁵ Maria Luísa Mendonça, "*Conference Synthesis on Economic, Social and Cultural Rights*", in "Another World Is Possible: Popular Alternatives to Globalization at the World Social Forum", 1 Jan 2003 by William F. Fisher and Thomas Ponniah (ed), pg.313.

agreements.⁵⁶ The seminar outcomes highlighted the improving relationship between trade and human rights, evident in the statement by the Director-General of WTO, Pascal Lamy that affirmed the importance of human rights. Furthermore, the WTO Secretariat supported impact assessments for improving understanding of trade liberalization but warned that it remained a political issue.⁵⁷ Human rights are generally a source of conflict between WTO member states.⁵⁸

The developed and developing countries have had contrasting focus and approaches to human rights in WTO context.⁵⁹ While developed countries focus on civil and political rights, developing countries prioritize economic, social and cultural rights and the right to development.⁶⁰ This perspective distinction renders it difficult for states to agree upon which human rights concerns should be addressed in the context of trade agreements.

⁵⁶ See the Report adopted by the Swiss NGO Berne Declaration, the Canadian Council for International Co-operation, and Misereor, “*Human rights impact assessment for trade and investment agreements. Report of the Expert Seminar*”, June 23-24, 2010, Geneva, Switzerland, pg.4.

⁵⁷ *Ibid.*

⁵⁸ *Ibid.*

⁵⁹ *Ibid* at pg.5

⁶⁰ *Ibid.*

3 Chapter II: Overview of Human Rights Impact Assessment

This chapter will provide an overview on impact assessments to illustrate how impact assessments have been developed to address growing concerns in the preparation and implementation of policies, programs and projects. Moving on from general background on impacts assessments and the two most well-established bodies of impact assessments, environmental impact assessment and social impact assessments, the chapter will discuss human rights impact assessment as an emerging tool in the impact assessment family, its typology, core elements and its added values in comparison with the family of impact assessments.

The Chapter intends to address the question on whether human rights impact assessment is indeed necessary for policies, programs, projects or other interventions, by pointing out that human rights impact assessment inherits the values of impact assessment family and at the same time adds to this set of tools, filling in the gaps that have been left by other impact assessments.

3.1 Impact Assessment

3.1.1 Overview of Impact Assessment

Impact Assessment (IA) is defined by the International Association for Impact Assessment (IAIA) in its frequently quoted definition as a “*structured process for considering the implications, for people and their environment, of proposed actions while there is still an opportunity to modify (or even, if appropriate, abandon) the proposals.*”⁶¹ It can be carried on at all levels of decision-making from policies to specific projects.⁶² The term “impact” demonstrates the “difference between what would happen with the action and what would happen without it.”⁶³ Impact can be positive or negative, affecting

⁶¹ International Association for Impact Assessment, “*Impact Assessment*” (*Impact Assessment Wiki*, 15 November 2012)

<<http://www.iaia.org/iaia/wiki/impactassessment.ashx>> accessed 6 April 2015.

The International Association for Impact Assessment is the leading global network on the use of impact assessment for informed decision making regarding policies, programs, plans and projects. Its definition of Impact Assessment has frequently been quoted in literature discussing this topic. My frequent encounter with this definition while reviewing literature on impact assessment justified my choice to include it in this paper.

⁶² *Ibid.*

⁶³ International Association for Impact Assessment, ‘*What is Impact Assessment?*’ (*White Paper, October 2009*) <http://www.iaia.org/publicdocuments/special-publications/What%20is%20IA_web.pdf> accessed 6 April 2015.

a broad range of subjects profoundly connected to different facets of human lives such as environment, communities, livelihoods, health etc.

An impact assessment typically includes two basic steps. First and foremost, it identifies and characterizes the most likely impacts of the proposed actions. The second step involves an assessment of the social significance of those impacts (impact evaluation).⁶⁴ Impact assessment is characterized by its dual nature that requires two separate methodological approaches as summarized below:⁶⁵

- Technical nature: Impact assessment serves as a technical tool for analysis of the consequences of a planned intervention.⁶⁶ Information provided to stakeholders and decision-makers is supposedly unbiased to support them in developing or selecting policies, programs, and projects.⁶⁷
- Procedural nature: Impact assessment is a legal and institutional procedure of the decision-making process that targets the planned intervention.⁶⁸ As a structured process, impact assessment engages all stakeholders, recognizes their interest, addresses all applicable laws and regulations and ensures that relevant information is present and accurate.⁶⁹

An IA is conducted for several purposes. The IAIA has identified four aims of IA summarized as follow:⁷⁰

- IA provides decision makers with analytical information regarding the biophysical, social, economic and institutional consequences of proposed actions.
- IA serves as a tool for promoting transparency and public participation in the course of .
- IA identifies suitable procedures and methods for monitoring and mitigating negative impacts in policy, planning and project cycles.

⁶⁴ International Association for Impact Assessment, "Impact Assessment" (*Impact Assessment Wiki, 2012*) <<http://www.iaia.org/iaia/wiki/impactassessment.ashx>>, accessed 6 April 2015.

⁶⁵ *Ibid.*

⁶⁶ International Association for Impact Assessment, 'What is Impact Assessment?' (*White Paper*), <http://www.iaia.org/publicdocuments/special-publications/What%20is%20IA_web.pdf>, accessed 6 April 2015

⁶⁷ International Association for Impact Assessment, 'Impact Assessment FasTips No. 1' <http://www.iaia.org/publicdocuments/special-publications/fast-tips/Fasttips_1%20Impact%20Assessment.pdf>, accessed 6 April 2015

⁶⁸ *Ibid.*

⁶⁹ *Ibid.*

⁷⁰ International Association for Impact Assessment, 'What is Impact Assessment?' (*White Paper, October 2009*) <http://www.iaia.org/publicdocuments/special-publications/What%20is%20IA_web.pdf>, accessed 6 April 2015.

- IA contributes to environmentally sound and sustainable development.

IA practice brings more coherent and well-structured tools for stakeholders to make well-informed and evidence-based decisions. While IA practice is utilized in a wide range of proposed actions, from policy making to project-level implementation, it is recognized as an especially essential aid to legislative bodies due to the large-scaled potential impacts of laws and policies. On the other hand, participation is inherent in IA, making it highly appealing to democratic aims. IA is characterized by its emphasis on participatory and inclusive approach, channeling different types of knowledge as well as the views of different groups in society, regardless of their economic and social status, into decision-making process.⁷¹

Indeed, IA practice has become a part of the European Union's (EU) efforts to improve the quality and rational foundation of its regulation in the last decade.⁷² IA was first announced by the European Commission as a 'general purpose impact analysis tool' in the preparation of proposals in 2002, following recommendations from the Mandelkern group on Better Regulation.⁷³ The participatory nature of IA was credited as making IA an ideal policy tool capable of shaping regulatory outcomes by combing expressed preferences with rational decision-making.⁷⁴

The complex and multi-faceted nature of a proposed action of which potential implications IA aims to consider requires that IA must be built upon a set of tools, involving physical and natural sciences and social sciences.⁷⁵ Even though an integrated approach is preferred for an ideal IA in order to encompass any likely impacts of the natural and social environment, IA practice has been developed into different forms to address specific issues within certain sectors such as environmental Impact Assessment (EIA), Social Impact Assessment (SIA), health IA, cultural IA, ecological IA.⁷⁶

⁷¹ International Association for Impact Assessment, 'What is Impact Assessment?' (*White Paper, October 2009*) <http://www.iaia.org/publicdocuments/special-publications/What%20is%20IA_web.pdf>, accessed 6 April 2015.

⁷² Alberto Alemanno, "A Meeting of Minds on Impact Assessment – When Ex Ante Evaluation Meets Ex Post Judicial Control", *European Public Law*, 2011, vol. 17, No.3, pg 1.

⁷³ Anne Meuwese, "Impact Assessment in EU Lawmaking", *Kluwer Law International* 2008, pg 32.

⁷⁴ Alberto Alemanno, "A Meeting of Minds on Impact Assessment – When Ex Ante Evaluation Meets Ex Post Judicial Control", *European Public Law*, 2011, vol. 17, No.3, pg. 2.

⁷⁵ International Association for Impact Assessment, 'What is Impact Assessment?' (*White Paper, October 2009*) <http://www.iaia.org/publicdocuments/special-publications/What%20is%20IA_web.pdf>, accessed 6 April 2015, pg. 2.

⁷⁶ *Ibid.*

3.1.2 Typology of Impact Assessment

IA practice can be categorized based on its usage or its relevant sectors. The utility-based category includes procedural contexts in which IAs can be used, while the impact-type-based category covers specific types of impacts in which a proposed action subjected to IA is closely linked.

3.1.2.1 Utility-based categorization of Impact Assessments

According to the utility of an IA, it can be categorized in to different contexts or levels where IA is conducted. The main types include: policy-making level, programming level, planning level and project level.⁷⁷ These types of IA are conducted by a wide range of stakeholders: governments, NGOs and business. IA is a useful tool for both public and private actors to examine the future consequences of their actions. Depending on the context of the proposed actions, IA can extend its coverage. Business typically requires a narrower IA for its project which is usually geographically defined; while an IA of policy demands a more extensive approach.

It is important to stress that because IA is a tool to predict future impacts for crafting mitigation measures, IA can only be useful when it is conducted with a serious intention to alternate the proposed action if necessary. IA has been more widely recognized in legal procedures and become a part of many legal compliance procedures, but an IA conducted for the sake of fulfilling certain legal compliance is not effective.⁷⁸ Furthermore, IA needs to be carried out in good timing, when interventions are still possible. Thus, IA is an essential part during the preparation stage.

3.1.2.2 Impact-type-based categorization of Impact Assessment.

Perhaps the categorization of IAs on the basis of the type of impacts with which the proposed actions are closely linked is more widely known. This owes to the fact that the first IA established – Environmental Impact Assessment (EIA) – is based on one certain type of impacts, thus paving the way for other IAs in different fields. According to the IAIA, EIA is the oldest and most well-established one of IAs.⁷⁹ Other IAs, most notably Social Impact Assessment (SIA), have been developed through the last few decades, addressing different impacts in various sectors.

The development of IA into different impact types is convenient as these IAs focus on a narrower set of impacts that are mostly confined in certain sectors.

⁷⁷ *Ibid.*

⁷⁸ *Ibid.*

⁷⁹ International Association for Impact Assessment, 'What is Impact Assessment?' (*White Paper, October 2009*) <http://www.iaia.org/publicdocuments/special-publications/What%20is%20IA_web.pdf>, accessed 6 April 2015, pg. 3

This concentration allows the mobilization of expertise and resources, which might be more challenging in a multi-disciplinary context. IAs addressing specific types of implications have proved to be useful and been used more commonly.

The following sections will give an overview of the two most well-established IAs: EIA and SIA/SEA, as well as mentions of a few other IAs.

a. Environmental Impact Assessment (EIA)

EIA owes its establishment to the increasing awareness of environmental issues during the 1950s and 1960. These two decades witnessed the rapid development of industries, which also produced undesirable environmental consequences. The situation called for a mechanism to examine the potential environmental consequences of all major projects before the authorization of their implementation.⁸⁰

In January 1970, the first comprehensive environmental legislation, the National Environmental Policy Act, was enacted by the Congress of the United States of America, first introducing the concept of EIA. Since then, EIA has increasingly been included in national legislations around the world.⁸¹

EIA is defined by the United Nation Environment Programme (UNEP) as “a procedure that identifies, describes, evaluates and develops means of mitigating potential impacts of a proposed activity on the environment.”⁸² UNEP’s guide clarifies that EIAs address not only environmental aspects but also all potential impacts of proposed activities on man and environment, requiring the considerations of different natural and environmental science disciplines and sometimes consideration of human health and socio-economic aspects where appropriate.⁸³

Depending on the specific projects and contexts, EIAs may differ greatly but they typically follow seven stages:

- Screening for projects that require IAs
- Scoping for potential relevant impacts
- Assessment and evaluation of impacts and development of alternatives
- Reporting the Environmental Impact Statement (EIS) or EIA report

⁸⁰ United Nations Environment Programme, “*United Nations Environment Programme Goals and Principles of EIA*”, 1987, <<http://www.unep.org/regionalseas/publications/reports/rsrs/pdfs/rsrs122.pdf>>, accessed 6 April 2015.

⁸¹ *Ibid.*

⁸² United Nations Environment Programme, “*Desalination – Resource and Guidance Manual for Environmental Impact Assessments*”, 2008, pg. vi, <<http://www.unep.org/Themes/Freshwater/PDF/Resource&GuidanceManualforEIAs.pdf>>, accessed 1 May 2015.

⁸³ *Ibid.*

- Review of the EIS
- Decision-making on project approval and conditions
- Monitoring, compliance, enforcement and environmental auditing⁸⁴

Strategic Environment Assessment (SEA) is a more recent development, first defined in 1996 as “the formalized, systematic and comprehensive process of identifying and evaluating the environmental consequences of proposed policies, plans or programs to ensure that they are fully included and appropriately addressed at the earliest possible stage of decision-making on a par with economic and social considerations”.⁸⁵ SEA represented a more sustainability-focus and integrated approach to IA, covering a wider range of fields and spanning a longer period of time than EIA.⁸⁶ SEA is regarded by UNEP as a secure foundation toward integrated assessment.⁸⁷ Several international conventions have specific requirements for EIA and SIA: the UN Convention on Biological Diversity (1992), the UN Convention on the Law of the Seas (1982), the regional Convention on EIA in a Transboundary Context (1991) which has a Protocol on SEA (2003) and the Antarctic Treaty (1959) which has an Environmental Protocol (1991) to name a few.⁸⁸

b. Social Impact Assessment (SIA)

The International Principles for Social Impact Assessment, in its frequently quoted definition, defines SIA as “the processes of analyzing, monitoring and managing the intended and unintended social consequences, both positive and negative, of planned interventions (policies, programs, plans, projects) and any social change processes invoked by those interventions”.⁸⁹

SIA arguably emerged in the early 1970s alongside EIA to address the legal requirement of the United States’ National Environmental Policy Act (NEPA).⁹⁰ It was within the context of NEPA that SIA was formalized in legal compliance requirement.⁹¹ Later, SIA has diverged from EIA because

⁸⁴ Website of the Secretariat of the Convention on Biological Diversity, “*What is Impact Assessment?*”, < <https://www.cbd.int/impact/whatis.shtml> >, accessed 15 April 2015.

⁸⁵ *Ibid.*

⁸⁶ *Ibid.*

⁸⁷ United Nations Environment Programme, “*Environmental Impact Assessment and Strategic Environmental Assessment: Towards an Integrated Approach*”, 2004, <<http://www.unep.ch/etu/publications/textONUbr.pdf>>, accessed 6 April 2015.

⁸⁸ International Association for Impact Assessment, “*What is Impact Assessment?*” (*White Paper, October 2009*) <http://www.iaia.org/publicdocuments/special-publications/What%20is%20IA_web.pdf>, accessed 6 April 2015, pg. 3

⁸⁹ Frank Vanclay, “*Social Impact Assessment – International Principles*”, *Impact Assessment and Project Appraisal*, volume 21, number 1, March 2003, pages 5–11, <http://www.socialimpactassessment.com/documents/0303%20Vanclay%20IAPA%20V21N1%20SIA%20International%20Principles_1.pdf>, accessed 6 April 2015.

⁹⁰ Ana Maria Esteves , Daniel Franks , Frank Vanclay, “*Social impact assessment: the state of the art*”, *Impact Assessment and Project Appraisal* Vol. 30, Iss. 1, 2012

⁹¹ *Ibid.*

of the growing awareness of fundamental differences between social issues and biophysical issues.⁹²

The process of an SIA is similar to the EIA process. It typically involves the following steps reproduced below:⁹³

- Public participation: it identifies the interested and affected stakeholders.
- Identification of alternatives: it describes the proposed action and reasonable alternatives to it.
- Profile of baseline condition: the relevant human environment and area of influence of the project as well as the existing social conditions and trends are identified.
- Scoping of the impacts: it involves identification and prioritization of the range of potential social impacts.
- Identification and analysis of estimated effects: it analyses and predicts potential impacts of the proposed action and the alternatives on the basis of baseline conditions.
- Prediction and evaluation of responses to impacts: it determines the significance of the identified social impacts to those who will be affected.
- The indirect and cumulative impacts are estimated to identify the subsequent effects of the proposed action.
- Evaluation of alternatives and impact mitigation: it involves evaluating alternatives in terms of their potential consequences for stakeholders.
- Monitoring plan: this stage develops and implements a monitoring program to identify deviations from the proposed action and any important unpredicted impacts.

The key values and principles of SIA specified in the International Principles for Social Impact Assessment state that SIA's objective and the project should be to contribute to the empowerment of vulnerable groups in the community; it requires a gender lens; and that respect for human rights should underpin all action.⁹⁴ The six Core Values of SIA specified in the International Principles for Social Impact Assessment contain explicit human rights language.⁹⁵ Indeed, it is recognized that many social and environmental

⁹² Frank Vanclay, "Social Impact Assessment: Guidance for assessing and managing the social impacts of projects", International Association for Impact Assessment, April 2015, <<https://www.iaia.org/pdf/IAIA%202015%20Social%20Impact%20Assessment%20guidance%20document.pdf>>, accessed 6 April 2015.

⁹³ Centre for Good Governance, "A Comprehensive Guide for Social Impact Assessment", 2006, <<http://unpan1.un.org/intradoc/groups/public/documents/cgg/unpan026197.pdf>>, accessed 6 April 2015.

⁹⁴ Frank Vanclay, "Social Impact Assessment: Guidance for assessing and managing the social impacts of projects", International Association for Impact Assessment, April 2015, <<https://www.iaia.org/pdf/IAIA%202015%20Social%20Impact%20Assessment%20guidance%20document.pdf>>, accessed 6 April 2015.

⁹⁵ Frank Vanclay, "International Principles for Social Impact Assessment", Impact Assessment and Project Appraisal, Vol.21, No.1, March 2003.

impacts are interpretable in terms of human rights and that SIA should address all significant human rights issues associated with a project.⁹⁶

c. Other impact assessments

As the interconnectedness of environmental, social and health issues are more recognized, integrated assessments are encouraged. The Environmental, Social and Health Impact Assessment (ESHIA) has been developed and become standard practice in private sector.⁹⁷

IA has developed into an extensive family of IAs, covering many different aspects of impacts such as Child IA, Gender IA, Poverty IA, Health IA, Ecological or Biodiversity IA, Economic and Fiscal IA etc.⁹⁸ Furthermore; an inter-disciplinary approach to IA has become popular. The integration of the environmental, social and economic aspects into IA has resulted in a more recent term and practice of Sustainability Assessment, which has been popularized by the European Union.⁹⁹

Human Rights Impact Assessments (HRIAs) have been developed from other types of IAs, most notably from the well-established EIA and SIA.¹⁰⁰ Being the focus of this thesis, HRIA will be discussed more in-depth in the next section of this chapter.

3.2 Human Rights Impact Assessment (HRIA)

3.2.1 Definition and background

The proliferation of international human rights instruments starting in the second half of the twentieth century has paved the way for the language of human rights to be mainstreamed into public discourse. Human rights have increasingly gained recognition to be central in governments' administrations and policies. Human rights NGOs, international and national human rights monitoring bodies have been established to respond to the increasing demand

⁹⁶ Frank Vanclay, "Social Impact Assessment: Guidance for assessing and managing the social impacts of projects", International Association for Impact Assessment, April 2015, <<https://www.iaia.org/pdf/IAIA%202015%20Social%20Impact%20Assessment%20guidance%20document.pdf>>, accessed 6 April 2015.

⁹⁷ *Ibid.*

⁹⁸ Simon Walker, "The Future of Human Rights Impact Assessments of Trade Agreements", School of Human Rights Research Series volume 35, Intersentia, 2009, pg 5.

⁹⁹ International Association for Impact Assessment, "What is Impact Assessment?" (*White Paper*), October 2009, <http://www.iaia.org/publicdocuments/special-publications/What%20is%20IA_web.pdf>, accessed 6 April 2015, pg 2

¹⁰⁰ The Nordic Trust Fund and the World Bank, "Human Rights Impact Assessments: A review of the Literature, Differences with other forms of Assessments and Relevance for Development", February 2013.

of states to fulfil their human rights obligations.¹⁰¹ Amidst this context, human rights violations have persisted, questioning whether institutional changes, policies and particular interventions have positive impacts on human rights, calling for tools to measure such impacts.¹⁰²

It can be argued that human rights impact was first encoded in core human rights instruments already in the 1960s, most notably the International Covenant on Economic, Social and Cultural Rights which calls for the “progressive realization of the rights enshrined, implicitly requiring measurements of human rights and of the progress being made toward the full realization of them.”¹⁰³ It was therefore no coincidence that the growing interest in measuring human rights impacts was in parallel with the acknowledgement of economic, social and cultural rights on the human rights agenda.¹⁰⁴ The growing attention given to economic, social and cultural rights played an important role in shifting the focus of human rights practice from the traditional approach of monitoring and addressing violations to new areas that explore the multiple and changing human rights impacts of various fields such as development, trade, business etc., requiring new tools and methodologies to monitor and measure these impacts.¹⁰⁵

Substantial discussions about HRIAs are traced back to the 1990s, originally motivated by the attention to the rights-based approach to development.¹⁰⁶ The is surging interest in HRIAs resulted from the United Nations’ reform initiatives that centralize the mainstreaming of human rights within the UN system¹⁰⁷, as called by the UN General-Secretary in 1997.¹⁰⁸ Subsequently, this led to the establishment of the rights-based approach to development¹⁰⁹ that, according to the UN OHCHR, provided “a conceptual framework for the process of human development that is normatively based on international human rights standards and operationally directed to promoting and protecting human rights”.¹¹⁰ It was argued later that the rights-based approach

¹⁰¹ Yasmine Ergas, “*Human Rights Impact: Developing and Agenda for Interdisciplinary, International Research*”, *Journal of Human Rights Practice*, vol.1 no.3, 2009, pg. 459.

¹⁰² *Ibid.*

¹⁰³ *Ibid.*, pg. 461.

¹⁰⁴ Simon Walker, “*Human Rights Impact Assessments: Emerging Practice and Challenges*”, from “*Economic, Social, and Cultural Rights in International Law: Contemporary Issues and Challenges*”, book edited by Eibe Riedel, Gilles Giacca and Christophe Golay, Oxford Scholarship Online, May 2014.

