

## WORKSHOP REPORT

### “MAKING THE RIGHT IMPACT?”

#### OHCHR/ FES EXPERT WORKSHOP ON EVALUATING HUMAN RIGHTS IMPACT ASSESSMENTS (HRIAs) IN TRADE AND INVESTMENT REGIMES

17 TO 18 SEPTEMBER 2014, BOGIS-BOSSEY, SWITZERLAND

##### Key messages:

- *This is an important moment for addressing the human rights impacts of trade and investment.*
- *HRIAs are not a panacea for all development ills and they must be used strategically by actors to maximise their impact.*
- *Through developing the practice of HRIAs, respective roles will be rebalanced creating a more democratic and transparent process for the design, negotiation and implementation of trade and investment agreements.*

#### I. Background

There is increasing recognition of the potential of human rights impact assessments (HRIAs) in trade and investment regimes. In principle, HRIAs can be an effective tool for identifying, quantifying and assessing the ways trade and investment impact upon the full spectrum of human rights. Their practice, however, is beset by challenges, relating to the form they take, how and when they are conducted, the actor undertaking the assessment, and the use that is made of their results. Despite the growing literature on HRIAs in the trade and investment context, there is a lack of established practice, and to date there has been no meta-assessment of whether HRIAs work, or of which elements work and which do not. In order to examine this topic, the Friedrich-Ebert-Stiftung (FES) Geneva office and the Office of the High

Commissioner for Human Rights (OHCHR) hosted a workshop for twenty-four experts, practitioners and academics in the fields of HRIAs, trade and investment in Geneva from 17 to 18 September 2014. This report summarises the discussions of the workshop, focusing on the issues facing HRIAs in trade and investment regimes and the role organisations, including non-governmental organisations (NGOs) and the OHCHR, can play in improving the effectiveness of future HRIAs in trade and investment.

## II. Defining Human Rights Impact Assessments

A HRIA is “an instrument for examining policies, legislation, programs and projects and measuring their impact on human rights.”<sup>1</sup> HRIAs enable an objective analysis of the ways and extent to which an intervention impacts upon the human rights of the affected population. In the development context, HRIAs are a particularly important tool. The purposes for conducting HRIAs include prioritising human rights in policy-making, strengthening accountability, and empowering rights holders.

HRIAs developed out of environmental and social impact assessments, in recognition of the profound ways development actors, governments and businesses impact upon human rights. HRIAs of trade and investment agreements were developed as tools to gather evidence of human rights impacts to advocate for policy change.

## III. HRIAs as a methodology

Unlike other forms of impact assessment, HRIAs engage the international human rights framework, and their practice demands a human rights based approach. The organising principle of HRIAs is the human rights themselves. Although other impact assessments regularly address participation, accountability and equality, HRIAs do so in a more systematic and comprehensive way. If the requirements of participation, independence and transparency are met, conducting a HRIA can be a means of institutionalising respect for human rights.

While the human rights framework can lend legal and moral legitimacy to assessments, it is in fact a double-edged sword. The fact that human rights remain contested creates a degree of uncertainty in the conduct of assessments and the use made of their results. There is a risk that the human rights

discourse can alienate some actors or be misappropriated to legitimise undeserving results.

In theory, HRIAs can be used to assess impacts on the full scope of human rights. In practice, however, the demanding nature of assessments requires the focus to be on a limited number of rights. While assessments can be conducted ex-post or ex-ante, the timing of an assessment will largely depend upon the actor. Given the role of NGOs and other civil society stakeholders as dominant actors in HRIAs and their experience in monitoring human rights impacts, the great majority of recorded HRIAs are ex-post assessments. With time and resources, an ex-ante assessment brings significant value and has the potential to change a project and mitigate impacts. Even with an ex-ante assessment, as the impact assessment process is a living process, it can never be just ex-ante.

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Increasing recognition of the potential of human rights impact assessments has generated an “explosion of activity”, however “scholarship and critical reflection on the practice of human rights impact assessment is currently very limited”.<sup>2</sup> There may be more HRIA toolkits and guidelines available today than actual assessments.

