



The impact of EU trade and development policies on human rights

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Executive Summary

Since the Lisbon treaty entered into force on 1 December 2009, all policies of the European Union must contribute to the promotion and protection of human rights. For the Union's external policies in particular, Article 21 of the Treaty on European Union stipulates that the EU should consistently and coherently 'consolidate and support democracy, the rule of law, human rights and the principles of international law' (TEU, Art 21, 2-b). As such, both the Union's Common Commercial Policy and its development cooperation are to be guided by the EU's human rights principles and objectives.

A previous report under this work package provided a comprehensive mapping of the EU's toolbox to implement these commitments and found that, on the whole, the EU is well-equipped to promote human rights in trade and development policies. In spite of the proliferation of legal and political commitments for human rights promotion since the Lisbon treaty, and the availability of the tools for their respective implementation, little is known however, about the actual impact of these human rights provisions in EU trade and development policies.

Indeed, assessing the impact of the EU's various trade and development policies on the human rights of citizens in EU partner countries would be methodologically daunting and is infeasible within the scope of this –and arguably any – report. Rather, the present report aims to assess:

- to what extent the EU itself is equipped – and willing – to adequately assess (ex-ante) and evaluate (ex-post) the effects of its trade and development policies on human rights; and
- In how far the provisions to take into account human rights considerations throughout these policies can make a difference in practice.

In order to do so, this report analyses the Union's various evaluation and impact assessment procedures, ex-ante and ex-post, to see in how far they take into account human rights considerations, in their scope and objectives, as well as throughout their procedures. It first describes the general underlying principles and objectives of including human rights in impact assessments and ex-post evaluations. Subsequently, and in view of recent EU commitments towards a 'Rights Based Approach to Development', this report looks into the EU's evaluation system for development cooperation, notably to see in how far its current evaluation function is equipped to conduct rights-based evaluations. In a next chapter on the EU's system for ex-ante impact assessments, this report studies the extent to which development and human rights concerns are taken into account in both the policy and practice of the Commission's ex-ante impact assessment tools. A fourth chapter then maps out the particular assessment challenges and opportunities within the field of EU trade policy and finally chapter five offers a case study on the practical application of rights-provisions under one of the EU's new generation trade agreements, notably the 2012 EU-Colombia trade agreement.

Human rights and impact assessments

Human Rights Impact Assessments (HRIAs) offer a policy tool aimed at systematically identifying and measuring both the potential and the real effects of a policy or a project-intervention on the realm of human rights. They analyse a wide range of different activities, ranging from development programmes,

over national legislation, to the activities of transnational corporations (TNC) and non-governmental organisations (NGO).

In terms of timing, a twofold distinction is to be made between HRIAs conducted either before (*ex-ante*) or after (*ex-post*) the implementation of a policy measure. A second typological distinction concerns the nature of the policy intervention under scrutiny. Essentially, HRIAs can apply both to policies and programmes that are directly and intentionally aimed at changing the human rights situation in a country, sector or project, as well as to policies and programmes whose primary purpose is in fact not related to human rights, but could potentially have an effect on them.

While there is significant overlap with other types of Impact Assessments, particularly in comparison to Sustainability or Environmental Impact Assessments, HRIAs arguably carry substantive added value in terms of scope and rationale. The main comparative advantages and challenges associated with conducting a HRIA include the following.

Comparative advantages

- HRIAs are based on the normative framework of binding international human rights legislation and relate to international and national legal human rights actors, institutions, instruments and mechanisms.
- In undertaking HRIAs, rights-holders are not perceived as passive study-subjects but rather they are encouraged to participate and contribute to the assessment.
- While other assessments often also include notions of equality, participation, transparency and accountability, HRIAs do so in a more systematic and comprehensive manner, including throughout the process of conducting the impact assessment.
- Where other impact assessments are usually selective in the rights they aim to cover, HRIAs fully embrace the notion that human rights are universal and interlinked. As such, the HRIA framework applies to civil and political rights just as much as to economic, social and cultural rights.

Associated risks and considerations

- HRIA frameworks can be unbalanced in scope and narrative. It is common for impact assessments in general to focus exclusively on more easily quantifiable short-term impacts, rather than on long-term effects that are less easily identified. For HRIAs, the normative focus on legal obligations risks becoming a vacuum-trap when the exercise fails to adequately take into account the broader social and environmental impacts of a policy intervention.
- Framing certain impacts of policy interventions as human rights concerns may externalise them from the policy or programme at hand. Ironically, while HRIAs aim to mainstream human rights concerns throughout e.g. trade and development policies, framing policy impacts as human rights issues risks presenting them as ipso facto 'non-trade or –development' concerns.
- Adopting a human rights lens necessarily politicises the actors involved since it requires a distinction between rights-holders and duty-bearers, and aims to contribute to the empowerment of the former group, potentially affecting the interests of the latter.

In terms of methodology, every HRIA is to be approached as a balancing exercise between scientific rigour and overall usability. There continues to be a trade-off in this regard, between methodological robustness, and therefore credibility of outcomes, and a more basic but useful, and therefore more communicable and sustainable, approach. A second consideration is whether to undertake a stand-alone HRIA, or to incorporate an HRIA into another type of impact assessment. Finally, like any impact assessment, HIRAs face the fundamental challenge of establishing causality and attribution. Identifying causal pathways which link a policy intervention to certain (potential) changes in the human rights situation in a country is a far from straightforward endeavour.

Despite their potential benefits and a recent proliferation of methodological guidance, the practical application of HRIAs is still in its infancy. Indeed, the amount of toolkits and guidelines by far outnumbers the number of conducted and published HRIA-reports. This in turn raises questions about their overall feasibility and added value as an evaluation tool aimed at contributing to better informed and human rights-sensitive policy-making. Moreover, given the wide range of different fields of application, and the variety of actors to potentially use them, there is also no universally approved and formalised methodology yet, and methodological best practices require further elaboration and fine-tuning, inter-alia through practical application.

A rights based approach to EU development evaluations

Such practical application can be found at an initial stage in the EU's recent commitments toward a rights-based approach to development, covering all steps of the programming cycle. In order to assess what such a rights-based approach would imply for EuropeAid's evaluation system, this report identifies three critical considerations on which, arguably, hinges the feasibility of effectively applying a rights based approach to EU development evaluations.

Flowing from the EU's interpretation of a rights based approach to development, and in view of a the recent criticism on a number of prevalent tendencies in EuropeAid's current evaluation culture, we identified three critical considerations regarding the overall feasibility for the EU to apply a rights based approach to its development evaluations.

- First, for the EU to apply a rights based approach, it would need to work more politically in development. The EU's understanding of a rights based approach to development aims to advance the design and the implementation of development interventions to better reach, and meanwhile empower, their target groups. Such a normative approach is supposed to not only treat symptoms but also to address the power-relations and incentive structures that constitute the root causes of development challenges. In other words, applying a RBA throughout the policy and programming cycle of a development intervention means taking a *normative* approach. For EuropeAid's evaluation function, this implies that its monitoring and evaluation systems touch upon political economy issues. Experience shows however, that for the Commission, taking a more political approach to development has so far been little more than a short-lived experience because it is deemed too sensitive.

- A second key concern revolves around the overall institutional support and guidance to systematically and consistently apply a human rights perspective in EuropeAid's evaluation function. For EuropeAid to systematically apply a RBA to its evaluations, the RBA would need to be backed by active and consistent support from the hierarchy. Support from the senior management should in turn translate into tangible institutional arrangements throughout the different thematic and operational services of the DG for the mainstreaming of the RBA to become a systemic concern. While the tool-box provides some guidance on the application of a RBA, this report finds that it lacks a clear identification of 'drivers of change' who will be held accountable for its implementation. Apart from a mid-term reassessment of the checklist-format, no particular provisions are foreseen to track progress, nor will the RBA-checklist be inserted in in-house reporting systems. As such, this report finds that the current RBA toolbox is not underpinned by a clear implementation strategy, nor does it provide a roadmap with well-defined targets.
- Finally, a third consideration revolves around EuropeAid's institutional culture and its readiness to comply with the objectives and principles of a RBA to evaluation. For donors, accommodating both human rights concerns and results-based management (RBM) into their M&E systems continues to be challenging, and that is no different for the EU. Moreover, this report finds that taking on a process-oriented, inclusive approach to evaluation, like the RBA stipulates, rather than a results – or action – oriented one, would make the evaluation process more complex and time consuming and would require a fundamental overhaul in EuropeAid's evaluation culture.

Human rights in the EU system for Integrated Impact Assessments

Since 2003 the EU has used a system of Integrated Impact Assessments to assess the potential economic, social and environmental impacts of its policy, regulatory and legislative initiatives. By assessing the overall impact of such 'major initiatives', the IA system aims to improve the quality and coherence of the policy development process, as well as to contribute to a more coherent implementation of the EU strategy for Sustainable Development. This report details the origins and the rules of procedures of the current IA system as it is regulated under its previous guidelines from 2009, and provides a forward-looking overview of some of the main changes under the recently issued new guidelines for impact assessment and better regulation. As such, this report identifies the IA system's main flaws and shortcomings, in general as well as in the area of human rights and development specifically.

While the IA system is generally regarded as a valuable policy tool and an intrinsic part of the Commission's policy development procedures, a number of critical weaknesses have been identified over the years. Some of these – though not all – have now been addressed in the new guidelines for IA, as part of the Commission's agenda for 'Better Regulation', released in May 2015. Fundamental handicaps in the EU's impact assessment system include the following issues:

- Based on the 2005 Inter-Institutional Common Approach to Impact Assessment, the Commission, the Council and the European Parliament should each assess the impact of their respective proposals and amendments, and develop the organisational means and resources to do so. Current practice however shows that, at the level of the European Parliament and the Council, the implementation of these provisions has been limited to non-existent. Limited in the case of the European Parliament, which in 2012 established a Directorate for Impact Assessment and

European Added Value and has since produced some 20 IAs for major legislative amendments. Non-existent for the Council, because they have assessed none so far. As a result, once a Commission proposal is significantly amended, the potential impact of the final legislative package remains, at least to some extent, unassessed. In its Proposal for a new Inter-institutional Agreement on Better Regulation (to be adopted by the end of 2015), the Commission again calls upon the European Parliament and the Council to carry out their own impact assessments on any substantial amendments they raise during the legislative process, hoping that ‘the new political mood’ in both institutions will provide ‘not just to commit to the principles of better regulation – but to make those principles stick’.

- Secondly, there is a perceived need for the Commission to be more transparent in the selection and targeting of its impact assessment work. In general, IAs are required for all major new initiatives and/or proposals with a significant impact. According to the 2009 guidelines, this implies all legislative proposals in the Commission Legislative and Work Programme (CLWP), a selection of non-CLWP legislative proposals with an anticipated significant impact, as well as major non-legislative proposals which define future policies (White Papers, action plans, expenditure programmes and negotiating guidelines for international agreements). These rules however leave considerable leeway for interpretation and, according to the European Court of Auditors, the decision on whether or not to execute an IA is as a result often not clear in practice.
- Third, there is a problem with the use and timing of stakeholder consultations to inform the IA process. Public input and scrutiny mechanisms like consultations are meant to serve as a verification check to ensure that IAs address the most relevant issues and offer a balanced and comprehensive assessment of all feasible policy options. Opinions from the IA Board have repeatedly stressed that draft IA reports should present more transparently the different views distilled from stakeholder consultations and, in order to enhance the IA’s accountability, explain better how stakeholders’ concerns were taken into consideration. The lack of such public scrutiny on IA drafts is all the more problematic as the Commission seems to use IAs mainly to gather and analyse evidence to improve its proposed initiative, rather than to actually question whether or not to go ahead with a proposal. It is fortunate in this regard that the Commission’s Better Regulation package includes new guidelines on stakeholder consultations. Among the new stipulations is the provision that stakeholders will from now on be able to share their views on the entire lifecycle of a given policy. Also, for the first time, public consultations will be able to also scrutinize delegated acts, which stipulate the technical or specific elements needed to implement the legislation adopted by the EP and the Council.

In theory, EU impact assessments should look into the potential impact of EU policies on human rights and developing countries. For development, any IA is formally required since 2009 to assess whether and in how far the proposed policy options may have an impact on the EU’s relations with developing countries. This provision relates strongly to the EU’s Policy Coherence for Development Agenda, which stipulates that all EU policies should work toward fulfilling its objectives in the area of development cooperation. The implementation of this obligation has however been limited to say the least, as analysis by CONCORD Denmark showed that between 2009 and 2013, less than 19% of the relevant IA reports actually took into account development considerations. While the new guidelines under the Better

Regulation Toolbox indeed provide improved guidance in this particular respect, it remains to be seen in how far this will translate into better practice. At the very least though, the new guidelines provide the development community, in- and outside the institutions, with more specific ‘handlebars’ to refer back to when holding the Commission accountable against its own commitments.

Concerning human rights impacts, the European Commission is since 2005 obliged to assess its policy proposals against the EU Charter of Fundamental Rights. In 2011 then, DG JUST issued ‘Operational Guidance’ describing for each methodological step of the impact assessment process, just how the fundamental rights aspect should be taken into account. Regarding external policies and their impact on human rights, these guidelines confirm that the Charter of Fundamental Rights applies equally to the internal and external actions of the Union, who is therefore under the obligation – in all its actions, externally as well as internally – to comply with the Charter. The strength with which this obligation has been taken on so far has varied, which may be why both the 2012 (and future, 2015) EU Action Plan on Human Rights and Democracy, as well as the Better Regulation Toolbox, strongly emphasise that human rights considerations should be integrated in the ex-ante impact assessments of EU policies.

While it is not within the scope and capacity of the current study to analyse all EU Impact Assessments (more than 700 between 2007 and 2014 alone), this report scanned a number of impact assessment reports by DG DEVCO since 2011, for their use of (human) rights language and whether or not they considered the impact of the concerned policy proposals on citizen’s rights. Across the 11 IA reports surveyed, this report identifies a variety of ways in which different types of human rights language, generalised or specific, feature throughout DG DEVCO’s impact assessments., yet none of them seemed to look into the potential human rights-related issues that may arise from the proposed development policy or regulation. Since this is too small a sample to be representative, this report concludes that more substantive research, similar to the aforementioned analysis done by CONCORD on development impacts, is necessary in order to gain a better understanding of the EU’s practice on taking into account human rights issues into its impact assessments.

Human rights in EU trade impact assessments

DG Trade also has a policy of submitting all major Trade Agreements to ‘Sustainability Impact Assessments’ in the early stages of negotiations. Human Rights have gradually found their place into the framework of SIAs, which rest on three pillars: economic, social and environmental impacts. EU practice on assessing human rights impacts *ex ante* is steadily improving, as is shown by the Draft New Handbook on trade SIAs or by the Operational Guidance on taking account of fundamental rights in IAs. Yet, such practice is still deficient on a number of counts.

First of all, the inclusion of human rights impacts in the middle of a wide array of other issues tends to dilute human rights issues whereas they should be considered a number one priority. Additionally, such an approach negates the specificity of human rights as based on legal standards, and fails to put such normative framework front and centre of the assessment. This encourages findings in which human rights impacts are not expressed in terms of compliance or violations of the catalogue of rights, but as extrapolations of economic scenarios.