¹⁰⁵ *Ibid.*

¹⁰⁶ *Ibid.*

¹⁰⁷ James Harrison, “*Human Rights measurement: Reflections on the Current Practice and Future Potential of Human Rights Impact Assessment*”, *Journal of Human Rights Practice*, vol.3 no.2, 2011, pg.165

¹⁰⁸ Global Policy Forum, “*Secretary General Kofi Annan's Reform Agenda - 1997 to 2006*”, <<https://www.globalpolicy.org/un-reform/un-reform-initiatives/secretary-general-kofi-annans-reform-agenda-1997-to-2006.html>>, accessed 1 May 2015.

¹⁰⁹ James Harrison, “*Human Rights measurement: Reflections on the Current Practice and Future Potential of Human Rights Impact Assessment*”, *Journal of Human Rights Practice*, vol.3 no.2, 2011, pg.165

¹¹⁰ UN OCHCR, “*FAQs on a Human Rights-Based Approach to Development*”, 2006, <<http://www.ohchr.org/Documents/Publications/FAQen.pdf>>, accessed 1 May 2015.

alone was not sufficient to assess impacts on human rights of a policy¹¹¹, thus HRIA became an important tool for this purpose.¹¹²

Recommendations from the UN system contributed positively to motivate the interests in HRIAs. In 2003, the Committee on the Rights of the Child urged States to incorporate “a continuous process of child impact assessment [...], child impact evaluation [...] into all levels of development and implementation of policies to ensure that the rights enshrined in the UN Convention on the Rights of the Child are respected by member states.¹¹³ States member to this Convention are encouraged to conduct impact assessment related to various human rights issues.¹¹⁴ Similar calls for human rights impact assessments were voiced by other UN human rights committees too, such as the Committee on Economic, Social and Cultural Rights.¹¹⁵

UN Special Rapporteurs were active in promoting the use of HRIAs. Back in 1998, the late UN Special Rapporteur on the Right to Education, Katarina Tomasevski, recommended a human rights impact assessment be carried out before macroeconomic policies were developed and implemented to prevent their potential disregard for human rights.¹¹⁶ In a 2003 report, Paul Hunt, the former UN Special Rapporteur on the Right to Health, recommended that “Before a State introduces a new law or policy it has to ensure that the new initiative is consistent with its existing national and international legal obligations, including those relating to human rights [...] Appropriate impact analyses are one way of ensuring that the right to health – especially of marginalized groups, including the poor - is given due weight in all national and international policy-making processes.”¹¹⁷

Oliver de Schutter, the former UN Rapporteur on the Right to Food, first called for a systematic impact assessment on the right to food to be conducted by the Brazilian authorities before the government engaged in any large-scale infrastructural project. The impact assessment could also be used to assess the overall and distributional effects on the right to food of increased agricultural

¹¹¹ Philip Alston, “*Ships Passing in the Night: The Current State of the Human Rights and Development Debate Seen Through the Lens of the Millennium Development Goals*,” Human Rights Quarterly · Volume 27, Number 3, August 2005, pg 802.

¹¹² James Harrison, “*Human Rights measurement: Reflections on the Current Practice and Future Potential of Human Rights Impact Assessment*”, Journal of Human Rights Practice, vol.3 no.2, 2011, pg.165

¹¹³ The Nordic Trust Fund and the World Bank, “*Human Rights Impact Assessments: A review of the Literature, Differences with other forms of Assessments and Relevance for Development*”, February 2013, pg. 4.

¹¹⁴ *Ibid.*

¹¹⁵ *Ibid.*

¹¹⁶ Katarina Tomasevski, “*Background Paper submitted by Ms. Katarina Tomasevski*”, UN Doc. No. E/C.12/1998/18 (November 30, 1998), para. 10.

¹¹⁷ Paul Hunt, former UN Special Rapporteur on the Right to Health, “*The right of everyone to the enjoyment of the highest attainable standard of physical and mental health - Report of the Special Rapporteur, Paul Hunt, submitted in accordance with Commission resolution 2002/31*”, 13 Feb 2003, para 82-85.

trade.¹¹⁸ Later, in 2012, De Schutter presented the UN Guiding Principles on Human Rights Impact Assessments of Trade and Investment Agreements”, outlining methodological steps for HRIAs in Trade and Investment Agreement.¹¹⁹

HRIAs of business activities constitute a rather well developed branch of HRIAs, of which John Ruggie, the UN Special Rapporteur on business and human rights, was one of the main contributors. Much of the work on HRIAs resulted from a growing demand from the business sector to avoid human rights violations while operating.¹²⁰

Examining the interests among the UN mechanisms alone has proved HRIAs’ diversity and its various usages within different contexts, addressing different demands. This characteristic of HRIAs will be further illustrated as we discuss their other motivators.

The development of HRIA can be attributed to the human rights community including human rights institutes, NGOs and inter-governmental bodies who initiated the frameworks for measuring human rights effects, striving to figure out the effective way to promote the full realization of human rights.¹²¹ These initiatives were largely isolated efforts, responding to the existing lack of integration of human rights commitments into day to day policies as well as how to measure the human rights results of such policies.¹²² Moving the focus from specific rights, human rights practitioners realized the importance of considering a range of rights and impacts linked to certain policies and projects.¹²³ HRIA emerged as a practical tool to examine such multi-dimensional impacts.

Another important driver for the birth of HRIA is the donors’ concern whether their funding was paying off in the improvement of human rights condition.¹²⁴ Landman illustrated this concern by quoting a statement from World Bank “Donors want evidence that funds provided by their taxpayers achieve results,

¹¹⁸ Oliver De Schutter, former UN Special Rapporteur on the right to food, *Report on Mission to Brazil*, para.45.

¹¹⁹ Oliver De Schutter, “*Guiding Principles on Human Rights Impact Assessments of Trade and Investment Agreements*”, Report presented at the 19th Session of the United Nations Human Rights Council, 06 March 2012.

¹²⁰ The Nordic Trust Fund and the World Bank, “*Human Rights Impact Assessments: A review of the Literature, Differences with other forms of Assessments and Relevance for Development*”, February 2013, pg.9.

¹²¹ Todd Landman, “*Studying Human Rights*”, Routledge 2006, Chapter 8, pg. 126.

¹²² Saskia Bakker, Marieke Van Den Berg, Deniz Düzenli, and Marike Radstaake, “*Human Rights Impact Assessment in Practice: The Case of the Health Rights of Women Assessment Instrument (HeRWAI)*”, *Journal of Human Rights Practice* (2009) 1 (3), pg.438.

¹²³ Simon Walker, “*Human Rights Impact Assessments: Emerging Practice and Challenges*”, from “*Economic, Social, and Cultural Rights in International Law: Contemporary Issues and Challenges*”, book edited by Eibe Riedel, Gilles Giacca and Christophe Golay, Oxford Scholarship Online, May 2014

¹²⁴ *Ibid.*

and the recipients of funds want to see tangible improvements in their living condition.”¹²⁵

HRIA owes much of its establishment to about four decades of development of EIA and SIA practices.¹²⁶ HRIA recently branched out from the IA literature to as a response to address growing human rights concerns. On the other hand, it can be argued that human rights principles and standards have deeply influenced the existing IA framework,¹²⁷ thus the birth of HRIA that puts human rights at the center of attention is inevitable. Indeed, EIA and SIA have expressed the need to take human rights into considerations in the IA practice.¹²⁸ HRIA had been developed as an integral part of SIA before stakeholders started to use it more independently.¹²⁹ HRIA was used to complement other impact assessments especially when the latter failed to give sufficient attention to the vulnerable and marginalized groups.¹³⁰ For this reason, HRIA has been used in a wide range of contexts and numerous fields.

The diverse background of HRIA may explain why there has been no uniformed HRIA framework, and it may not be necessary to produce such framework.¹³¹ Depending on the nature of the object of assessment, participating stakeholders, and purposes, the chosen HRIA will follow certain framework and have different characteristics.¹³²

Indeed, this nature of HRIA has, for a long time, made it difficult to define HRIA. A fairly comprehensive joint study on HRIA by the Nordic Trust Fund and the World Bank defined it as “an instrument for examining policies, legislation, programs and projects to identify and measure their effects on human rights”.¹³³ HRIA aims to prevent adverse consequences and maximize positive effects on human rights of proposed interventions, whether or not the interventions in question themselves are designed to have an impact on human rights.¹³⁴

¹²⁵ Todd Landman, “*Studying Human Rights*”, Routledge 2006, Chapter 8, pg. 126.

¹²⁶ Simon Walker, “*The Future of Human Rights Impact Assessments of Trade Agreements*”, School of Human Rights Research Series volume 35, Intersentia, 2009, pg 5.

¹²⁷ *Ibid.*

¹²⁸ Frank Vanclay, “*Social Impact Assessment: Guidance for assessing and managing the social impacts of projects*”, International Association for Impact Assessment, April 2015, <<https://www.iaia.org/pdf/IAIA%202015%20Social%20Impact%20Assessment%20guidance%20document.pdf>>, accessed 1 May 2015

¹²⁹ Gauthier De Beco, “*Human Rights Impact Assessment*”, Netherlands Quarterly of Human Rights, Vol.27/2, 2009, Netherlands Institute of Human Rights (SIM), pg 141.

¹³⁰ Lawrence Gostin and Jonathan Mann, “*Towards the development of a human rights impact assessment for the formulation and evaluation of public health policies*”, Health and Human Rights, Vol. 1, No. 1 (1994), pp. 59.

¹³¹ James Harrison, “*Human Rights measurement: Reflections on the Current Practice and Future Potential of Human Rights Impact Assessment*”, Journal of Human Rights Practice, vol.3 no.2, 2011, pg.165

¹³² *Ibid.*

¹³³ The Nordic Trust Fund and the World Bank, “*Human Rights Impact Assessments: A review of the Literature, Differences with other forms of Assessments and Relevance for Development*”, February 2013.

¹³⁴ *Ibid.*, pg. ix

Nevertheless, literature on HRIAs has demonstrated that despite the differences, all HRIAs must retain characterizing elements and key methodological steps, which will be discussed later in this thesis.

3.2.2 Typology of Human Rights Impact Assessments

The diversity of HRIAs is apparent, but efforts have been made by several authors to categorize HRIAs. To date, there have been four different ways to categorize HRIAs based on four criteria: timing, forms, goals and actors who carry out HRIA. Reviewing the typology of HRIAs raises important questions on HRIA practice that will later become relevant when we discuss the HRIA in the context of trade and investment agreements.

a. Timing of the HRIA

HRIAs can be categorized based on the time when it is conducted in relation to the time of the examined intervention. According to this, HRIAs can be *ex ante* or *ex post* impact assessment. The timing of HRIAs is an important consideration when we later discuss the methodology and key issues of HRIAs in trade and investment agreement in the second chapter.

An *ex ante* impact assessment is conducted before the intervention takes place. It aims to predict and measure the potential consequences of the intervention on human rights, environment, social issues etc. depending on whether the impact assessment is EIA, SIA, HRIA or others. *Ex ante* impact assessments are typical for EIA or Strategic Environment Assessment and SIA. In fact, impact assessments are almost always expected to be of *ex ante* nature. The definition of impact assessments by IAIA discussed in chapter 1.1 implied this *ex ante* nature by underlining the timing of an impact assessment as when “there is still an opportunity to modify (or even, if appropriate, abandon) the proposals”.¹³⁵

The possibility to consider impacts of proposed interventions as well as impacts of alternative actions in order to make an informed decision is the most important benefit of conducting an impact assessment. If one is to interpret this definition strictly, impact assessments must take place prior to concluding any decision. Otherwise, one will risk turning the impact assessment into an impact report that does not contribute anything to the decision-making process.

Ex ante HRIA is carried out at the earliest stage of the decision-making process, allowing the findings to be incorporated, contributing to shape the

¹³⁵ International Association for Impact Assessment, ‘Impact Assessment’ (*Impact Assessment Wiki*, 15 November 2012), <http://www.iaia.org/iaia/wiki/impactassessment.ashx> accessed 6 April 2015

final outcomes of proposed interventions¹³⁶. This early timing is essential as the alternative interventions might be chosen instead of the proposed action should the HRIA outcomes dictate so. *Ex ante* HRIA stays true to the nature of impact assessment that is to anticipate future implications of proposed interventions. It presents a new approach to human rights practice, in which violations are predicted and mitigation measures are employed to prevent them. This approach is radically different from the traditional approach in human rights, which focuses on violations, victims and remedies and generally takes place after a violation occurred. The approach of *ex ante* HRIA on the other hand offers to enhance policy development by enabling decision-makers to adjust or change their policy, project or program to prevent adverse human rights consequences.¹³⁷

Ex post impact assessments measure the actual impact of a certain intervention by comparing the current situations before and after the intervention takes place.¹³⁸ The *ex post* HRIA looks backward in time, examining the human rights impacts resulted from an intervention.¹³⁹

Ex post HRIA is acknowledged by most authors studying HRIA to constitute a significant category of HRIAs¹⁴⁰. They consider *ex post* HRIAs as a stand-alone exercise of an evaluation phase of an *ex ante* HRIA.¹⁴¹ In fact, the Study on Human Rights Impact Assessments conducted by the Nordic Trust Fund and the World Bank concluded that the majority of surveyed HRIAs were *ex post* assessments, most of which were carried on by civil society organizations.¹⁴²

This finding poses a question relating to the inherent nature of impact assessments in general and HRIAs in particular. If an *ex post* HRIA takes place after the examined policy, project or program has been carried out, is the *ex post* HRIA in question essentially a mere report on human rights situation following the implementation of such policy, project or program? One may argue that the *ex post* HRIA is different from a human rights report in the sense that it does not simply inform stakeholders of the human rights situation in general, but the human rights situations that resulted from the intervention, stressing on the causality. Nevertheless, the fact that an *ex post*

¹³⁶ The Nordic Trust Fund and the World Bank, “*Human Rights Impact Assessments: A review of the Literature, Differences with other forms of Assessments and Relevance for Development*”, February 2013

¹³⁷ *Ibid.*

¹³⁸ *Ibid.*

¹³⁹ Simon Walker, “*Human Rights Impact Assessments: Emerging Practice and Challenges*”, from “Economic, Social, and Cultural Rights in International Law: Contemporary Issues and Challenges”, May 2014

¹⁴⁰ Authors who acknowledged the *ex post* category of HRIAs include Todd Landman in “*Studying Human Rights*”, Simon Walker in “*Human Rights Impact Assessments: Emerging Practice and Challenges*” as well as in the *Study on Human Rights Impact Assessments* by the Nordic Trust Fund and the World Bank

¹⁴¹ The Nordic Trust Fund and the World Bank, “*Human Rights Impact Assessments: A review of the Literature, Differences with other forms of Assessments and Relevance for Development*”, February 2013, pg 9

¹⁴² *Ibid.*

HRIA is carried out after the implementation of an intervention may severely limit the possibility that stakeholders adjust or change the intervention that might be irreversible in some cases. This limitation of *ex post* HRIAs is against the incentive of an impact assessment: that is to prevent violations and mitigate adverse consequences of a policy, project or program.

It is quite interesting to observe that the Study on Human Rights Impact Assessments by the Nordic Trust Fund and the World Bank quoted a definition from the IAIA which states that impact assessment is the process of identifying the *future* consequences of a current or proposed action (italic added) when it illustrated its statement that the *ex ante* element is essential in many impact assessments. The study itself, however, defines HRIA as “an instrument for examining policies, legislation, programs and projects and identifying and measuring their effects on human rights”, thus leaving out the timing element of HRIAs. This gap in its definition might result from the fact that a high number of existing HRIAs are *ex post*, despite their obvious resemblance to human rights reporting.

Ex ante HRIAs, especially when it comes to assessing policy, are very challenging and resource consuming.¹⁴³ As we discuss HRIA of Trade and Investment Agreements in the next chapter, this issue of *ex ante* HRIA versus *ex post* HRIA will be discussed in more details, since it poses a methodological challenge to HRIAs of Trade and Investment Agreements.

b. Form of the HRIA

The second approach to categorize HRIAs is to rely on the intentions of the proposed intervention: whether they are intended to have direct or indirect human rights impacts.

HRIAs can target policies, legal agreements, projects or programs that have a direct and intended impact on human rights.¹⁴⁴ On the other hand, HRIAs can assess policies, initiatives or projects of which explicit goals don't include human rights impact, but they nevertheless affect human rights indirectly by bringing out unintended impacts on human rights. Regarding HRIA for interventions that have indirect impacts on human rights, it is crucial that the impact assessment is able to highlight and prove the causality between the proposed intervention and the impacts found.¹⁴⁵

Interestingly, a large number of HRIAs have been conducted on policies or projects of which original aims are not to directly address human rights issues.¹⁴⁶ Policies or projects, especially those concerning trade, development

¹⁴³ *Ibid.*

¹⁴⁴ *Ibid.*

¹⁴⁵ *Ibid.*

¹⁴⁶ *Ibid.*

etc. can certainly affect human rights favorably or adversely,¹⁴⁷ due to the interrelatedness of human rights to other issues in different areas. The relevance of human rights in these policies or projects usually is not apparent in the planning stage. Human rights often arise as a concern when the policies or projects are being implemented.¹⁴⁸ Without adequate attentions to human rights *prior* to their implementations, it may then be too late to act upon these concerns. In this circumstance, HRIAs of policies or projects of which initial objectives are not human rights prove essential for the stakeholders to anticipate indirect and unintended implications on human rights resulting from their activities. This usefulness might explain why most HRIAs have been conducted on interventions that have unintended impacts on human rights.¹⁴⁹

As we move on to discuss HRIA and trade and investment agreements, this linkage between human rights and trade will be explored further, explaining why HRIAs on trade and investment agreements fall neatly into this category of unintended impacts.

Another approach to categorize HRIAs was proposed by Todd Landman, in which he combined the timing of the impact assessment and the form of impacts to divide HRIAs into four groups. His typology of HRIAs can be illustrated in the following table:¹⁵⁰

| | | Forms | |
|--------|----------------|--|--|
| | | Direct | Indirect |
| Timing | <i>Ex ante</i> | I Intentional planning to change the human rights situation | II Awareness of impact of other and/or unrelated activities |
| | <i>Ex post</i> | III Evaluation and assessment of policies, strategies, and programmes for changing the human rights situation | IV Evaluation and assessment of outcomes of policies, strategies, and programmes that were not intended for changing the human rights situation |

¹⁴⁷ Simon Walker, “Human Rights Impact Assessments: Emerging Practice and Challenges”, from “Economic, Social, and Cultural Rights in International Law: Contemporary Issues and Challenges”, May 2014

¹⁴⁸ The Nordic Trust Fund and the World Bank, “Human Rights Impact Assessments: A review of the Literature, Differences with other forms of Assessments and Relevance for Development”, February 2013, pg 9

¹⁴⁹ *Ibid.*

¹⁵⁰ Todd Landman, “Studying Human Rights”, Routledge 2006, Chapter 8, pg. 128.

The typology proposed by Landman is a combination of criteria of assessment's timing and criteria of impact's types. When analyzing his categorization, Landman focused on the timing criteria for *ex ante* and *ex post* assessments, thus confirming the importance of assessment timing to the HRIA process.

c. Level of impact assessment

HRIAs can be carried out at a policy level (for example: legislation, public policy), project level or program level.¹⁵¹ Walker proposed to divide HRIAs into policy HRIAs and project HRIAs that include impact assessments of programs, projects and other interventions.¹⁵²

The difference between these two groups has an impact on the methodologies chosen for HRIAs. Since policies tend to cover a larger area of circumstances and issues, ideally, the methodology for such policy HRIAs must also address a broader range of concerns. Nevertheless, a comprehensive study and assessment may be unfeasible due to resource constraints. Existing policy HRIA methodology addressed this problem by prioritizing the issues as one of the main steps.

On the other hand, programs and projects usually target more specific goals, thus, it might be easier for project HRIAs to identify the relevant concerns that need to be examined. The choice of comprehensive or narrow approach to HRIA poses a challenge to the HRIA methodology, in particular HRIA of Trade and Investment Agreements.

d. Actors who carry out HRIAs

The last approach to categorize HRIAs is to look into the actors who carry out HRIAs. There have been different actors who conducted HRIAs, including civil society organizations (CSOs), governmental agencies, the European Union and private businesses to name a few.

It was observed by the Study on Human Rights Impact Assessments that CSOs was the main actors conducting HRIAs in developing countries.¹⁵³ This is not surprising since HRIA is rather new as a concept and as a methodology.

¹⁵¹ The Nordic Trust Fund and the World Bank, "*Human Rights Impact Assessments: A review of the Literature, Differences with other forms of Assessments and Relevance for Development*", February 2013, pg 10

¹⁵² Simon Walker, "*Human Rights Impact Assessments: Emerging Practice and Challenges*", from "*Economic, Social, and Cultural Rights in International Law: Contemporary Issues and Challenges*" [Eibe Riedel, Gilles Giacca, Christophe Golay], May 2014.

¹⁵³ The Nordic Trust Fund and the World Bank, "*Human Rights Impact Assessments: A review of the Literature, Differences with other forms of Assessments and Relevance for Development*", February 2013, pg. 10.

This study surveyed the Resource Database of Case Studies of the Human Right Impact Resource Centre and found that out of 28 full HRIAs carried in developing countries, 26 were carried out by CSOs and two by business companies.

In addition, this picture of HRIAs might not be complete because HRIAs driven by the private sectors tend to remain unpublished.¹⁵⁴

HRIAs can be conducted by government agencies, especially when governments draft and implement policies or governmental projects. Policies usually have extensive, direct and/or indirect impacts on different facets of the society and so need to carry on HRIAs on them are apparent. Governments are responsible for policies, thus naturally they are the suitable actors who conduct HRIAs to address human rights issues that may result from such policies.

HRIAs were developed upon older impact assessments, carrying characteristics of impact assessments including the technical nature: that is to provide a technical tool for analysis the impacts. The technical nature of impact assessment lends it impartiality, and therefor authenticity, to HRIAs. Since the interpretation of human rights has often been subjected to politicization according to the stakeholders' political will and interest, the technical, science-based nature of the HRIA tool may serve to eliminate such subjectivity.

However, the methodology for HRIAs is in its nascent stage, lacking an established framework. In this circumstance, the actor who carries on a HRIA might play a decisive role in the success of the HRIA. Stakeholders' bias and their conflict of interests may pose a risk to the success and values of HRIAs.

