



Human Rights Impact Assessment of Trade and Investment Agreements and Business Operations

Good Practices and Key Factors to Consider

Prepared by the Just Governance Group April 2012

As part of our commitment to the development of just societies, the Just Governance Group (JGG) values the importance of promoting knowledge and the exchange of ideas in development and good governance practice. Consultants in the JGG community of practice have experience related to Human Rights Impact Assessments (HRIA) and, in response to increased interest in demonstrating the impacts of trade and investment agreements and business operations on individuals and communities, the Group has prepared this briefing note on good practices and key factors to consider when carrying out such assessments.¹

We have summarized common approaches, practices, techniques, and crucial steps to follow. This document is based on the work of leading international experts James Harrison² and Simon Walker³, as well as on the guiding principles on Human Rights Impact Assessment of Trade and Investment Agreements by the United Nations Special Rapporteur on the right to food⁴. It also draws upon the United Nations Guiding Principles on Business and Human Rights⁵, as well as on HRIA policies and tools developed by Rights & Democracy⁶, the International Finance Corporation⁷, the Human Rights Impact Resource Centre⁸, and 3D: Trade, Human Rights, Equitable Economy⁹. Observations based on the experience of senior JGG consultants have also been integrated. We hope this summary of good practices helps practitioners develop an

¹ This briefing note was prepared by Stephanie Tissot with the support of Kimberly Inksater and Lloyd Lipsett. The Just Governance Group is grateful for the comments and helpful suggestions of James Harrison and Simon Walker on a draft version of this note.

² James Harrison, "[Trade and Human Rights: What does 'impact assessment' have to offer?](#)" *Human Rights Law Review* 8 (4), 587 – 615, (2008); James Harrison, "[Human Rights Impact Assessment of Trade Agreements: Reflections on Practice and Principles for Future Assessments.](#)" (June 2010); James Harrison 'Human Rights Measurement: Reflections on the Current Practice and Future Potential of Human Rights Impact Assessment' *Journal of Human Rights Practice* (2011) 3 (2), 162 – 187.

³ Simon Mark Walker, [The Future of Human Rights Impact Assessments of Free Trade Agreements](#), (October, 2009).

⁴ Olivier De Schutter, [Report of the Special Rapporteur on the right to food. Guiding principles on human rights impact assessments of trade and investment agreements.](#) United Nations Human Rights Council (December, 2011).

⁵ John Ruggie, [Guiding Principles on Business and Human Rights: Implementing the United Nations "Protect, Respect and Remedy" Framework](#) (March, 2011). The Special Representative presented the guiding principles in March 2011; they were adopted by the Human Rights Council during its 17th regular session in June, 2011.

⁶ See Rights & Democracy publications related to investment and human rights: http://www.rightsanddemocracy.org/site/what_we_do/index.php?id=1489&subsection=themes&subsubsection=theme_documents ; and HRIA tool <http://dd-rd.ca/hria/en/>

⁷ See HRIA guide at: <http://www.guidetohriam.org/welcome>

⁸ See publications at: www.humanrightsimpact.org

⁹ See 3D publications at: <http://www.3dthree.org/en/pages.php?IDcat=5>

understanding of the main concepts, elements, and preferred methods for implementing an HRIA that can effectively measure the impact of trade and business activities on human rights.

What is Human Rights Impact Assessment (HRIA)?

HRIA is a process used to measure the impact of a range of activities on human rights. The activities commonly subject to impact measurement include international trade agreements, development cooperation programs, and business operations.

HRIA measures the gap between internationally and nationally recognized human rights standards and a current or proposed action. The objective of such an assessment is to enhance the knowledge of decision-makers and stakeholders, (which include policy-makers, corporations, watchdog agencies, human rights institutions, non-governmental organizations, and communities), as well as to prevent or address the adverse effects these activities may have on human rights.