Methodologically, HRIAs as practiced by the EU are also flawed in a number of ways. First of all, there is no guidance or accepted framework for conducting a proper screening of relevant human rights likely to be affected, which therefore leads to a quasi-systematic omission of civil and political rights from the scope of the assessments, on the premise that they bear no direct connection to economic policies such as trade. For what regards the analysis of the impacts as such, official EU methodology mandates consultants to base their work on two mutually reinforcing methods: data analysis through modelling and stakeholder consultation. In practice however, the first method has been found to be much more decisive than the second in the conclusions of the different reports. This is problematic given the paucity and lack of reliability of many datasets, especially in developing countries. Moreover, as indicated above, this tends to keep the focus on social rights directly impacted by economic variations, to the detriment of other types of (non-quantifiable) rights.

Concerning the extent to which stakeholders are effectively consulted, the picture is also mixed. If stakeholder consultations are conducted in all cases, the efforts put in by the consultants to reach out to vulnerable stakeholders who do not have the means or resources to participate spontaneously is deemed insufficient and leads to truncated findings. Regarding the use of the information gathered through consultations, as indicated in the above paragraph, it comes only second to quantitative data and modelling, thereby causing them not to be firmly anchored in the experience of affected stakeholders.

Regarding the effectiveness of HRIAs in terms of the influence they have on the decision-making process, the analysis is also disappointing. Given the processual shortcomings described above, the recommendations which are formulated are generally rather shallow and over-general, sometimes to the point of self-evidence. In any event, SIA findings have never seriously challenged the usual course of action of the Commission.

As indicated above, the Commission has recently taken steps to update its Handbook on Trade Sustainability Assessments, and the Draft New Handbook contains a very welcome clarification that human rights should be part and parcel of the impacts studied. However, the Draft New Handbook is also very general on methodological aspects and is unlikely, in its current shape, to address the flaws identified above. Hopefully the consultation process to which the Draft New Handbook is currently subject will allow to redress this weakness.

Finally, concerning the ex-post evaluation of the protection of human rights which are included in FTAs most work still needs to be done. It is not yet well understood how the integration of human rights or social clauses in FTAs affects the protection of specific human rights. Little or no evaluations and data are available to assess the impact. In this chapter we presented the results of an exploratory study, based on a new dataset created for FRAME, which focused on freedom of association and collective bargaining, two of the key rights in FTAs. The focus on these rights was chosen because academic literature and data is available on which we were able to build. This exploratory study did not find any direct observable impact on the protection of these rights. To the contrary, over time less protection might be found. However, this report also cautions against drawing strong conclusions on the basis of these findings since they can be explained by a series of factors and do not establish a strong causal link between the integration of specific rights in FTAs on the protection of these rights on the level of countries.

Human rights provisions in practice: the EU-Colombia trade agreement

In order to further analyse the ex post impact of the integration of human rights provision in FTAs, this report includes an in-depth case study of the 2012 EU-Colombia trade agreement. Methodologically speaking, it is far from straightforward to isolate the effects of one parameter, notably the ratification of a trade agreement, on the protection of specific rights. However, one can further investigate the ex-post impact of an FTA in other ways, namely by focusing on what happens in terms of ‘follow up’ once an agreement has come into force.

Chapter five therefore analyses what – if anything – happens with the specific human rights provisions after an FTA comes into force. What changes does it generate in terms of legislation (*de jure*) and enforcement of rights (*de facto*)? As such, the case-study assessed the perceptions voiced by different stakeholders on the potential of this trade agreement to strengthen the enforcement of the protection of labour rights.

Based on a series of interviews in Bogotá and Brussels, the case-study finds that a majority of stakeholders are sceptical about the impact of the provisions under the trade agreement and many do not expect to observe any changes in terms of concrete action to further strengthen the protection of human rights and labour rights. A partial explanation for this lies in the nature of these agreements, which rely on a spirit of partnership for each party to implement, monitor and enforce their respective commitments and obligations under the various stipulations of the trade agreement. Yet, if these commitments do not materialize, the agreement arguably offers little in terms of alternative enforcement potential. The conclusions of the case-study explore alternative ways to ‘enforce beyond borders’ and suggest that the use of private enforcement mechanisms might be considered as one alternative or complementary route to strengthen the enforcement of labour rights provisions through trade.

Conclusion

A number of cross-cutting observations are identified by this report for further consideration.

Overall, there seems to be little evidence of EU impact assessments adequately taking into account human rights considerations. Both in general, as well as for trade-specific SIAs, practice is far more limited than what policy commitments, tool boxes and guidance material would suggest. While further research is necessary, initial scanning exercises on the IA and SIA reports show very limited analysis on the impact of a policy intervention on the realm of human rights.

On the one hand, methodologically speaking, assessing the impact of EU external action through trade and development remains a daunting task. This holds true in general, as Human Rights Impact Assessments face the fundamental challenge of establishing causality and attribution between an external action, like a trade or development measure, on inherently ill-quantifiable and multi-faced legal standards such as human rights. As described above however, the methodological guidance offered is limited to general principles and/or biased in favour of economic modelling, with little consideration for the ‘human’ dimension of a measure and what this may entail in a particular country or sectorial context. More ‘hands-on’, human rights specific methodological guidance per policy area might help EU staff and contracted

consultants to take into approach human rights in a more practical, targeted manner when conducting impact assessments. Consequently, one might hope that findings and recommendations of IAs concerning human rights will become more credible and more influential on policy-makers, thereby raising the profile of human rights issues in the policy cycle.

On the other hand, toolkits and methodological guidance can only offer so much as a general starting point since they remain, by definition, theoretical frameworks and templates. Actual insights and best-practice however, have to come from practical experience and comparative learning. So far, knowledge on the human rights impact of EU trade and development policies remains by far the least developed aspect of the post-Lisbon framework for human rights. Current efforts, ranging from commitments toward mainstreaming a rights-based approach to development, to operational guidelines on taking into account fundamental rights in IAs, have been limited to studying and promoting the concept itself, often without much consideration about the practical implications or the overall feasibility of its implementation.

Without proper knowledge-generation feeding into the relevant policy processes, human rights provisions across the spectrum of EU trade and development instruments risk becoming box-checking exercises without much further use. It is more important therefore, to entertain realistic ambitions and doing things right from the beginning, rather than making lofty commitments followed by broad but vague implementation schemes which do not lead to practical follow up or learning. Keeping in mind the methodologically challenging nature of HRIAs in general, and the specific dynamics and particularities of working within the EU policy-making system, it is worth considering a more targeted pilot-approach, focussing on just a few critical policy or human-rights issues. From thereon, a community of practice can be built to help further develop the attitude, skills and capacity required to make human rights a core element of the IA and evaluation systems.

List of abbreviations

ACP	Group of African Caribbean and Pacific states
AfC	Agenda for Change
AFL-CIO	American Federation of Labour and Congress of Industrial Organizations
ALOP	Asociación Latinoamericana de Organizaciones de Promoción al Desarrollo
ANDEMOS	Asociación Colombiana de Vehículos Automotores
ANNALAC	Asociación Nacional de Productores e Industriales Lácteos
BEST	Business Environment Simplification Task Force
BIA	Business Impact Assessment
BN	Briefing Note
BP	British Petroleum
CARICOM	Caribbean Community
CBA	Cost Benefit Analysis
CCA	Compliance Cost Assessment
CCOFTA	Canada-Colombia Free Trade Agreement
CESCR	Covenant on Economic, Social and Cultural Rights
CETCOIT	Comisión Especial de Tratamiento de Conflictos ante la OIT
CGE	Computable General Equilibrium
CLWP	Commission Legislative and Work Programme
CGT	Confederación General del Trabajo
CoEU	Council of the European Union
CSO	Civil Society Organisation
CPR	Civil and Political Rights
CSR	Corporate Social Responsibility
CTA	Associated Work Cooperative

CTC	Confederación de Trabajadores de Colombia
CUT	Central Unitaria de Trabajadores de Colombia
DAC	Development Assistance Committee of the OECD
DEVCO	Directorate General for International Cooperation and Development
DCI	Development Cooperation Instrument
DfID	Department for International Development UK
DG	Directorate General of the European Commission
DIHR	Danish Institute for Human Rights
EC	European Commission
ECA	European Court of Auditors
EEAS	European External Action Service
EFTA	European Free Trade Association
EIDHR	European Instrument for Democracy and Human Rights
ENS	Escuela Nacional Sindical
EP	European Parliament
EPA	Economic Partnership Agreement
EPRS	European Parliamentary Research Service
ESCR	Economic Social and Cultural Rights
EST	Empresas de Servicios Temporales
ETUC	European Trade Union Confederation
EU	European Union
EIA	Environmental Impact Assessment
FACB	Freedom of Association and Collective Bargaining
FARC	Fuerzas Armadas Revolucionarias de Colombia
FEDEGAN	Federación Colombiana de Ganaderos

FIAN	FoodFirst Information and Action Network
FIDH	International Federation for Human Rights
FLA	Fair Labour Association
FLO	Fair-trade Labelling Organization
FQD	EU Fuel Quality Directive
FTA	Free Trade Agreement
GAO	United States Government Accountability Office
GIZ	Deutsche Gesellschaft für Internationale Zusammenarbeit
GSP	Generalised System of Preferences
HR	Human Rights
HRBA	Human Rights Based Approach to development
HRD	Human Rights Defender
HRC	United Nations Human Rights Council
HRIA	Human Rights Impact Assessment
HRIAM	Human Rights Impact Assessment and Management
HRVP	High Representative Vice-President of the European Union
HQ	Head Quarters
IA	Impact Assessment
IAB	Impact Assessment Board
IBLF	International Business Leaders Forum
ICCPR	International Covenant on Civil and Political Rights
IFC	International Finance Corporation
ILO	International Labour Organization
ITUC	International Trade Union Confederation
JFC	Justice for Colombia

JEU	Joint Evaluation Unit
LAP	Labor Action Plan
M&E	Monitoring and Evaluation
MINT	Ministerio del Trabajo de Colombia
MRE	Ministerio de Relaciones Exteriores de Colombia
MSC	Marine Stewardship Council
NGO	Non-Governmental Organisation
NORAD	Norwegian Agency for Development Cooperation
OECD	Organisation for Economic Cooperation and Development
OIDHACO	International Office for Human Rights Action on Colombia
PCD	Policy Coherence for Development
PND	Plan Nacional de Desarrollo
NTF	Norwegian Trust Fund
RBA	Rights Based Approach to development
RBM	Results Based Management
RED	EU Renewable Energy Directive
RSPO	Roundtable on Sustainable Palm Oil
RSB	Regulatory Scrutiny Board
SAI	Social Accountability International
SAS	Simplified Stock Associations
SENA	Servicio Nacional de Aprendizaje
SIA	Sustainability Impact Assessment
SLIM	Simplification of the Legislation of the Internal Market
SME	Small and Medium Enterprises
SWD	Staff Working Document

TA	Trade Agreement
TEU	Treaty of the European Union
TFEU	Treaty on the Functioning of the European Union
TISA	Trade in Services Agreement
TNC	Transnational Corporation
ToR	Terms of Reference
TUC	Trades Union Congress UK
HRC	Human Rights Council of the United Nations
UN	United Nations
UNCO	United Nations Common Understanding on the Human Rights Based Approach to Development
UNDG	United Nations Development Group
UNFCCC	United Nations Framework Convention on Climate Change
UNFSS	United Nations Forum on Sustainability Standards
UNICEF	United Nations Children’s Fund
US	United States of America
USAID	United States Agency for International Development
USDL	United States Department of Labor
USG	United States Government
VSS	Voluntary Sustainability Standards
WB	World Bank
WTO	World Trade Organisation

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I. Introduction

Policy interventions in the area of trade and development can affect human rights in various ways, not always intentional, directly or even negatively. Yet such impacts, and the process or causal linkages through which they affect the citizens concerned, constitute issues of growing concern in an increasingly globalised world. Trade liberalisation can generate economic growth but may affect the right to food if it weakens the protection for smallholder farmers, effectively hampering the economic productivity and the development potential of the affected parties. Likewise, despite good intentions, development programmes have been known to strengthen unjust power relations, to negatively impinge on workers' labour rights, or even lead to forced displacement.

Increasingly aware of these risks, policy-makers like the European Union are committed to assess, and if necessary re-evaluate, their policies according to their potential impacts abroad. Particularly so where the policy concerned is believed to have a negative bearing on people's rights and development opportunities. The entry into force of the Lisbon Treaty has firmly anchored the EU's role as a normative global actor in this regard, and requires all areas of its external action to consistently and coherently 'consolidate and support democracy, the rule of law, human rights and the principles of international law' (TEU, Art 21, 2-b).

The Union's trade and development cooperation policies, two of the main pillars of EU foreign policy, are thus not only well placed but also legally required to positively contribute to the promotion and protection of human rights worldwide. In addition, the EU-system is also found to be well-equipped to do so. In a first deliverable within this Work Package (WP 9), Beke et al. (2014) mapped out the widely diversified toolbox of policy instruments and mechanisms at the EU's disposal to integrate human rights concerns throughout the various aspects of its trade and development cooperation.

Building on this comprehensive mapping, the present report aims to assess to what extent the EU is equipped – and willing – to effectively use and follow up on these tools and commitments. On the one hand, we do so by analysing the extent to which the various evaluation and impact assessment procedures, ex-ante and ex-post, take into account human rights considerations in their objectives as well as throughout their procedures. Based on an extensive literature review and a select number of interviews with key stakeholders, we aim to address the following two key overarching research questions:

1. What are the tools and the legal provisions in place for the ex-ante and ex-post evaluation of trade and development policies?
2. To what extent are these tools and provisions geared toward, and effectively applied to ensure that the EU's human rights obligations are usefully taken into account?

Secondly, the report offers findings from a comprehensive case study on the use and the perceived impact and effectiveness of one of the EU's most promising mechanisms for human rights promotion through trade. The key objective of this case study is to gain a better understanding of what the integration of labour rights standards under the sustainability chapters of a new generation of EU trade agreements entails in practice. How the practical application of such provisions and mechanisms plays out in a particular country context, and how the different stakeholders involved perceive the usefulness and

effectiveness of the sustainability chapter as an instrument to protect and promote labour rights standards.

The aim of the present study is thus not to offer an analysis of the actual *impact* of the trade agreement. However, it aims to provide insights on the different types of challenges encountered in the application of specific provisions under the sustainability chapter of the EU-Colombia agreement, and its overall potential benefits and limitations in terms of contributing to changes in the realm of labour rights. The main aim of this exercise is thus to gain a better understanding of how governance through trade plays out in the targeted ‘recipient’ country, in this case Colombia.

The report proceeds as following. Chapter II first sets the scene by describing the general underlying principles of Human Rights Impact Assessments (HRIA) and subsequently provides an analysis of what such a rights based approach would entail for the EU’s evaluation system in the area of development cooperation. The aim here is to assess to what extent EuropeAid’s evaluation function is equipped to take into account human rights considerations, and particularly in view of recent commitments regarding a Rights Based Approach to Development. By mapping out the contours of the evaluation system, addressing its strengths and weaknesses, we seek to assess in how far the current evaluation function, in its current outlook, is equipped to adequately apply a rights based approach to its evaluations. Finally we identify a set of three structural considerations regarding the overall feasibility for EuropeAid to mainstream human rights into its day-to-day evaluation work.