When conducting HRIAs, in particular HRIAs on policies and projects of other stakeholders, CSOs might be considered a third-party, arguably impartial assessor whose assessments are valuable. At the same time, CSOs have encountered difficulties in accessing necessary information from duty bearers (governments, companies)¹⁵⁵ most likely due to the latter's negative perception about CSOs. On the other hand, when governments or private companies carry on HRIAs, the conflict of interests may arise especially when they examine their own policies or projects, jeopardizing the success of the HRIAs in question.

3.2.3 Essential elements of human rights impact assessments

The previous section has given an overview on the diversity of the HRIA family. The diverse nature of HRIAs corresponds to the broad range of human rights that they seek to address as well as the contexts in which human rights issues may arise. For that reason, HRIAs need flexibility to be utilized in such wide range of circumstances and purposes.

¹⁵⁴ *Ibid.*

¹⁵⁵ *Ibid*

On the other hand, the lack of an established framework has contributed to the challenges that HRIAs face, most notably the risk of its being altered to serve certain political ambitions and interests other than human rights. Therefore, even though a detailed HRIA methodology framework might be more of a far-fetched idea, a set of fundamental elements to HRIAs is much needed.

Having been developed from the impact assessment family, most notable the EIA and SIA, HRIAs carry characteristics similar to that of these well-established impact assessments. The similarities to EIA and SIA were detailed in the Report of the Special Representative of the Secretary-General on the issue of human rights and transnational corporations and other business enterprises, titled “Human rights impact assessments – resolving key methodological questions”.¹⁵⁶ The similar elements in this Human Rights Council report fit into the process of EIA and SIA that were put forward in the earlier chapter of this paper.¹⁵⁷

On the other hand, HRIA has its characterizing elements. These core elements are what differentiate HRIAs from other impact assessments such as SIA. Moreover, studies on HRIAs have generally agreed that these elements are the values that HRIAs bring into impact assessment tools. In this section, I will discuss each of the core elements of HRIAs and elaborate on their added values to the proposed policies, programs or projects in comparisons to other impacts assessment.

This section will outline the core elements of HRIAs that distinguish HRIA from other impact assessments. The core elements of HRIAs are: (1) Normative human rights framework, (2) Human-Rights-Based Approach, (3) Transparency and access to information, (4) Inter-sectorial approach and international policy coherence. Selection of these core elements is made upon surveying the academic literature on this topic, most notably is the Nordic Trust Fund and the World Bank’s Study on Human Rights Impact Assessments. The study itself did a rather comprehensive study on HRIA to put forward its core elements. Works by another notable author of HRIA who is heavily cited by others - Simon Walker - will also be referred to. Other scholarly sources are consulted where relevant.

¹⁵⁶ Human Rights Council, Report of the Special Representative of the Secretary-General on the issue of human rights and transnational corporations and other business enterprises, “*Human rights impact assessments – resolving key methodological questions*”, 5 February 2007, A/HRC/4/74, pg 4.

¹⁵⁷ Refer to the section on EIA and SIA in this thesis for the general process of these impact assessments.

For the full general steps of EIA can be found at: Convention on Biological Diversity, “*What is Impact Assessment?*”, < <https://www.cbd.int/impact/whatis.shtml>>, accessed 15 April 2015. The SIA framework elements can be found at: Centre for Good Governance, “*A Comprehensive Guide for Social Impact Assessment*”, 2006. <<http://unpan1.un.org/intradoc/groups/public/documents/cgg/unpan026197.pdf>>, accessed 1 May 2015.

The views expressed here are adopted from the above mentioned works. It is essential to note that I do not necessarily agree with all the so-called “added-values” of HRIA proposed by these sources. In fact, while acknowledging some of their aspects, I am generally aware of their shortcomings. In addition, where it’s relevant to my later discussion on the methodology of HRIA of trade agreements, I will offer further analysis.

a. Normative human rights framework

Literature on HRIAs has agreed that the most important and defining characteristic of HRIA is its basis upon normative human rights framework. This feature is almost uniformly cited by authors as the first element when distinguishing HRIA and other impact assessments. In this section, I am going to discuss the aspects of the normative human rights framework that have been praised by the majority of authors as contributing to the added values of HRIA over other impact assessments while putting in my thoughts and concerns on such claims.

The binding nature of human rights obligations

In his report to the Human Rights Council in 2007, John Ruggie, the former Special Representative of the Secretary-General on human rights and transnational corporations and other business enterprises (2005 – 2011), named the basis of international human rights framework as the clearest distinction between HRIA and other impact assessments.¹⁵⁸ The international human rights framework includes the International Bill of Rights consisting of the Universal Declaration of Human Rights and the two International Covenants on Civil and Political Rights and on Economic, Social and Cultural Rights. While the relevant legal, regulatory and administrative standards must be reflected in HRIAs,¹⁵⁹ relevant human rights standards in international conventions as well as customary laws, traditions and international humanitarian law must also be considered. Regarding international human rights conventions, Ruggie made a point that their human rights standards should be applied whether the state has ratified the conventions or not. This view is especially relevant in the cases of assessing foreign investment and trans-national and international trade, where home countries and host countries might not have the same level of human rights protection. By requiring the consideration of human rights conventions that have not ratified by the state, a higher standard of human rights protection is applied for HRIA framework regardless of the State’s ratification status.

¹⁵⁸ Human Rights Council, Report of the Special Representative of the Secretary-General on the issue of human rights and transnational corporations and other business enterprises, “*Human rights impact assessments – resolving key methodological questions*”, 5 February 2007, A/HRC/4/74, pg 6.

¹⁵⁹ *Ibid*, pg 4.

Sharing similar view, a prominent author on HRIA, Simon Walker, proposed that a HRIA should have human rights as its explicit subject.¹⁶⁰ This requirement is in turn illustrated by five factors, the first of which is an explicit reference to international human rights norms and standards, identifying which human rights are affected.¹⁶¹ According to the author, the minimum requirement of HRIA framework in referencing to human rights norms should be the UN core human rights instruments. Under specific circumstances, relevant instruments can also be used.¹⁶²

The normative human rights framework is usually lauded as the most important element of HRIA as well as the added value that HRIA brings to impact assessments, setting it apart from SIA¹⁶³ as well as other impact assessments such as EIA.

Impact assessments such as EIA and SIA were first developed due to practical concerns, and they only obtained formal status in legislation following their establishment. Therefore, the legal requirement for EIA or SIA differs in each country, depending on whether their relevant laws demand them or not. For example, even though EIA has been a relatively common practice, in states where environmental requirements have not become legal norms, EIA does not automatically have a status for mandatory application.

On the other hand, it can be argued that HRIA has a reverse history in comparison with the above-mentioned impact assessments. International human rights law has a longer history and development, laying out the foundation for HRIA. In turn, HRIA has been developed as a tool for stakeholders to fulfil their human rights obligations. Thus, HRIA relies on binding legal commitments and human rights standards that have achieved wide consensus.

The universal nature of human rights obligations

Human rights have been widely acknowledged to be universal. The universality of human rights norms were affirmed in the Vienna Declaration and Programme of Action which was adopted by the World Conference on Human Rights in Vienna on 25 June 1993: “The universal nature of these rights and freedoms is beyond question.” The universality of human rights

¹⁶⁰ Simon Walker, *“The future of Human Rights Impact Assessments of Trade Agreement”*, Book, School of Human Rights Research Series, vol.35, 2009, pg.30.

¹⁶¹ Simon Walker, *“The future of Human Rights Impact Assessments of Trade Agreement”*, Book, School of Human Rights Research Series, vol.35, 2009, pg.31.

¹⁶² An example cited by Walker is the methodology developed by the International Finance Corporation, UN Global Compact Office and the International Business Leaders Forum (the IFC Guide) to support businesses in *ex ante* assessment of their investment projects refers to human rights treaties and ILO conventions.

International Finance Corporation (IFC), UN Global Compact Office and the International Business Leaders Forum (IBLF), *“Guide to Human Rights Impact Assessment and Management: Road-Testing Draft”*, June 2007, IFC and IBLF, 2007, pg.62-64.

¹⁶³ James Harrison and Alessa Goller, *“Trade and Human Rights: What does ‘Impact Assessment’ Have to Offer?”*, Human Rights Law Review 8:4 (2008), pg.605.

framework of common norms and shared values provides HRIA with cross-cultural implementation at international and regional level. Other impact assessments such as SIA, on the contrary, have difficulties in finding a universally recognized framework.¹⁶⁴ SIA often encounters great lack of uniformed principles when examining interventions that span across diverse cultural, religious and socio-economic contexts.¹⁶⁵ This shortcoming of SIA explains its heavy reliance on human rights norms, which were illustrated in its core values of the IAIA Principles.¹⁶⁶

The indivisible nature of human rights obligations

The Vienna Declaration and Programme of Action 1993 affirmed the indivisibility of human rights obligations, requiring the international community to “treat human rights in a fair and equal manner, on the same footing and with the same emphasis.”¹⁶⁷ All human rights are of equal validity and importance.¹⁶⁸

The emphasis on equal importance of human rights guarantees that in HRIA, there would be no acceptable scenario where good compliance to a certain right may off-set violation of another right. The overall human rights situation cannot be evened out in such a quantitative manner. Violation of one right is not to be mitigated by compliance of another. This approach ensures that all human rights are assessed and addressed with appropriate remedies.

The enforceability of human rights norms

Owning its legitimacy from the binding nature of human rights obligations, the enforceability of human rights norms lends its authority to HRIA, providing a solid legal basis for HRIA to be carried out. Because international human rights obligations are to be respected, a tool that identifies potential negative impacts on human rights ought to be adopted as a part of the stakeholders’ efforts to fulfil their human rights commitments. HRIA should be conducted whether there is any legislation that explicitly requires HRIA or not, because HRIA itself is already a part of the human rights legislations. In this aspect, the normative human rights framework makes HRIA a much more

¹⁶⁴ Simon Walker, “*The future of Human Rights Impact Assessments of Trade Agreement*”, Book, School of Human Rights Research Series, vol.35, 2009, pg.43

¹⁶⁵ *Ibid*, pg.44.

¹⁶⁶ Vanclay, “*International Principles for Social Impact Assessment*”, 2003.

¹⁶⁷ World Conference on Human Rights, “*Vienna Declaration and Programme of Action*”, 25 June 1993,

¹⁶⁸ The debate on the hierarchy of human rights has not yet been settled. The view that there is no hierarchy among human rights adopted in this paper is taken from the Universal Declaration on Human Rights 1948. This view is affirmed by the OHCHR in their FAQs on a Rights-based-approach to development cooperation, where it was further pointed out that a number of other human rights instruments approve the same view, such as the Declaration on the Right to Development and the Convention on the Rights of the Child. See: Office of the United Nations High Commissioner for Human Rights, “*Frequently asked questions on a human right-based approach to development cooperation*”, 2006, <<http://www.ohchr.org/Documents/Publications/FAQen.pdf>> , Accessed May 1, 2015

powerful tool of which legitimacy is undeniable regardless of its explicit incorporation into law or not.

The human rights normative framework of HRIA provides the legitimacy for reinforcing recommendations that result from conducting HRIA.¹⁶⁹ These recommendations being drawn from HRIA represent the duties of stakeholders to enforce human rights. Therefore, a failure to comply with such duties can be interpreted as a violation of a state's legal obligations and give rise to enforceable claims by rights-holders.¹⁷⁰

Discussing this aspect of human rights norms, it is important to note that human rights' enforceability remains disputable, especially when human rights are paired against other regimes of international law. No hierarchy in international law has been acknowledged: its different regimes are generally considered to be of equal authority. While each of them operates well on its own, the fragmentation of international law may cause unresolvable conflicts between them. For example, if a state finds out that enforcing a trade agreement leads to one or a few human rights violations, it is still not easy to opt out of the trade obligations taking into consideration that failure to honour a binding trade agreement can result in costly compensations at international trade arbitration. The independence of these two regimes were elaborated in details in the first chapter of this paper. In short, in international law, there is no hierarchy to guarantee the enforceability of human rights norms above other regimes. This assumption of human rights enforceability and superiority over other international law's norms might be mere optimism from human rights advocates. That said, as human rights language and concerns are gaining grounds recently across a wide range of actors, enforceability of human rights norms should still be considered an advantage of HRIA.

On the other hand, if we are to agree with the enforceability of human rights framework, any consideration to weight human rights against other gains is out of question. This view is shared by Walker who asserted that one of the important contributions of HRIAs is to limit the trade-offs between human rights of individuals and groups and greater good by setting minimum threshold of acceptable impacts.¹⁷¹ The risk of trade-offs is high, especially at the policy level. For example, when signing off trade and investment agreements, a State may attempt to justify the adverse human rights impacts on some marginalized and vulnerable groups by claiming that the trade deals will bring economic prosperity to the whole country ("greater good") and benefit the entire population in the long term. The burden of such sacrifices usually falls on the most disadvantaged groups who are always placed at the

¹⁶⁹ The Nordic Trust Fund and the World Bank, *"Human Rights Impact Assessments: A review of the Literature, Differences with other forms of Assessments and Relevance for Development"*, February 2013, pg. 12.

¹⁷⁰ Rebekah Gay, *"Mainstreaming wellbeing: an impact assessment for the right to health"*, Australian Journal of Human Rights, vol.13, issue 2, 2008, pg.42.

¹⁷¹ Simon Walker, *"The future of Human Rights Impact Assessments of Trade Agreement"*, Book, School of Human Rights Research Series, vol.35, 2009, pg 47.

centre of attention in human rights framework. The HRIA eliminates this risk with its uncompromising attitude in upholding human rights standards.

Moreover, in contrast with SIA where the current situation (prior to the proposed intervention) is set as standard for impact assessment of future impact, HRIA studies and evaluate the current situation itself in accordance with human rights standards *as well as* uses the situation as reference point later.¹⁷² Baseline study *and* assessment are both necessary in HRIA process. Moving the focus from avoiding worsening the current situation (as in SIA approach), HRIA adheres to the stable and objective standards of human rights for reference, aiming toward an overall improvement of human rights situations solely in comparison with human rights minimum thresholds.

Identification of rights-holders and duty-bearers under human rights framework

An HRIA analysis guided by the human rights framework can identify the duty-bearers and rights-holders of human rights. The clear identification of duty-bearer and rights-holders serves to translate the HRIA outcome statements into real enforcement by naming who might be harmed by the impacts and who are legally responsible for providing remedies.¹⁷³ This step can also help to identify and involve other stakeholders such as civil societies in the process of HRIA.

States can select and enforce policies, projects and programs to pursue their goals in their discretion by referring to the principle of national sovereignty under international law.¹⁷⁴ Their roles as duty-bearers for human rights obligations, however, bound them to exercise their margin of discretion only within the limit of human rights frameworks.¹⁷⁵ ¹⁷⁶ HRIA informs the duty-bearers of their obligations to only implement legitimate policies, projects or programs.¹⁷⁷

Furthermore, Walker argued that depending on the context, the use of human rights terms could contribute greatly to social objectives relating to human rights, even when the actual legal implication of human rights might be weak.

¹⁷² *Ibid*, pg.46.

¹⁷³ *Ibid*, pg.32.

¹⁷⁴ Maastricht Guidelines, 1997, “*Maastrichts Guidelines on Violations of Economic, Social and Cultural Rights*”, Maastricht, 22-28 January 1997, Guideline 8.

¹⁷⁵ UN Committee on Economic, Social and Cultural Rights (CESCR), “*General Comment No. 12: The Right to Adequate Food (Art. 11 of the Covenant)*”, 12 May 1999, para.21

¹⁷⁶ UN Committee on Economic, Social and Cultural Rights (CESCR), “*General Comment No. 14: The Right to the Highest Attainable Standard of Health (Art. 12 of the Covenant)*”, 11 August 2000, E/C.12/2000/4, para 53

¹⁷⁷ The Nordic Trust Fund and the World Bank, “*Human Rights Impact Assessments: A review of the Literature, Differences with other forms of Assessments and Relevance for Development*”, February 2013, pg. 12.

¹⁷⁸ This argument holds true for both states and private businesses that are just as concerned about avoiding the label of human rights violators.¹⁷⁹

To conclude, apart from the identification of rights holders and duty bearers in the human rights framework, other elements that are thought by some scholars to constitute the added values of HRIA (human rights framework's binding nature, universality, indivisibility and enforceability) cannot be taken for granted. While they have been acknowledged and advocated for by a wide range of actor such as the UN, civil societies and legal scholars, they have not achieved absolute unanimity and uniform practice in the international community. Indeed, as much as human rights advocates want to claim these features as fact, human rights interpretation and implementation have not always turned out that way. At the ideological level, these characteristics have even been disputed by some. Thus, while they do add values to HRIA, the so-called advantages of HRIA in reality might be less powerful than how they are said to be,

b. Human Rights-Based Approach to HRIA

Several HRIA research works such as the ones by Simon Walker and the Danish Institute for Human Rights identify a human rights-based approach (HRBA) as the next key feature of HRIA¹⁸⁰. HRBA is closely related to the discourse of human rights and development. HRBA is defined by the Office of the United Nations High Commissioner for Human Rights as follow:

*A human rights-based approach is a conceptual framework for the process of human development that is normatively based on international human rights standards and operationally directed to promoting and protecting human rights. It seeks to analyse inequalities which lie at the heart of development problems and redress discriminatory practices and unjust distributions of power that impede development progress.*¹⁸¹

HRBA encompasses a number of human rights principles: (1) Universality and inalienability, (2) Indivisibility, (3) Independence and inter-relatedness, (4) Non-discrimination and equality, (5) Participation and inclusion, (6)

¹⁷⁸ Simon Walker, *"The future of Human Rights Impact Assessments of Trade Agreement"*, Book, School of Human Rights Research Series, vol.35, 2009.

¹⁷⁹ The Nordic Trust Fund and the World Bank, *"Human Rights Impact Assessments: A review of the Literature, Differences with other forms of Assessments and Relevance for Development"*, February 2013, pg. 12.

¹⁸⁰ Nora Gotzmann, *"Human Rights and Impact Assessment – Conceptual and Practical Considerations in the Private Sector Context"*, the Danish Institute for Human Rights, Matters of Concerns – Human Rights Research Papers, No. 2014/2, 2014.

¹⁸¹ Office of the United Nations High Commissioner for Human Rights, *"Frequently asked questions on a human right-based approach to development cooperation"*, 2006, pg 15, <<http://www.ohchr.org/Documents/Publications/FAQen.pdf>> , Accessed May 1, 2015

Accountability.¹⁸² Despite their equal importance, in order to stay relevant, this section will only elaborate on the principles that will be directly related to the challenges faced by HRIA of Trade and Investment Agreements which are: (1) Public Participation, (2) Equality and non-discrimination and (3) Accountability.

Public participation:

Public participation is considered a core element of HRIA. According to Harrison, the centrality of the consultative process one of the key characteristics that differentiates HRIA from other impact assessments that tend to focus on aggregate impacts and pay inadequate attention to the impacts on vulnerable groups.¹⁸³

Public participation means that “every person and all peoples are entitled to active, free and meaningful participation in, contributing to, and enjoyment of civil, economic, social, cultural and political development in which human rights can be realized”.¹⁸⁴ Regarding HRIA, in one way, principle of participation requires that an HRIA should seek the “active, free and meaningful participation” of rights-holders and duty-bearers in the assessment process.¹⁸⁵ In another way, public participation is one of the criteria that HRIA take into consideration when assessing an intervention. It means that an HRIA needs to examine whether the intervention itself has a mechanism in place that allows active, free and meaningful participation during all stages of the intervention.¹⁸⁶

An opinion put forward by the Danish Institute for Human rights argues that “participation” is not the same as “consultation” even though the latter is featured prominently in EIA and SIA as the main method to gather inputs from affected communities and stakeholders.¹⁸⁷ Consultation has been associated with several limitations; most notable is its formats that only allow the consulted communities to give feedbacks according to pre-designed information without any chance to co-create the process.¹⁸⁸ On the contrary, principle of participation in a HRBA “goes well beyond mere consultation or a technical add-on to project design. Rather, participation should be viewed

¹⁸² United Nations Development Group (UNDG), “*UN Statement of Common Understanding on Human Rights-Based Approaches to Development Cooperation and Programming (the Common Understanding)*”, 2003.

¹⁸³ James Harrison and Mary-Ann Stevenson, “*Assessing the Impact of the Public Spending Cuts: Taking Human Rights and Equality Seriously*”, Warwick School of Law Research Paper No. 2011-07.

¹⁸⁴ Simon Walker, “*The future of Human Rights Impact Assessments of Trade Agreement*”, Book, School of Human Rights Research Series, vol.35, 2009, pg.35.

¹⁸⁵ *Ibid.*

¹⁸⁶ The Nordic Trust Fund and the World Bank, “*Human Rights Impact Assessments: A review of the Literature, Differences with other forms of Assessments and Relevance for Development*”, February 2013, pg. 13.

¹⁸⁷ Nora Gotzmann, “*Human Rights and Impact Assessment – Conceptual and Practical Considerations in the Private Sector Context*”, Matters of Concerns – Human Rights Research Papers, the Danish Institute for Human Rights, No. 2014/2, 2014, pg 20.

¹⁸⁸ *Ibid.*

as fostering critical consciousness and decision-making as the basis for active citizenship.”¹⁸⁹ Public participation principle in HRBA can only be fulfilled when rights-holders meaningfully take part in shaping and influencing the impact assessment process, findings and decisions. The involvement of rights-holders in HRIA is the focus of principle of public participation.¹⁹⁰ This clarification is necessary to avoid false claims of upholding the principles of participation while cursory consultation was conducted as a part of the HRIA. In addition, the assessor who conducts HRIA needs to keep this distinction in mind when examining whether the intervention subjected to HRIA does indeed comply with the principle of participation and inclusion.

It is important to note that the practice of consultation itself is an essential part of participatory mechanism in HRIA. Consultation, if done correctly, is among the most effective methods to engage stakeholders in the HRIA process. The differentiation offered by the Danish Institute for Human Rights perhaps aims to draw attention to the cursory consultations, which do not have real impacts on ensuring public participation. Such consultations are of little practical use at best, and misleading at worst. The Study on HRIA by the Nordic Trust Fund and the World Bank named superficial or uninformative consultations among the obstacles that prevent effective participation processes. Other challenges against effective and meaningful participation process include: rushed schedules, shortfalls in the dissemination of calls for consultations, shortcomings in the inclusivity of the consultation with regards to marginalized and vulnerable groups.¹⁹¹ The attention given to marginalized and vulnerable groups is a fundamental human rights principle. Public participation with special attention to such groups is in turn a characterizing feature of HRIA in comparison with other assessments.