HRIAs can cover actions that are specifically designed to have an impact on human rights (such as a development initiative to improve respect for workers' rights or strengthen a national human rights institution), as well as actions that are not intended to impact on human rights directly (such as a trade agreement to reduce tariffs on imported and exported goods). HRIAs can take the form of *ex ante* assessments (prior to implementation of a trade agreement or business activity) or *ex post* assessments (after the trade agreement or business activity has been in effect for a period of time).

The increased attention to HRIA is linked to the growing recognition that business corporations have an obligation to respect human rights in their operations, regardless of their location, ownership, structure, size or sector. The United Nations Guiding Principles on Business and Human Rights¹⁰, in particular guiding principles 17 to 21, require businesses to undertake due diligence such as assessment and monitoring of potential human rights impacts of their business activities.

HRIAs of trade agreements also act as a tool that can promote policy coherence as part of the State's obligation to protect human rights. The purpose of HRIA in the context of trade and investment agreements is to ensure that the agreements contribute to human rights protection.¹¹

Why are HRIAs important?

HRIAs of trade and investment agreements are processes that measure the positive and negative impacts of *trade and investment agreements* (and the *business activities* that derive from these agreements) on human rights. The purpose of HRIAs is to provide decision-makers and investors with a better understanding of the consequences of their trade and investment activities, and provide strong recommendations that can help them mitigate any adverse effects of their actions on the human rights of individuals and communities. Such assessments help to hold economic actors and decision-makers accountable for their actions, and can therefore contribute to the development of more sustainable and fair economies.¹²

The first guiding principle in the United Nations Guiding Principles on human rights impact assessments of trade and investment agreements recognized the duty of States to monitor the

¹⁰ John Ruggie, <http://www.business-hum-anrights.org/media/documents/ruggie/ruggie-guiding-principles-21-mar-2011.pdf>.

¹¹ De Schutter, Guiding Principle 6.

¹² Harrison, 2010.

impacts of trade and investment agreements once implemented as well as to undertake HRIAs prior to the conclusion of such agreements. This early HRIA is meant to ensure that the trade and investment agreement is not inconsistent with existing international treaty obligations.¹³

General Considerations for HRIAs

Although HRIAs vary depending on the range of subjects assessed, the context and time of the assessment, the resources and quality of data available, and the complexity of the analysis undertaken, they share and are governed by important guiding principles.¹⁴ These guiding principles are:

Adopting a human rights-based approach (HRBA)

- HRIAs should be guided by a HRBA. This approach refers to basic principles that are derived from international human rights norms contained in the core international human rights instruments of the United Nations system.¹⁵ HRBA is a lens that can be applied to both a process and an analytical framework. In such an approach:
 - *Individuals and groups are recognized as "rights-holders", while States are recognized as "duty-bearers" with the primary obligation to protect, respect and fulfill human rights.*
 - *The reciprocal relationship between rights-holders and duty-bearers is characterized by participation of the rights-holders in the decision-making processes of the State and other duty-bearers, and by accountability of the State to respect, protect, and fulfill its human rights obligations and to provide access to remedy and redress when human rights are violated.*
 - *Non-discrimination and inclusive participation of rights-holders are cross-cutting principles.*
 - *Human rights are indivisible, interrelated and interdependent.*
- In addition, HRIAs should provide duty-bearers with concrete suggestions for ensuring the protection of right-holders. Legal obligations and key principles of human rights must be central to the assessment. The process should involve human rights actors.
- HRIAs should involve the effective participation of all stakeholders and actors. Inclusive processes that take into account the impact on human rights of various groups, including the more vulnerable and marginalized, tend to be more effective and more likely to provide evidence that is relevant for holding public decision-makers and business operations accountable for their actions.

Implementing ongoing assessment

- HRIAs should be implemented periodically in a cycle.
- Each HRIA should conduct a baseline study prior to the assessment. The baseline should define the initial situation or conditions that exist before a trade agreement or business activity begins. This analysis will form the basis for a 'before and after' or a

¹³ De Schutter, Guiding Principles 2 and 3.