While the EU does not apply human rights impact assessments as such, it does have a well-developed system of ex-ante Integrated Impact Assessments at its disposal to assess the potential impact of major legislative and policy proposals. Chapter III thus describes the Commission’s impact assessment-system, with a particular focus on two types of potential impacts, notably the consequences of EU policy-making on developing countries and the potential implications of spill over effects on the human rights of citizens in third countries.

Chapter IV first offers a discussion on the particular challenges and opportunities within the field of trade when it comes to conducting human rights impact assessments. We illustrate such challenges and opportunities based on the theoretical foundations of the EU’s assessment of the human rights impacts of its trade policies. Moreover, we test the effectiveness with which EU trade policies are able to assess their impacts on human rights, either *ex ante*, or *ex post*, and to adapt them accordingly. To do so we have reviewed the methodology, the recommendations and the influence of the impact assessments conducted so far in the field of trade. Subsequently we suggest a methodology for *ex post* trade impact assessments on labour rights, focussing in particular on potential changes in the right to freedom of association and collective bargaining (FACB).

A fifth Chapter takes on a slightly different approach in the sense that it offers a case-study on the practical implications and perceived effectiveness of one particularly promising feature for human rights promotion in EU trade policy, notably the sustainability chapter of the 2013 EU-Colombia trade agreement. Focussing on the particular monitoring and dialogue mechanisms in place under the agreement, we aim to gain a better understanding of what the integration of labour standards under the sustainability chapters of the

new generation of EU trade agreements entails in practice, and in a particular country context. As such, this case-study provides insights on the various limitations and areas of potential for trade to contribute to labour rights protection.

Drawing from the findings from the respective sections mentioned above, the final part of this report then distils a set of key conclusions regarding the EU's overall ability, and its perceived ambitions, to build and act upon the evidence base required to make informed decisions when it comes to foster human rights throughout its trade and development policies.

II. Human rights and impact assessments

Policy makers, and increasingly also private sector actors, try to foresee and address the impacts of their interventions by using various assessment and evaluation tools. Traditionally, these tools have focussed on economic and environmental impacts, with little attention for the human dimension of their policies. Human Rights Impact Assessments (HRIA) offer a fairly recent policy-tool, designed specifically to address this blind spot. In addition, existing impact assessment (IA) and Monitoring and Evaluation (M&E) practices also increasingly incorporate human rights considerations into both their scope and processes.

Section A of this chapter sets the scene for impact assessments in the area of human rights, before entering an EU-specific context. It describes the use and principles of Human Rights Impact Assessments (HRIA), focussing particularly on the state of play in terms of practice and methodological guidance. Section B subsequently moves the discussion to the context of EU Development evaluations. Here we analyse recent commitments toward applying a rights based approach to EU development cooperation and what this implies for DG DEVCO's evaluation function.

A. Human Rights Impact Assessments

1. Concept, origin and essential elements

HRIAs are defined as a policy tool designed to systematically identify and measure the potential and real effects of policies, programmes, projects, legislation, or any other intervention on human rights. They analyse a wide range of different activities, ranging from development programmes, over national legislation, to the activities of transnational corporations (TNC) and non-governmental organisations (NGO) (Harrison and Goller, 2008: 588).

With regard to the typology, HRIAs can be done before and/or after the implementation of a policy intervention. As such, HRIAs can be used to make sure that the human rights implications of a policy are taken into account when the policy is being developed, essentially to assess its potential implications ahead of implementation (*ex-ante*). On the other hand, HRIAs can be applied to assess the impact of a policy intervention on a given human rights situation, to evaluate the identified effects after implementation (*ex-post*) (Harrison and Stephenson, 2010: 14). A second typological distinction concerns the nature of the policy intervention under scrutiny. Essentially, HRIAs can apply both to policies and programmes that are directly and intentionally aimed at changing the human rights situation in a country, sector or project, as well as to policies and programmes whose primary purpose is in fact not related to human rights, but could potentially have an unintended effect on them. Across these two axes, four categories appear, though in practice HRIAs are likely to differ methodologically and substantially on a case-by-case basis and often relate to more than one of the below categories at the same time (Landman, 1995):

- *Ex-ante* impact assessments of policies that *intentionally* seek to ensure that future activities will positively change the human rights situation.
- *Ex-ante* impact assessments of policies with a potential but *unintentional* bearing on human rights.

- *Ex-post* impact assessments that seek to identify and measure the effects of activities *intentionally* designed to change the human rights situation.
- *Ex-post* impact assessments of activities which might have had an unintentional effect on human rights.

It is worth noting that HRIAs do not create additional human rights obligations to states. Their core aim is to assess to what extent a state's international legal human rights obligations are consistent with (the impact of) other legal obligations it has agreed to, for instance under the framework of a trade agreement. HRIAs are thus not meant to examine a state's overall human rights track record, nor its compliance with existing human rights obligations, but rather to assess the compatibility of the policy intervention with pre-existing international and national human rights legislation (HRC, 2011:5).

HRIAs have been around since the late 1990s and stem from more established types of assessment and evaluation tools. At their origin, a number of inter-linked factors are believed to have spurred their increasing application. First, the late 1990's was a time when the United Nations system and European donor agencies expressed an increasing interest in rights-based approaches to development. This implied taking into account human rights considerations throughout the policy cycle of development planning and programming, including the development of methodologies, aimed at assessing the human rights impacts of foreign aid investments and development projects. Second, on a parallel track, a wide variety of non-governmental organisations, human rights advocates, inter-governmental organisations and, increasingly, private sector stakeholders began promoting HRIAs as a way to enhance corporate accountability and due diligence. And one way of contributing to such corporate social responsibility (CSR) is through rights-focused impact assessments (Harrison, 2012). Finally, as human rights practitioners focus more and more on issues related to economic, social and cultural rights (ESCR), greater consideration is granted to monitoring and evaluating the human rights dimension of policies and activities in those areas (Walker, 2009). Despite being a relatively new tool, HRIAs have been conducted in a fairly broad range of different fields so far, yet in terms of application, it is fair to say that toolkits and methodological guidance are far more abundant than actual HRIA-reports. Box 1 below provides a brief overview of the existing practice in the main areas where HRIAs have gained more prominent usage.

Box 1: Main areas of human rights impact assessments

Development

Development cooperation is the field where much of the early work on HRIAs took place, focusing on the human rights dimension of development policies and programmes, and the impact of civil society organisations and NGOs. As noted in the text above, this relates to an ongoing trend toward a human rights-based approach to development, which in turn requires donor agencies to identify and measure the human-rights dimension of their development programmes and investments. NORAD, the Norwegian Agency for Development Cooperation, was the first institution to develop methodological guidance for applying HRIAs to development interventions in a 'Handbook in Human Rights Impacts Assessment: State Obligations, Awareness & Empowerment' (NORAD, 2001). Some individual studies commissioned by the Dutch government followed, notably one concerning nine human rights NGOs (Landman and Abraham, 2004) and one on the Dutch development programme on governance and human rights (Biekart et al.,

2004). Ever since, there appears however to have been little recent work building on these early experiences. As such, it is interesting to follow-up on the emerging narrative on mainstreaming human rights in development cooperation and how this narrative will translate in the monitoring and evaluation culture of the development policy (see chapter II.B of this report).

Trade

Trade policy currently provides the most dynamic area of HRIA literature. While UN bodies, national parliaments and NGOs have been vocal in calling for a systematic application of HRIAs for trade agreements, practical application however seems to lag behind somewhat. Of the limited number of HRIAs of trade agreements currently available, the first one stems from 2006, conducted by the Thailand Human Rights Commission and concerns the US-Thailand Free Trade Agreement (FTA), covering four broad areas – agriculture, environment, intellectual property, and services and investment – as well as the process of negotiation and the apparent lack of public participation therein (Harrison, 2010a: 12). Subsequently, in 2009, the FoodFirst Information and Action Network (FIAN) conducted an impact assessment on the liberalisation of trade in a number of agricultural commodities on the right to food in Ghana, Honduras, Indonesia, Uganda and Zambia (Paasch, 2009). Walker then in 2009 applied the HRIA approach to assess the Dominican Republic – United States- Central America FTA, focusing on the impact of intellectual property provisions on the right to health and related rights (Walker, 2009: 123-186). The Canada-Colombia FTA (CCOFTA) since 2010 also contains a Human Rights Reporting Process and, although not explicitly termed a HRIA, the CCOFTA arguably is ‘the first trade agreement in the world to include an ongoing human rights impact assessment’ (House of Commons, 2010). Finally, in 2011, The EU-India FTA was subjected to a right to food impact assessment (Paasch et al., 2011).

Children’s Rights

HRIAs specifically focussing on the rights of the child use the UN Convention on the Rights of the Child as the legal baseline for assessment. While multiple methodological toolkits for children’s rights impact assessments are available, their actual implementation has so far been less common.¹ Primary examples of conducted HRIAs in this area include a study on the impact of price rises in electricity on children’s rights in Bosnia and Herzegovina, done by UNICEF and a range of NGOs (UNICEF, 2007) and an assessment of the impact of high density housing and waste management in New Zealand. In 2013, UNICEF and the Danish Institute for Human Rights launched a guide for companies to assess how their policies and processes relate to their responsibility to the protection of children’s rights. Covering ten business and children’s rights principles across some 58 criteria, the guide aims to integrate children’s rights considerations into ongoing business impact and other risk assessments (UNICEF and DIHR, 2013).

Transnational corporations

¹ Leading methodological toolkits include models developed by the Scottish Commissioner for Children and Young People (Paton and Munro, 2006), the Children’s Rights Alliance in Ireland (Corrigan, 2006), and the Office of the Children’s Commissioner in New Zealand (Mason and Hanna, 2009).

The impact of multinational companies' business interventions on human rights has become one of the most dynamic areas for HRIAs. The recent increase in both methodological guidance and assessments have, at least to some extent, to do with the work of the UN Special Representative on Business and Human Rights, John Ruggie, who has repeatedly urged companies to respect their duty of due diligence, particularly -though not exclusively- through the use of human rights impact and compliance assessments (HRC, 2007).

A wide variety of toolkits for HRIAs on business conduct have been developed in recent years, ranging from the more general, broadly applicable models to more specialised tools for particular projects and industries. The most widely applicable HRIA guidelines for TNCs are formulated in the Guide to Human Rights Impact Assessment and Management (HRIM) by the International Finance Corporation (IFC) and the International Business Leaders Forum (IBLF). Throughout a comprehensive seven stage methodological process, the Guide to HRIM provides detailed but flexible guidance for companies wanting to assess their potential and/or existing human rights impacts and how to integrate those considerations into the relevant managements systems (IBLF & IFC, 2013). Other toolkits are designed to assess the impact of particular types of projects in developing countries. For example, the guide by International Alert on Conflict Sensitive Business Practice provides tailored guidance to extractive industries active in conflict regions. As such, it also touches upon sensitive issues like transparency, corruption and social investment (IA, 2005). Another interesting methodological tool is the online 'Getting it Right' HRIA Guide for Foreign Investment Projects, which was developed by Rights and Democracy as a tool aimed at local civil society organisations (CSO), instead of at TNCs, to help them assess and raise human rights impacts on local communities.²

Contrary to the range of HRIA toolkits available to assess the impact of TNCs, the actual impact assessments that are publically available are far fewer, although their number has increased in recent years. One of the early examples is the human rights assessment of a project by British Petroleum (BP) in Indonesia, covering a wide range of indigenous, fundamental, and labour rights (Smith et al., 2002). Other examples of published HRIAs on TNCs include three studies conducted by the independent research organisation Nomogaia, respectively on, tree plantations in Tanzania, a gold and silver mine in Indonesia and a uranium extraction project in Malawi and (Nomogaia 2009a, 2009b, 2010a). The aforementioned 'Getting it Right' model by Rights and Democracy was also applied by local NGOs in the Philippines, Tibet, the Democratic Republic of Congo, Argentina and Peru (R&D, 2007).

As mentioned above, HRIAs did not originate in a vacuum but developed out of other, more established, types of impact assessments. Historically, IA focused exclusively on the likely economic effects of policy interventions, largely blindsiding the impacts on people's lives and habitat. This led to the development of environmental and social impact assessment methodologies as an alternative or additional way to examine the effects of e.g. trade and investment agreements. While SIAs still do not enjoy the same level of policy support and legal promotion as Environmental Impact Assessments (EIA), both constitute over

² The online tool to conduct the HRIA is available online: <http://hria.equalit.ie/en/>

four decades of methodological guidance for best practice and have generated a proliferation of more sophisticated and specialised impact assessment literature (Harrison, 2010: 3).³

HRIA frameworks are among these recent additions and draw on multi-disciplinary experiences from fields including development studies, social and environmental sciences, M&E, business administration and public policy. Since HRIAs largely originated as an extension or aspect of SIAs, there is considerable overlap between the two.⁴ More so, given the abundance of methodologies for Environmental Impact Assessments and Social Impact Assessments (SIA), it is worth questioning the overall added value of HRIAs and why practitioners and policy-makers should choose to undertake an HRIA instead of other types of assessments to explore the human dimension of a given policy intervention (Walker, 2009: 3).

While the similarities with other types of Impact Assessments are obvious, its proponents argue that there are significant substantive and methodological differences which distinguish a human rights focused approach from other impact assessments. As such, a number of original aspects of the HRIA framework can be observed, which potentially offer important contributions to the promotion and protection of human rights (Harrison, 2011: 166-167; WB NTF, 2013: 7-8).

- First and foremost, HRIAs are based on the normative framework of binding international human rights legislation. Contrary to SIAs, HRIAs not only aim to measure the impact of policy interventions on the living conditions of populations, but also aim to assess to what extent the countries comply with their international human rights obligations (IFDH, 2008: 13). This legal framework constitutes an objective standard of assessment, more so than the sometimes vague or seemingly arbitrary ‘social’ principles used in other types of impact assessments (e.g. on poverty, equity, health, education, etc.) (Harrison, 2010b: 5). Also, and perhaps more importantly, the framework of international human rights law gives HRIAs the moral legitimacy and legal accountability to determine clear minimum ‘thresholds’ of what is acceptable or not. Whereas other impact assessments tend to speak in terms of tolerable ‘trade-offs’, where the differentiated impact of a policy or programme creates both ‘winners’ and ‘losers’ and decisions are made depending on the explicit or implicit priority-setting of policy-makers, HRIAs identify a minimum level of universal conditions of human dignity below which it is unacceptable to go, whatever the greater good or potential gains involved (Walker, 2009: 47).
- HRIAs engage international and national legal human rights actors, institutions, instruments and mechanisms. They draw upon developed jurisprudence and put pressure on ‘duty-bearers’ to follow up on the recommendations formulated in the impact assessment. As such, HRIAs strengthen democratic accountability and inclusion (Harrison and Goller, 2008: 611).

³ The International Association for Impact Assessment (IAIA) collects a wide variety of resources and guidelines on over 50 types of impact assessments, please see online: <http://www.iaia.org/publications-resources/>

⁴ Walker (2009) identifies five general areas of convergence between HRIAs and SIAs: i) the importance of public participation; ii) the use of this public participation as a means to empowering the communities concerned; iii) the focus on examining impacts on individuals and groups, at a differentiated level of analysis; iv) a multidimensional outlook on the range of inter-related issues that affect peoples’ lives across different dimensions; and v) the importance of monitoring and accountability (Walker, 2009:41-42).