Meaningful participation is linked closely with the timing of HRIA in relation to the adoption of the intervention, namely the *ex ante* and *ex post* approaches.¹⁹² Public participation process only serves its purpose when it is done early enough for the inclusion of the process’ outcomes. To illustrate this point, the Study on HRIA by the Nordic Trust Fund and the World Bank cited the Inter-American Court on Human Rights’ statement regarding the case of the Sarayaku indigenous community that consultations “should be held from the early stages of the formulation or planning of the proposed measure, so that indigenous people can truly participate and influence the

¹⁸⁹ Office of the United Nations High Commissioner for Human Rights (OHCHR), “*Frequently Asked Questions on a Human Rights-Based Approach to Development Cooperation*”, 2006, pg.26.

¹⁹⁰ Nora Gotzmann, “*Human Rights and Impact Assessment – Conceptual and Practical Considerations in the Private Sector Context*”, Matters of Concerns – Human Rights Research Papers, the Danish Institute for Human Rights, No. 2014/2, 2014, pg 20.

¹⁹¹ The Nordic Trust Fund and the World Bank, “*Human Rights Impact Assessments: A review of the Literature, Differences with other forms of Assessments and Relevance for Development*”, February 2013, pg. 13.

¹⁹² *Ibid.*

decision-making process, in accordance with relevant international standards.”¹⁹³

Equality and non-discrimination

The principle of equality guarantees that “all individuals are equal as human beings and by virtue of the inherent dignity of each human person. No one, therefore, should suffer discrimination on the basis of race, color, ethnicity, gender, age, language, sexual orientation, religion, political or other opinion, national, social or geographical origin, disability, property, birth or other status as established by human rights standards.”¹⁹⁴ Non-discrimination is a crosscutting human rights principle as well as a human right. The Human Rights Committee has emphasized that “non-discrimination, together with equality before the law and equal protection of the law without any discrimination, constitute a basic and general principle relating to the protection of human rights.”¹⁹⁵

Taking a HRBA, the HRIA must uphold equality and non-discrimination. As a result, the HRIA must not exclude directly or indirectly any individuals or groups from the assessment; neither can it favour certain individuals or groups without justification.¹⁹⁶ The principle of non-discrimination requires that an “impacted community” should not be considered as homogenous but as it should entail a plurality of different groups.¹⁹⁷

The focus equality is not unique to HRIA. Social Impact Assessment (SIA), Poverty and Social Impact Assessment (PSIA) and Health Impact Assessment, for example, also consider equality as an important issue.¹⁹⁸ The lack of a structure to back the analysis of these impacts, in particular SIA, however, leads to the focus on identifying the distribution of impact among different individuals and groups with the aim to avoid the burden of disparate impact concentrated in specific groups.¹⁹⁹ Disparate impact analysis and interpretation in SIA receive little guidance from guiding documents such as the US Guidelines or the IAIA Principles.²⁰⁰

¹⁹³ *Ibid.*

¹⁹⁴ United Nations Population Fund, “*Human Rights Principles*”, 2005, <<http://www.unfpa.org/resources/human-rights-principles>>, accessed 1 May 2015

¹⁹⁵ Human Rights Committee, *General Comment 18, Non-discrimination (Thirty-seventh session, 1989)*, Compilation of General Comments and General Recommendations Adopted by Human Rights Treaty Bodies, U.N. Doc. HRI/GEN/1/Rev.1 at 26 (1994).

¹⁹⁶ Simon Walker, “*The future of Human Rights Impact Assessments of Trade Agreement*”, Book, School of Human Rights Research Series, vol.35, 2009, pg.35

¹⁹⁷ Nora Gotzmann, “*Human Rights and Impact Assessment – Conceptual and Practical Considerations in the Private Sector Context*”, Matters of Concerns – Human Rights Research Papers, , the Danish Institute for Human Rights, No. 2014/2, 2014, pg 23

¹⁹⁸ The Nordic Trust Fund and the World Bank, “*Human Rights Impact Assessments: A review of the Literature, Differences with other forms of Assessments and Relevance for Development*”, February 2013, pg. 14.

¹⁹⁹ Simon Walker, “*The future of Human Rights Impact Assessments of Trade Agreement*”, Book, School of Human Rights Research Series, vol.35, 2009, pg.46

²⁰⁰ *Ibid.*

The advantage of HRIA in comparison with other impact assessments is the consideration of equality through the right to non-discrimination and equality rights.²⁰¹ The right to non-discrimination provides a broad normative framework that has been consolidated by decades of national regional and international courts' and tribunals' jurisprudence.²⁰² Equality issues under the lens of the right to non-discrimination go beyond the distribution of impact among different group. It extends to thorough examination how the disaggregated impacts upon the communities are attributed to direct or indirect discrimination which results from certain policies or practice, possible justification of discriminatory practices, remedies afforded to rights-holders and recommendations to states to rectify the problem.²⁰³ The principle of equality and non-discrimination in HRIA provides an effective tool to analyze underlying causes and biases as well as proposal of necessary steps to improve the situation.

Accountability

The HRBA demands accountability as a part of the process. Accountability requires that States and other duty-bearers are answerable for the observance of human rights: they must comply with legal norms and standards enshrined in human rights instruments. Failure to do so resulted in the aggrieved rights-holders' right to claim for appropriate redress before a competent court or other adjudicator in accordance with the rules and procedures provided by law.²⁰⁴

Accountability is inherent to the human rights framework: "the idea of an individual right must involve directly or indirectly a claim that one person has over others – individuals, groups, societies or states."²⁰⁵ A particular right only makes sense when right-holders can hold duty-bearers responsible to help or collaborate in ensuring such right.²⁰⁶ Human rights obligations entail the states' duties to *respect, protect and fulfil*.²⁰⁷ Other non-states actors bear

²⁰¹ The Nordic Trust Fund and the World Bank, "Human Rights Impact Assessments: A review of the Literature, Differences with other forms of Assessments and Relevance for Development", February 2013, pg. 14.

²⁰² Simon Walker, "The future of Human Rights Impact Assessments of Trade Agreement", Book, School of Human Rights Research Series, vol.35, 2009, pg.46

²⁰³ *Ibid.*

²⁰⁴ United Nations Development Group (UNDG), "The Human Rights Based Approach to Development Cooperation: Towards a Common Understanding Among UN Agencies", 2003, <<http://hrbportal.org/the-human-rights-based-approach-to-development-cooperation-towards-a-common-understanding-among-un-agencies>>, accessed 1 May 2015.

²⁰⁵ United Nations Development Programme (UNDP), "Human Rights and Human Development", in Human Development Report, 2000, ch.1, pg.20-21.

²⁰⁶ *Ibid.*, pg.21.

²⁰⁷ The *respect – protect – fulfil* framework is widely recognized as the basis of states' human rights obligations. The obligation to *respect* requires States to refrain from interfering with the enjoyment of human rights by means of policies or project or program implementation. The obligation to *protect* requires States to prevent violations committed by third parties. Finally, the obligation to *fulfil* requires States to make use of any means necessary and available, including but not limited to legislative, budgetary, judicial and other measures towards the full realisation of such rights.

the moral and potentially legal human rights responsibilities.²⁰⁸ The distribution of accountability to stakeholders in turn affords rights-holders with a powerful tool to seek remedy.²⁰⁹

In a HRIA context, accountability principle offers to clarify the scope of human rights obligations of each duty-bearers and to depict the level of duty-bearers' human rights fulfilment in relation to the impact of their interventions.²¹⁰ However, it is necessary to emphasize that HRIA does not create new obligations for states or limit their range of policy options: it only identifies existing human rights obligations that states ought to comply with, thus enhancing the coherence between potentially conflicting obligations.²¹¹ HRIA does not stop at analyzing and comparing between duty-bearers' legal commitments and their actions in order to identify existing gaps.²¹² It serves to fill in the gaps by assigning the responsibility for such shortcomings to specific actors as well as by linking other relevant duty-bearers capable of making future changes to mitigate or prevent adverse impacts.²¹³ This function gives HRIA an advantage over other impact assessments, giving clear and feasible guidelines to relevant stakeholders to make sure that the HRIA outcomes will be considered incorporated into the interventions.

A HRIA will consider whether the proposed policies, project or program include an effective grievance mechanism that goes beyond the access to courts and formal legal system, providing the impacted rights-holders with remedies for past and future potential violations.²¹⁴ HRIA puts a special emphasis on grievance mechanisms of the assessed interventions because this criterion makes HRIA a powerful tool to protect human rights. The attention to grievance mechanism not only secures redress to affected rights-holders but contributes to institutional changes as well. The demand for policy changes is particularly strong thanks to its basis founded upon binding human

This framework was stated by the Committee on Economic, Social and Cultural Rights (CESCR) and in the "Maastricht Guidelines on Violations of Economic, Social and Cultural Rights".

For an overview of the tripartite typology of human rights obligations *respect, protect and fulfil*, see Ida Elisabeth Koch, "Dichotomies, Trichotomies or Waves of Duties?", Human Rights Law Review, Volume 5, No.1, 2005.

²⁰⁸ Simon Walker, "The future of Human Rights Impact Assessments of Trade Agreement", Book, School of Human Rights Research Series, vol.35, 2009, pg.35

²⁰⁹ United Nations Development Programme (UNDP), "Human Rights and Human Development" in Human Development Report, 2000, ch.1, pg.21.

²¹⁰ The Nordic Trust Fund and the World Bank, "Human Rights Impact Assessments: A review of the Literature, Differences with other forms of Assessments and Relevance for Development", February 2013, pg. 17.

²¹¹ Fabiane Baxewanos, Werner Raza, Austrian Foundation for Development Research, "Human Rights Impact Assessments as a New Tool for Development of Policy?", Working Paper 37, January 2013, pg.5.

²¹² Simon Walker, "The future of Human Rights Impact Assessments of Trade Agreement", Book, School of Human Rights Research Series, vol.35, 2009, pg.33.

²¹³ *Ibid.*

²¹⁴ The Nordic Trust Fund and the World Bank, "Human Rights Impact Assessments: A review of the Literature, Differences with other forms of Assessments and Relevance for Development", February 2013, pg. 17.

rights obligation framework, thus the outcomes recommended after HRIA process has significant authoritative values.

c. Transparency and access to information

Transparency is an underlying principle in human rights. The access to information inherent to transparency principle is closely linked with the requirement for public participation. Participatory process is meaningful and effective only when the participating stakeholders are well aware of all information essential for them to make informed decisions.

As similar the principle of public participation that was discussed earlier, in the context of HRIA, transparency consists of two aspects.²¹⁵

Firstly, it requires that information related to the assessed intervention be made available to the public before the intervention is finalized.²¹⁶ This aspect of transparency in HRIA has been much debated.²¹⁷ The human rights perspective advocates for maximizing the public access to information, provided that such disclosure does not cause or potentially cause harms to the related rights-holders.²¹⁸ Disclosure of information must also meet the timing requirement, being provided well in time for rights-holders' participation in decision-making processes and prior to the conclusion of the assessed intervention.²¹⁹ Availability of documents related to proposed intervention differs greatly, depending entirely on the stakeholders responsible for them. In many cases, the access to information becomes the one of the biggest challenges against HRIA, such as when it involves bilateral trade agreements or private companies.²²⁰ Requirements for publicly disclosing information concern a host of business actors fearing that such disclosure may result in legal liability claims or may be perceived as critical of a host government.²²¹ State actors in general are more willing to disclose information such as draft laws at debate stage, but much less transparent in regards to bilateral or multilateral trade agreements that are being negotiated.

²¹⁵ *Ibid*, pg. 16.

²¹⁶ *Ibid*, pg. 16.

²¹⁷ Nora Gotzmann, "*Human Rights and Impact Assessment – Conceptual and Practical Considerations in the Private Sector Context*", Matters of Concerns – Human Rights Research Papers, , the Danish Institute for Human Rights, No. 2014/2, 2014, pg 30.

²¹⁸ *Ibid*, pg 24.

²¹⁹ The Nordic Trust Fund and the World Bank, "*Human Rights Impact Assessments: A review of the Literature, Differences with other forms of Assessments and Relevance for Development*", February 2013, pg. 17.

²²⁰ James Harrison, "*Conducting A Human Rights Impact Assessment of the Canada-Columbia Free Trade Agreement: Key Issues*", A Background Paper for the CCIC Americas Policy Group, pg.3.

²²¹ Nora Gotzmann, , "*Human Rights and Impact Assessment – Conceptual and Practical Considerations in the Private Sector Context*", Matters of Concerns – Human Rights Research Papers, the Danish Institute for Human Rights, No. 2014/2, 2014, pg 24.

Secondly, the principle of transparency and access to information applies to disclose information on the HRIA process itself.²²² Transparency is required in all stages of the HRIA, from its methodologies to the final outcomes of the assessment, in order to monitor the accuracy and impartiality of the process and findings.²²³ A transparent HRIA methodology is necessary to avoid the risk of its being misused by stakeholders to serve political agendas by ways of downplaying the negative human rights implications or, contrarily, over-exaggerating the impacts to unfairly criticize or terminate the assessed intervention.²²⁴ The disclosure of HRIA findings is necessary to ensure that its outcomes are being adopted into the assessed intervention, making the HRIA process truly fruitful.

d. Inter-sectoral approach and policy coherence

This key element of HRIA is drawn from the crosscutting human rights principles of interdependence and interrelatedness.²²⁵ These principles were affirmed in the Vienna Declaration and Programme of Action adopted by the World Conference on Human Rights in Vienna on 25 June 1993:

“Human rights are universal, indivisible and interdependent and interrelated. The international community must treat human rights globally in a fair and equal manner, on the same footing, and with the same emphasis.”

HRIA is superior than other assessments in this aspect because it looks at the big picture of interrelated human rights that are not limited so one or several specific sectors. While EIA may also consider multidimensional impacts related to human lives, and SIA may cover a set of social aspects, their ranges of impacts still revolve around certain thematic factors. Likewise, the choice of to what extent of impacts that the assessment will cover lies entirely on the assessors’ views and visions. On the other hand, human rights framework readily offers a set of interrelated rights as clear guidance for HRIA to trace the impacts to greatest extent possible.

Furthermore, consideration for the interdependent and interrelated nature of human rights allows HRIA to thoroughly address potential impacts that might not be visible at first, especially in the case of *ex ante* HRIA. Impact assessments *prior* to the proposed intervention are not easy tasks due to the complexity of impacts. In this situation, HRIA is at an advantage by having this guidance.

²²² The Nordic Trust Fund and the World Bank, “*Human Rights Impact Assessments: A review of the Literature, Differences with other forms of Assessments and Relevance for Development*”, February 2013, pg. 16.

²²³ *Ibid*, pg. 17.

²²⁴ James Harrison and Mary-Ann Stephenson, “*Human Rights Impact Assessment: Review of Practice and Guidance for Future Assessments*”, Scottish Human Rights Commission, 1 June 2010.

²²⁵ The Nordic Trust Fund and the World Bank, “*Human Rights Impact Assessments: A review of the Literature, Differences with other forms of Assessments and Relevance for Development*”, February 2013, pg. 19.

Besides, the interdependence and interrelatedness of human rights allow HRIA to measure the cumulative impact of one or various interventions by a diverse range of stakeholders and across sectors.²²⁶

Policy coherence

State's policies tend to be broad and complicated, with high risk of conflicts between them. In the sphere of international law of which different branches can be highly complex, conflicting and fragmented, it is not uncommon for human rights obligations to collide with other commitments. HRIA provides a tool to screen and identify such tangles when a state enters new international law commitments or implements new policies domestically and internationally. Combining this function with its coverage across sectors as discussed above, HRIA ensures policy coherence between diverse aspects of international legal obligations.

²²⁶ *Ibid.*

4 Chapter III: Human Rights Impact Assessment of Trade Agreement

This chapter is going to discuss the use of HRIA in trade agreements. I will first provide an overview of the background in which HRIA emerged in the arena of trade agreements. Next, the most common approach of HRIA in the context of trade agreements and its most acknowledged methodologies will be examined.

4.1 Overview of human rights impact assessment in trade agreements

4.1.1 The growing interest in Human Rights Impact Assessment in Trade Agreements

In the last decade or so, the call for assessment of human rights impacts in the arena of trade agreements has increased, echoed by different actors. The previous chapters have argued for the need of human rights considerations in trade agreements and singled out HRIA as the suitable tool to measure the impacts on human rights resulted from these treaties. Despite the growing demand for HRIA in trade agreements, its conceptual and methodological development has been slow.

The United Nations was among the first actors to voice its calls for HRIAs of trade agreements. As early as 2000, the United Nations Conference on Trade and Development (UNCTAD) was given the mandate to develop impact assessment among others in order to identify the implications of existing and emerging multilateral trade rules.²²⁷ In the same year, the Sub-Commission for the Promotion and Protection of Human Rights issued Resolution 2000/7, requesting the High Commissioner for Human Rights (OHCHR) to analyze the human rights impacts of the Agreement on Trade-Related Aspects of Intellectual Property Rights (the TRIPS Agreement) of the World Trade Organization (WTO).²²⁸ Following this Resolution 2000/7, the UN High Commissioner recommended further reports and analysis on the impacts of TRIPS Agreement on specific human rights.²²⁹ In the following year of 2002,

²²⁷ United Nations Conference on Trade and Development (UNCTAD), *Report of the United Nations Conference on Trade and Development on its Tenth Session – Held in Bangkok, Thailand*, 12-19 February 2000, para.129.

²²⁸ United Nations Office of the High Commissioner for Human Rights, The Sub-Commission on the Promotion and Protection of Human Rights, *Intellectual property rights and human rights - Sub-Commission on Human Rights resolution 2000/7*, E/CN.4/SUB.2/RES/2000/7, August 2000.

²²⁹ United Nations Office of the High Commissioner for Human Rights, Sub-Commission on the Promotion and Protection of Human Rights, *The impact of the Agreement on*

the OHCHR reinstated its call for human rights impact studies by States to consider more closely the positive and negative impacts of trade liberalization on human rights in implementing and reviewing trade rules.²³⁰ Consequently, the development of methodologies for human rights impact assessments of trade and investment rules and policies was prioritized by the OHCHR in 2003, encouraging States to undertake HRIA prior entering commitments of trade and investment liberalization.²³¹ HRIA in trade agreements was also a focus area of discussion during the 5th WTO Ministerial Conference in Cancun, Mexico, 10-14 September 2003.²³² The OHCHR was active in voicing its recommendations for HRIAs to be undertaken by states in relation to conclusion of trade agreements.

In the following years, other UN bodies, especially the UN Committees mandated to monitor specific human rights or groups of rights, such as the Committee on Economic, Social and Cultural rights (CESCR), the Committee on the Elimination of Discrimination Against Women (CEDAW) and the Committee on the Rights of the Child (CRC), have called for impact assessments of trade agreements in their Concluding Observations by a number of states of which reports had been submitted to the committees.²³³ HRIA of trade agreements concerning the right to health was recommended by the UN Special Rapporteur on the Right to Health in his report on Peru in 2005.²³⁵ The initial calls for HRIAs of trade agreements by specialized UN bodies tend to focus on certain rights within their mandates. Later, in 2011, Oliver De Schutter, then UN Special Rapporteur on the right to food, developed a quite structured set of Guiding Principles on human rights impact assessments of trade and investment agreements, laying the early foundation for HRIA of trade agreements which was to be applied across a broader range

Trade-Related Aspects of Intellectual Property Rights on human rights”,

E/CN.4/Sub.2/2001/13, 27 June 2001

²³⁰ United Nations Office of the High Commissioner for Human Rights, Sub-Commission on the Promotion and Protection of Human Rights “*Globalization and its impact on the full enjoyment of human rights*”, E/CN.4/2002/54, 15 January 2002, para 46.

²³¹ United Nations Office of the High Commissioner for Human Rights, Sub-Commission on the Promotion and Protection of Human Rights, “*Human rights, trade and investment*”, E/CN.4/Sub.2/2003/9, 2 July 2003

²³² United Nations Office of the High Commissioner for Human Rights, “*Human Rights and Trade*”, 5th WTO Ministerial Conference in Cancun, Mexico, 10-14 September 2003.

²³³ James Harrison and Alessa Goller, “*Trade and Human Rights: What Does ‘Impact Assessment’ Have to Offer?*”, Human Rights Law Review 8:4, 2008, pg .589.

²³⁴ The Concluding Observations include:

Concluding Observations of the Committee on Economic Social and Cultural Rights regarding Ecuador, 7 July 2004, E/C.12/1/Add.100 at para. 56; *Concluding Observations of the Committee on the Rights of the Child regarding El Salvador*, 30 June 2004, CRC/C/15/Add.232 at para. 48; *Concluding Observations of the Committee on the Elimination of Discrimination Against Women regarding Colombia*, 2 February 2007, CEDAW/C/COL/CO/6 at para. 29; *Concluding Observations of the Committee on the Elimination of Discrimination Against Women regarding Philippines*, 25 October 2006, CEDAW/C/PHI/CO/6 at para. 26; and *Concluding Observations of the Committee on the Elimination of Discrimination Against Women regarding Guatemala*, 2 June 2006, CEDAW/C/GUA/CO/6 at para. 32.

²³⁵ Report of Special Rapporteur, Paul Hunt, on the right of everyone to the enjoyment of the highest attainable standard of physical and mental health, ‘*Mission to Peru*’, 4 February 2005, E/CN.4/2005/51/Add.3, para. 50.

of rights.²³⁶ His work was a response to an Expert Seminar on Human rights impact assessments for Trade and Investment Agreements which took place in June 2010 in Geneva under his auspices, gathering participants from civil society, with support from the European Union.²³⁷ Most recently, in September 2014, the OHCHR in collaboration with the Friedrich Ebert Stiftung organized an expert workshop named “Making the right impact?” on evaluating HRIAs in trade and investment regimes.²³⁸

HRIAs have also been conducted at national level on at least two occasions. The Canada-Colombia Free Trade Agreement regulated a human rights reporting process conducted annually by both Parties on the effect of the Free Trade Agreement on human rights in the territories of both countries.²³⁹ The European Union conducted an impact assessment to assist negotiation of the EU Colombia-Peru Trade Agreement that included human rights considerations.²⁴⁰ It also applied a human rights reporting process for its agreements with Colombia and Peru.²⁴¹ Civil society actors have been expressing their interest in HRIAs of trade agreements, stressing the need for such assessments, such as the International Federation for Human Rights (FIDH),²⁴² Association 3D-Trade-Human Rights-Equitable Economy.²⁴³ Topics on HRIA in trade agreements have also attracted legal academics.²⁴⁴

Despite significant attentions and confirmed demands of HRIA of trade agreements, the body of literature regarding this issue is rather small. The majority of the works in this area are by three main authors: Oliver De Schutter, Simon Walker and James Harrison. Reports by different organizations and academic papers by other authors have mostly quoted these three writers. Methodologies developed by De Schutter, Walker and Harrison

²³⁶ Report of the Special Rapporteur on the right to food, Olivier De Schutter, “*Guiding principles on human rights impact assessments of trade and investment agreements*”, A/HRC/19/59/Add.5, 19 December 2011.