## IV. Conducting Human Rights Impact Assessments

### Assessing impacts is conceptually difficult

Assessing the impacts of interventions upon human rights is a conceptually difficult exercise. Despite progress in the development of human rights

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<sup>1</sup> The Nordic Trust Fund and World Bank, *Human Rights Impact Assessments: A Review of the Literature, Difference with Other Forms of Assessment and Relevance for Development*, February 2013, ix.

<sup>2</sup> 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, 163.

indicators,<sup>3</sup> the extent to which human rights impacts can be measured remains up for discussion. HRIAs may be based on assumptions about quantifiability of human rights impacts which may be false.

It is also unclear whether the full spectrum of recognised human rights are capable of being assessed, or whether assessment is only possible for those rights which have been adjudicated or for which jurisprudence exists.

There is also some confusion about what qualifies as an “impact”; specifically, whether an impact needs to reach the level of a human rights violation. An alternative to measuring human rights impacts is the Human Rights Compliance Assessment tool, developed and used by the Danish Institute for Human Rights.<sup>4</sup>

Given these conceptual difficulties and the diversity of practice, ensuring that HRIAs remain credible and reliable tools requires the professionalisation of their use. However, demanding a high degree of rigour in HRIAs may compromise their usability and stymie practice.

#### Rigorous methodology versus usability

The term HRIAs and its definition as a methodology call for a series of rigorous steps to be followed which may not always be feasible in terms of cost, time or resources. By emphasizing a rigorous series of steps, HRIAs may become un-replicable or may

crowd out other strategies employed by communities and other actors at different levels.

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To become an accessible tool and to address the lack of practice, HRIAs need to be user-friendly and adaptable to different contexts. It may not be in the interests of effectiveness to define a fixed HRIA methodology or identify best practice but rather focus on the assessing of impacts as opposed to standardised HRIAs. Assessments that are flexible and can be adapted to the specificities of an agreement are more likely to be accepted by the state or business being assessed than assessments that are unduly rigorous and demanding. There may also be value in incorporating HRIAs into other established assessments, such as social or environmental impact assessments. Some compromise in robustness of an assessment may be initially acceptable in order to encourage the use and development of the tool.<sup>5</sup>

#### Aligning data collection with needs

In conducting assessments it is important to align data collection strategies with needs in order to ensure adequate but not unmanageable amounts of data are collected.<sup>6</sup>

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<sup>3</sup> See, for example, OHCHR, *Human Rights Indicators: A Guide to Measurement and Implementation*, available at <http://www.ohchr.org/EN/Issues/Indicators/Pages/documents.aspx>.

<sup>4</sup> The Human Rights Compliance Assessment is an online tool for detecting human rights risks in company operations. The tool comprises an extensive database of questions and indicators based on international human rights and labour instruments and enables companies to measure their performance using these standards as a benchmark. A final report indicates areas of compliance or non-compliance in company policies, procedures and operations. See <https://hrca2.humanrightsbusiness.org>.

<sup>5</sup> For example, the Human Rights Compliance Assessment enables companies to customise the tool by screening out questions and indicators that are not relevant to their operations. The result is that no company uses the tool in the same way, but on an as-needs basis. Companies’ methodologies usually evolve throughout the assessment and some compromise in the initial robustness of the methodology may be necessary in order to encourage use of the tool.

<sup>6</sup> See “Owning Seeds, Accessing Food”, A Human Rights Impact Assessment of UPOV 1991 based on case studies in Kenya, Peru and the Philippines, 2014. The primary concern of this study is the lack of knowledge of potential human rights impacts of plant variety protection (PVP) laws, especially on vulnerable groups in developing countries. Challenges in undertaking this HRIA were associated with two factors in particular. First, tracking the impact of specific UPOV provisions on the right to food required the development of causal chains where the

### Transparency and participation are necessary

Ensuring transparency and participation in the process of HRIAs is challenging and there is little uniformity of practice.

While the human rights framework requires a human rights-based approach to conducting HRIAs, in practice there may be limits to the degree of transparency and participation that HRIAs of trade and investment permit. Governments and corporations may only agree to divulge information on the basis that the results of the assessment will not be publicised. In the negotiation of agreements, a high degree of transparency could make it difficult to achieve consensus. HRIAs can be empowering for communities, but conducting HRIAs can disempower and alienate community members where there is insufficient participation. There is also little guidance on what participation looks like in HRIAs of trade and investment.