- In undertaking HRIAs, rights-holders are not perceived as passive study-subjects but rather they are encouraged to participate and contribute to the assessment. HRIAs, contrary to common practice in other types of assessments, thus go beyond consulting authority or specialist perspectives and therefore enhance the empowerment and ownership of local communities as rights-holders (De Beco, 2009: 166).
- HRIAs differ from other impact assessments in the way they address human rights issues, particular with regard to the level of detail and overall comprehensiveness of the analysis. While other assessments often also include notions of equality, participation, transparency and accountability, HRIAs do so in a more systematic and comprehensive manner, both in the process of conducting the impact assessment and in analysing the design, negotiation, implementation and impact of the policy or programme at hand (Harrison, 2011: 167). Regarding the level of analysis, a human rights focused impact assessment takes on a more tailored approach in the sense that its focus shifts from aggregate welfare or growth to disaggregated impacts, including on vulnerable, disadvantaged or marginalised people. Such a disaggregated perspective is a distinctive feature of a human rights-based assessment, not commonly found in other types of impact assessments (Baxewanes and Raza, 2013: 14).
- Finally, where other impact assessments are usually selective in the rights they aim to cover, HRIAs fully embrace the notion that human rights are universal and interlinked. As such, the HRIA framework applies to civil and political rights just as much as to economic, social and cultural rights. The fact that HRIAs recognise these rights as interdependent and interrelated further necessitates and reinforces a comprehensive cross-sectorial approach in the assessment strategy and promotes international policy coherence. Indeed, as line-ministries and donor agencies often lack effective coordination mechanisms to ensure policy coherence, the mainstreaming of human rights offers a legitimate and legally mandated common framework to change institutional cultures (MacNaughton and Hunt, 2011).

Besides the potential benefits over other impact assessments, HRIAs also hold some specific risks to keep in mind when undertaking them:

- HRIA frameworks can be unbalanced in scope and narrative. It is common for impact assessments in general to focus exclusively on more easily quantifiable short-term impacts, rather than on more long-term effects that are less easily identified. Harrison therefore warns that HRIAs should not perpetrate a ‘dumbing down’ process on human rights promotion. Also, the normative focus on international legal obligations risks becoming a vacuum-trap when HRIAs fail to adequately take into account the broader social and environmental impacts of a policy intervention. An HRIA bias toward human rights violations may also lead to a disregard of potentially positive human rights impacts (Harrison, 2010b: 13).
- Framing the impacts of policy interventions as human rights concerns may externalise them from the policy or programme at hand. Ironically, while HRIAs aim to mainstream human rights concerns throughout e.g. trade and development policies, framing policy impacts as human rights issues, and engaging with the relevant human rights bodies and regulations, risks presenting them as ipso facto ‘non-trade or –development’ concerns. Effectively making the human rights impact

of a policy intervention a ‘problem’ for the human rights community, not for the trade or development community (Walker, 2009: 205).

- Adopting a human rights lens necessarily politicises the actors involved since it requires a distinction between rights-holders and duty-bearers, and aims to contribute to the empowerment of the former group, potentially affecting the interests of the latter. As such, HRIAs often involve a real risk of politicisation, meaning a shift in focus, away from the impact at hand toward a context of power dynamics. Politicisation may have significant consequences regarding the overall desirability of the project, e.g. in terms of scope and quality of stakeholder consultations. The risk of politicisation, and whether it overrides the benefits of the HRIA, should therefore be considered on a case-by-case basis and depends to a large degree on who executes the impact assessment and the overall culture of human rights protection in the country concerned (WB NTF, 2013: 34-35).

Regarding the scope of HRIAs, the question of which human rights are considered depends on the nature of the policy intervention that is being examined. In general however, experience with past HRIAs displays a bias in favour of economic, social and cultural rights (ESC), which comparably receive more attention than civil and political rights (CPR) (Harrison and Goller, 2008: 611). Such ESC rights include the right to food, water, health, work and education, yet in general there is a tendency among policy-makers to treat ESC rights as second rate to so-called core-obligations (HRC, 2007: 11). In a similar vein, it is a well-known observation that states, when exposed to often conflicting obligations from different international agreements, tend to prioritise those which can lead to sanctions in case of breach, which is the case for instance with the World Trade Organisation’s dispute settlement mechanism, or under certain conditionality clauses in bilateral trade agreements, while they often lack a proper understanding of the legally binding nature of human rights obligations (Paasch, 2011: 5). Under international law however, human rights enjoy priority over other legal obligations, including those arising from trade agreements (HRC, 2009: 15-16). As such, HRIAs have the potential to bring both civil and political as well as economic, social and cultural rights centre-stage.

2. Methodological features and challenges

In order for HRIAs to meet the potential advantages compared to other types of assessments, the research is to be based on a rigorous methodological framework. This is particularly the case since more and more actors, including governments and private sector stakeholders are starting to use HRIAs and the associated terminology. Harrison points in this regard to the danger that, without a clear set of minimum methodological requirements of what an HRIA process should entail, the concept will lose its status as a robust tool for evidence-based policy-making and human rights protection. Widespread usage without universally agreed methodological standards could indeed result in the normative repackaging of existing risk assessments, downgrading HRIA practice to a merely bureaucratic box ticking exercise, or even the misuse of HRIAs as a means to justify or dismiss a policy or business intervention, regardless of its actual impact or merits (Harrison, 2011: 171-172).

HRIAs have been around for little more than a decade and, although no longer in their methodological infancy, they are still a policy tool in the making. Given the wide range of different fields of application, and the variety in actors using them, there is no universally approved, formalised methodology yet and

methodological discussions require further elaboration and practical fine-tuning. Some of the methodological toolkits discussed in box 1 however provide a good basis for basic principles and lessons learned. The Guiding Principles on Human Rights Impact Assessments of Trade and Investment Agreements by UN Special Rapporteur on the Right to Food, Olivier de Schutter, in particular present an important first step towards a more harmonised approach (HRC, 2011).

The Guiding Principles argue that a human rights-based approach, and its credibility and effectiveness require the fulfilment of five interlinked minimum conditions. First, whoever undertakes the HRIA should always be independent from the actors responsible for the policy intervention in question. Secondly, the sources, data and methodological assumptions used, as well as the HRIA's outcomes, should be presented in a transparent manner. Third, the research process should allow for public submissions and affected right-holders should receive all available information to guarantee their inclusive participation. Fourth, it is argued that HRIAs require multidisciplinary teams of experts and sufficient financial resources in order to ensure high-quality work. Fifth and finally, HRIAs are meant to inform policy decisions and should therefore feed into the decision making process that approves or denounces a policy intervention (*ex-ante*) or that addresses the effects of a policy in place (*ex-post*) (HRC, 2011: 9-11).

While practice differs on a case-by-case basis, depending on the timing, scope and on the people conducting the exercise, HRIA literature has resulted in a broad consensus on best practice, based on a set of essential methodological steps. Like most impact assessments the HRIA methodology follows an iterative, process categorised in different stages. It is worth noting however that these are not stand-alone steps and are likely to overlap both in terms of scope and chronology. (Harrison, 2011; IBLF and IFC, 2011; WB NTF, 2013; Walker, 2009).

- *Screening* is the preliminary step of identifying which (parts of) policies, programmes, projects or legislation at hand are more likely to have an impact on human rights issues and should therefore be subjected to a HRIA. The screening process determines whether it is worth to conduct a full impact assessment, how to narrow its focus and allows to discard those (aspects of) policies or programmes where an HRIA is deemed irrelevant or less suitable. While screening is essential to focus resources and efforts to areas with a potentially significant human rights impact, the process of selection also risks excluding policies that may nonetheless evoke sensitive or harmful effects. It is therefore crucial to establish a robust and transparent screening process, to ensure that the selection of coverage is a rational rather than an arbitrary process.
- *Scoping* takes place once the decision is made to undertake an HRIA and provides a road map for the rest of the research process. It involves drafting the terms of reference, outlining the objectives of the HRIA, what will be assessed and how. While the scoping process differs depending on the nature of the assessment at hand, there are several key areas that should be covered at this stage of the impact assessment, including i) a mapping of the legal, political and social context in which the assessment takes place, including a base-line assessment of the current human rights situation; ii) gathering all relevant information regarding the policy intervention under scrutiny (including e.g. provisions of a trade agreement, negotiating positions, existing reviews and evaluations); iii) identification of relevant stakeholders and potentially affected communities; iv) the identification of the specific human rights issues at stake and the

corresponding indicators to measure impacts; v) a mapping of the required evidence, identifying relevant sources and possible information gaps.

- *Evidence gathering* should provide the relevant data to inform the analysis of the potential human rights impacts. Again, the type of information needed, as well as the methods used to gather it, will depend on the subject, timing (ex-ante or ex-post) and scope of the assessment. In general however, the literature suggests a combination of quantitative and qualitative research methods, building on the methodological tools developed over time by social scientists and economists. This includes data-gathering instruments such as statistical methods, econometric modelling, surveys, participatory assessment methods and interviews. Particular to HRIA practice however, is to ensure that the evidence gathering process reaches out, in an inclusive, participatory manner, to those communities, often marginalised and vulnerable, who are likely to experience the impacts of the policy or programme under analysis (WB NTF, 2013: 25-26).
- *Consultation* procedures ensure the involvement and participation of affected communities and generally draw on experiences of the development community with participatory methods. Depending on the timing of the HRIA, the role of participatory process can differ. For ex-post impact assessments, consultations allow the researchers to identify people's lived experiences of the impacts at hand, while ex-ante exercises might use participatory tools to identify people's concerns or anticipation. The centrality of the consultative process throughout HRIs also aims to sensitise, educate and/or mobilise 'rights-holders' regarding (upcoming) policy changes that may affect them.
- *Analysis* of the data gathered should essentially allow for the actual assessment of the human rights impact of the policy interventions concerned. Since the normative legal framework of national and international human rights legislation is one of the key distinguishing features underpinning the HRIA framework, the process of analysis requires these legal norms to function as the primary benchmarks for measuring the impacts. Translating codified international human rights law into useful analytical tools is however not a straightforward exercise and requires careful scrutiny. UN agencies have over the years developed sets of indicators to measure compliance with and/or the implementation of human rights conventions at the national level, though it remains difficult to incorporate these in a context-specific HRIA approach (UNHCR, 2012).
- *Conclusions and recommendations* summarise the main findings of the HRIA and potentially formulate suggestions for corrective action to all types of duty-bearers, to counter or mitigate the negative human rights impacts identified in the assessment.
- *Publication* of the HRIA seems an obvious step but is a crucial aspect of any impact assessment since it ensures that researchers and administrators can be held accountable. Publication of the report should therefore include a transparent record of methodological choices so that others can question and/or redo the analysis. While confidentiality can be a relevant concern in case of politically- or business-sensitive issues, the general presumption should always be in favour of a complete and transparent publication. In view of the centrality of the human rights principles of

transparency and accountability, the assessment team should share their findings and recommendations to the affected stakeholders and consult them for further inputs, particularly on issues on which they were previously consulted on.

- *Monitoring and evaluation* involves scrutinising the impact assessment itself. First, to determine to what extent the HRIAs has met its objectives as established in the scoping process. Did the HRIA overlook any major human rights risks and impacts, have any of the foreseen impacts materialised, and if so, to what extent and who are the affected communities? Second, to evaluate in how far conclusions from the assessment have been taken aboard by policy makers and duty-bearers of all kinds. The latter implies looking into the actual implementation of policy recommendations formulated in the HRIA. What mitigating measures were adopted following the HRIA report and the extent to which policy reforms after the HRIA take into account the HRIA's findings and recommendations? As such, HRIAs should arguably be approached as part of an iterative, cyclical process aimed at charting human rights evolutions over time, rather than a one-off exercise.

Like any impact assessment, HRIAs are a complex and demanding exercise and pose several technical challenges and dilemmas. Every HRIA is thus to be approached as a balancing exercise between scientific rigour and overall usability.

- Essentially, there continues to be a trade-off between methodological robustness, and therefore credibility of outcomes, and a more basic but useful, and therefore more communicable and sustainable, approach. Since conducting HRIAs can be a demanding endeavour in terms of time, financial resources and the types of data and expertise required, there are numerous technical and practical questions that deserve careful consideration before embarking on a HRIA exercise. In order to address these challenges, the human rights community has been encouraged to develop methodologies for different levels of use, depending on their purpose and the time and resources available (Walker, 2009). One crucial consideration to take into account in this regard concerns who should undertake the HRIA and who should pay for it, keeping in mind this will affect the overall credibility of the research.
- A Second consideration is whether to undertake a stand-alone HRIA, or to incorporate an HRIA into another type of impact assessment. While the latter is considered to be the advisable option for a government undertaking the HRIA since it requires less resources and allows for human rights mainstreaming and drawing on established methodologies, incorporation also holds the risk of diluting human rights concerns amidst a range of other potential areas of impact. Stand-alone HRIAs are the preferred option for NGOs since this formula allows them to focus on those specific human rights issues they deem most relevant, without investing too much time and resources.
- A final, more fundamental issue to take into account is the fact that - regardless of the methodological rigor applied- HRIAs, like any impact assessment, face the fundamental challenge of establishing causality and attribution. Identifying causal pathways which link a policy intervention to certain (potential) changes in the human rights situation in a country is a far from straightforward endeavour. Particularly since there is a whole range of internal and externally-

induced factors influencing any identifiable impact while causal links can be indirect or merely contextual. Therefore, it can be difficult to attribute the perceived impacts to particular actors or policy interventions. Given the normative emphasis on accountability and responsibility of duty-bearers, causality and attribution issues are particularly challenging for HRIAs (WB NTF, 2013: 35-36).

3. Conclusion

Human Rights Impact Assessments offer a useful policy tool to systematically identify and measure the potential and real effects of a policy or a project-intervention on the realm of human rights. They analyse a wide range of different activities, ranging from development programmes, over national legislation, to the activities of transnational corporations (TNC) and non-governmental organisations (NGO) (Harrison and Goller, 2008: 588).

In terms of timing, we identified a twofold distinction between HRIAs conducted either before or after the implementation of a policy intervention. A second typological distinction concerns the nature of the policy intervention under scrutiny. Essentially, HRIAs can apply both to policies and programmes that are directly and intentionally aimed at changing the human rights situation in a country, sector or project, as well as to policies and programmes whose primary purpose is in fact not related to human rights, but could potentially have an unintended effect on them.

While there is significant overlap with other types of Impact Assessments, particularly in comparison to Sustainability or Environmental Impact Assessments, it was found that HRIAs arguably carry substantive added value in terms of scope and rationale (Harrison, 2011: 166-167; WB NTF, 2013: 7-8). Below, we list the main comparative advantages and challenges associated with conducting a HRIA.

Comparative advantages

- HRIAs are based on the normative framework of binding international human rights legislation and relate to international and national legal human rights actors, institutions, instruments and mechanisms.
- In undertaking HRIAs, rights-holders are not perceived as passive study-subjects but rather they are encouraged to participate and contribute to the assessment.
- While other assessments often also include notions of equality, participation, transparency and accountability, HRIAs do so in a more systematic and comprehensive manner, including throughout the process of conducting the impact assessment.
- Where other impact assessments are usually selective in the rights they aim to cover, HRIAs fully embrace the notion that human rights are universal and interlinked. As such, the HRIA framework applies to civil and political rights just as much as to economic, social and cultural rights.