¹⁴ See *Insights on Human Rights Impact Assessments of Trade Policy and Agreements*, at: <http://www.3dthree.org/en/pages.php?IDcat=5>

¹⁵ For more information on the UN Human Rights-Based Approach see The UN Statement on the Common Understanding on Human Rights-Based Approach to Development Cooperation and programming at: <http://www.undg.org/index.cfm?P=221>

'change over time' assessment that is useful in determining the outcomes and impact of these activities.

- Ideally, the process should be repeated at regular intervals to fully capture the impact of trade and investment agreements and business activities. The first HRIA should be started as early as possible, as the process is generally long (several months). If not carried out in a timely manner, HRIAs will not be able to influence decision-makers.
- Business enterprises are expected to apply human rights due diligence on an ongoing basis, given that human rights risks may change over time.¹⁶

Linking trade agreements, business activities, and impact on human rights

- The literature¹⁷ addresses the importance of undertaking a causal chain analysis that links the legal provisions of the trade agreement with changes in economic activity or investment and then, in turn, with actual positive or negative effects on human rights.
- HRIAs should capture the changes in human rights that have occurred or will occur due to a provision in a trade agreement. Such assessments must analyze the links between a trade agreement and the contexts in which that trade agreement will be taking place in order to assess the type of impact that occurs.

Applying clarity, transparency, and discussion of final results

- HRIAs should recommend specific and clear actions to efficiently prevent or mitigate any adverse effects that trade and investment agreements may have on human rights.
- Results of the HRIA should be communicated to the public, business corporations, affected communities and other stakeholders,¹⁸ and if undertaken by States related to bilateral or multilateral trade and investment agreements, the outcomes should be tabled and debated in parliament.¹⁹

Striving for credibility

- A credible HRIA process is characterized by the participation of affected groups, as well as by independence, transparency, appropriate expertise, sufficient funding, and public discussion of results.²⁰

Key Factors in the HRIA Process

Although HRIAs are context-specific, there are some important steps that are common to their implementation. Once the general parameters of the HRIA are clearly defined, these steps should be rigorously followed and consistently applied, as they will be key factors in determining the assessment's ability to map the interactions between human rights and a trade and investment agreement and its effects.²¹ A number of sources have developed steps to follow in HRIA processes. Given that authors use various terminologies to refer to the stages and tasks, for the

¹⁶ Ruggie, Guiding Principle 17 (c)

¹⁷ Harrison, 2010; and Walker, 2011.

¹⁸ Ruggie, Guiding Principle 21.

¹⁹ De Schutter, Guiding Principle 4, paragraph 4.7 on *status*.

²⁰ De Schutter, Guiding Principle 4 and Ruggie, Guiding Principle 18.

²¹ Walker, [The Future of Human Rights Impact Assessments of Free Trade Agreements](#), October, 2009,; United Nations ["Draft Guiding Principles on Human Rights Impact Assessments of Trade and Investments Agreements."](#) June, 2011; and Harrison, ["Trade and Human Rights: What does 'impact assessment' have to offer?"](#) *Human Rights Law Review* 8 (4), 587 – 615, (2008); and, ["Human Rights Impact Assessment of Trade Agreements: Reflections on Practice and Principles for Future Assessments."](#) (June 2010).

purposes of this briefing note we have used the Guiding Principles on Human Rights Impact Assessments of Trade and Investment Agreements prepared by Olivier De Schutter, the Special Rapporteur on the right to food.

In undertaking an HRIA, it is not sufficient to simply follow the eight stages set out below in order to achieve a robust and meaningful assessment process. Rather it is the *manner in which* each of the stages is carried out that will determine the value of the HRIA.²² Some suggestions are outlined below for key issues that should be considered for each stage. Beyond this, practitioners undertaking assessments should make sure that they learn from examples of good practices in existing assessments and obtain guidance from relevant experts when undertaking their own assessments.²³

1. Initial Preparation

- Identify the skills, resources, and time available for carrying out the assessment, and clearly set the purpose, focus, and parameters of the evaluation.
- Identify an interdisciplinary team of persons with complementary knowledge and skills.
- Identify the terms of reference of the assessment, describing in detail the elements of the trade agreement and the resulting business activity to be assessed.