### Achieving desired results

The outcome of a HRIA needs to be properly employed to achieve the desired results. Assessment reports should be widely disseminated, with equal amounts of resources dedicated to disseminating the report as producing it. Consultants and others assisting with designing and carrying out HRIAs should require an explanation of the intended use of the assessment results before participating further. As with all human rights advocacy, there is a need for creativity of methods to achieve the desired result, and HRIAs are just one tool among many for realising human rights ends.

## **V. Specific Challenges to HRIAs in Trade and Investment Regimes**

### *a) Investment regimes*

Although trade and investment are separate regimes, there are economic, legal and institutional linkages between them, which is why they are often considered together. However, lessons learned from conducting HRIAs of trade agreements may not be applicable to investment agreements, and the two regimes may invite individual consideration.

Before assessing the situation of HRIAs of investment, there is a need to define what is comprised by investment. The term investment incorporates domestic policies and regulation on investment, investment projects, investment contracts and complex investment treaties. Applying HRIAs to projects is not the same as applying them to a policy discussion or agreement. While there are numerous examples of and guidelines for HRIAs of investment projects (for example, Nomogaia's assessment of Paladin Energy's Kayelekera Uranium Project in North Malawi), as well as guidelines developed by the Special Representative of the Secretary-General on human rights and transnational corporations and business enterprises on investment contracts, there has been no specific HRIA of an investment treaty. The assessments that have been conducted of the investment chapters of free trade agreements have proved inadequate. For example, the assessment of the investment chapter of the Thai-US Free Trade Agreement, conducted by Thailand's National Human Rights Commission, does not assess the impacts of the agreement on specific rights or the State's capacity to meet its human rights obligations and was not publically released. As required by the Canada-Colombia Free Trade Agreement, Canada

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ultimate effects do not directly emanate from the provision under consideration but rather result from an intermediate impact. Second, the pioneering nature of the research necessitated a fair amount of innovative thinking and creativity as there was no pool of experience to draw from. Despite these challenges, the research provided clear evidence of impacts and areas of concern such as the resulting threat to the enjoyment of the right to food when access to seeds of protected varieties is restricted and the informal seed system is weakened by such laws.

has produced a report on the effects on human rights of measures taken under the Agreement. The report excluded the investment chapter of the Agreement and has been widely criticised for failing to consult with the affected communities. To date, there has been no assessment by the Colombian Government.

Establishing the human rights impacts of investment agreements is challenging for a number of reasons. It is difficult to determine with precision the sectors and geographical areas that will be affected by the agreement. This is in part because the scope of provisions of an investment agreement may be subject to interpretation by arbitration tribunals and applied on a case-by-case basis. Comparing baseline conditions and conditions post-assessment could only make tenuous attributions to the investment agreement.

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Examining the investment regime raises the issue of Investor-State Dispute Settlement (ISDS) and the impacts of ISDS on human rights. Arbitrations related to investment agreements have been criticised for the lack of transparency of process and accountability of arbitrators, as well as the fact that arbitration allows private parties to challenge decisions of states relating to the protection of public interest and human rights.

#### *b) Trade regimes*

Tracing the human rights impact of trade is also ambitious and an onerous exercise. While corporations acting in countries leave a verifiable

footprint, trade is conducted through many channels. Trade policy itself has developed tremendously during the past decades. The traditional impacts on tariffs and quotas are still subject to trade policy though to a much lower extent. So-called non-tariff barriers, intellectual property rights, trade facilitation, and impacts on environment are essential elements of trade policy nowadays. Tracing human rights impacts through the international production and distribution networks, and thus establishing causation or responsibility, is a resource-intensive process.