Associated risks and considerations

- HRIA frameworks can be unbalanced in scope and narrative. It is common for impact assessments in general to focus exclusively on more easily quantifiable short-term impacts, rather than on long-term effects that are less easily identified. For HRIAs, the normative focus on legal obligations

risks becoming a vacuum-trap when the exercise fails to adequately take into account the broader social and environmental impacts of a policy intervention.

- Framing certain impacts of policy interventions as human rights concerns may externalise them from the policy or programme at hand. Ironically, while HRIAs aim to mainstream human rights concerns throughout e.g. trade and development policies, framing policy impacts as human rights issues risks presenting them as ipso facto ‘non-trade or –development’ concerns.
- Adopting a human rights lens necessarily politicises the actors involved since it requires a distinction between rights-holders and duty-bearers, and aims to contribute to the empowerment of the former group, potentially affecting the interests of the latter

In terms of methodology, every HRIA is to be approached as a balancing exercise between scientific rigour and overall usability. There continues to be a trade-off in this regard, between methodological robustness, and therefore credibility of outcomes, and a more basic but useful, and therefore more communicable and sustainable, approach. A second consideration is whether to undertake a stand-alone HRIA, or to incorporate an HRIA into another type of impact assessment. Finally, like any impact assessment, HRIAs face the fundamental challenge of establishing causality and attribution. Identifying causal pathways which link a policy intervention to certain (potential) changes in the human rights situation in a country is a far from straightforward endeavour.

In sum, despite its potential benefits and a recent proliferation of methodological guidance, the practical application of HRIAs is still in its infancy. Indeed, the amount of toolkits and guidelines by far outnumbers the amount of conducted and published HRIA-reports. This in turn raises questions about their overall feasibility and added value as an evaluation tool aimed at contributing to better informed, human rights-sensitive policy-making. Moreover, given the wide range of different fields of application, and the variety of actors to potentially use them, there is also no universally approved, formalised methodology yet and methodological discussions require further elaboration and fine-tuning, inter-alia through practical application.

B. A Rights Based Approach to EU Development Evaluation

The EU prides itself in its long-standing commitment to the global promotion of human rights, good governance and democratic institutions, and has increasingly sought to foster those values throughout its policies on international cooperation. Since the entry into force of the Lisbon Treaty, which anchored Development Cooperation more firmly in the realm of EU External Action, and against the context of the Arab Spring, the Agenda for Change (AfC) identified two mutually reinforcing working areas for the EU to concentrate its development efforts on: i) human rights, democracy and other key elements of good governance; and ii) inclusive and sustainable growth for human development (EC, 2011c: 4). In Follow up of the Lisbon Treaty and the AfC, several new policy tools and commitments have emphasised the role of HR in the EU's approach to Development Cooperation since then.

While previous studies under this research project, notably Deliverable 9.1 (Beke et al., 2014), have provided a comprehensive mapping and assessment of the different mechanisms and policy tools at the EU's disposal to promote and safeguard human rights throughout its array of development interventions, the below sections aim to assess to what extent both the policy and practice of EuropeAid's evaluation function are equipped to take into account human rights concerns.

In terms of structure, this part looks as follows. First, section 1 maps out the contours of EuropeAid's evaluation system, looking at the different types of evaluations and the actors involved, a description of the procedural and methodological guidance in place. Subsequently we take a look at some of the identified critical weaknesses of the system, particularly with regard to the EU's recent commitments to rejuvenate a corporate culture of accountability and learning. A second section then aims to assess to what extent the current evaluation system is equipped to apply a Rights Based Approach to its evaluations. First by describing the policy commitments and the implementation tools to translate them into practice, and finally, by identifying a set of three crucial considerations regarding the overall feasibility for EuropeAid to apply a RBA to its evaluation work.

1. The EU evaluation system for development cooperation

'An evaluation is an assessment, as systematic and objective as possible, of an on-going or completed project, programme or policy, its design, implementation and results. The aim is to determine the relevance and fulfilment of objectives, developmental efficiency, effectiveness, impact and sustainability. An evaluation should provide information that is credible and useful, enabling the incorporation of lessons learned into the decision-making process of both recipients and donors.' (OECD-DAC, 1991: 4)

Under the 'Financial Regulation', which applies to the general EU budget and its rules of application, the Commission is required to regularly conduct evaluations of its policies and regulatory measures (EC, 2013). Within the contours of a framework of commission-wide stipulations regarding the general standards for the organisation, design and use of evaluations, it is up to each individual Commission DGs to evaluate

their own activities and to structure their evaluation systems as they deem best fit in view of their respective needs and institutional requirements.⁵

a) Contours of the EuropeAid evaluation system

The Commission's Directorate-General for development cooperation has historically been one of the first Commission services to establish an evaluation function and has over time increasingly invested in the quality and organisation of its evaluation system (Cracknell, 1991). Following a comprehensive reform of the EU's international cooperation, initiated in May 2000, a 'Joint Evaluation Unit' (JEU) was set up in 2001 with the mandate to further strengthen the evaluation function and to ensure its integration into the decision-making processes. In line with a request from the OECD-DAC, the JEU was granted the required independence from the DG's operational and policy services, and programme and project evaluations became a decentralised responsibility so as to allow the JEU to concentrate solely on large thematic and strategic evaluations (EC, 2001d: 11).

EuropeAid currently undertakes a wide range of evaluation-types, which all aim to assess the EU's aid performance against five criteria, as outlined in the OECD-DAC definition mentioned above, notably relevance, effectiveness, efficiency, sustainability, and impact. In addition, EU development evaluations are also meant to assess the EU's comparative advantage (subsidiarity) and its overall coherence against the broader context of EU policies and programmes, as well as other international actors' policies and donor interventions. A two-fold typological distinction can be made according to the evaluation's timing, scope and intended use and audiences:

- **Strategic evaluations** focus on corporate issues of strategic importance (e.g. budget support, blending, joint programming), a specific thematic area or sector (e.g. human rights support, private sector development, food security), but also comprise geographic evaluations covering a country or region. Their main aim is to inform senior management regarding (upcoming or past) strategic choices on programming and development policy. As such, they are managed by the JEU (comprised of some 16 full-time staff), which is also responsible for the design of EuropeAid's evaluation guidelines and methodology, as well as for the overall coordination and monitoring of the DG's evaluation activities. The JEU in turn reports directly to the deputy Director-General for Geographic Coordination, as to ensure both support from senior management, general oversight and uptake of results in the strategic decision-making at that level. Budget support evaluations are generally considered to be more of a strategic nature and are therefore usually managed by the JEU and, unless the EU is the only donor, such evaluations should always be done jointly with the other donors involved (joint evaluations) (EC & EEAS, 2013: 9-17). Upcoming strategic evaluations are planned in an indicative multiannual evaluation plan which traditionally aimed to provide full geographic coverage within the given time-frame. Selection criteria have recently been further refined however, and the current Strategic Evaluation Work Programme (2014-2018)

⁵ The Commission's overall evaluation policy framework is set out in the following policy and regulatory documents: i) European Commission, 'Responding to Strategic Needs: Reinforcing the use of evaluation', Communication to the Commission from Ms. Grybauskaitė in agreement with the President, 21 February 2007, SEC (2007) 213; ii) European Commission, 'Putting evaluation into practice within the Commission', Communication of the President, 12 November 2001, C (2001) 3661; and European Commission, 'Strengthening the foundation of Smart Regulation – improving evaluation', 2 October 2013, COM (2013) 686 final.

distinguishes between geographic evaluations and thematic and other evaluations. For the former, geographic coverage is meant to offer a proportional balance between regions (Africa, Latin America and Asia), and types of countries (Middle Income Countries, Fragile States and countries with big budget support programmes). The latter type of thematic evaluations are selected based on their priority status under the Agenda for Change, balancing themes under the AfC's two core objectives: i) HR, democracy and good governance; and ii) inclusive and sustainable growth (EC, 2014c).

- **Project or programme evaluations** focus on support interventions in a specific sector at country-level, or track progress and evaluate individual programs and projects. They can take place during the implementation (mid-term or interim reviews), upon completion (final evaluation), or afterward (ex-post evaluations), and are meant to inform the operational services within the institutions at sector or project-level in order to help improve on-going or future design of projects and programmes (EC & EEAS, 2013: 9). Programme and project evaluations are managed in a decentralised way, at the level of operational units at Head Quarters (HQ), or within the EU Delegation concerned. This potentially leads to better monitoring and uptake of results at project-/programme-level, but equally affects the DG's overall overview and supervision of ongoing evaluations. The criteria for programme evaluation selection are far less clear than they are for strategic evaluations. Since they are to be budgeted under the overall programme- or project budget, they are carried out when this is a stipulation, or at least a possibility, in the financing agreement with the beneficiary and/or implementing partner. The provision to evaluate an aid intervention happens on a case-by-case basis, at the design-phase of a programme, and without any general guidance on how to make that decision (ECA, 2014: 13-14). A recent evaluation policy by EuropeAid and the EEAS (see Section II.B.1.c) tries to provide that guidance and stipulates that, in addition to where provisions are made in the financing agreement, programme evaluations should cover most of the multi-annual indicative programme and that programmes funded over a certain threshold, or programmes of an innovative nature, or which have been particularly successful or unsuccessful should also be prioritised for evaluation (EC & EEAS, 2013: 17).

b) Procedures and methodology

Over the years, EuropeAid's JEU has invested heavily in establishing the necessary procedural and methodological guidance on how to conduct evaluations. The so-called 'blue bible' for evaluations consists of four volumes, respectively outlining the current procedural framework for carrying out both strategic (EC, 2006c) and programme and project evaluations (EC, 2006d), as well as offering a detailed methodology (EC, 2006b) and 12 useful evaluation tools (EC, 2006e).

According to this methodological framework, an evaluation manager must be appointed within the concerned service, ahead of the actual start of the evaluation. He or she, preferably assisted by a deputy manager, is then in charge of coordinating and overseeing the evaluation process on behalf of the Commission. After a contextual analysis of the issues at stake, it is the task of the evaluation manager to establish a 'reference group' and to subsequently draft a terms of reference (ToR). In accordance with the Commission's overall evaluation standards, a reference group is to be established for each evaluation, though reportedly this is rarely the case in practice for programme evaluations (ECA, 2014: 16).

The mandate of the reference group, chaired by the evaluation manager, is to provide support, advice and quality control at intermediate, decisive steps along the evaluation process. Its constitution depends on a case by case basis but should generally benefit the evaluation in terms of access to information and interpretation of findings, and as an interface between the evaluation manager and the evaluation team, it allows for the uptake of different viewpoints. In terms of membership, the composition of the group depends on whether the evaluation is managed at HQ- (strategic evaluations) or at EUD-level (programme and project evaluations) (EC, 2006b: 32). If managed at HQ-level, the reference group should include representatives from the concerned Commission services, topical specialists from within the Commission and, in case of a country level evaluation, a representative from the embassy of the partner country (EC, 2006c: 8-9). For programme or project evaluations, membership of the group may extend to CSO-staff, partner country's authorities, external experts and donor agencies (EC, 2006d: 8).

Both strategic and programme evaluations are executed by external consultants, contracted through public procurement procedures. The evaluation team is responsible for the actual methodological design (though evaluation questions have to be validated by the reference group), the data collection and analysis and the final report of the evaluation. In a guidance document on the 'methodological bases for Evaluation', it is noted that, in the case of country or regional evaluations, the involvement of local consultants can help '*promote the development of local capacity and to benefit from their close knowledge of the field*' (EC, 2006b: 34).

After the evaluation questions and a set of corresponding 'reasoned assessment criteria' are adopted, the evaluation team formulates assumptions based on desk research and develops indicators and a work plan for data collection and analysis.⁶ In a subsequent 'field phase' the evaluation team then implements that work plan to test the previously developed assumptions. Drawing from these findings, a draft report is forwarded and possibly presented to the reference group. If appropriate, the evaluation manager can also convene a discussion seminar in order to share and discuss preliminary findings with a wider, though carefully selected audience (EC, 2006d: 18). Comments gathered during these discussions then feed into the final report which in turn undergoes a final quality assessment, by the evaluation manager and a second person, against a standard quality assessment grid. While the use of the quality grid is indeed common practice for strategic evaluations, a survey by the ECA found that for only one out of three programme evaluations a quality grid is used (ECA, 2014: 16).

After the evaluation manager approves the final version of the report, it is his or her duty to forward the evaluation and a 2-page summary to his seniors in the DG hierarchy. Fifteen days later, or more if requested by the hierarchy, the evaluation manager then publishes the strategic evaluation, the summary and the quality assessment grid, and distributes them among the relevant Commission services and other evaluation users within the institutions (EC, 2006c). For programme and project evaluations, dissemination to the public is only necessary if explicitly requested by the hierarchy. In general, programme evaluation reports are shared and discussed by programme managers with directly interested

⁶ EuropeAid's Evaluation Unit offers a summarised explanation of twelve analytical evaluation tools to help gather, organise and analyse data (EC, 2006e), please see: https://ec.europa.eu/europeaid/sites/devco/files/evaluation-methods-guidance-vol4_en.pdf

stakeholders, essentially the concerned services within EuropeAid and implementing partners. They are however rarely shared with the donor community, or with beneficiaries and other stakeholders involved in or affected by the intervention (ECA, 2014: 23). In terms of follow-up, one year after the dissemination of the report the evaluation manager should contact the concerned commission services to assess to what extent they have used and addressed the recommendations and findings of the evaluation. This then allows to conclude the so-called *fiche contradictoire*, which constitutes the formal end of the evaluation (EC, 2006d: 19-23). Whether a follow-up strategy limited to one year after the publication of the final evaluation report is long enough to implement the actions recommended in the evaluation is but the question, particularly since these often involve tweaking and amending sectorial policies and country or regional strategies. More fundamentally perhaps, the uptake and use of EuropeAid's evaluations has continuously proven to be a weakness within the DG's corporate management- the specificities of this are discussed in the section below (ECA, 2014: 21).

c) *A culture of accountability and learning?*

While the above section describes the evaluation procedures according to the evaluation guidelines, the functioning of EuropeAid's evaluation system in practice has been subjected to severe criticism in the past few years. While, in general the evaluation system is found to be well-organised, it suffers from a lack of an enabling environment and capacity constraints. A special report on EuropeAid's evaluation and monitoring system by the ECA in 2014, came to the sobering conclusion that the current monitoring and evaluation functions are not sufficiently reliable. Programme evaluations in particular were found to suffer from a lack of supervision and oversight by senior management and overall quality control. By focusing predominantly on actions, in combination with a lack of well-defined objectives and indicators in the multiannual programming documents (against which the intervention is to be evaluated), both programme and strategic evaluations were found to provide inadequate information on the results achieved or the processes to which an intervention may have contributed. As such, the ECA report concluded that *'EuropeAid's capacity to account for its activities is limited and its reporting gives few indications of the actual results achieved'* (ECA, 2014: 24).