²³⁷ Carin Smaller, “*Human Rights Impact Assessments for Trade and Investment Agreements – Report of the Expert Seminar*”, June 23-24, 2010, Geneva, Switzerland.

²³⁸ United Nations Office of the High Commissioner for Human Rights and the Friedrich Ebert Stiftung, Workshop Report, “*Making the right impact?*”, OHCHR/FES Expert workshop on evaluating human rights impact assessments in trade and investment regimes, 17-18 September, 2014, Bogis-Bossey, Switzerland.

²³⁹ Report of the Standing Committee on *International Trade, Human Rights, the Environment and Free Trade with Colombia*, Ottawa: Communication Canada, June 2008.

²⁴⁰ European Parliament, Directorate-General for External Policies of the Union, “*European Union: “Trade Agreement with Colombia and Peru*”, 2012.

²⁴¹ James Harrison, “*Human Rights Impact Assessments of Free Trade Agreements: What is the State of the Art?*”, Presentation at the Austrian Scientific Foundation for International Developments (ÖFSE) in Vienna, 5 November 2013.

²⁴² International Federation for Human Rights (FIDH), “*Position Paper: Human Rights Impact Assessment of Trade and Investment Agreements concluded by the European Union*”, February 2008,

²⁴³ Association 3D-Trade-Human Rights-Equitable Economy, “*Trade-related intellectual property rights, access to medicines and human rights*” – Morocco, April 2006, <http://www2.ohchr.org/english/bodies/cescr/docs/info-ngos/access_to_medicines_and_hr.pdf>, accessed May 1, 2015.

²⁴⁴ James Harrison and Alessa Goller, “*Trade and Human Rights: What Does ‘Impact Assessment’ Have to Offer?*”, *Human Rights Law Review* 8:4, 2008, pg .590.

have a lot in common, perhaps due to the reliance on the general impact assessment methodology. Taking a step further from De Schutter's guiding principles, Walker and Harrison have elaborated the methodologies in more details.²⁴⁵ Nevertheless, the differences between their proposed methodologies are insignificant. In other words, in spite of growing interests and urging calls for HRIAs of trade agreements, the methodology itself has not progressed much. As a result, as of 2014, at the OHCHR/FES expert workshop, many of the same conceptual and methodological concerns and difficulties, which had been highlighted a few years before by Walker and Harrison were still voiced. It seems that while more HRIAs of trade agreements have been conducted in the last few years, the issues and challenges encountered by them have not been resolved.

4.1.2 Reasons for undertaking Human Rights Impact Assessments of Trade Agreements

HRIA of trade agreements was a response to the increasing attention to the linkage between human rights and trade, offering practical support to States while little guidance on HRIAs of trade agreements was available.²⁴⁶ While it retains the general added values of HRIA that were discussed in the previous chapter,²⁴⁷ HRIA of trade agreements bring benefits, which are closely linked to trade agreements. Regarding these exclusive benefits, De Schutter highlighted three reasons why HRIAs of trade and investment agreements were helpful.²⁴⁸ These reasons are to be elaborated below.

Firstly, De Schutter stated that HRIA does not create more international legal obligations; it elaborates "the implications of pre-existing international human rights norms and standards for States when negotiating trade and investment agreements."²⁴⁹ Recognizing States' multiple international commitments under international law spanning across a wide spectrum of issues, HRIA is essential to eliminate inconsistency and conflicts between States' various obligations. Considering the impacts on human rights of trade

²⁴⁵ De Schutter proposed a six-step methodology in his Guiding Principles on HRIA of Trade and Investment Agreement, which was largely based on the basics steps of impact assessments. Walker developed a seven-step methodology for human rights impact assessments of trade agreements with insignificant differences, mostly in the order of steps taken, albeit more thorough elaboration of steps. Harrison proposed an eight-step methodology in undertaking an HRIA of a Trade Agreement, which largely resembles the works of De Schutter and Walker.

²⁴⁶ Report of the Special Rapporteur on the right to food, Olivier De Schutter, "*Guiding principles on human rights impact assessments of trade and investment agreements*", A/HRC/19/59/Add.5, 19 December 2011.

²⁴⁷ Refer to Chapter two of this thesis. HRIA of trade agreements inherits the characteristic values of HRIA in general, namely: (1) Solid foundation upon a normative human rights framework, (2) Guidance by the Human Rights Based Approach, (3) Transparency and access to information and (4) Inter-sectoral approach and international policy coherence.

²⁴⁸ Carin Smaller, "*Human Rights Impact Assessments for Trade and Investment Agreements – Report of the Expert Seminar*", June 23-24, 2010, Geneva, Switzerland, pg 2.

²⁴⁹ Report of the Special Rapporteur on the right to food, Olivier De Schutter, "*Guiding principles on human rights impact assessments of trade and investment agreements*", A/HRC/19/59/Add.5, 19 December 2011, para.6.

agreements, States avoid the risk to undermine their human rights obligations when fulfilling trade rules regulated by strict enforcement mechanisms of international trade law.

Secondly, according to De Schutter, HRIA helps to strengthen democracy and accountability for the effects of trade and investment agreements. Indeed, recurring concerns throughout the establishment and conducts of HRIA of trade agreement are transparency and public participation of the trade agreement regimes. It is not uncommon for trade agreements to be negotiated in a secret manner, only involving a limited number of stakeholders, who are not representative for the affected rights-holders. The process of HRIA emphasizes transparency and participation, allowing a wider range of stakeholders to voice their concerns over the potential human rights impacts of trade agreements and to take part in the decision-making process. HRIA thus strengthens democracy and accountability of involving actors.

Finally, De Schutter asserted that HRIA might empower governments from developing countries to improve their bargaining power while negotiating trade and investment agreements. Developing countries used to hesitate when human rights considerations were introduced in trade negotiations for fears of conditionalities that could impede their market access. They have since become more accepting of human rights considerations when they started to see the benefits of such considerations.

4.2 Human Rights Impact Assessment of trade agreements: main approaches and methodologies

4.2.1 Approaches

In the previous chapter, I have discussed the different criteria based on which HRIAs can be categorized. Regarding HRIA of trade agreements, some criteria are more important than the others when evaluating the methodologies of HRIA for trade agreements.

HRIA of trade agreements can be quickly placed into the group of HRIA for indirect human rights impacts. The main objects of trade agreements include, undoubtedly, trade and access to market. Human rights concerns are usually indirect, arising from the exercise of main trade objects. In relation to the categorization based on the level of interventions, HRIA of trade agreements is carried out at policy-level due to the legislative impacts of binding trade agreements.

Both governmental and non-governmental actors have conducted HRIAs of trade agreements. In the case of non-governmental assessors, nevertheless, it still requires the governments' willingness to adopt such recommendations in order for HRIA to be helpful as the government is a signatory Party to and

executor of trade agreements. It explains why a large number of HRIAs of trade agreements were governmental HRIA.

The most important categorization of HRIAs of trade agreements is the timing of the assessment. The timing of the assessment is highly influential over the methodology as well as the challenges that HRIA may face. HRIAs of trade agreements can be categorized into two groups: *ex ante* HRIA and *ex post* HRIA.

Ex ante HRIA is conducted before or during the negotiation of the trade agreement and prior to its implementation. Walker clarified the meaning of the term *ex ante* as referring to both assessments during the negotiation process and assessments directly after the adoption of the agreement but *prior* to implementation. He argued that HRIAs conducted in between the agreement's adoption and implementation was still capable of influencing the direction of the reform program surrounding the trade agreement.²⁵⁰ *Ex ante* HRIA encounters more complex methodological challenges.²⁵¹ These challenges result from the inherent difficulty to predict potential future consequences of proposed interventions. Furthermore, when the proposed intervention in question is a trade agreement, the challenges expand to the limit of access to information, in some cases, the access to draft text of the agreement. Trade agreements are traditionally negotiated in secret with very limited number of actors having the access to information behind closed door. Whether trade agreements should be negotiated in the open has still been much debated. It has always been the negotiators, mostly States or sometimes a union of States, who decide if they want to publicize the agreement that is being negotiated. A prominent treaty party, the European Union, has committed to promote transparency of trade agreements in negotiations, having published its steps to ensure transparency in EU trade negotiations.²⁵² Despite such openly stated commitments, the EU has been subjected to criticism for its lack of transparency in trade negotiations.²⁵³ On the other hand, a vast number of other State Parties have not found this idea of early disclosure attractive. The most recent trade agreement that has attracted much

²⁵⁰ Simon Walker, "The Future of Human Rights Impact Assessments of Trade Agreements", School of Human Rights Research, Vol.35, 2009, pg.86-87.

²⁵¹ James Harrison, "Human Rights Impact Assessments of Free Trade Agreements: What is the State of the Art?", Presentation at the Austrian Scientific Foundation for International Developments (ÖFSE) in Vienna, 5 November 2013.

²⁵² European Commission, "Factsheet: Transparency in EU trade negotiations", 2013, <http://trade.ec.europa.eu/doclib/docs/2013/june/tradoc_151381.pdf>, accessed May 1, 2015.

²⁵³ Corporate Europe Observatory, "Busting the myths of transparency around the EU-US trade deal", September 2013, <<http://corporateeurope.org/trade/2013/09/busting-myths-transparency-around-eu-us-trade-deal>>, accessed May 1 2015.

Furthermore, the European Ombudsman asked the Council of the European Union to publish EU negotiating directives for the Transatlantic Trade and Investment Partnership (TTIP) that is being negotiated with the US.

European Ombudsman, "Ombudsman asks Council and Commission to publish more TTIP documents", Press release no. 17/2014, 31 July 2014, <<http://www.ombudsman.europa.eu/en/press/release.faces/en/54636/html.bookmark>>, accessed May 1, 2015.

negative publicity due to their lack of transparency is the Transatlantic Trade and Investment Partnership (TTIP) between the United States and EU.²⁵⁴

Ex post HRIA are performed after the conclusion of the trade agreement in question, once the impacts are measurable.²⁵⁵ As it might prove infeasible to predict all future impacts on human rights once the trade agreement enters into force, *ex post* HRIA is necessary to complement *ex ante* HRIA. De Schutter's guiding principles dictate that HRIA should be an iterative process that takes place on a regular basis. Moreover, the trade agreement should include safeguard clauses to enable a State Party to withdraw from the agreement in case it is impossible to comply with the State's human rights obligations within the agreement's rules.²⁵⁶ The ability of denunciation should be implied even when there is no clause that explicitly permits it.²⁵⁷ Thanks to the availability to information and data regarding the actual impact assessments on human rights of trade agreements after its entry into force, *ex post* HRIA could identify the impacts much more easily, clearly and comprehensively. Data gathering in *ex post* HRIA is not as challenging as it is for *ex ante* HRIA. *Ex post* HRIA, however, doesn't offer a perfect solution

²⁵⁴ The European Ombudsman asked the Council of the European Union to publish EU negotiating directives for the Transatlantic Trade and Investment Partnership (TTIP) that is being negotiated with the US.

European Ombudsman, "Ombudsman asks Council and Commission to publish more TTIP documents", Press release no. 17/2014, 31 July 2014, <<http://www.ombudsman.europa.eu/en/press/release.faces/en/54636/html.bookmark>>, accessed May 1, 2015.

²⁵⁵ Report of the Special Rapporteur on the right to food, Olivier De Schutter, "Guiding principles on human rights impact assessments of trade and investment agreements", A/HRC/19/59/Add.5, 19 December 2011, para.3.3.

The "safeguard clause" proposed by De Schutter is "to ensure that, should such *ex post* assessments lead to the conclusion that the State is unable to comply with its human rights obligations within the constraints of the agreement, it should be released from such constraints to the extent of the incompatibility." Such safeguard clause, is different from the "human rights conditionality" in regional trade agreements on which I have written an unpublished essay in 2014.

The human rights conditionality, or human right clause, of regional trade agreements is an "essential element clause", initiated by the European Union to allow one Party to suspend or terminate the treaty's obligations under Vienna Convention on the Law of Treaties in case democratic principles and fundamental human rights were violated by the other Party. Its close link with the European Union demonstrates its intended usage: that is to free EU from executing its treaty obligations that will violate democratic principles and fundamental human rights by its trading partner. Being an essential element clause, it is meant to provide a "blanket" over any other possible human rights violations in the future. Human rights conditionality, however, is included in the regional trade agreements to fulfil one of EU policy's requirements without any examination of the *potential* impacts on human rights unique to the trade agreement in which such human rights conditionality is incorporated. On the contrary, the "safeguard clause" suggested by De Schutter is exclusive to the trade agreement subjected to HRIA. The safeguard clause, therefore, emerges from the necessity to address certain potential negative impacts on human rights that are identified by HRIA, responding to the findings and recommendations resulted from conducting a HRIA on a specific trade agreement.

²⁵⁶ Report of the Special Rapporteur on the right to food, Olivier De Schutter, "Guiding principles on human rights impact assessments of trade and investment agreements", A/HRC/19/59/Add.5, 19 December 2011, para.3.3.

²⁵⁷ *Ibid.*

either. As it is conducted after the conclusion of a trade agreement, the opportunities for alternative choices, or in some extreme instances, for the denunciation of the agreement, are limited. *Ex post* HRIA's integration and real influences in policies are highly dependent on the mechanisms, which may allow such influences. The mechanisms might be found in the agreement itself or proposed by earlier *ex post* HRIA.

Though the Guiding principles on HRIA of trade and investment agreements allow for denunciation in the absence of explicit mechanisms, State Parties might resist alternatives or withdrawal from the agreement due to the usually strict enforcement mechanisms of international trade law and the risks of costly compensations. Furthermore, it can be argued that the possibility to withdraw from trade agreements is hazardous from an international law perspective: it may water down the binding nature of such an international agreements, decreasing their authority and threatening the already fragile international legal frameworks.

4.2.2 Methodologies of human rights impact assessment of trade agreements.

4.2.2.1 Overview of available methodologies

As discussed in the previous section, the methodologies for HRIA of trade agreements have been limited, despite the growing calls and discussions for them, in contrast with the rather comprehensive body of HRIAs for company operations.²⁵⁸ It has been widely agreed that there is no one-size-fit-all methodology for HRIA in general.²⁵⁹ The most comprehensive studies and most structured methodologies have been developed by three main authors Oliver De Schutter, Simon Walker and James Harrison.

De Schutter proposed a six-step methodology in his Guiding Principles on HRIA of Trade and Investment Agreement, which was largely based on the basics steps of impact assessments. Walker developed a seven-step

²⁵⁸ HRIA for corporate and business operations has been well developed. Leading actors in this field include NomoGaia of which HRIA toolkit provides specific step-by-step guidance as well as case studies. See: NomoGaia, "*Human Rights Impact Assessment Toolkit*", <<http://nomogaia.org/tools/>>, accessed May 1, 2015.

Another leading actor in HRIA for business and corporates is the Danish Institute for Human Rights (DIHR). The DIHR developed the Human Rights Compliance Assessment Tool to detect human rights risks in company operation with a large database of 195 questions and 947 indicators. Recently, it issued the Guide on integrating human rights into environmental, social and health impact assessments (ESHIA). See:

The Danish Institute for Human Rights, "*The Human Rights Compliance Assessment*", <<http://www.humanrights.dk/business/the-human-rights-compliance-assessment>>, accessed May 1, 2015

The Danish Institute for Human Rights, "*Human Rights and Impact Assessment*", <<http://www.humanrights.dk/business/impact-assessment>>, accessed May 1, 2015.

²⁵⁹ This has been stated often in studies, discussions, and commentations on impact assessments in general and HRIAs in particular. For HRIA of trade agreements, see De Schutter's *Guiding Principles for HRIA of trade and investment agreements*, Walker "*The Future of Human Rights Impact Assessments of Trade Agreements*" among others.

methodology for human rights impact assessments of trade agreements with insignificant differences, mostly in the order of steps taken, albeit more thorough elaboration of steps. Harrison proposed an eight-step methodology in undertaking an HRIA of a Trade Agreement, which largely resembles the works of De Schutter and Walker. The following table will illustrate the methodologies proposed by the three authors.

| Oliver De Schutter²⁶⁰ | Simon Walker²⁶¹ | James Harrison²⁶² |
|---|-----------------------------------|---------------------------------------|
| 1. Screening | 1. Preparation | 1. Screening |
| 2. Scoping | 2. Screening | 2. Scoping |
| 3. Evidence gathering | 3. Scoping | 3. Evidence gathering |
| 4. Analysis | 4. Analysis | 4. Consultation/ Participation |
| 5. Conclusions and recommendations | 5. Recommendations | 5. Analysis |
| 6. Evaluation mechanism | 6. Monitoring and Evaluation | 6. Conclusions and Recommendations |
| | 7. Preparation of the report | 7. Publication/ Reporting |
| | | 8. Monitoring and review |

The three methodologies are almost identical. The differences between them are slight. The absence of participatory process is noticeable in the above key step methodologies by De Schutter and Walker. However, both De Schutter and Walker upheld participation process in their proposals. De Schutter considered participation as one of the minimum conditions for the procedure of HRIA of trade agreements.²⁶³ On the other hand, Walker integrated participation process and data collection into his third step of Scoping. The last steps in the three methodologies are also slightly different. Due to such uniformity of proposed methodologies by these three authors and the lack of

²⁶⁰ Report of the Special Rapporteur on the right to food, Olivier De Schutter, “*Guiding principles on human rights impact assessments of trade and investment agreements*”, A/HRC/19/59/Add.5, 19 December 2011.

²⁶¹ Simon Walker, “*The Future of Human Rights Impact Assessments of Trade Agreements*”, School of Human rights Research Series, vol.35, 2009, Chapter 2.4, pg 86-102.

²⁶² James Harrison, “*Human Rights Impact Assessments of Free Trade Agreements: What is the State of the Art?*”, Presentation at the Austrian Scientific Foundation for International Developments (ÖFSE) in Vienna, 5 November 2013.

²⁶³ Report of the Special Rapporteur on the right to food, Olivier De Schutter, “*Guiding principles on human rights impact assessments of trade and investment agreements*”, A/HRC/19/59/Add.5, 19 December 2011, para.4.

alternative proposals of equally structured methodologies, I will choose one of the three methodologies to represent the existing methodologies for HRIA of trade agreements. Walker's key step methodology is selected due to its being the most robust and elaborated of the three. The next section will give a general description of each key step.

4.2.2.2 Methodologies

Adopting the basic elements common to many impact assessments, Walker proposed a step-by-step methodology for HRIA in trade agreements.²⁶⁴ He justified his choice by citing the logical sequence of these steps, their ability to keep the HRIA relevant to the aspects of trade agreement, and the respect for human rights principles. His methodology was intended mainly for *ex ante* HRIA. He designed its usage to be repetitive from the early preliminary stage to the later more deepened and narrowed stages. Keeping that in mind, the HRIA of a trade agreement must be broken down into levels of assessment to quickly eliminate insignificant impacts within the complex nature of the trade agreement. Seven steps of Walker's methodology are: (1) Preparation, (2) Screening, (3) Scoping, (4) Analysis, (5) Recommendations, (6) Evaluation and monitoring, and (7) Preparation of the report.

I will summarize the main points of each step, but also offer my thoughts on elements that are closely linked with my critique of the methodology.

Step one: Preparation

Unlike De Schutter and Harrison, Walker devoted the first step solely to the preparatory stage of the HRIA. The purpose of this step is to clarify various aspects concerning the context of the assessment, to identify relevant stakeholders, to set out the objectives, scale and focus of the assessment and finally to determine necessary resources. This first step consists of several elements as summarized below:

- Setting the purpose: Walker identified a number of possible purposes that a HRIA can pursue, among them are exploring the linkage between human rights and trade, informing policy-makers, developing policy, increasing transparency and participation in the decision-making process, enhancing policy coherence and consistence between different international law obligations, providing in-depth analysis of trade impacts on human rights, setting baseline for future *ex post* assessment.
- Setting the focus and parameters: this activity aims to select the agreement for examination, to limit HRIA to certain sectoral and geographical scope and time frame. In addition, it allows narrowing down the concentration to specific rights. Human rights obligations committed by States must also require a mapping process.

²⁶⁴ Simon Walker, "The Future of Human Rights Impact Assessments of Trade Agreements", School of Human rights Research Series, vol.35, 2009, pg 87.

- Identifying stakeholders: the methodology suggests that identification of stakeholders at this early stage is possible and might be done at this point. Rights and obligations of impacted communities and stakeholders might also be described.
- Determining the administrative framework: this activity largely depends on the assessor of the HRIA as it concerns the coordination framework of the actor that undertakes HRIA. It aims to select the most suitable administrative framework to oversee assessment.
- Preparation of a baseline study: Baseline study is identified as a key step to prepare HRIA of trade agreements. Walker has identified objective standards employed by HRIA as one of its most valuable contributions. He emphasized the role of baseline situation, which is a reference point for future impacts *and* a part of the HRIA process itself. Placing baseline as an object of assessment, the methodology demands mitigation measures for the baseline situations themselves apart from the measures in response to negative impacts by the trade agreement.

Step two: Screening²⁶⁵

Screening step typically scans the trade agreement's measures and picks out the ones that are most likely to have significant impacts on human rights. Having limited the HRIA to certain thematic scope in the previous step, this step demands a clarification of causal links between the trade measures and the subjects of the assessment. Though providing a list of trade sectors more relevant to human rights²⁶⁶, Walker left this step to the discretion of assessors to identify sectors, measures and rights that are most affected on a case-by-case basis. It is inferred that it entirely depends on the assessing actors to make judgments of the impacts' significance to decide on taking them to the next steps. The author identified four factors to determine the impacts' significance as follow:

- The extent of existing human rights stresses in the affected areas;
- The direction of changes compared to baseline conditions (positive or negative);
- The nature, magnitude, geographic extent, duration and reversibility of changes, including the likelihood of impacts having a cumulative effect;
- The regulatory and institutional capacity to implement mitigation and enhancement measures.