#### *c) Shared challenges*

Although trade and investment are distinct regimes, there are some shared challenges for the effective conduct of HRIAs. The determination of best practice in these areas is still at a rather conceptual level and requires further elaboration and practical investigation. Determining best practice will require addressing the tension between rigour and usability. The Guiding Principles on human rights impact assessments of trade and investment agreements represent an important first step towards a harmonized framework.<sup>7</sup>

## **VI. Specific requirements of HRIAs in Trade and Investment Regimes**

#### *a) Content level*

The density and complexity of trade and investment agreements mean that the technical expertise and skills of an interdisciplinary coalition of actors, including economists, human rights lawyers and social scientists, may be needed to effectively conduct HRIAs. Undoubtedly, a coalition of actors and a rigorous and well-defined methodology lends credibility to the assessment and legitimacy to its results. However, there is a tension between the skills and expertise needed to

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<sup>7</sup> These guidelines were developed by the Former Special Rapporteur on the right to food in 2011 and it provides guidance to States on how to ensure that trade and investment agreements they conclude are consistent with their international human rights obligations. There are seven guiding principles relating to preparation, avoiding inconsistency with human rights obligations, responses to human rights incompatibility, human rights-based approach, methodology, aiding protection of human rights and outlining of the key steps of screening, scoping, evidence-gathering, analysis, conclusion and recommendations, and evaluation.

conduct HRIAs and their applicability. The requirement for expertise may inhibit the widespread use of HRIAs and lower the necessary level of participation. In addition, a multi-stakeholder collaboration demands additional time and coordination. The demands of HRIAs in the trade and investment context, namely the requirements for persons with particular expertise, time and considerable financial resources, should prompt consideration of whether conducting a HRIA is the best choice in the given circumstances.

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HRIAs are not only more formidable in terms of substance in trade and investment agreement, they are also procedurally more complex. The sensitivities of economists to the design of trade policy and insufficient consultation are inimical to the requirement for participation in the negotiation process. While pioneering work is being done in this field, addressing the lack of practice through trial and error represents a time-consuming and costly exercise.

The timing of HRIAs in the trade and investment context should be prior to the conclusion of agreements but close enough to their finalisation that there is certainty regarding the content of the agreement. Ideally, negotiations should be suspended during the period in which the assessment is being conducted. In practice, ex-ante assessments of trade and investment agreements may be of little effect if there is no scope within an

agreement for it to be retrospectively invalidated or amended, although it may have some value as an advocacy tool. There are also insufficiently developed compensatory measures and remedies within trade or investment regimes, especially at the international level.

If all aspects of an agreement are assessed, the task of conducting a HRIA becomes an insurmountable one: a key step in a HRIA is thus to screen key areas of human rights concern. Conducting a comparative HRIA, where different countries will likely be at different stages of implementation of the agreement, is particularly difficult. These practical hurdles highlight the need for a narrow focus of HRIAs, by right or by sector, and their likely unsuitability to comprehensive assessments. Sector-wide approaches to HRIAs in trade and investment could sharpen the focus.<sup>8</sup>

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Differences in the bargaining powers of states, the lack of coherence of dispute settlement mechanisms with human rights and provisions for sanctions within agreements contribute to further impacts upon human rights. HRIAs may not be the appropriate tool for addressing these systemic issues. To address the negative impacts of trade and investment upon human rights, and to ensure trade and investment advance sustainable development, there is arguably a need for a transformation of the trade and investment regimes. Among other measures, the integration of human rights protections and mechanisms for accountability should be involved throughout the regimes.

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<sup>8</sup> For example, the Myanmar Oil and Gas Sector Wide Impact Assessment, developed by the Institute for Human Rights and Business in partnership with the Myanmar Centre for Responsible Business and the Danish Institute for Human Rights, has produced detailed information for public use on the impacts, including human rights impacts, of the growing oil and gas sector of Myanmar's economy. See <http://www.ihrb.org/news/myanmar-oil-gas-swia.html>.

## b) Actor level

The actor best suited to carrying out HRIA will vary in different contexts. This can include governments, companies and civil society actors. National Human Rights Institutions (NHRIs) may be well placed, given their requirements of independence and their experience in working with different stakeholders. However, not all states have NHRIs that are sufficiently independent, possess adequate capacity or are trusted by governments to work on this issue. Developing the capacity of NHRIs to undertake this work is important.