2. Screening

- The screening and scoping steps involve the design of the HRIA methodology by independent experts. In the literature review, these two steps were sometimes difficult to differentiate, as they often involve similar and interrelated tasks. In this briefing note, we have highlighted the main activities of each stage, as described in the methodology developed by Special Rapporteur on the right to food, Olivier De Schutter.
- In the context of HRIAs of trade and investment agreements, it is important to undertake economic modeling, analysis supported by the application of economic theories as well as quantitative or qualitative models and techniques, to evaluate the causes and effects of a trade agreement or business activity on various economic sectors. Identify reliable and current sources of economic data to undertake this analysis.
- The analysis of the full range of measures in the trade and investment agreement and the economic modeling analysis should lead to the identification of priority economic sectors that will be affected by the trade and investment agreement. Those provisions or measures that will likely have no causal effect on human rights can be eliminated from the HRIA and those measures that will likely have the most significant impact on human rights should be prioritized in the HRIA.
- After prioritizing the provisions within the trade agreement and the economic sectors that will most likely impact human rights, identify specific human rights and the particular rights-bearers that will most likely be affected.²⁴
- When determining the human rights most likely to be affected by business activity in an economic sector it is important to consider the specific national or local context.

²² Harrison, 'Human Rights Measurement: Reflections on the Current Practice and Future Potential of Human Rights Impact Assessment' *Journal of Human Rights Practice* 3 (2), 162 – 187 at 172.

²³ See Harrison 'Human Rights Measurement: Reflections on the Current Practice and Future Potential of Human Rights Impact Assessment' *Journal of Human Rights Practice* 3 (2), 162 – 187 for examples of HRIAs in a wide variety of different fields.

²⁴ De Schutter, Guiding Principle 7, commentary 7.1.

3. Scoping

- Identify the negotiation or implementation of future scenarios to be assessed, significant criteria, the data sources relied upon, as well as the various assessment tools to be employed.
- Identify a set of questions as well as a set of indicators to measure whether human rights violations have occurred and the extent of such human rights violations.²⁵
- Identify indicators that are reliable, valid, relevant, objective, and amenable to disaggregation. They should be sustainable to measurement over time.
- Introduce structural indicators, process indicators, and outcome indicators in your data gathering methodology.²⁶
- Identify research methods that will ensure the participation and inclusiveness of key actors and stakeholders. Desk research, institutional assessments, case studies and stakeholder surveys are some methods to consider.
- Identify specific groups of rights-holders who are likely to be the most affected, and design specific research methods, such as consultations or surveys, that will enable you to ascertain the effects on their rights.
- Clearly define how the evidence will be collected as well as the level of participation and involvement of the groups and actors affected by the agreement or business activity.

4. Evidence Gathering

- In order to determine the human rights impact as precisely as possible, gather evidence that includes the use of both qualitative and quantitative research.
- Conduct desk research at the outset to gather precise data on the legal, economic, social, and political context.
- Keep in mind the contribution of HRIAs to improving participation and accountability in trade and investment agreements when defining data gathering strategies.
- Integrate inclusive data gathering techniques that can open channels of communication between actors.
- Rely on human rights indicators that can measure:
 - whether the trade agreement and the resulting business or investment activities create obstacles to the enjoyment, implementation and protection of human rights,
 - the ways in which these obstacles might affect stakeholders,

²⁵ De Schutter, Guiding Principle 7, commentary 7.2.

²⁶ The UN identifies the categories of indicators in the following manner:

- Structural indicators relate to the existence of legal standards, regulations, institutional mechanisms and formal policies and strategies deemed necessary to facilitate the realization of the right.
- Process indicators relate to the measures taken by the State to give effect to its obligations related to international standards.
- Outcome indicators reflect the degree to which the right is enjoyed. It is an indicator that reflects a number of processes that accumulate to aid the realization of the right. Outcome indicators are slow to change and demonstrate the observance of the right at the macro level.