Aware of the shortcomings in its evaluation function, EuropeAid has taken steps to *'upgrade the role and practice of evaluation in its activities with a view to improving the evidence base of its actions and encouraging an evaluation policy'*.⁷ An evaluation policy has been developed, jointly with the EEAS, in 2013, entitled 'Evaluation Matters'. It is the first of its kind so far, since there had been no real corporate policy on the role and principles of EU development evaluations before. The policy expresses the joint commitment of the two institutions to appraise the role of evaluation as a central part of development practice, as well as of their respective policy-cycle and corporate management cultures as such.

As a motivation for this reinvigorated commitment, the policy identifies learning and accountability as the two most important purposes of any evaluation system. Learning in the sense that evaluations i) generate knowledge about what works and what does not, and under what conditions; ii) allow for evidence-based

⁷ From the EuropeAid evaluation website, please see: http://ec.europa.eu/europeaid/evaluation-policy_en

decision-making; and iii) improve the policy and practice of development cooperation through the sharing, especially via joint evaluations, of lessons learned and best practice principles. Evaluations are also to contribute to the EU's accountability in the sense that they i) assess the performance of EU development interventions; ii) offer an explanation when interventions do not lead to the planned results; and iii) ensure transparency on the EU's performance toward stakeholders and the wider public (EC & EEAS, 2013: 7-8).

'Evaluation Matters' aims to represent 'a firm commitment to upgrade the evaluation function' though arguably, for the policy to be more than a signal of awareness and good will, it lacks the type of precise actions and indicative timeline needed to adequately address the flaws identified over the years. While EuropeAid's evaluation services are recognised for delivering qualitative and rigorously executed evaluations in a context of increasing resource constraints, and within a rather slow-moving bureaucratic organisation, the overall assessment of the evaluation service has been rather sobering, particularly in terms of contributing to a corporate culture of accountability and learning.

A recent study on the uptake of EuropeAid's strategic evaluations revealed that, in the eyes of many observers, the role of the evaluation function has become increasingly marginalised in the overall EU development cooperation system. The relevance and outreach of EuropeAid's evaluation function seems to have suffered from the institutional overhaul within the Commission since the Lisbon Treaty. Indeed, the JEU has been moved around three times across the EuropeAid organigram since 2010.⁸ While some of this shifting around is part of the institutional change after the 2011 merger (between the EuropeAid Cooperation Office (AIDCO) with the DG for Development and Relations with ACP States (DEV)), it does suggest that there has been some confusion on the role of evaluations in the overall system. According to most stakeholders consulted in the framework of the uptake study, the institutional merger also significantly reduced the capacity of the thematic units to 'foster uptake of evaluation evidence'. Since the 2011 overhaul, these units now often have to manage funds which reduces their time and space to function as the knowledge brokers they were formerly set up to be. In this sense the JEU is perceived to have lost some of its 'natural allies' in its efforts to feed evaluation-generated lessons to the implementing services. Also, the creation of the EEAS has raised some uncertainty about the organisation of development evaluations, since the EEAS and EuropeAid are mandated to work closely together throughout the whole cycle of EU external action policies, yet effective cooperation between the two institutions has been uneven in the initial years and often depends on services and the people concerned. Moreover, the working arrangement between the Commission and the EEAS regarding external action do not specify how evaluations should be organised (Bossuyt et al, 2014: 10-12). The 2013 evaluation policy sheds some clarity in this regard, in the sense that it identifies the EEAS' Development Co-operation Co-ordination Division (DCCD) to support the evaluation work undertaken by EuropeAid. The DCCD will meet regularly with the JEU to i) coordinate 'policy, planning, action and follow up' on evaluation issues within the EEAS and to support the JEU in its coordination function; ii) facilitate the EEAS participation in reference groups; iii) integrate evaluation in the programming and policies of the EEAS; and iv) oversee

⁸ Until 2011 the JEU reported directly to the senior management, afterward it was brought under the policy directorates and now, since late 2013, it reports to the Deputy Director General Geographic Coordination.

the follow-up of the EEAS on knowledge and recommendations generated by evaluations (EC & EEAS, 2013: 14).

Already in 2012, the OECD-DAC peer review concluded that the EU needs to do more to make knowledge management a corporate priority and find ways *‘to draw on and value staff knowledge and experience – particularly in implementation, monitoring and evaluation – disseminating it, and establishing better links between these lessons and policy’* (OECD-DAC, 2012: 68-69). The ‘uptake study’ however, paints a sobering image in this regard. While there is evidence of several of the JEU’s strategic evaluations influencing, in various ways, the EU’s policy and programming decisions, the overall perception is that evaluations hardly manage to find a relevant audience.

There seems to be a ‘major evaluation ownership deficit’, in the sense that many of the concerned Commission staff (management, EUDs and operational and geographic units at HQ), as well as in the other institutions, were either unaware of existing evaluations, did not consult them or did not find them part of their work. Such sentiments indicate a number of other issues, including i) weak linkages with the demand-side, or prospected users of the end product; ii) an often limited involvement of key stakeholders during the evaluation process; iii) the lack of a user-friendly evaluation format and ineffective communication strategies; iv) the increasing preference for methodological orthodoxy and procedural and administrative rigour, over objectives of ownership, learning and usability; v) a tendency to focus on *what* happened during an EU initiative, rather than analysing the *why*, the rationale of the process of the intervention. Moreover, considerable disconnects were observed between EuropeAid’s evaluation function and key internal processes, including those regarding policy formulation, results-oriented monitoring (the ROM-system), programming and the broader Knowledge Management system (KM). On the whole, the study found that, on top of *‘ongoing pressures on human resources’* (doing more with less), *‘a lack of an enabling overall institutional environment for evidence gathering, learning and the effective multi-level use of knowledge in policy-making’* further hindered the development and uptake of useful evaluations (Bossuyt et al., 2014).

2. Human rights in EuropeAid’s evaluation system: policy and practice

a) Policy commitments toward a rights based approach to EU development evaluations

As analysed by D’Hollander et al. (2014), the EU has multiple channels at its disposal to integrate human rights in its development initiatives. Historically, this was done mainly through two distinct policy strategies. First, the EU uses human rights as a pre-condition for EU aid allocation. By looking at the HR track record of a partner country to determine whether, what type and how much development funds it can access, the EU uses its financial leverage to influence – through incentives and disincentives - a third government’s behaviour. Second, the EU offers development projects directly (though not necessarily explicitly or visibly) aimed at addressing HR issues and supporting vulnerable groups or individuals. The European Instrument for Democracy and Human Rights (EIDHR) is the EU’s primary financial instrument

in this regard, and uses direct support measures to enable local and international organisations, mostly CSOs and HR Defenders (HRD), to contribute to democratic reform and the promotion of HRs (Beke et al., 2014: 116-129).⁹

More recently, the EU has embarked on a third, distinct, approach aimed at integrating HR-considerations 'horizontally' into all aspects of the design, implementation, monitoring and evaluation of its development policies and programmes. Such a Human Rights Based Approach to development is not new however, in fact its standard definition goes back to 2003 when it was endorsed by the various UN Agencies of the UN Development Group (UNDG). According to the Group's 'Common Understanding' (UNCO), a HRBA should comply with the following three core principles (UNDG, 2003):

1. all development initiatives should further the realisation of HR as laid down in the UDHR and other international human rights instruments;
2. human rights standards and principles derived from the UDHR and other international human rights instruments should guide all development programming in all sectors and in all phases of the programming process; and
3. development cooperation should contribute to the development of the capacities of 'duty-bearers' to meet their obligations and/or of 'rights-holders' to claim their rights.

While the EU did not formally endorse the above principles, it has over the past few years made policy commitments in the area of HR and Development that are considered to be fully in line with the definition established in UNDG's Common Understanding. Chronologically, a first such commitment lies in the Joint Communication by the Commission and the High Representative Vice-President (HRVP) on 'Human Rights and Democracy at the heart of EU external action – towards a more effective approach' (EC and HRVP, 2011), which for the first time mentioned the HRBA explicitly as a working method to mainstream HR and Democracy across development cooperation. The Council Conclusion's on the Commission's Agenda for Change – a policy strategy aimed at increasing the impact of EU development cooperation by focusing support where it can trigger the greatest change in partner countries - subsequently called for EU support to governance to feature more prominently in 'all partnerships', and identified a 'Rights-Based Approach' (RBA) as one of the means to do so (EC, 2011c: 2).¹⁰

In line with the Agenda for Change, article 3.8 of the 2014-2020 regulation for the Development Cooperation Instrument (DCI), one of the Commission's main financing instruments for development cooperation, states that the EU will promote '*a rights-based approach encompassing all human rights,*

⁹ For an analysis of these two approaches, and their respective use and perceived effectiveness, we refer to Beke et al. (2014: 109-138), available online: <http://www.fp7-frame.eu/wp-content/materiale/reports/07-Deliverable-9.1.pdf>

¹⁰ While the UN and most bilateral donors speak of a HRBA, the EU Council refers to a 'Rights Based Approach'. Yet, this disappearance of the 'H' should not be understood as a downgrade, on the contrary, it goes beyond the internationally recognised HRs in order to include specific EU commitments to the advancement of other types of rights, including intellectual property rights, basic economic and social delivery rights, as well as sexual and reproductive health and rights (CoEU, 2014: 7).

whether civil and political or economic, social and cultural, in order to integrate human rights principles in the implementation of this Regulation, to assist partner countries in implementing their international human rights obligations and to support the right holders, with a focus on poor and vulnerable groups, in claiming their rights' (EP and CoEU, 2014: 50). Clearly based on the UNCO, article 3 (8) effectively recognises the RBA as one of the general principles for DCI programming.

In order for these commitments to translate into the day to day practice of EU development cooperation, and in direct follow-up to one of the actions listed in the 2012 Action Plan on HR and Democracy, the Commission issued in April 2014 a 'Tool-Box', to help Commission staff with *'integrating human rights principles into EU operational activities for development, covering arrangements both at HQ and in the field for the synchronisation of human rights and development activities'* (CoEU, 2012a: 10).

The tool-box describes the EU's understanding of what an RBA to development implies, by explaining its core concepts and rationale, as well as by clarifying a number of common misunderstandings regarding its scope and implications. Essentially, the RBA as outlined under the tool-box aims to systematically mainstream the HR dimension in all sectors of EU aid interventions, beyond the traditional spheres of governance and rule of law, into the traditionally more technical areas such as health care, education, food security, energy and infrastructure. This does not imply a revision of priority areas in favour of governance related sectors. The RBA is about the *'how'*, not the *'what'* in the sense that it offers *'a qualitative methodology to advance the analysis, design and implementation of development programme and projects to better reach target-groups and to strengthen their access to basic services in all sectors of intervention'*. The RBA also redefines development in the sense that it puts forward the accomplishment of human rights as an essential condition and a key catalyst to achieve any development objective, effectively adding human rights fulfilment as a fundamental aspect of the needs analysis to fight poverty. As such, the RBA ensures that development interventions do not only address symptoms but effectively touch upon the incentive- and power-structures that form the root causes of governance problems. Also, the rights narrative alters the understanding of development cooperation from voluntary cooperation to a legal rationale where *'duty bearers'* are to uphold certain international treaty standards vis-à-vis *'rights-holders'*. Effectively re-interpreting development cooperation as a tool to contribute to the capacity of i) partner governments to meet their duties and/or ii) citizens to claim their rights. (CoEU, 2014: 5-6).

For Commission staff to effectively implement the RBA, the Tool-Box offers a checklist of questions and considerations to be applied at the different stages of the policy or programme cycle, from the design to the monitoring and evaluation of a project. Across these different stages, the tool-box identifies five guiding working principles: i) applying the legality, universality and indivisibility of all Rights; ii) ensuring stakeholder participation and access to the decision making process; iii) ensure non-discrimination and equal access to the services and goods supported by the development intervention; iv) accountability and access to the rule of law; and v) transparency and access to information.

Arguably, the EU already recognised these working principles in the past and all are part of the EU's methods and guidance. However, the added value of the Tool-Box is reportedly in its objective to use them in a more systematic and dynamic way, by applying these considerations in a more structured way, and *'enshrining this change of analytical approach into day to day practice'*.

With regard to the monitoring and evaluation stage of development projects and programmes, these five principles would then translate into the following checklist for EU staff to consider when conducting evaluations:

1. Do monitoring and evaluation mechanisms effectively foresee specific monitoring with regard to the working principles of the RBA listed above?
2. Do they allow monitoring of:
 - a. The impact on vulnerable groups in general? On targeted vulnerable groups?
 - b. The effectiveness and quality of participation of targeted vulnerable groups?
 - c. The impact of the selected programme/project on accountability mechanisms?
3. Do monitoring and evaluation mechanisms effectively refer to the quality of the implementation process?
4. Do the sources of information used include disaggregated data, qualitative and quantitative information, assessments and recommendations provided by national/international HR bodies, NGOs and other donor?

The above checklist is to be seen as mere 'guidance' for EU staff and other stakeholders involved, and should thus not add another formal administrative layer to the evaluation process. Nonetheless, its use will be monitored and if deemed necessary the format can be redesigned after a first implementation period of two years, in 2016. Either way, the Commission acknowledges that, judging from previous experiences from other donors, applying a RBA in the day-to-day practice of development work takes time and is to be seen as a process. Based on incremental steps, the Commission hopes to progressively build up the required expertise and staff attitude to fully and wholeheartedly integrate the HR-dimension into the relevant parts of their development work.

In order to support the aforementioned 'analytical change of approach', the Commission has announced a couple of concrete steps, to be taken in 2014, including the revision of the template of the identification fiche for all aid modalities: to ensure i) that its context analysis assesses the potential negative and positive impacts in terms of rights fulfilment and ii) that equal access to delivered goods and services is guaranteed. The same changes would be made to the Commission's Results-Oriented Monitoring (ROM) system, as well as to the quality assessment grid for EuropeAid evaluations. RBA principles will also be integrated systematically into the various existing training materials for EuropeAid staff and on top of that a separate support package will provide further assistance and guidance for both Headquarters (HQ) and delegations, the latter including temporary external expert support on specific HR themes.

b) Conditions and scope for a RBA to EuropeAid evaluations

Given the recent policy commitments for an RBA to EU development, this section aims to provide an assessment of what an RBA to evaluations would imply for EuropeAid's evaluation system. As such, it should be noted that this does not concern the evaluation of human rights projects, nor of the impact or added value of a HRBA to development interventions, nor of HR dialogue and conditionality initiatives or mainstreaming efforts.¹¹ What it does provide, is an assessment of the overall scope and feasibility for an

¹¹ For a comprehensive analysis of the conceptual implications and state-of-the-art donor practice in implementing a HRBA in development programming, including evaluation, as well as an overview of relevant issues concerned with

RBA to development evaluation to become reality within the current contours of the evaluation system. This allows us to identify a number of critical concerns which arguably constitute a fundamental prerequisite for the RBA to be applied usefully to EU development evaluations.

A first critical consideration to take into account when thinking about the overall feasibility for the EU to effectively implement its recent RBA commitments is the questionable scope for the EU to work more politically in development. As mentioned above, the EU's understanding of a RBA to development offers a qualitative *method* –the 'how', rather than the 'what' - to advance the design and implementation of development interventions to better reach, and meanwhile empower, their target groups. The RBA is supposed to not only treat symptoms but also to address the power-relations and incentive structures that constitute the root causes of development challenges. In its Conclusions on a RBA to development of 14 May 2014, the European Council reaffirmed this understanding.