Walker made a suggestion of qualitative assessment that goes together with quantitative assessment in terms of scores to evaluate these factors, but he

²⁶⁵ Simon Walker, "*The Future of Human Rights Impact Assessments of Trade Agreements*", School of Human rights Research Series, vol.35, 2009, Chapter 2.4, pg 92.

²⁶⁶ The eight trade sectors more relevant to human rights are identified in his earlier chapter. Simon Walker, "*The Future of Human Rights Impact Assessments of Trade Agreements*", School of Human rights Research Series, vol.35, 2009, pg 60.

quickly warned of the risks where positively-scored factors off-set negatively-scored factors, which is an unwanted scenario in HRIA.

It is worth mentioning that Walker disagreed with some other impact assessments' methodologies of combining screening and scoping stages. The screening step is distinguished from the scoping step in how it functions. While the former eliminates irrelevant subjects of assessment ('narrowing-down' process), the latter focus on analyzing in details the remaining subjects ('expanding' process).

Step three: Scoping²⁶⁷

After the screening stage has narrowed down and identified the trade measures that are subjected to impact assessment, the following scoping step will examine these target measures more closely. According to Walker, the scoping stage must at least include the following activities:

- (1) Describing the trade agreement in details and a range of potential negotiation outcomes in case of an *ex ante* assessment,
- (2) Indicating the likely impacts,
- (3) Prioritizing the likely impacts,
- (4) Setting indicators of impacts and impact significance criteria,
- (5) Collecting data and determining analysis techniques,
- (6) Planning for consultation and participation plan.

The scoping stage is rather complicated, consisting of smaller steps. Instead of elaborating each and every activity, I will only focus on discussing the aspects that are connected to my critique on the methodologies of HRIA of trade agreements later.

Anticipation of future impacts

The first part of the scoping step is to examine in details the relevant trade measures that are going to be assessed. For an *ex ante* HRIA, this step is particularly important yet challenging, because it requires the assessor to make a number of predictions. While in some cases *ex ante* HRIA can be carried out after the signing of the trade agreement but prior to the implementation, it is common for an *ex ante* HRIA to be conducted during negotiation period and before the trade agreement terms are finalized.

²⁶⁷ Simon Walker, "The Future of Human Rights Impact Assessments of Trade Agreements", School of Human rights Research Series, vol.35, 2009, Chapter 2.4, pg 93.

The *ex ante* HRIA which is done early has great potential to influence the outcome of the trade agreement, but it also poses a big methodological challenge. According to Walker, after detailed descriptions of previously identified trade measures, it requires an extensive exercise to predict possible negotiation outcomes and trade measures, which subsequently lead to the anticipation of likely impacts. If predicting likely impacts of trade agreements is challenging enough due to the extent of influence generated by such an agreement, this activity encounters more hindrance if the draft text of the agreement is not disclosed prior to its conclusion. In the first chapter, I have discussed the issue of non-transparency during trade agreements' negotiations. While the matter of whether or not trade agreements should be negotiated behind closed door is still debatable, the common secrecy of trade agreements' negotiations certainly has a profound significance to the feasibility of this step.

In his methodology, Walker acknowledged the complication created by trade negotiation's confidentiality but he failed to introduce a coherent solution for it. He did, however, suggested that negotiation scenarios be created without references to the real negotiating positions. In addition, he referred to the article by Kirkpatrick and George on methodological issues of trade policy's impact assessment²⁶⁸ and recommended their approach of simplifying the anticipation process by focusing on the range of scenarios instead. The range of scenarios comprises of two outer limit scenarios: an outer bound for each measure from which the likely impact of any intermediate position can be inferred and a no-action baseline scenario. In Walker's example, the first outer limit scenario has been created using the scenario that had occurred most often in previous trade policy though he warned of dangers of missing human rights impacts due to sole reliance on this method.

The difficulties in predicting negotiation scenarios are big enough, consequently, anticipating likely impacts and proposing suitable indicators for them are equally, if not more, challenging. Though Walker did not have a satisfying solution for this difficult task, it is completely understandable. The lack of transparency in trade negotiation has been a persisting problem to HRIA's exercise of anticipating impacts, which will be revisited in the next chapter where I offer critiques of the existing methodologies for HRIA of trade agreements.

Regarding the identification of likely impacts, Walker asserted that most impacts on human rights by trade agreements are indirect, taking the form of flow-on effects from other impacts such as economic impacts. To address this issue, a causal chain of impacts needs to be established; starting from the immediate impacts resulted directly from the trade agreements then branching out to relevant human rights impacts. In order to facilitate this activity, Walker set out ten categories of impact of trade agreements on human rights

²⁶⁸ Colin Kirkpatrick , Clive George, "*Methodological issues in the impact assessment of trade policy: experience from the European Commission's Sustainability Impact Assessment (SIA) programme*", *Impact Assessment and Project Appraisal*, Vol. 24, Iss. 4, 2006, pg 329.

as a reference for assessors.²⁶⁹ In my opinion, while his ten categories cover broad aspects of human rights impacts of trade agreements, they certainly do not constitute an exhaustive list and should be treated with cautions. Human rights impacts of trade agreements are mostly indirect and can be elusive at times. The repertoire of existing HRIAs of trade agreements is far from extensive to be capable of signaling *all* potential impacts. It is necessary to keep one's eyes open to identify new indirect impacts that have not made the list.

Prioritizing likely impacts

The Screening stage earlier allows assessor to narrow down the extent of assessment by prioritizing the trade measures most relevant to human rights impacts. At this Scoping stage, Walker suggested that *assessment priorities* be indicated to ensure that more serious impacts are prioritized. While his choice to conduct another prioritizing exercise can be justified due the time and resource constrains, I am concerned about whether more prioritization can harm the quality of the HRIA by leaving out impacts that should have been considered. Besides, this practice might risk compromising the human rights cross-cutting principles of universality, indivisibility, interdependence and interrelatedness. Detail elaboration on this matter will be presented in the next section where I discuss shortcomings and risks of the methodologies.

Consultation and participation plan

Participation is a key principle to HRIA and it is important that participation is fully adopted into the assessment. Walker as a part of the scoping stage incorporated consultation and participation plan. He drew the distinction between consultation and participation: while the former refers the two-way sharing of information to enhance transparency and awareness-raising, the latter moves beyond, aiming to engage in dialogue with stakeholders. The difficulty to ensure meaningful public participation regarding HRIA of trade agreements due to confidentiality issues was also acknowledged by Walker but he did not suggest any specific measure to address it. Evidently this challenge is not easy to overcome.

Another author whose works focus on HRIA of trade agreements, Harrison, appears to elaborate and emphasize more on participation process. He separates consultation and participation plan from the scoping step and make it another step itself.²⁷⁰ In his paper, Harrison claimed that there was a lack of existing minimum reasonable standard of consultation and participation in an

²⁶⁹ Ten categories of impact of trade agreements on human rights are articulated in Chapter two in Walker's book on HRIA of trade agreements. See: Simon Walker, "*The Future of Human Rights Impact Assessments of Trade Agreements*", School of Human rights Research Series, vol.35, 2009, pg 61

²⁷⁰ James Harrison, "*Human Rights Impact Assessments of Trade Agreements: Reflections on Practice and Principles for Future Assessments*", A Background Paper for the Expert Seminar on Human Rights Impact Assessments of Trade and Investment Agreements, June 23-24, 2010 Geneva, pg. 31.

HRIA. He observed that even though the role of consultation and participation is stressed in the majority of guidance, the actual guidance and good practice principles were lacking. This has been a persisting problem to HRIA. As of September 2014, the OHCHR/FES Expert workshop on evaluating HRIAs in trade and investment regimes still echoed the same challenge of ensuring transparency and participation and the lack of uniformity of practice.²⁷¹

Step four: Analysis²⁷²

In this stage, the causal links between relevant trade measures (identified in screening step) and the potential human rights impacts (identified in scoping steps) are thoroughly analyzed and verified. Walker warned of the time and resources consuming nature of this laborious stage in the context of an *ex ante* HRIA, and suggested that identifying *assessment priorities* in the scoping stage can help to reduce the time, budget and data constraints while maintaining the fidelity to the human rights framework. He made further remarks that the results of the impact assessment need to be analysed by referring to the human rights framework, linking to the rights and obligations in human rights treaties, as understood by the various human rights bodies.

Step five: Recommendations

The recommendations provided at this step of an *ex ante* HRIA should ideally be incorporated into a negotiation or implementation process. Walker insisted on avoiding the terms “mitigation and enhancement measures” or “flanking measures” which suggest measures to avoid or reduce negative impacts or to optimize desirable impacts. He argued that human rights violations should be prevented from occurring in the first place and that rethinking the negotiation strategy should be preferred over working around the problem. Basing on a number of sources,²⁷³ Walker list the measures that recommendations might refer to:

²⁷¹ United Nations Office of the High Commissioner for Human Rights (OHCHR) and Friedrich Ebert Stiftung (FES), “*Workshop Report: ‘Making the right impact?’ OHCHR/FES Expert Workshop on Evaluating Human Rights Impact Assessments (HRIAs) in Trade and Investment Regimes*”, 17-18 September 2014, Bogis-Bossey, Switzerland, pg. 4.

²⁷² Simon Walker, “*The Future of Human Rights Impact Assessments of Trade Agreements*”, School of Human rights Research Series, vol.35, 2009, Chapter 2.4, pg 98.

²⁷³ Sources include:

Colin Kirkpatrick and Norman Lee, “*Further Development of the Methodology for a Sustainability Impact Assessment of Proposed WTO Negotiations*”, Final Report to the European Commission, Institute for Development Policy and Management, University of Manchester, 2002, pg. 14.

United Nations, “*Reference Manual for the Integrated Assessment of Trade-Related Policies*”, United Nations Environment Programme, New York and Geneva, 2001. Pg 45f.

Department of Foreign Affairs and International Trade, “*Handbook for Conducting Environmental Impact Assessments of Trade Negotiations*”, DFAIT, Canada, 2006, pg.56.

United Nations, “*Handbook on Integrated Assessment of Trade-Related Measures: The Agriculture Sector*”, United Nations Environment Programme, New York and Geneva, 2005.

- a) Measures built into the trade agreement itself such as a modification of a trade measure, the inclusion of a safeguard mechanism or exception, changes to the timing of implementation;
- b) Measures included in a parallel agreement or side-letter to the agreement, such as interpretative statements or creation of institutional arrangements to help implement programs of common interest to the parties to mitigate negative impacts or to monitor implementation of the agreement;
- c) Technical cooperation or capacity-building projects to improve infrastructure, access international institutions and human rights bodies, improve data collection and analysis and so on;
- d) National measures directed towards remedying market imperfections, such as pricing mechanisms, government support through subsidies, tax measures, microcredit schemes and so on;
- e) Regulatory measures, including the adoption of human rights legislation or regulations, private sector regulation, ratification of international instruments, consumer protection legislation and so on;
- f) Voluntary measures such as adoption of industry standards, codes of conduct, eco-labeling and fair trade schemes;
- g) Institutional measures to enhance public participation, improve transparency around trade negotiation and implementation of agreements including access to information, and to strengthen accountability mechanisms;
- h) Abandonment of the trade agreement, identification of ‘no-go’ areas or exclusion of certain trade measures.

Trade measures and human rights measures that might affect the impact of trade agreements should be considered by HRIA. Walker stated that besides from mitigation measures and enhancement measures, strategies relevant to strengthening capacity of individuals and groups to claim their rights should also be identified. In addition, he advocated for the impact assessment of the recommendations themselves to evaluate their potentials to fulfil the objectives and to select which one to include in the report. He noted that public participation should be combined in this step, though there is a risk of delaying the process by doing so.

Step six: Monitoring and evaluation²⁷⁴

Monitoring and evaluation requires follow-up activity to the HRIA to retain the assessment’s influences. Walker suggested that the results of an *ex ante*

²⁷⁴ Simon Walker, “*The Future of Human Rights Impact Assessments of Trade Agreements*”, School of Human rights Research Series, vol.35, 2009, Chapter 2.4, pg 101.

HRIA can become the baseline study for a later *ex post* HRIA to serve a number of functions:

- an *ex post* impact assessment of the trade agreement on human rights after a period of implementation to examine the real impacts on human rights
- an *ex post* impact assessment to examine the extent to which the trade agreement has been implemented
- an *ex post* assessment of the findings of the *ex ante* impact assessment after a period of implementation to examine the accuracy of the initial assessment, including the effectiveness of any recommendations that were implemented
- an evaluation of the *ex ante* impact assessment methodology in the form of a lessons learned exercise.

Monitoring and evaluation is an inherent part of the *ex ante* HRIA methodology and crucial to keep the trade agreement's implementation under regular check, timely addressing any newly arising impacts. Walker put a strong emphasis on conducting monitoring and evaluation stage as an *ex post* impact assessment and suggested the potential actors to carry it out to transform it into an effective means of continuing the process of mobilization and awareness rising for the community.

Step seven: Preparation of the report²⁷⁵

A report of the HRIA of trade agreement should include the details of activities in the previous stage. According to Walker, the content of the report includes:

- The description of the assessment process and the techniques employed, a description of the trade agreement.
- The assessment of the impact of the trade agreement on human rights and on government obligations
- Recommendations as well as any corrective action taken to respond to human rights abuses that came to light as a result of the assessment,
- A summary of any comments received on the impact assessment and/or recommendations.
- An evaluation of the process in the form of a lessons-learned chapter, as well as an outline of future monitoring processes and roles of relevant human rights actors.

To strengthen the impact assessment, it is necessary to set up a plan included in the report. The plan will elaborate on how to adopt the final report into the implementation of the trade agreement. This step is greatly essential to HRIA of trade agreements because without the channel to integrate the HRIA

²⁷⁵ Simon Walker, “*The Future of Human Rights Impact Assessments of Trade Agreements*”, School of Human rights Research Series, vol.35, 2009, Chapter 2.4, pg 102.

findings into the trade agreements to generate improvement of human rights situation, the HRIA would no longer be useful and retain its advantages.

5 Chapter IV: Human Rights Impact Assessment of Trade Agreement – Critiques, Alternative approach and Conclusion

The fourth chapter will discuss the shortcomings of the methodology for HRIA of trade agreement that is laid out in the previous chapter. Having offered the critiques of HRIA of trade agreement, I will then consider an alternative option to this current methodology. The alternative will also be assessed for pros and cons, in order to reach a conclusion on what is the best approach for HRIA of trade agreements.

5.1 Critiques of the existing methodology for HRIA of Trade Agreements

HRIA has been praised as a suitable tool to assess the impacts trade agreements may have on human rights. Indeed, the UN bodies have showed their support for the tool, and the WTO Secretariat has echoed this sentiment.²⁷⁶ Nevertheless, just not a long time ago, as of September 2014, the OHCHR/FES Expert Workshop on evaluating HRIAs in trade and investment regimes still voiced the concern over the reality that despite the growing literature on HRIAs in the trade and investment context, there is a lack of established practice for it.²⁷⁷ The works on methodology of HRIA of trade agreements by Walker and Harrison have so far still been influential and heavily cited by other authors who discussed the HRIA of trade agreements. Their methodologies, discussed in a representative manner in the last chapter, are not perfect. Identifying their shortcomings is essential to move towards a common functional framework for HRIA of trade agreements.

My critiques of the methodology for HRIA of trade agreements are constructed by measuring the methodology in question against the arguably ‘added values’ of HRIA which I have analyzed in the second chapter. I will argue that despite the advantages that HRIAs supposedly have, in the context

²⁷⁶ Report adopted by the Swiss NGO Berne Declaration, the Canadian Council for International Co-operation, and Misereor, “*Human rights impact assessment for trade and investment agreements. Report of the Expert Seminar*”, June 23-24, 2010, Geneva, Switzerland, pg.2.

²⁷⁷ United Nations Office of the High Commissioner for Human Rights and the Friedrich Ebert Stiftung, Workshop Report, “*Making the right impact?*”, OHCHR/FES Expert workshop on evaluating human rights impact assessments in trade and investment regimes, 17-18 September, 2014, Bogis-Bossey, Switzerland.

of trade arguments, the proposed methodology itself no longer holds true to such claims.

While it might be necessary to get into highly technical details of the methodology such as indicators, the scope of this thesis does not allow such attempts. Nonetheless, evaluating the proposed methodology using the core values of HRIA²⁷⁸ alone without getting into technical details already reveals a number of problematic issues. Before presenting the critiques, I want to clarify that the existing methodology in question for HRIA of trade agreement proposed by Walker is to be assessed under presumption that the HRIA is conducted as a stand-alone exercise. Such understanding is justified by the fact that he discussed the HRIA methodology independently from other impact assessments. This interpretation needs to be affirmed to avoid confusions and to facilitate the analysis.

I have identified four main critiques of HRIA methodology for trade agreements which are: (1) The narrow approach of HRIA methodology undermines human rights cross-cutting principles; (2) Lack of participation in earlier impact assessment steps compromises the validity of HRIA; (3) Lack of transparency of trade agreements affects the feasibility and quality of HRIA; and (4) Timing of HRIA affects the utility of HRIA. They are to be analyzed in details in this section.

5.1.1 The narrow approach of HRIA methodology undermines human rights cross-cutting principles

Reviewing Walker's methodology for HRIA of trade agreement, I was intrigued by its approach of narrowing down and prioritizing the subjects of impact assessments, especially in his preparation, screening and scoping stages. The preparation allows choosing specific rights for concentration.²⁷⁹ The screening step limits the subjects of assessment further, scanning for the trade measures that supposedly have most impacts on human rights. The selection of assessed trade measures relies on a list of trade sectors that he deems most relevant to human rights.²⁸⁰ However, generally, the identification of most affected sectors, measures and rights are conducted on a case-by-case basis, being left this step to the discretion of assessors to identify. The following step, scoping, claims to take an opposite approach to the narrowing-down activity. It focuses on analyzing in detail the remaining subjects in an 'expanding' process.²⁸¹ In fact, this step also involves further

²⁷⁸ See section 3.2.3 at page 41 of this thesis regarding the core elements of HRIA that add values to and distinguish HRIA from other impact assessments. These core elements of HRIA are: (1) Normative human rights framework, (2) Human Rights-Based Approach, (3) Transparency and access to information, (4) Inter-sectoral approach and international policy coherence.

²⁷⁹ Simon Walker, *"The Future of Human Rights Impact Assessments of Trade Agreements"*, School of Human rights Research Series, vol.35, 2009, pg 90.

²⁸⁰ *Ibid*, pg 60.

²⁸¹ *Ibid*, pg 93.

limiting the number of assessed subjects in the anticipation of future scenarios and impacts and prioritizing likely impacts.

Thus, the HRIA methodology for assessing trade agreements involves continuous activities of narrowing down the human rights impacts that are going to be analyzed. The author provides criteria for selection and offers his list of eight trade sectors more relevant to human rights²⁸² as well as ten categories of impact of trade agreements on human rights.²⁸³

On the other hand, HRIA is said to trump over other impact assessments for its human rights-based approach, which emphasizes on the cross-cutting human rights of universality, indivisibility, interdependence and interrelatedness. I find it immensely hard to reconcile this practice of HRIA methodology for trade agreement assessment with these fundamental human rights principles.

The priority that is put on one right over another implies the inequality regarding human rights implementations. Here, we are reminded of the persisting debate on the hierarchy of rights, or between civil and political rights and economic, social and cultural rights. Such debate has not been settled; while the indivisibility of human rights has increasingly gained popular acceptance, being affirmed in a number of core human rights declarations and instruments. The prioritizing approach of HRIA methodology inadvertently goes against the commonly held principle of indivisibility. The indivisible nature of human rights is not compatible with the selective approach to pick out likely impacts, targeting certain rights while neglecting the others. Moreover, as human rights are interdependent and interrelated, HRIA ought to be comprehensively conducted to ensure no impacts on human rights are to be missed out. Prioritization of relevant trade measures and impacts to be assessed does not uphold the treasured human rights cross-cutting principles that HRIA takes pride upon as one of its advantages.

²⁸² *Ibid*, pg. 60

²⁸³ Simon Walker, “*The Future of Human Rights Impact Assessments of Trade Agreements*”, School of Human rights Research Series, vol.35, 2009, pg. 61

In Chapter II Section 3, Walker listed his ten categories of impact of trade agreements on human rights as follow:

(1) Trade law complements human rights law, (2) Trade agreements promote the growth and resources necessary for the progressive realization of human rights, (3) Trade agreements can breach human rights in practice, (4) Trade agreements can limit government capacity to promote human rights, (5) Trade agreements lead to a 'race-to-the-bottom' in human rights protection as countries try to compete on global markets, (6) Trade agreements limit the use of trade measures to improve the enjoyment of human rights abroad, (7) Trade law conflicts with human rights law, (8) Enforcement of trade agreements is stronger than human rights enforcement which could lead to prioritization of trade law over human rights law, (9) Trade agreements and trade institutions fail to respect the right to take part in the conduct of public affairs, (10) Trade 'value' threaten human rights 'values'

Recognizing the methodology's author's efforts to facilitate and make the best out of these prioritizing and selective exercises by providing readily made lists of concerned areas and criteria, I do not mean to underestimate this solution by the author. In addition, I fully understand that such an approach was formulated with the concerns over time and resource constraints that HRIA actors might face.

Yet, the discourse on human rights impacts of trade agreements has been dynamic and constantly changing, such proposed lists must be taken with precautions so as not to miss out any new development in the field. Besides, since there has not been any equally established and radically innovative HRIA methodology during the last few years following Walker's proposal, his approach remains the most influential. Though there has not been any satisfying solution, it is necessary to voice concerns of this shortcoming for HRIA actors to take prudence.

5.1.2 Lack of participation in earlier impact assessment steps compromises the validity of HRIA

The consultation and participation planning activity in Walker's methodology's scoping step and Harrison's methodology appear to me that this process is only conducted after relevant trades measures have been identified (in the Screening step) and after a while into the Scoping step when negotiation scenarios and likely impacts have been identified. I inferred from these methodologies that actors engaging in the participation process can only do so after the assessors have narrowed the assessment down to a number of supposedly relevant impact assessments. In other words, participation process doesn't start until a quite many important decisions of HRIA have been made.