For more information on these types of indicators please see: Walker, [The Future of Human Rights Impact Assessments of Free Trade Agreements](#), October, 2009.

- the efforts and ways in which duty-bearers are meeting their obligations to respect, protect, and fulfill human rights (institutional assessment),
 - changing trends in the enjoyment of human rights over time, and
 - the actual level of enjoyment of human rights.
- Undertake participatory consultations with stakeholders and key actors in order to identify what measures (domestically and internationally) are in place to deal with negative impacts.

5. Analysis

- Analyze the relation between the trade agreement's provisions in priority economic areas of activity or specific business operations and the enjoyment of human rights.
- Determine the direction of change (positive or negative) in the enjoyment of specific human rights in comparison to baseline conditions.
- Analyze the regulatory and institutional capacity of the State as duty-bearer to protect, respect and remedy those human rights that will be negatively affected.²⁷
- Identify success factors in the instances of positive change in enjoyment of human rights as compared to the baseline conditions.

6. Conclusions and Recommendations

- Consider which measures can be taken by responsible duty-bearers that might optimize the positive impacts and reduce the negative effects of the trade agreement and resulting business activity identified during the data gathering stage.²⁸
- Clearly identify the effects that violate international treaties and therefore require immediate decisions related to the relevant trade, investment or corporate activity of concern.
- Consider recommendations that will help reform agreements or implement new action plans of common interest to the actors and stakeholders.
- Include recommendations comprising measures of technical cooperation or capacity building that can improve: infrastructure, access to international institutions and human rights bodies, government support, and corporate collaboration.
- Consider whether the results of the HRIA should be sent to national human rights institutions or international human rights mechanisms for further action, such as the launch of urgent actions or the triggering of individual complaints mechanisms.
- Assess plausible recommendations encompassing: regulatory, institutional, national economic and voluntary measures that can be adopted by decision-makers and key actors to mitigate negative effects of agreements or business activities.
- Identify key actions that can enhance public participation, improve transparency of agreements and activities, and strengthen accountability mechanisms.

7. Preparation of Final Report

- Compile a report upon the completion of the steps described above, setting out the evidence gathered, the analysis of the impact of trade agreement provisions or

²⁷ De Schutter, Guiding Principle 7, commentary 7.4.

²⁸ De Schutter, Guiding Principle 7, commentary 7.5.

business activity on human rights, conclusions, and recommendations to duty-bearers on mitigation and enhancement measures.

- In the report, include an evaluation of the HRIA process itself as well as an outline for future monitoring of compliance with recommendations.

8. Monitoring and Evaluation

- States and/or corporate executives should acknowledge and implement appropriate follow up to the conclusions and recommendations adopted at the final stage of the HRIA.²⁹
- Organize a monitoring and evaluation mechanism to assess the extent to which these conclusions and recommendations were in fact taken into account.
- Consider if the assessment has met its objectives and is acceptable to stakeholders.
- Consider the lessons learned from the assessment to apply in a subsequent process.
- Establish, along with stakeholders, a monitoring plan to assess the future impacts of the trade agreement or business activity.

Additional Resources

Human Rights Impact Resource Centre, www.humanrightsimpact.org

International Association for Impact Assessment, www.iaia.org

The Danish Institute for Human Rights, www.humanrights.dk

The University of Nottingham Human Rights Law Centre Trade Impact Assessments database: www.nottingham.ac.uk/law/hrlc/business-trade/Final_Database.xls

The European Commission, http://ec.europa.eu/trade/issues/global/sia/index_en.htm

Carin Smaller, *Human Rights Impact Assessment for Trade and Investment Agreements*. Report of the Expert Seminar, June 23-24, 2010, Geneva, Switzerland: http://www2.ohchr.org/english/issues/food/docs/report_hria-seminar_2010.pdf

²⁹ De Schutter, Guiding Principle 7, commentary 7.6.