'The Council notes that the implementation of a rights-based approach to development cooperation, supported by the aforementioned Toolbox, requires a context-specific assessment of the human rights situation, examining the capacity gaps of both duty bearers to respect, protect and fulfil human rights and of rights-holders to know, exercise and claim their rights, with a view to identifying the root causes of poverty and social exclusion' (CoE, 2014: 2).

In other words, applying a RBA throughout the policy and programming cycle of a development intervention means taking a *normative* approach. For EuropeAid's evaluation function, this implies that its monitoring and evaluation systems touch upon political economy issues, assessing to what extent its interventions have benefited rights holders, and in particular those most likely to be marginalised and have their rights violated, and/or managed to enhance the capacity of duty bearers and other stakeholders in a power position, to fulfil their responsibilities in terms of meeting and protecting the rights of their respective constituencies. A RBA to development evaluation therefore includes identifying and analysing the inequalities, unjust power relations, discriminatory practices and the incentive structures that maintain them. HR-responsive evaluations are thus, implicitly or explicitly, political since they touch upon the power-structures at hand and align the work of evaluators with binding international HR law. Moreover, a purely technical evaluation that neglects or omits such HR-considerations arguably chooses to be blind to the fundamental issue of who really benefits from an aid intervention, who does not and under what particular circumstances. More fundamentally, an evaluation that overlooks the political- or HR-dimension of an intervention, risks perpetuating unjust power- and dependency structures and hampers the donor's overall credibility, as well as the sustainability of its interventions, by failing to address structural underlying issues (UNEG, 2014: 2-4).

Besides putting the credibility and sustainability of development interventions at risk, ill-informed policies and programmes can cause irrevocable damage, effectively breaking the 'do no harm' policy of the basic HRBA principles in project cycle management. Frequent changes in donor policy stipulations and incoherent, incomplete reform for instance, are known to have done serious harm in Sub-Saharan Africa

evaluating HR policies in the sphere of development, please see D'hollander et al., (2013), available online: <http://www.fp7-frame.eu/wp-content/materiale/w-papers/WP108-Dhollander-Marx-Wouters.pdf>

over the years (Booth, 2011). Particularly in fragile states, donor interventions have led to parallel, and thus competing, administrative structures hampering ongoing state building processes (OECD, 2010).

Working politically in development, usually referred to as using a ‘political economy’ approach (PEA) has been part of the donor community’s lingo for over a decade now, yet its practical application remains limited. Donors have so far proven reluctant, or at least hesitant, to use a political economy approach in their work, and the EU is no different in this regard. While a HRBA and a PEA to development naturally differ in terms of scope and objectives, they both depart from the understanding that most development problems are political rather than technical and that solutions therefore need to be ‘locally owned’ and necessitate working with and among forces that drive or impede better development outcomes (DFID, 2010). Since touching upon power structures generally includes the elites that govern a country or sector, many donors, and including the EU, generally struggle with the PEA, finding it ‘too political’. To avoid the perception of meddling in the politics of a partner country, donor agencies still prefer apolitical technocratic approaches. Indeed, working politically in development would imply a drastic overhaul in how donors do their work (Carothers and de Gramont, 2013). The practice of using a PEA to development, if applied at all, is usually limited to using a Political Economy Analysis, usually in the form of a risks assessment, to map out the ongoing political dynamics in a partner country as a means to anticipate potential risks and opportunities.¹² The EC as well has experimented with the use of political economy analysis in the past few years, yet this exercise was abruptly, and without much explanation, put to a halt in 2013. The next few paragraphs briefly outline this experiment.

As of 2010, the Commission started exploring ways to strengthen the use of PE insights in its work, mainly by means of informing and supporting its staff, including through training, on how to incorporate a PEA approach as a key part of their work. Early 2012 this accumulated into a EuropeAid Background Note on ‘Using a Political Economy Analysis to Improve EU Development Effectiveness’. The Note had been prepared as part of a broader exercise by EuropeAid ‘to bring together existing guidance on development practice into one harmonised document, the Project and Programme Cycle Management Guidance’. The PEA Note, a draft concept paper, explains the concept of political economy analysis, its critical relevance for understanding development challenges and outcomes, and its implications for the day to day work of donor agencies. Complemented by two annexes, offering PEA tools for country and sector level analysis respectively, the paper also offers suggestions on how to incorporate PE findings into all aspects of the EU’s development activity, including programming, identification and formulation of specific interventions, risk management and policy dialogue (DEVCO BN, 2012).¹³

In the following couple of years, roughly between 2011 and 2013, the aforementioned methodology for country-level political economy analysis - developed by Sue Unsworth (the former Chief Governance

¹² See, McCulloch, N., ‘Can a Political Economy Approach explain aid donor’s reluctance to think and work politically’, 27 March 2014, available online: <http://oxfamblogs.org/fp2p/can-a-political-economy-approach-explain-aid-donors-reluctance-to-think-and-work-politically-guest-post-from-neil-mcculloch/>

¹³ The Background Note was never formally adopted by the Commission and has no indication of an author, which is why we refer to it as DEVCO BN (2012) from hereon. The note, as well as the methodology for country- and sector-level political economy analysis are however still publically available on the website of Capacity4Dev, see: <http://capacity4dev.ec.europa.eu/political-economy/documents>

Advisor at DfID) - was applied to a number of EU partner countries, notably for Bangladesh, Lao PDR, Mozambique, Senegal, and Zambia. Only a summary of the analysis on Senegal has been made available to the public and can be found on the website of the EUD to Senegal.¹⁴ Despite overall positive experiences during a stocktaking seminar organised in March 2013, a message on EuropeAid's Capacity4Dev website end of June that year concluded that the PEA exercise should be discontinued. The reason for putting a halt to the ongoing work was twofold. First, it was felt that, following a stocktaking of the lessons-learned so far, including through the application of the methodology on a number of pilot countries, concerns had arisen that understanding the political and economic reality in which they operate belonged to the core tasks of the desk officers in the EEAS and the staff in EUDs. As such, political economy analysis on behalf of the EU should no longer be conducted by external consultants but in a more institutional setting, similar to diplomatic reporting. Secondly, the Commission felt there was an inherent political risk in gathering detailed PE information into one single report.¹⁵

It is safe to say that taking a more political approach to development, even in its most accepted form of political economy analysis, has so far been little more than a short-lived experience for the Commission. While similar approaches, like EuropeAid's ongoing work on 'context analysis' can arguably be considered as disguised forms of PEA, it is far from self-evident for the Commission to 'work politically' in development. Keeping in mind that the decision to 'pull the plug' on the PEA exercise came from high up in the hierarchy, the overall willingness to approach the EU's development work through an HRBA which is inherently political, seems to be limited at best. This brings us to a second point of concern.

A second key concern revolves around the overall institutional support and guidance to systematically and consistently apply a human rights perspective in EuropeAid's evaluation function. The Council, in its conclusions on a RBA to development, welcomed the tool-box as a means to ensure that *'the fulfilment of human rights becomes an integral part of the identification, design, implementation, monitoring and evaluation of all development policies and projects'*. In order for such policy commitments to become an operational reality throughout the policy and programming cycle however, the HRBA needs clear and dedicated support from the leadership within the institution, and a corporate enabling environment to guide, monitor and manage its implementation.

Donor Experiences with the mainstreaming of cross-cutting issues (e.g. gender equality and environmental sustainability) learn that *'consistent leadership and commitment from senior management over the long term is critical for a policy or strategy to be mainstreamed at organisational, country and intervention level'*. On the other hand, a lack of supportive high-level leadership in supporting the implementation of a mainstreaming policy can lead to 'policy evaporation'. In the latter case, mainstreaming becomes a euphemism: everyone's concern, but no-one's responsibility. It is only when the senior management consistently and actively prioritises the advancement of a cross-cutting policy

¹⁴

Available

online:

http://eeas.europa.eu/delegations/senegal/documents/presse_corner/20130226_analyse_d_economie_politique_au_senegal/20130226_version_finale_rapport_pea_fr.pdf

¹⁵ Bossuyt, J., 'Is there a Future for Political Economy Analysis in the European Commission, 26 July 2013, available online: <http://ecdpm.org/talking-points/is-there-a-future-political-economy-analysis-european-commission/>

that the following two fundamental prerequisites for a policy to be mainstreamed become possible (OECD, 2014: 11-12).

1. Mainstreaming commitments need to translate into the organisational arrangements that constitute an enabling environment. To ensure that a cross-cutting policy commitment like the HRBA does not become another short-lived 'trend', its advocates have to go beyond one-off technical fixes and establish effective linkages between overall policy making, the allocated resources, corporate incentives and accountability systems.
2. The cross-cutting issue at hand is to be taken seriously throughout the institution. Apart from high-level political support, experience also illustrates that, in order for mainstreaming to work, the issue at hand needs 'drivers of change' in the right positions, notably experts in senior and mid-level management. What often happens however, is that mainstreaming responsibilities are delegated to a newly established unit or to technical staff, without the necessary institutional authority or resources to lead effectively.

For EuropeAid to systematically apply a RBA to its evaluations, the RBA would need to be backed by active and consistent support from the hierarchy. Support from the senior management should in turn translate into tangible institutional arrangements throughout the different thematic and operational services of the DG for the mainstreaming of the RBA to become a systemic concern.

During the last few years, there has been no shortage of political declarations and policy commitments in favour of human rights, in their various forms and applications, including on mainstreaming and a RBA to development. The Strategic Framework and Action Plan on Human Rights and Democracy (SFAP), adopted by the Council in June 2012 arguably offers the most high-level, comprehensive and operational EU-wide commitment in this regard. Then HRVP, Catherine Ashton identified Human Rights as one of her top priorities and '*a silver thread that runs through everything that we do in external relations*' (CoEU, 2012b). In order to help put the SFAP into practice, an EU Special Representative on HR was appointed with the mandate, also to i) contribute to the implementation of the HR guidelines and action plans already in place; ii) enhance dialogue with governments in third countries and other relevant stakeholders; and iii) contribute to better coherence and consistency of EU HR promotion (CoEU, 2012c).

While EU-wide political support and policy commitments for Human Rights in general is increasingly present, a RBA to development is but one aspect of this general commitment. The current overarching political mandate for EU development policy, the 2005 European Consensus on Development, adopted by the EC, the EP and the Council, does not provide a clear and accurate definition of human rights based development, let alone a commitment to apply it as an approach to all EU development interventions. The Agenda for Change, the current Commission policy on development cooperation did not provide any further commitments, nor clarification in this regard either.¹⁶

As such, the highest commitment for a RBA to development is to be found in the 2012 SFAP and goes as following: '*In the area of development cooperation, a human rights based approach will be used to ensure*

¹⁶ Though the Council Conclusions on the AfC did call for EU support to governance to feature more prominently in all partnership, and identified the RBA as one of the means to do so (EC, 2011c: 2).

that the EU strengthens its efforts to assist partner countries in implementing their international human rights obligations' (CoEU, 2012a: 2). While again, the RBA to development is but one action point among many in the SFAP, the only RBA-specific output from either of the EU institutions is the 2014 Tool-Box, a EuropeAid Staff Working Document (SWD).

It is too soon to judge whether the provisions in the Tool-Box will find traction throughout the different stages of EuropeAid policy-making and programming, though there does not seem to be a broad-based commitment across the different services of the DG to incorporate human rights in the various strands of their work package. Apart from the SFAP, which deals with the RBA in a rather half-hearted manner, there are no clear political instructions to drive the complex and demanding process of applying a RBA to development.

At the operational level, it is the 2014 Tool-Box on the RBA to Development which outlines the implications of an RBA to EuropeAid's evaluation function. As for all different stages of the policy or programme cycle, EuropeAid's staff working on strategic or programme evaluations will need to apply the five RBA guiding work principles: i) applying the legality, universality and indivisibility of all Rights; ii) ensuring stakeholder participation and access to the decision making process; iii) ensure non-discrimination and equal access to the services and goods supported by the development intervention; and iv) accountability and access to the rule of law. These five principles identified in the Tool-Box are broadly based on the principles under the UN Common Understanding of a HRBA, notably universality and inalienability, indivisibility, interdependence and interrelatedness, equality and non-discrimination, participation and inclusion, and accountability and rule of law.¹⁷ In order for each of these principles to be taken into consideration throughout the different stages of the policy intervention, including in its monitoring and evaluation, the Tool-Box provides a checklist with questions for each such step of the policy or programming process (CoEU, 2014).

The Tool-Box thus succeeds in giving practical guidance to EuropeAid's evaluation staff on how to apply the RBA operationally, notably by going through a checklist of questions which should make evaluators aware of the various types of issues to take into account, e.g. the impact on vulnerable groups and their inclusion, the quality of the implementation *process*, the type of data used. It remains however to be seen to what extent this can actually be implemented, keeping in mind for instance the already high workload and the reported human resource constraints in the JEU (Bossuyt et al., 2014: 24). The Tool-box is aimed at *'EU staff and all stakeholders involved in the whole development process'*, yet does not identify particular *'drivers of change'* who will be held accountable for its implementation. Apart from a mid-term reassessment of the checklist-format, no particular provisions are foreseen to track progress, nor will the RBA-checklist be inserted in-house reporting systems (CoEU, 2014: 20).

¹⁷ Sometimes summarised under the acronym 'PANEL' (Participation, Accountability, Non-Discrimination, Accountability and Linkages to international HR standards). For a comprehensive review of examples of the practical ramifications of these principles throughout development programming, we refer again to D'hollander et al., (2013: 35-42), available online: <http://www.fp7-frame.eu/wp-content/materiale/w-papers/WP108-Dhollander-Marx-Wouters.pdf>

While the Tool-Box arguably provides some guidance on the practical ramifications of a RBA, it is not underpinned by a clear implementation strategy, nor does it provide a roadmap with well-defined targets, monitoring benchmarks or feedback mechanisms.¹⁸ For the Commission's commitment to an RBA to evaluation to translate into the day to day practice of EuropeAid's evaluation work would require a fundamental revision of the 2006 evaluation guidelines and methodology to take place, incorporating the existing guidance on what a HRBA to development evaluation implies.

A third and final consideration revolves around EuropeAid's institutional culture and its readiness to comply with the objectives and principles of a RBA to evaluation. With regard to the latter, the UNCO recommends that development interventions should be geared towards assessing both the results of an intervention as well as look into the quality of its processes. Such process orientation should help verify whether marginalised and vulnerable groups have been involved and participated in the development intervention and stems from the understanding that development effectiveness is not only evaluated in outcomes but also in its processes. Since HR improvements may only be visible in the long term, making sure that the process of a development intervention is HR friendly is than seen as a good way to evaluate the long-term effectiveness and sustainability of the intervention (UN Habitat, 2014).

For donors, integrating HR concerns and results-based management (RBM) into their M&E systems continues to be challenging, and that is no different for the EU. In theory, RBM and a HRBA are not inherently contradictory in the sense that the former is the programme management vehicle to deliver upon a programme that is planned and implemented in accordance with the principles of HRBA. In practice however, the evaluation stage of an aid intervention is often where the inherent tension between the RBA's normative and inclusive narrative to address power-and incentive structures and the traditional, input-biased, way of development programming, becomes most apparent – and increasingly so in a development sector where 'value for money' has driven programming towards what's measurable, rather than 'what matters' (Cowley, 2013: 5).