The suitability of NHRIs to conduct HRIAs aside, ways must be made to facilitate the cooperation of a coalition of actors with the necessary skills and expertise to conduct HRIAs in the complex area of trade and investment. There is a need for openness amongst actors who conduct assessments, as well as a platform for the sharing of practice, so that actors can learn from one another as well as develop and improve methodologies. Testing methodologies on actual projects, or learning from others' experiences, is key to improving methodologies. Ensuring transparency between companies, and providing a platform for exchange, can contribute to the improvement of methodologies.

An alternative actor for the conduct of assessments is a standing committee within parliament, which could systematically review agreements for their human rights impacts. Rather than contracting new experts to conduct each assessment, this approach would enable one body to develop practice and expertise, resulting in more rapid and less burdensome assessments. This approach would address in part the conflict between rigour and usability of HRIAs. In this regard, the role of communities in conducting HRIAs and community-led assessments must also be further explored and supported.

## VII. Opportunities for HRIAs in Trade and Investment Regimes

From the HRIAs that have been conducted in the trade and investment context, it is clear that HRIAs of investment projects can be particularly effective in convincing large companies, including transnational companies, to both publicise the results of the assessment and to act differently. In large part, their effectiveness lies in developing a confident and trusting relationship with companies, a relationship that may take years to build.

Although there are limited examples of practice of HRIAs in trade and investment agreements, their practice could be supplemented by HRIAs in other contexts. This could provide the methodological insights that are needed to move the process forward. In addition, HRIAs can be integrated into other impact assessments and framed as a part of a government's due diligence requirements in the conclusion of agreements. This approach would likely reduce opposition to the identification of human rights concerns within an agreement. However, given that HRIAs invoke a specific legal framework and rely on specialist expertise, they require, at the very least, a separate chapter in an impact assessment.

Considering the reluctance of governments and companies to divulge information concerning their operations, a staged methodology, moving from self-assessment to independent assessment, may attract support.

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The HRIA is a pioneering tool in bringing a human rights perspective into the policy development stage. HRIAs are an effective means of bringing human rights issues to policy makers and business who may not have considered them. HRIAs can strengthen governance structures and can be used

to empower negotiators and to craft text during negotiations.

Through the lens of human rights, issues such as inadequate participation can be identified and brought to light. From a human rights perspective the requirement of participation is not satisfied by only allowing different stakeholders to participate; it also measures if and how concerns of these stakeholders were taken into account. In the context of demands for accountability and transparency HRIAs are a powerful tool for unveiling human rights issues.

## VIII. The way forward for HRIAs in Trade and Investment Regimes

### Engagement with practice

To address these challenges for HRIAs in the trade and investment context, and to improve their effectiveness, there is a critical need for further practice of HRIAs in trade and investment, particularly in the context of agreements. Assessments must be monitored, with transparency in the methodologies and meaningful participation of stakeholders. Trade-offs should be examined through an open, democratic and deliberative process.

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Practice in the area of HRIAs is crucial and building on further guidance, and toolkits without engagement with practice and supporting pioneers in this area is futile. As a potential tool, HRIAs must be used sparingly but strategically. HRIAs can be a pure inquiry to learn and demonstrate or an inquiry that is then part of a strategy for change.

### Further capacity building and guidance

This requires that the actors carrying out HRIAs, presently comprising mostly NGOs and research

institutes, be supported in their work. OHCHR and other organisations, by associating with these actors, can contribute to the perception of credibility and robustness of assessments and assist in the dissemination of results. There is also a decisive need for capacity building and guidance for all actors undertaking HRIAs in trade and investment. Trainings on HRIAs can extend to actors involved in the negotiation of trade and investment agreements, thus building a bridge between oft-separated fields.

Requirements of or minimum standards for effective participation need to be elaborated on in the conduct of HRIAs of trade and investment agreements, as well as further suggestions to address the barriers to participation and the opacity within which agreements are often concluded.