While I do not mean to question the capacity of the assessors, the concern of whether such timing for the consultation and participation stage was too late into the HRIA process must be raised. Participation is regarded as a highly important element of human rights. Its purpose is to incorporate relevant stakeholders into the decision-making process. Therefore, if the stakeholders are only engaged in participation after quite many important decisions have been made, the purpose of participation will not be fully preserved.

Furthermore, as I have discussed earlier in chapter II.2.3, in a meaningful participation process, stakeholders are expected not only to contribute their thoughts and information but also to actively take part in shaping the assessment. If stakeholders are consulted of after the likely impacts have already been laid out before them, their potential contribution will be diminished significantly. Public participation should play a bigger role, engaging in the impact assessment at a greater extent to avoid contradicting the very essential element of human rights of participation.

Integrating participation process into all steps is indeed a laborious and resource-consuming task as viewed by Walker. Indeed, meaningful participation firstly requires bringing out a wide range of stakeholders, corresponding to the ideally wide range of potential human rights impacts to fulfill the human rights cross-cutting principles, the latter has been discussed in the earlier section. Secondly, stakeholders are not simply asked to provide answers to assessors' formulated questions: they are meant to actively take part in shaping the assessment itself. At this point, we are faced with the challenge that stakeholders' diverse backgrounds mean they may not equally capacitated to *actively* and *effectively* contribute to the impact assessment. Meaningful participation ought to be pre-conditioned by a certain level of understanding of human rights and HRIA. Thus, capacity development is vital to enable stakeholders to meaningfully take part in the HRIA process. Inclusion of such capacity development inevitably leads to more a more complex and resource-consuming process of HRIA.

On the other hand, forgoing this element may risk undermining severely the requirement for meaningful participation that is central to human rights principles. Furthermore, without it, HRIA loses its appeal in comparison to other impact assessments: its impartiality and consequently its validity.

5.1.3 Lack of transparency of trade agreement negotiation affects the feasibility and quality of HRIA

The lack of transparency during trade agreements negotiation has a significant impact on the feasibility and quality of HRIA of trade agreements. It is the distinctive challenge faced by most *ex ante* HRIAs of trade agreements.

Diplomats have historically embraced secrecy and international negotiators have grown accustomed to carrying out negotiations behind closed door.²⁸⁴ To diplomats and negotiators, secrecy is considered a negotiation strategy that has been established for centuries, arguably attaining a normative status.²⁸⁵ Negotiations conducted away from the eye of the public is said to benefit the process of negotiations, which run more smoothly and efficiently while being shielded from external pressures such as those of NGOs, creating an environment of confidence.²⁸⁶

Being placed under the high scrutiny of the public is the last thing negotiators want when negotiating trade agreements. Nevertheless, it has been claimed that trade negotiations today are not as secret as they were in the past: pressures over the year have led to the disclosure of limited information in the form of press releases, meeting agendas, fact sheets, negotiation

²⁸⁴ Michelle Limenta, "Open Trade Negotiations as Opposed to Secret Trade Negotiations: From Transparency to Public Participation", New Zealand Yearbook of International Law, Vol 10, 2012, pg.78.

²⁸⁵ *Ibid.*

²⁸⁶ *Ibid.*

summaries and discussion papers.²⁸⁷ While negotiators might claim that negotiations behind closed door bring strategic benefits, others do not agree. Susan Aaronson was quoted saying that this lack of transparency and access to information had largely been proven counterproductive and the claim that secrecy achieves better outcomes in bargaining could be disputed: “There’s no evidence that you lose negotiating clout if you’re transparent.”²⁸⁸

Lack of transparency and access to information during the negotiation of a trade agreement that is subject to HRIA is not an easy challenge to overcome. In the past, there has been at least one occasion when a HRIA of trade agreement was carried out under such circumstances. The Thailand National Human Rights Commission (TNHRC) in 2006 produced a report on the human rights implications of the free trade agreement that Thailand was negotiating with the United States at that moment, which was regarded as the first national HRIA of an international trade agreement.²⁸⁹ Due to the lack of access to the proposed agreement, the TNHRC based its assessment on a leaked text of the intellectual property chapter proposed by the United States and on the texts of other bilateral deals signed by the United States with comparable countries.²⁹⁰ The United States stopped its negotiation with Thailand following the military coup, thus this HRIA has remained shelved.

Though using leaked texts and modelling the agreement in question after other similar trade agreements might be a solution in the case of non-transparency during the negotiation phase, it is not a sustainable practice. Depending on the countries in context, availability of leaked documents and possible models are not always guaranteed. In addition, I find the use of leaked documents difficult to agree upon: it risks undermining the legitimacy of the HRIA tool because such disclosure might amount to criminal offenses, though it has not been the case in existing HRIAs of trade agreements yet. Modelling the assessed agreement offers a more legitimate solution, but concerns arise over whether the chosen model would be similar to the concluded agreement later. In case the model chosen for assessment differ significantly from the concluded trade agreement, the HRIA that was already conducted would become obsolete.

The lack of transparency and access to information further affects the principle of public participation. Trade agreements negotiated behind closed door allowing only a very limited number of people to access the information might fail to be a transparent and participatory process itself. Though it is true that participation from experts and some potentially affected actors might be granted, the selection of such actors depends on state parties themselves with

²⁸⁷ *Ibid.*

²⁸⁸ Lydia DePillis, “*The catch-22 of trade deals done in secret*”, The Washington Post, 15 May 2015, <<http://www.washingtonpost.com/blogs/wonkblog/wp/2015/05/15/the-catch-22-of-trade-deals-done-in-secret/>>, accessed May 20, 2015.

²⁸⁹ James Harrison and Alessa Goller, “*Trade and Human Rights: What Does ‘Impact Assessment’ have to offer?*”, Human Rights Law Review 8:4, 2008, pg 604.

²⁹⁰ *Ibid.*

little guaranty of fair and balanced participation from *all* representatives of impacted communities.

Additionally, compromising to some degree of non-transparency during trade negotiation might cripple all other efforts to promote transparency by the negotiating parties. European Union (EU) happens to be in that case. The EU affirms its commitment to transparency in EU trade negotiations, stating “democratic scrutiny and public involvement are encouraged at all stages of negotiations”.²⁹¹ At the same time, it states that the negotiations and their texts are not themselves public, justifying this secrecy on the ground of “a certain level of confidentiality is necessary to protect EU interests and to keep chances for a satisfactory outcome high” and it is “entirely normal for trade negotiations”.²⁹² Commentators have disputed this justification, citing the cases of disclosure of negotiation information such as the WTO where members (including EU) publish their negotiation positions and global climate negotiations in the UN where parties (again including the EU) do not seem to see obscurity of negotiation as a precondition for a successful agreement.²⁹³ In this example, the EU tries to present itself as an advocator for transparency, but its insistence on avoiding disclosure of information on trade negotiations renders its transparency efforts useless, casting it under negative light. Evidently, the ongoing negotiation between the United States and the European Union on the Transatlantic Trade and Investment Partnership (TTIP) has currently been heavily criticized for the lack of transparency regarding a trade agreement that might have profound impacts on human rights. This secrecy and non-transparency might do more harm than good for the agreement itself, as many fear that TTIP will suffer the same fate as the Anti-Counterfeiting Trade Agreement (ACTA) of which ratifications were completely hindered due to similar reasons.²⁹⁴

5.1.4 Timing of HRIA affects the utility of HRIA

As discussed in the second chapter, the timing of HRIA of trade agreements is a substantial methodological challenge. Though the methodology of HRIA of trade agreements embraces both *ex ante* and *ex post* HRIA, in my opinion, only *ex ante* HRIA stays true to the original notion of impact assessment as a

²⁹¹ European Commission, “*Factsheet: Transparency in EU trade negotiation*”, June 2013, <http://trade.ec.europa.eu/doclib/docs/2013/june/tradoc_151381.pdf>, accessed May 1, 2015.

The European Union reinstated its claimed commitment to transparency of trade negotiation in a number of other documents. See more at:

European Commission, “*Trade negotiations step by step*”, September 2013, <http://trade.ec.europa.eu/doclib/docs/2012/june/tradoc_149616.pdf>, accessed May 1, 2015.

²⁹² European Commission, “*Factsheet: Transparency in EU trade negotiation*”, June 2013, <http://trade.ec.europa.eu/doclib/docs/2013/june/tradoc_151381.pdf>, accessed May 1, 2015.

²⁹³ Corporate Europe Observatory, “*Busting the myths of transparency around the EU-US trade deal*”, September 25, 2013, <<http://corporateeurope.org/trade/2013/09/busting-myths-transparency-around-eu-us-trade-deal>>, accessed May 1, 2015.

²⁹⁴ *Ibid.*

tool to assess potential impacts. *Ex post* HRIA resembles more of an evaluation and monitoring process (and indeed it has been considered to be such a process by Walker in some instances).²⁹⁵ Besides, HRIA is helpful only if it is possible to adopt its outcomes into the interventions.

Regarding trade agreements, Walker included in his methodology a type of *ex ante* HRIA that is conducted after the agreement's conclusion but prior to its implementation, arguing that there would still be room for integrating the HRIA outcomes into the implementation. While this approach might solve the problem of lack of transparency during the negotiation, I highly doubt its feasibility regarding time and its incorporation into policy. It has been acknowledged by Walker himself that HRIA of trade agreement is a laborious and time- and resource-consuming task. Ideally, HRIA should be done in a meticulous manner to ensure the inclusion of all human rights core principles as well as the quality of the findings. On the other hand, the timeframe between a trade agreement's conclusion and its implementation is very narrow, raising questions of whether this type of *ex ante* HRIA will be done in the most effective manner considering the extreme time restraint it might face.

Moreover, trade agreements might take a very long time to negotiate. By the time a consensus is reached between negotiating parties, the final draft of the trade agreement might be the best compromise that they can make. Thus, it can be assumed that once the trade agreement is concluded, there will be very little, if any at all, room for alternating, even though the subsequent HRIA's outcomes demand such changes. The chance of abandoning the trade agreement, in case the HRIA found the human rights impacts irreconcilable, is even more limited, if not border-lining unthinkable.

Thus, the methodology of HRIA of trade agreements perhaps must uphold the *ex ante* approach. It is acknowledged that *ex ante* HRIA imposes a number of methodological challenges relating to the transparency of trade negotiations and the difficulties in predicting and assessing future potential impacts. Nonetheless, such challenges are present in other impact assessments too, and those impact assessments are still conducted despite the hindrances. The challenges to *ex ante* HRIA methodology need solutions which do not include forfeiting the timing essence that gives values to HRIA of trade agreements.

5.2 An alternative approach to the existing methodology of HRIA of trade agreements

5.2.1 An alternative approach: Integration of human rights into other impact

²⁹⁵ See Chapter 3, section on methodology of HRIA of trade agreements.II

assessments

The methodology HRIA of trade agreement that has been discussed in this paper is understood as a stand-alone instrument. I have analyzed its methodology and shortcomings, demonstrating that the tool is far from perfect.

There have been ample discussions for an alternative to the stand-alone HRIA of trade agreements. The alternative approach to stand-alone HRIAs takes the form of integrating HRIA into other forms of impact assessments.²⁹⁶ The report of the Scottish Human Rights Commission listed three forms of impact assessment into which HRIA can be integrated: equality, health and environmental impact assessment.²⁹⁷ Another notable attempt to integrate human rights into other impact assessments is the Guide on integrating human rights into environmental, social and health impact assessments (ESHIA) that was developed by the Danish Institute for Human Rights (DIHR) in collaboration with the global oil and gas industry association for environmental and social issues IPIECA.²⁹⁸

5.2.2 The pros and cons of the integrated approach

To evaluate whether an integrated impact assessment can be good alternative choice to the existing methodology of HRIA of trade agreement, the pros and cons of this alternate must be considered. The Scottish Human Rights Commission report has touched upon this issue, listing a number of advantages and disadvantages of integrated impact assessments. Drawing mainly from this work, I will analyze claims for the pros and cons of human rights integrated impact assessment on the basis of whether and how this approach addresses the shortcomings of the existing methodology of HRIA of trade agreements. Each advantage and disadvantage listed below will be accompanied by its direct quote from the above mentioned Scottish Human Rights Commission Report.

a. Advantages of the integrated impact assessment

²⁹⁶ James Harrison and Mary-Ann Stephenson, “*Human Rights Impact Assessment: Review of Practice and Guidance for Future Assessments*”, Report of the Scottish Human Rights Commission, 1 June 2010, pg.76.

²⁹⁷ *Ibid.*

²⁹⁸ The Danish Institute for Human Rights and the global oil and gas industry association for environmental and social issues IPIECA, “*Human rights and ESHIA*”, <<http://www.humanrights.dk/business/tools/human-rights-eshia>>, accessed 1 May 2015.

*An integrated impact assessment reduces the workload of setting up a new instrument – “integration of human rights into existing impact assessments may reduce start-up cost and administrative burden.”*²⁹⁹

Three out of four shortcomings of the existing methodology of HRIA of trade agreements that I discussed in my critiques of the methodology in the previous section are largely related to resource constraints. The stand-alone HRIA of trade agreements is undoubtedly a burdensome task that consumes a lot of time, human and financial resources. The resource constraints have always been invoked to justify the choice of a narrower HRIA where assessors prioritize only a few human rights and potential impacts instead of providing more comprehensive assessment.

Trade agreements has a multifaceted range of impacts, thus HRIA might not be the only assessment to be carried out. Integrating HRIA into other impact assessments might ease the process, reducing constraints and allowing the integrated impact assessment to benefit the impacted community the most. Human rights are certainly not the only concerns to address regarding trade agreements, considering the wide impacts such agreements may have on all social and economic facets. Impact assessments in general are resource-consuming. Conducting several comprehensive impacts assessments on different facets of a trade agreement might make stakeholders hesitate due to the huge commitment, time and resources needed. In that circumstances, an integrated impact assessments might look attractive to the stakeholders.

On the other hand, incorporating HRIAs into other impact assessments may risk using human rights to merely fill in the gaps other impact assessments leave out. In this case, human rights might not be considered a universal, indivisible, interdependent and interrelated set of rights but are presented in the form of fragmentations: some would be selected to fill in the gaps of other impact assessments and some would be discarded. Integrated impact assessment, in turn, is not an approach compatible with the human rights cross-cutting principles that grants HRIA its values. Therefore, incorporating HRIA would become a fruitless activity.

*An integrated impact assessment builds on existing expertise – “HRIA can build on the experience and expertise of existing impact assessments which have a longer history and more refined methodologies (e.g. equality, health, and environment).”*³⁰⁰

It is undisputable that comparing to other impact assessments, HRIA is among the youngest ones. While HRIA for business operation has grown substantially over the last decade, HRIA of trade agreement has experienced

²⁹⁹ James Harrison and Mary-Ann Stephenson, “*Human Rights Impact Assessment: Review of Practice and Guidance for Future Assessments*”, Report of the Scottish Human Rights Commission, 1 June 2010, pg.76.

³⁰⁰ *Ibid.*

little change. Its methodology has not been refined and far from being widely established. The identified shortcomings have sustained until now.³⁰¹ By integrating HRIA into other impact assessments, the instrument may take advantage of more coherent frameworks and learn from their experiences.

The methodologies of HRIA and other impact assessments have common elements.³⁰² The existing methodology of HRIA borrows a lot from the family of impact assessments. HRIA however was built upon human rights principles, and it owes its legitimacy to the normative human rights framework.³⁰³ Though human rights are acknowledged in some other impact assessments such as SIA, they are hardly the core guiding norms for those impact assessments. Instead, being just one of several norms of other impact assessments, human rights may end up having no real operational values but merely reference points for the impact assessments. While integrated impact assessment allows the inclusion of other impact assessments' expertise, the risk is high that this integrated approach may not work the other way around: to make use of HRIA's expertise and added values.

An integrated impact assessment can encourage mainstreaming – “By integrating human rights into other impact assessments it encourages human rights to be mainstreamed into government/business processes more generally.”³⁰⁴

While this statement is true to some extent, it may pose another serious threat to HRIA. The mainstreaming of human rights may pose the risk that HRIA becomes a tool for government/business to claim that they have adequately considered human rights impacts even though the human rights elements are not large in the integrated impact assessment, and they are clear of responsibility to ever look into human rights issues again.

This scenario has happened before concerning the EU-Vietnam Free Trade Agreement that is being negotiated. EU and the Association of Southeast Asian Nations (ASEAN) originally launched negotiations on an EU-ASEAN Free Trade Agreement (FTA) in 2007 but broke them off in 2009 due to disagreements that centered European concerns over ASEAN member Myanmar's human rights record.³⁰⁵ EU shifted to pursuing bilateral FTAs

³⁰¹ A look into the most recent workshop in HRIA of trade agreements, the OHCHR/FES workshop in 2014 in Switzerland, reveals the same challenges that have been highlighted by Simon Walker and James Harrison in 2008-2009. United Nations Office of the High Commissioner for Human Rights and the Friedrich Ebert Stiftung, Workshop Report, “*Making the right impact?*”, OHCHR/FES Expert workshop on evaluating human rights impact assessments in trade and investment regimes, 17-18 September, 2014, Bogis-Bossey, Switzerland.

³⁰² HRIA as a part of the impact assessment family embodies the common principles of impact assessment. See chapter two for more analysis.

³⁰³ See more in chapter two.

³⁰⁴ *Ibid.*

³⁰⁵ EurActiv, “*EU and ASEAN to jumpstart trade agreement talks*”, 27 April 2015, <<http://www.euractiv.com/sections/trade-society/eu-and-asean-kick-start-free-trade-agreement-talks-314100>> accessed 5 May 2015.

with a number of ASEAN member states, including Vietnam, with which FTA negotiations were launched in June 2012. Calls from civil society organizations, most including notably The International Federation for Human Rights (FIDH), have demanded the EU Commission to conduct a human rights impact assessment in the context of trade agreement negotiations with Vietnam.³⁰⁶ The European Commission has refused to conduct the obligatory HRIA with regards to Vietnam on the basis that a partial assessment was made in 2009.³⁰⁷

Thus, it is an imminent threat to HRIA of trade agreement to be dismissed on the basis that *some* form of impact assessment has been conducted, despite the lack of human rights focus on the later.

b. Disadvantages of integrated impact assessment

Integrated impact assessment narrows the focus of HRIAs – “HRIAs are only developed in areas where there are existing impact assessments, rather than in areas where human rights concerns are greatest”

I would like to repeat my views expressed earlier to add that even in these areas where there are existing impact assessments and where HRIAs supposedly developed, HRIAs only examine the fragments of human rights, undermining its cross-cutting principles of universality, indivisibility, interdependence and interrelatedness. Using HRIA to “fill in the gaps” has been claimed to be one of the advantages of this integrated approach to ease the cumbersome task of conducting several comprehensive assessments. Nevertheless, the same practice also prompts criticism due to its lack of extensive attention to all potential human rights issues. In addition, one concern associated with the trade agreement in examination may be viewed from different perspectives and need addressing from all angles. If assessors only look to “fill in the gaps” left after other impact assessments, they might miss potential impacts that have been touched upon in other assessments and addressed from other angles, but the same impacts still need a human rights perspective to examine. For example, water contamination as a potential impact can be addressed by an environmental impact assessment; on the other hand, it may need to be examined under HRIA in relation to the right to water

³⁰⁶ International Federation for Human Rights (FIDH), International Federation for Human Rights (FIDH), “*Vietnam: EU-Vietnam Free Trade agreement must protect human rights and be preceded by a human rights impact assessment*”, 7 March 2014, <<https://www.fidh.org/International-Federation-for-Human-Rights/asia/vietnam/14885-vietnam-eu-vietnam-free-trade-agreement-must-protect-human-rights-and-be>>, accessed 1 May 2015.

³⁰⁷ International Federation for Human Rights (FIDH), “*EU Commission’s refusal to conduct a human rights impact assessment in the context of trade agreement negotiations constitutes maladministration, says EU Ombudsperson*”, 14 April 2015, <<https://www.fidh.org/International-Federation-for-Human-Rights/asia/vietnam/eu-commission-s-refusal-to-conduct-a-human-rights-impact-assessment>>, accessed May 1, 2015.

and/or the right to food if the water question is the surrounding's community's main livelihood.

Integrated impact assessment results in marginalization of human rights – “There is a danger that human rights may be marginalized within other impact assessment methodologies and human rights are seen as aspirations rather than legal obligations with which policymakers must comply.”

This view on disadvantage of integrated impact assessment resonates well with my opinion expressed earlier that the lack of human rights principles as core guiding norms within other impacts assessment might undermine the human rights core values of HRIA. This problem links with the previous issue of lack of human rights focus in integrated impact assessment. Without a sound legal foundation closely associated with international human rights frameworks – a crucial element of HRIA, and the relatively nascent methodology of HRIA in relation to other well-established impact assessments, human rights might be overshadowed by others, resulting in their being only an optional reference for assessor and not legal obligations.

Integrated impact assessment lacks expertise – “Where HRIAs are being integrated into other forms of impact assessment (e.g. health, environment) and where the primary expertise of those undertaking the assessment is on the latter issues (i.e. health, environment etc.) then appropriate training, support, guidance and monitoring becomes even more important to ensure proper implementation of methodologies.”

While the broad range of expertise has been claimed as an advantage of integrated impact assessment for its diverse outlooks and contribution, it might become a disadvantage itself too. Different expertise from different fields may result in misunderstanding and miscommunication. For example, I have discussed at length in the first chapter on how experts in the fields of human rights law and economic laws expressed strikingly divided opinions on the same matters, leading to conflicts that are hard to reconcile. It is important to emphasize that in such example, international human rights law and economic laws are still under the same roof of international laws, yet the legal scholars in two fields have strikingly different opinions. If the two fields of expertise are even further apart such as between social and natural sciences, the conflicts of ideology and approaches are more difficult to resolve. Integrated impact assessment will then require thorough training and guidance to ensure that such conflicts will not be obstacles to the assessment's success.

5.3 Conclusion – Seeking the best approach to HRIA of trade agreements

I have analyzed the existing methodology for HRIA of trade agreements as well as an alternative approach to this methodology for the purpose of finding the best methodological approach to this instrument.

The existing methodology of the stand-alone HRIA of trade agreements established by Simon Walker appears to be the most comprehensive tool available in this field. It does, however, contain a number of shortcomings which are incompatible with human rights principles as well as in contradictory to the proclaimed 'added-values' of HRIA. Nevertheless, this methodology remains heavily cited and adopted in spite of these flaws, most likely due to the lack of better alternative for stand-alone HRIA of trade agreements.

An evaluation of a prominent alternative approach – the integrated impact assessment – reveals equally serious disadvantages. The integrated impact appears, at first sight, to be capable of overcoming the flaws in Walker's methodology. However, a deeper analysis reveals that it might not help as much as it claims to. The integrated impact assessment also suffers a number of disadvantages that may significantly harm the human rights values embodied in HRIA.

It is indeed difficult to select the best approach from these two flawed options. However, I observe that the integrated impact assessment suffers structural flaws, resulting from its underlying conceptual basis that has little to do with human rights principles. Such challenges tend to be highly difficult to overcome as they might include different perspectives at conceptual level.

On the other hand, most of the challenges (narrow approach, lack of participation, timing) that the methodology of stand-alone HRIA of trade agreement faces can be attributed to time and resource constraints. These flaws do not result from the underlying human rights principles of HRIA. To put it more accurately, they are the results of a *lack of strict adherence* to the human rights principles, but they do not demonstrate any fundamental conflicts with the human rights principles themselves.

It certainly involves some degree of political will in order to contribute more resources to overcome these challenges, but it is feasible to address such challenge. The political will in question mostly relates to the governments' awareness of how trade agreements have impacts on human rights. After all, the concerns over trade agreements' impacts on human rights have only been raised recently, thus the common lack of understanding on this matter among different stakeholders and governments are no exception. Besides, human rights have been over-politicized for such a long time that they may invoke hesitance among states when they consider whether or not to adopt HRIA. The prospect of raising such awareness on this matter seems promising, as there are more and more discussions on trade agreements' human rights impacts. The increasingly discourse on the benefits of conducting HRIA of trade agreements will finally erase doubts and hesitance over human rights measurements.

In addition, the parallel fast-growing body of HRIA tool for company operation and its expanding adoption signals that measuring human rights impacts of specific interventions is no longer feared upon. In fact, the private

sectors have now seen it as a way to promote their images. This change in attitude from the business sphere may overflow to the public sphere in regards to trade agreements which are in some way relevant to private actors too, supporting and motivating more methodological developments of HRIA of trade agreements.

The remaining concern that HRIA of trade agreement needs to address is lack of transparency and access to information to trade negotiations. While this secrecy has been a tradition, this “tradition” is changing within the WTO as I have mentioned in the earlier section. The attention that TTIP has brought to the debate over trade negotiation’s secrecy and confidentiality is promising; which gives adequate reasons to expect a shift in the future. The pressure from the public for more transparency of trade negotiations and agreements is growing. There have been calls to the negotiating parties to conduct HRIA of trade agreements to demonstrate their commitment for human rights and transparency.³⁰⁸

In conclusion, though the existing methodology of HRIA of trade agreement is flawed, it appears to be the best methodology available. This methodology, however, needs a lot more improvements. The trend in the debate, acknowledgement and awareness of trade agreements’ impacts on human rights is moving to a favorable direction, promising future progress towards a more comprehensive and coherent methodology.

³⁰⁸ I will not explore at length the discussion over TTIP’s transparency and human rights concerns. Running a search on Google returned a large number of newspaper articles, experts’ opinions and civil societies’ opinions etc. concerning this matter. The overall impression is an urgent call for transparency and HRIA of the TTIP.

Bibliography

Books, articles and published reports

Aaronson S.A. and Zimmerman J.M., *“Trade Imbalance: The Struggle to Weigh Human Rights Concerns in Trade Policymaking”*, Cambridge University Press, New York, 2008.

Alemanno A., *“A Meeting of Minds on Impact Assessment – When Ex Ante Evaluation Meets Ex Post Judicial Control”*, European Public Law, 2011, vol. 17, No.3.

Alston P., *“Resisting the Merger and Acquisition of Human Rights by Trade Law: A Reply to Petersmann”*, European Journal of International Law, Vol 13 No.4, 2002, 815-844.

Alston P., *“Ships Passing in the Night: The Current State of the Human Rights and Development Debate Seen Through the Lens of the Millennium Development Goals,”* Human Rights Quarterly · Volume 27, Number 3, August 2005.

Association 3D-Trade-Human Rights-Equitable Economy, *“Trade-related intellectual property rights, access to medicines and human rights”* – Morocco, April 2006, <http://www2.ohchr.org/english/bodies/cescr/docs/info-ngos/access_to_medicines_and_hr.pdf>, accessed May 1, 2015.

Bakker S., Van Den Berg M., Düzenli D., and Radstaake M., *“Human Rights Impact Assessment in Practice: The Case of the Health Rights of Women Assessment Instrument (HeRWAI)”*, Journal of Human Rights Practice (2009) 1 (3)

Baxewanos F., Raza W., Austrian Foundation for Development Research, *“Human Rights Impact Assessments as a New Tool for Development of Policy?”*, Working Paper 37, January 2013

Report adopted by the Swiss NGO Berne Declaration, the Canadian Council for International Co-operation, and Misereor, *“Humanrights impact assessment for trade and investment agreements. Report of the Expert Seminar”*, June23-24, 2010, Geneva, Switzerland.

Cass D.Z., *“The Constitutionalization of the World Trade Organization: Legitimacy, Democracy, and Community in the International Trading System”*, International Economic Law Series, Oxford University Press, 2005, Chapter 5, 145-176.

Centre for Good Governance, *“A Comprehensive Guide for Social Impact Assessment”*, 2006, <

<http://unpan1.un.org/intradoc/groups/public/documents/cgg/unpan026197.pdf>>, accessed 6 April 2015.

Corporate Europe Observatory, “*Busting the myths of transparency around the EU-US trade deal*”, September 25, 2013, <<http://corporateeurope.org/trade/2013/09/busting-myths-transparency-around-eu-us-trade-deal>>, accessed May 1, 2015.

Cottier T., “*Trade and Human Rights: A Relationship to Discover*”, Journal of International Economic Law 5(1), 2002.

Cottier T., Pauwelyn J. and Burgi E, “*Linking Trade Regulation and Human Rights in International Law: An Overview*”, Human Rights and International Trade, Oxford University Press, 2005.

Danish Institute for Human Rights, “*Human Rights and Impact Assessment*”, <<http://www.humanrights.dk/business/impact-assessment>>, accessed 1 May 2015

De Beco G., “*Human Rights Impact Assessment*”, Netherlands Quarterly of Human Rights, Vol.27/2, 2009, Netherlands Institute of Human Rights (SIM).

Department of Foreign Affairs and International Trade, “*Handbook for Conducting Environmental Impact Assessments of Trade Negotiations*”, DFAIT, Canada, 2006

DePillis L, “*The catch-22 of trade deals done in secret*”, The Washington Post, 15 May 2015, <<http://www.washingtonpost.com/blogs/wonkblog/wp/2015/05/15/the-catch-22-of-trade-deals-done-in-secret/>>, accessed May 20, 2015.

Ergas Y., “*Human Rights Impact: Developing and Agenda for Interdisciplinary, International Research*”, Journal of Human Rights Practice, vol.1 no.3, 2009, pg. 459

EurActiv, “*EU and ASEAN to jumpstart trade agreement talks*”, 27 April 2015, <<http://www.euractiv.com/sections/trade-society/eu-and-asean-kick-start-free-trade-agreement-talks-314100>> accessed 5 May 2015.

European Commission, “*Factsheet: Transparency in EU trade negotiation*”, June 2013, <http://trade.ec.europa.eu/doclib/docs/2013/june/tradoc_151381.pdf>, accessed May 1, 2015.

European Commission, “*Trade negotiations step by step*”, September 2013,

http://trade.ec.europa.eu/doclib/docs/2012/june/tradoc_149616.pdf), accessed May 1, 2015.

European Ombudsman, “*Ombudsman asks Council and Commission to publish more TTIP documents*”, Press release no. 17/2014, 31 July 2014, <http://www.ombudsman.europa.eu/en/press/release.faces/en/54636/html.bookmark>), accessed May 1, 2015.

European Parliament, Directorate-General for External Policies of the Union, “*European Union: “Trade Agreement with Colombia and Peru”*”, 2012.

Gay R., “*Mainstreaming wellbeing: an impact assessment for the right to health*”, *Australian Journal of Human Rights*, 13(2)

Global Policy Forum, “*Secretary General Kofi Annan's Reform Agenda - 1997 to 2006*”, <https://www.globalpolicy.org/un-reform/un-reform-initiatives/secretary-general-kofi-annans-reform-agenda-1997-to-2006.html>), accessed 1 May 2015.

Gostin L. and Mann J., “*Towards the development of a human rights impact assessment for the formulation and evaluation of public health policies*”, *Health and Human Rights*, Vol. 1, No. 1 (1994), pp. 59.

Gotzmann N., “*Human Rights and Impact Assessment – Conceptual and Practical Considerations in the Private Sector Context*”, the Danish Institute for Human Rights, *Matters of Concerns – Human Rights Research Papers*, No. 2014/2, 2014

Harrison J. and Goller A., “*Trade and Human Rights: What does ‘Impact Assessment’ Have to Offer?*”, *Human Rights Law Review* 8:4 (2008)

Harrison J., “*Human Rights Impact Assessments of Free Trade Agreements: What is the State of the Art?*”, Presentation at the Austrian Scientific Foundation for International Developments (ÖFSE) in Vienna, 5 November 2013.

Harrison J., “*Human Rights measurement: Reflections on the Current Practice and Future Potential of Human Rights Impact Assessment*”, *Journal of Human Rights Practice*, vol.3 no.2, 2011, pg.165

Harrison J., “*The Human Rights Impact of the World Trade Organisation*”, *Studies in International Trade Law* Vol. 10, Hart Publishing, Oxford and Portland, Oregon, 2007.

Howse R. & Nicolaidis K., “*Legitimacy and Global Governance: Why Constitutionalizing the WTO Is a Step Too Far*”, in Roger B. Porter et

al., eds., *Efficiency, Equity, and Legitimacy: The Multilateral Trading System at the Millennium* (Washington, DC: Brookings, 2001).

Ibrahim A.M., "*International Trade and Human Rights: An Unfinished Debate*", *German Law Journal*, Vol 14 No 01, 2013.

International Federation for Human Rights (FIDH), "*EU Commission's refusal to conduct a human rights impact assessment in the context of trade agreement negotiations constitutes maladministration, says EU Ombudsperson*", 14 April 2015, <<https://www.fidh.org/International-Federation-for-Human-Rights/asia/vietnam/eu-commission-s-refusal-to-conduct-a-human-rights-impact-assessment>>, accessed May 1, 2015.

International Federation for Human Rights (FIDH), "*Position Paper: Human Rights Impact Assessment of Trade and Investment Agreements concluded by the European Union*", February 2008.

International Federation for Human Rights (FIDH), International Federation for Human Rights (FIDH), "*Vietnam: EU-Vietnam Free Trade agreement must protect human rights and be preceded by a human rights impact assessment*", 7 March 2014, <<https://www.fidh.org/International-Federation-for-Human-Rights/asia/vietnam/14885-vietnam-eu-vietnam-free-trade-agreement-must-protect-human-rights-and-be>>, accessed 1 May 2015.

International Finance Corporation (IFC), UN Global Compact Office and the International Business Leaders Forum (IBLF), "*Guide to Human Rights Impact Assessment and Management: Road-Testing Draft*", June 2007, IFC and IBLF, 2007

Kirkpatrick C. , George C., "*Methodological issues in the impact assessment of trade policy: experience from the European Commission's Sustainability Impact Assessment (SIA) programme*", *Impact Assessment and Project Appraisal*, Vol. 24, Iss. 4, 2006

Kirkpatrick C. and Lee N., "*Further Development of the Methodology for a sustainability Impact Assessment of Proposed WTO Negotiations*", Final Report to the European Commission, Institute for Development Policy and Management, University of Manchester, 2002

Koch I.E., "*Dichotomies, Trichotomies or Waves of Duties?*", *Human Rights Law Review*, Volume 5, No.1, 2005

Landman T., "*Studying Human Rights*", Routledge 2006.

Lang A., "*Re-Thinking Trade and Human Rights*", *Tulane Journal of International and Comparative Law*, Vol 15 no 2, 2007.

Limenta M., “*Open Trade Negotiations as Opposed to Secret Trade Negotiations: From Transparency to Public Participation*”, New Zealand Yearbook of International Law, Vol 10, 2012

Maastricht Guidelines, 1997, “*Maastrichts Guidelines on Violations of Economic, Social and Cultural Rights*”, Maastricht, 22-28 January 1997, Guideline 8.

Mendonça M.L., “*Conference Synthesis on Economic, Social and Cultural Rights*”, in “*Another World Is Possible: Popular Alternatives to Globalization at the World Social Forum*”, 1 Jan 2003 by William F. Fisher and Thomas Ponniah (ed).

Meuwese A., “*Impact Assessment in EU Lawmaking*”, Kluwer Law International 2008.

Nomogaia, “*Human Rights Impact Assessment Toolkit*”, <<http://nomogaia.org/tools/>>, accessed 1 May 2015

Peers S., “*Fundamental right or political whim? : WTO law and the European Court of Justice*”, in G. de Burca and J. Scott (eds), “*The EU and the WTO (2001)*).

Petersmann E., “*Taking Human Dignity, Poverty and Empowerment of Individuals More Seriously: Rejoinder to Alston*”, European Journal of International Law, Vol 13 No.4, 2002, 845-851.

Petersmann E., “*Time for a United Nations “Global Compact” for International Human Rights into the Law of Worldwide Organizations: Lessons from European Integration*” European Journal of International Law, Vol 13 No.3, 2002, 621-650.

Report of the Standing Committee on *International Trade, Human Rights, the Environment and Free Trade with Colombia*, Ottawa: Communication Canada, June 2008.

Smaller C., “*Human Rights Impact Assessments for Trade and Investment Agreements – Report of the Expert Seminar*”, June 23-24, 2010, Geneva, Switzerland.

The Nordic Trust Fund and the World Bank, “*Human Rights Impact Assessments: A review of the Literature, Differences with other forms of Assessments and Relevance for Development*”, February 2013.

Walker S., “*Human Rights Impact Assessments: Emerging Practice and Challenges*”, from “*Economic, Social, and Cultural Rights in International Law: Contemporary Issues and Challenges*”, book edited by Eibe Riedel, Gilles Giacca and Christophe Golay, Oxford Scholarship Online, May 2014.

Walker S., “*The Future of Human Rights Impact Assessments of Trade Agreements*”, School of Human Rights Research Series, Vol. 35, 2009.

Walker S., “*The Future of Human Rights Impact Assessments of Trade Agreements*”, School of Human Rights Research Series volume 35, Intersentia, 2009, pg 5.

Van Grastek C., “*The History and Future of the World Trade Organization*”, World Trade Organization Publications, 2013.

Vanclay F., “*Social Impact Assessment – International Principles*”, Impact Assessment and Project Appraisal, volume 21, number 1, March 2003, pages 5–11,
<http://www.socialimpactassessment.com/documents/0303%20Vanclay%20IAPA%20V21N1%20SIA%20International%20Principles_1.pdf>, accessed 6 April 2015.

Vanclay F., “*Social Impact Assessment: Guidance for assessing and managing the social impacts of projects*”, International Association for Impact Assessment, April 2015,
<<https://www.iaia.org/pdf/IAIA%202015%20Social%20Impact%20Assessment%20guidance%20document.pdf>>, accessed 6 April 2015.

Vanclay F., Esteves A.M. , Franks D., “*Social impact assessment: the state of the art*”, Impact Assessment and Project Appraisal Vol. 30, Issue No. 1, 2012.

United Nations Documents

De Schutter O., “*Guiding Principles on Human Rights Impact Assessments of Trade and Investment Agreements*”, Report of the UN Special Rapporteur on the Right to Food presented at the 19th Session of the United Nations Human Rights Council, 06 March 2012.

De Schutter O., *Report on Mission to Brazil*, Report of the UN Special Rapporteur on the Right to Food March 2010.

Human Rights Committee, *General Comment 18, Non-discrimination (Thirty-seventh session, 1989)*, Compilation of General Comments and General Recommendations Adopted by Human Rights Treaty Bodies, U.N. Doc. HRI/GEN/1/Rev.1 at 26 (1994).

Human Rights Council, Report of the Special Representative of the Secretary-General on the issue of human rights and transnational corporations and other business enterprises, “*Human rights impact assessments – resolving key methodological questions*”, 5 February 2007, A/HRC/4/74.

Hunt P., “*The right of everyone to the enjoyment of the highest attainable standard of physical and mental health*” - Report of the Special Rapporteur, Paul Hunt, submitted in accordance with Commission resolution 2002/31”, 13 Feb 2003.

Hunt P., Report of Special Rapporteur on the right of everyone to the enjoyment of the highest attainable standard of physical and mental health, ‘*Mission to Peru*’, 4 February 2005, E/CN.4/2005/51/Add.3

Tomasevski K., “*Background Paper submitted by Ms. Katarina Tomasevski*”, UN Doc. No. E/C.12/1998/18 (November 30, 1998)

United Nations Committee on Economic, Social and Cultural Rights (CESCR), “*General Comment No. 12: The Right to Adequate Food (Art. 11 of the Covenant)*”, 12 May 1999.

United Nations Committee on Economic, Social and Cultural Rights (CESCR), “*General Comment No. 14: The Right to the Highest Attainable Standard of Health (Art. 12 of the Covenant)*”, 11 August 2000, E/C.12/2000/4

United Nations Conference on Trade and Development (UNCTAD), “*Report of the United Nations Conference on Trade and Development on its Tenth Session – Held in Bangkok, Thailand*”, 12-19 February 2000

United Nations Development Group (UNDG), “*The Human Rights Based Approach to Development Cooperation: Towards a Common Understanding Among UN Agencies*”, 2003, <<http://hrbaportal.org/the-human-rights-based-approach-to-development-cooperation-towards-a-common-understanding-among-un-agencies>>, accessed 1 May 2015.

United Nations Development Group (UNDG), “*UN Statement of Common Understanding on Human Rights-Based Approaches to Development Cooperation and Programming (the Common Understanding)*”, 2003.

United Nations Development Programme (UNDP), “*Human Rights and Human Development*” in Human Development Report, 2000

United Nations Environment Programme, “*Desalination – Resource and Guidance Manual for Environmental Impact Assessments*”, 2008, pg. vi, <<http://www.unep.org/Themes/Freshwater/PDF/Resource&GuidanceManualforEIAs.pdf>>, accessed 1 May 2015.

United Nations Environment Programme, “*Environmental Impact Assessment and Strategic Environmental Assessment: Towards an Integrated Approach*”, 2004,

<<http://www.unep.ch/etu/publications/textONUbr.pdf>>, accessed 6 April 2015.

United Nations Environment Programme, "*United Nations Environment Programme Goals and Principles of EIA*", 1987, <<http://www.unep.org/regionalseas/publications/reports/rsrs/pdfs/rsrs122.pdf>>, accessed 6 April 2015.

United Nations Office of the High Commissioner for Human Rights and the Friedrich Ebert Stiftung, Workshop Report, "*Making the right impact?*", OHCHR/FES Expert workshop on evaluating human rights impact assessments in trade and investment regimes, 17-18 September, 2014, Bogis-Bossey, Switzerland.

United Nations Office of the High Commissioner for Human Rights, "*FAQs on a Human Rights-Based Approach to Development*", 2006, <<http://www.ohchr.org/Documents/Publications/FAQen.pdf>>, accessed 1 May 2015.

United Nations Office of the High Commissioner for Human Rights, "*Human Rights and Trade*", 5th WTO Ministerial Conference in Cancun, Mexico, 10-14 September 2003.

United Nations Office of the High Commissioner for Human Rights, The Sub-Commission on the Promotion and Protection of Human Rights, "*Intellectual property rights and human rights - Sub-Commission on Human Rights resolution 2000/7*", E/CN.4/SUB.2/RES/2000/7, August 2000.

United Nations Office of the High Commissioner for Human Rights, Sub-Commission on the Promotion and Protection of Human Rights, "*The impact of the Agreement on Trade-Related Aspects of Intellectual Property Rights on human rights*", E/CN.4/Sub.2/2001/13, 27 June 2001

United Nations Office of the High Commissioner for Human Rights, Sub-Commission on the Promotion and Protection of Human Rights "*Globalization and its impact on the full enjoyment of human rights*", E/CN.4/2002/54, 15 January 2002.

United Nations Office of the High Commissioner for Human Rights, Sub-Commission on the Promotion and Protection of Human Rights, "*Human rights, trade and investment*", E/CN.4/Sub.2/2003/9, 2 July 2003

United Nations Population Fund, "*Human Rights Principles*", 2005, <<http://www.unfpa.org/resources/human-rights-principles>>, accessed 1 May 2015

United Nations, “*Handbook on Integrated Assessment of Trade-Related Measures: The Agriculture Sector*”, United Nations Environment Programme, New York and Geneva, 2005.

United Nations, “*Reference Manual for the Integrated Assessment of Trade-Related Policies*”, United Nations Environment Programme, New York and Geneva, 2001.

Websites

International Association for Impact Assessment, ‘*Impact Assessment FasTips No. 1*’ <http://www.iaia.org/publicdocuments/special-publications/fast-tips/Fasttips_1%20Impact%20Assessment.pdf>, accessed 6 April 2015

International Association for Impact Assessment, ‘*What is Impact Assessment?*’ (*White Paper, October 2009*) <http://www.iaia.org/publicdocuments/special-publications/What%20is%20IA_web.pdf> accessed 6 April 2015.

International Association for Impact Assessment, “*Impact Assessment*” (*Impact Assessment Wiki*, 15 November 2012) <<http://www.iaia.org/iaia/wiki/impactassessment.ashx>> accessed 6 April 2015.

Website of the Secretariat of the Convention on Biological Diversity, “*What is Impact Assessment?*”, <<https://www.cbd.int/impact/whatis.shtml>>, accessed 15 April 2015.

World Conference on Human Rights, “*Vienna Declaration and Programme of Action*”, 25 June 1993

Yearwood R.R.F. , “*The Interaction between World Trade Organisation (WTO) Law and External International Law: The Constrained Openness of WTO Law (A Prologue to a Theory)*”, London: Routledge, 2012.