### Advocacy at domestic and international levels

Creativity is needed in both the targeting of trade and investment agreements for assessment and in the strategic use of the results of HRIAs. HRIAs should be targeted to agreements, not where the human rights impact is a popular or obvious one, but where it has not been identified or articulated by policy makers. The results of HRIA cannot only be made publically available, but can also be used to engage with the Trade Policy Review Mechanism of the World Trade Organization (WTO), integrated into national strategic plans such as National Action Plans on Business and Human Rights or used to lobby governments to enact legislation requiring mandatory HRIAs of trade and investment agreements. Human rights can be harnessed by engaging in political advocacy to advance the protection of human rights. HRIAs are useful for obtaining evidence and should be viewed as a tool for strategic use, alongside a toolkit of other strategies, each of which is necessary in creating change.

There are currently limited options for using the results of HRIA in the international human rights system. Treaty body committees have very limited time and resources to consider complex human



rights impacts of trade and investment agreements. Training committee body members on the impacts of trade and investment on human rights could increase the capacity of these mechanisms to make use of the results of HRIAs. Another suggestion is the creation of a review mechanism, modelled on the Universal Periodic Review (UPR), composed of state representatives with the knowledge and expertise to review the human rights impacts of a state's trade and investment commitments.

#### Alternative avenues for HRIAs

Given that many investment treaties share common clauses, a human rights analysis of the common provisions of an investment treaty could provide guidance to actors conducting HRIAs of each agreement. Comments could be made on how provisions operate in different contexts. The development of an online repository of the recurring concerns of each area of common trade and investment agreements from a human rights perspective could be consulted by actors conducting assessments and adapted to the specific circumstances of their case. This repository could provide support to actors, guidance on issues that are recurring problems and a platform for the sharing of information, practice and lessons learned, thus addressing the gaps in knowledge and in practice. The value of this approach is that it would enable actors to ask questions of negotiators, even without having a copy of the text of the agreement, based on the clauses that are usually included in agreements. This would address the issues of the timing of assessments as well as lack of access to information. It is clear that the guidance must stem from lessons learned and from practice, and not from abstract global standards.

Human rights clauses and human rights language in trade or investment agreements are potential entry points. The danger is that this will be subject to interpretation by adjudicators and arbitrators in trade and investment, who do not possess human rights expertise, and these are forums where human rights is clearly not high on the agenda.

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A compliance assessment tool for multi-stakeholder assessment, as developed by the Danish Institute for Human Rights, also offers another avenue. This experience showed that evolution of methodology will be iterative and cannot be robust from the beginning.<sup>9</sup> Further, a self-assessment guidance tool on trade and investment and human rights could be included in National Action Plans on Business and Human Rights.

## **IX. Conclusion**

This is an important moment for addressing the human rights impacts of trade and investment. Trade and investment processes, while not fully transparent, are subject to more scrutiny than ever before; a small window is open for the use of HRIAs. In addition, the political landscape is changing, with more sensitivity towards human rights and development issues and more discussion on the human rights implications of investor-state dispute settlement. If HRIAs are to be effective in addressing the human rights impacts of trade and investment

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<sup>9</sup> Lessons learned to be taken forward in the use of HRIAs are that (1) tools have to be context-driven as actors have other institutional imperatives, (2) heavy investment in process lends credibility, (3) methodology will evolve through a staged progression and great should not be the enemy of the good, (4) resilience is valuable, (5) process is resource-intensive, (6) participation is a problem and when not realised or achieved, it can have a disempowering, alienating effect, (7) awareness-raising and capacity-building have educative functions, (8) need to think about monitoring and evaluation and (9) HRIA as a label has certain connotations.

agreements, further guidance, capacity building and support for their practice is essential.

HRIAs are not a panacea for all development ills and they must be used strategically by actors to maximise their impact. There are methodologies, checklists and tools which are available but practice is uneven and patchy. This is compounded by the challenges such as lack of resources, time, expertise and the need for complex data collection and rigorous analysis. Through developing the practice of HRIAs, respective roles will be balanced creating a more democratic and transparent process for the design, negotiation and implementation of trade and investment agreements. Trade and investment should be about making the right development impact on the ground and HRIAs are an important if still modest pathway to making that happen.

On the author

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The views expressed in this publication are not necessarily the ones of the OHCHR or Friedrich-Ebert-Stiftung.

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