A process-oriented, inclusive approach to evaluation, like the UNCO stipulates, rather than a results- or action- oriented one, indeed makes the evaluation process more complex and time consuming and would require a fundamental overhaul in EuropeAid's evaluation culture. Not only have time and resource constraints become increasingly stringent in the JEU, the prevailing logic of value for money has led to evaluation models which focus on spending and tracing financial flows, rather than on the objective of results-oriented learning (through trial and error). In line with this narrow accountability focus, stakeholders have over the years observed an increasing tendency to manage evaluations in a rather 'bureaucratic mode of operation'. This is visible in how the JEU has come to deal with the evaluation procedures and methodology in an overly standardised and rigorous manner without leaving much scope for flexible prioritisation or thinking 'out of the box'. As for the showing of results, both the ECA audit report and the uptake study found that EU evaluations tend to focus more on the 'what', on the

¹⁸ In fact, in the absence of a clearly defined mandate, and questionable institution-wide support, smart forms of mainstreaming, integrating human rights in concrete practices on the ground may prove to be more effective than rigid administrative formats or checklists.

implementation of an intervention, than on the results achieved (ECA, 2014), or on ‘why’ things occurred (Bossuyt et al., 2014). Moreover, the uptake study notes that EuropeAid’s evaluation function has fallen prone to the prevailing incentive structure of development spending, which in turn leads to tensions between quality insurance and disbursement quota. All of this tends to lead to an institutional culture of bureaucratic compliance, rather than the type of learning-oriented attitude required evaluating and understanding processes.

3. Conclusion

The EU prides itself in its long-standing commitment to the global promotion of human rights, good governance and democratic institutions, and has increasingly sought to foster those values throughout its policies on international cooperation. Most recently, it has embarked on a new approach to do so, notably by integrating HR-considerations ‘horizontally’ into all aspects of the design, implementation, monitoring and evaluation of its development policies and programmes. Such a ‘Human Rights Based Approach’, according to its definition by the UN Development Group, should comply with the following three core principles (UNDG, 2003):

1. all development initiatives should further the realisation of HR as laid down in the UDHR and other international human rights instruments;
2. human rights standards and principles derived from the UDHR and other international human rights instruments should guide all development programming in all sectors and in all phases of the programming process; and
3. development cooperation should contribute to the development of the capacities of ‘duty-bearers’ to meet their obligations and/or of ‘rights-holders’ to claim their rights.

The aim of this particular section has been to provide an assessment of what such a rights-based approach would imply for EuropeAid’s evaluation system. We identified three critical considerations in this regard, on which, we argue, hinges the feasibility of effectively applying a HRBA to EU development evaluations.

Following numerous policy commitments to start using a rights-based approach to development as a working principle to mainstream human rights and democratic principles across development cooperation, the Commission in 2014 issued a ‘Tool-Box’, to translate those commitments into EuropeAid’s operational activities. This tool-box describes the EU’s understanding of what an RBA to development implies, by explaining its core concepts and rationale, as well as by clarifying a number of common misunderstandings regarding its scope and implications. For Commission staff to effectively implement the RBA, the tool-box offers a checklist of questions and considerations, which can be applied at the different stages of the policy or programme cycle, including through its evaluations.

The core aim of this particular section has been to provide an assessment of what this rights-based approach would imply for EuropeAid’s evaluation system. We identified three critical considerations in this regard, on which, we argue, hinges the feasibility of effectively applying a HRBA to EU development evaluations.

First however, in order to properly assess the feasibility of these commitments, one needs to come to a proper understanding of the dynamics of EuropeAid’s evaluation function first. DG Development’s

evaluation system has historically been one of the first Commission services to establish an evaluation function and has over time increasingly invested in the quality and organisation of its evaluation system. Since 2001, a Joint Evaluation Unit is in charge of managing EuropeAid's evaluation activities, including the design of evaluation guidelines and methodology, as well as the overall coordination and monitoring of on-going evaluations.

Despite its established reputation as a well-organised evaluation unit, EuropeAid's evaluation function has become subject to increasing criticism and concern in recent years, particularly when it comes to its seemingly decreasing capacity to contribute to a corporate culture of accountability and learning. Building on a recent audit by the European Court of Auditors, and an independent evaluation on the general uptake of strategic evaluations, we identified a number of critical shortcomings in the current evaluation function, which contribute to what has been coined a 'major evaluation ownership deficit'.

Flowing from the EU's interpretation of a rights based approach to development, and in view of a recent criticism on a number of prevalent tendencies in EuropeAid's current evaluation culture, we identified three critical considerations regarding the overall feasibility for the EU to apply a rights based approach to its development evaluations.

First, for the EU to apply a rights based approach, it would need to work more politically in development. The EU's understanding of a rights based approach to development aims to advance the design and the implementation of development interventions to better reach, and meanwhile empower, their target groups. Such a normative approach is supposed to not only treat symptoms but also to address the power-relations and incentive structures that constitute the root causes of development challenges. In other words, applying a RBA throughout the policy and programming cycle of a development intervention means taking a *normative* approach. For EuropeAid's evaluation function, this implies that its monitoring and evaluation systems touch upon political economy issues. Experience shows however, that for the Commission, taking a more political approach to development has so far been little more than a short-lived experience because it is deemed too sensitive.

A second key concern revolves around the overall institutional support and guidance to systematically and consistently apply a human rights perspective in EuropeAid's evaluation function. For EuropeAid to systematically apply a RBA to its evaluations, the RBA would need to be backed by active and consistent support from the hierarchy. Support from the senior management should in turn translate into tangible institutional arrangements throughout the different thematic and operational services of the DG for the mainstreaming of the RBA to become a systemic concern. While the tool-box provides some guidance on the application of a RBA, we find that it lacks a clear identification of 'drivers of change' who will be held accountable for its implementation. Apart from a mid-term reassessment of the checklist-format, no particular provisions are foreseen to track progress, nor will the RBA-checklist be inserted in in-house reporting systems. As such, we find that the current RBA tool-box is not underpinned by a clear implementation strategy, nor does it provide a roadmap with well-defined targets.

Finally, a third consideration revolves around EuropeAid's institutional culture and its readiness to comply with the objectives and principles of a RBA to evaluation. For donors, atoning both human rights concerns

and results-based management (RBM) into their M&E systems continues to be challenging, and that is no different for the EU. Moreover, we find that taking on a process-oriented, inclusive approach to evaluation, like the RBA stipulates, rather than a results- or action- oriented one, would make the evaluation process more complex and time consuming and would require a fundamental overhaul in EuropeAid's evaluation culture.

III. EU impact assessment systems and human rights

A. The use of ex-ante impact assessments in EU policy

Since January 2003, the EU uses an Integrated Impact Assessment model to assess the economic, social and environmental impact of new policy, regulatory and legislative initiatives. At the time, the impact assessment system brought together a variety of specific assessments into one overriding instrument, in an effort to do away with the existing situation of partial and sectorial assessments, while contributing to a more coherent implementation of the European strategy for Sustainable Development. By assessing the overall impact of ‘all major initiatives’ the Impact Assessment is intended to improve the quality and coherence of the policy development process, as well as to contribute to a more coherent implementation of the EU strategy for Sustainable Development (EC, 2002a: 1).

1. EU ex-ante impact assessments: origins and evolution

The origins of the EU’s Impact Assessment system are twofold. First, the use of impact assessments in the EU is to be seen against the context of a wider evolution of regulatory management since the 1990’s. Described by the OECD as a process of ‘reassessing and optimising regulatory structures and systems’, the concept of regulatory management revolves around improving the governmental use of legislative powers in order to address regulatory failure (OECD, 1997: 4).¹⁹ Better, or ‘smart’ regulation, includes legislative reform, public consultation, ex-post evaluation, regulatory transparency and an overall simplification of regulation aimed at breaking down unnecessary bureaucratic burdens (Radealli et al., 2008). Since smart regulation concerns the policy cycle as a whole, from policy design to implementation, enforcement, evaluation and revision, impact assessment systems have been considered a key element of the EU Better Regulation agenda for over a decade now (EC, 2010a: 3).

In parallel to the evolving interpretation of what constitutes regulatory failure, ‘smart regulation’ has been subject to different interpretations, which in turn led to a range of different approaches to impact assessments. A first, rather narrow, interpretation of regulatory management suggests that its failure mainly stems from too much regulation. Such an approach is often associated with an explicit or implicit political agenda of market deregulation and minimal governmental interference in the private sector. Impact Assessments which follow this interpretation tend to stick to administrative and economic compliance costs for businesses and apply a strong cost-and-benefit rationale (Radealli, 2005: 6-7). A second, broader interpretation of regulatory management implies improving the overall quality of policy-making. This includes increasing the accountability and transparency of governance, which may lead to policies that address market failure and therefore go against the argument of over-regulation. Likewise, impact assessments that lean toward the latter approach tend to include operational guidelines that serve this qualitative notion of smart regulation and apply a broader scope in terms of the potential impacts associated with a given policy proposal (Janowski et al., 2011: 17-18). Looking at the use of impact

¹⁹ Regulatory failure can be defined as the adverse effect of governmental intervention, potentially worsening market failures or failing to achieve set public policy goals. As such, the occurrence of market and government failures is arguably the reason why there is a need for a specific policy dedicated to regulator quality (Radaelli and Meuwese, 2009).

assessments in the EU context, we identify a clear evolution from the rather narrowly focused type of impact assessments, to the broader, holistic impact assessment model aimed at improving the overall quality of EU policy-making (see below).

Secondly, the origins of the EU Impact Assessment system are also to be seen as part of the EU's Sustainable Development Strategy. In response to the 1992 Rio Declaration and in line with the 1993 EU Environment Action Plan, sustainable development increasingly became one of the guiding principles in EU policy (Lofstedt, 2004: 241).²⁰ Following up on the EU's Rio Commitments, the Council asked the Commission to design a long-term strategy 'dove-tailing policies for economically, socially and ecologically sustainable development'. In its 2001 EU Strategy for Sustainable Development, the Commission argued the following:

'Sustainable development should become the central objective of all sectors and policies. This means that policy makers must identify likely spill-overs – good and bad – onto other policy areas and take them into account. Careful assessment of the full effects of a policy proposal must include estimates of its economic, environmental and social impacts inside and outside the EU' (EC, 2001a).

As mentioned before, the EU's impact assessment system as we know it today entered into force in 2003. Before that, a visible evolution in the use and interpretation of impact assessment tools took place since the mid-1980's, driven by the regulatory and sustainable development concerns described above. Concretely, impact assessments were first introduced to the EU policy-toolbox in 1986 when the UK Presidency launched the Business Impact Assessment (BIA) model, based on its own national system of Compliance Cost Assessment (CCA). Much like the CCA, the BIA was first and foremost aimed at evaluating the impact of a limited set of policy proposals and regulations on business, essentially intended to estimate the economic costs of regulatory compliance (Renda, 2006: 45). As such, the initial scope of EU impact assessments was on regulatory effectiveness to address impacts that might affect the competitiveness of EU enterprises.

The BIA system was criticised however for this limited scope as well as for its less than robust methodological approach. As mentioned above, the BIA model only considered information regarding business compliance costs, blindsiding any other potential impact areas regarding e.g. the social dimension of a policy proposal. The BIA procedure also did not imply a preliminary identification of alternative policy options as it only entered stage after the Commission already selected the preferred option in its yearly regulatory agenda. Such methodological bias and the overall flawed scientific rigour of the BIA-system raised significant doubts about its overall reliability as a tool for informed policy-making. The fact that the officials in the Commission's Directorate Generals (DG) who were in charge of applying BIAs did not receive adequate training contributed further to an overall sense of dissatisfaction with the BIA-model as such (Renda, 2006: 47).

²⁰ The 1993 EU Environment Action Programme indicated a shift from previous EU environmental policies in the sense that it called for measures promoting greater sustainability, rather than just environmental protection, effectively signalling the start of a new policy narrative (Liberatore, 2002).

In an attempt to complement the evaluations carried out under the BIA-system, and address its perceived shortcomings, the Commission introduced a series of new tools during the second half of the 1990's. Such additional initiatives included the Simplification of the Legislation on the Internal Market (SLIM), launched in 1996 and aimed at cutting red tape and reducing the regulatory constraints imposed by the Internal Market on business (EC, 2001b: 29-30).²¹ In 1997, the Commission established the Business Environment Simplification Task Force (BEST) with the mandate to explore areas where regulatory and administrative burdens could be removed or simplified in order to improve the business environment, particularly for small and medium-sized enterprises (SMEs). In a similar vein, a Business Test Panel was created in 1998 to act as a consultative body to discuss with private companies the compliance costs and administrative consequences of new legislative proposals (Renda, 2006: 47). Besides these business-oriented measures, the Commission also generated quite some experience in single-sector, single-issue types of impact assessments, e.g. in the area of trade, environment, health, gender mainstreaming and employment. The BIA being the only assessment tool applicable throughout the Commission services, the partial approach created an overly fragmented framework for doing impact assessments (EC, 2002a: 3). Not only did these partial approaches not allow for policy-makers to assess trade-offs and compare different policy proposals across different policy sectors, the proliferation of impact assessment tools arguably ended up creating exactly the regulatory creep that impact assessments were supposed to address (Renda, 2006: 43).

Out of dissatisfaction with the current approach, a series of policy-initiatives in the 2000's eventually introduced a new model of EU Impact assessments as part of a broader overhaul in EU regulatory management. First, the 2000 Lisbon Council mandated the Commission to propose an agenda for further coordinated action on regulatory reform (Meeuwese, 2008:21). Consequently, in October 2001 the Commission presented its White Paper on European Governance, outlining possible actions to improve the overall quality of EU policy-making underpinned by five principles of good governance: openness, participation, accountability, effectiveness and coherence (EC, 2001c). While the White Paper final report does not elaborate beyond the need for impact assessments to help improve the quality of EU regulation, the Preparatory Work for the White Paper recognised the many flaws of the BIA-system. It notes in this regard that, although the use of a Cost Benefit Analysis (CBA) is recommended as the most comprehensive economic model, international experience has shown that 'exact economic calculations are not the most important contributors to increased regulatory quality'. Rather the considered added value of undertaking impact assessments 'the process of learning, understanding and exploring regulatory options, which acts as a tool for changing the "logic of decision-making"' (EC, 2002a: 90).

On a parallel track to the Commission's White Paper, and in response to the same request of the Lisbon Council, the Council of Public Administration of November 2000 in Strasbourg mandated the creation of a high-level advisory group to draft an action plan for better regulation. The group would consist of

²¹ The Commission forwarded the communication on simpler legislation for the internal market (SLIM) to the Council and the European Parliament by letter on 13 May 1996, see: <http://www.europarl.europa.eu/sides/getDoc.do?type=REPORT&mode=XML&reference=A4-1997-0108&language=EN#top>

regulatory experts from the Member States (MS) as well as from the Commission, and was chaired by a former member of the Conseil d'état named Dieudonné Mandelkern (COA, 2010: 5).

Little over a month after the publication of the White Paper on European Governance, the 'Mandelkern Group on Better Regulation' published its final report, which identified impact assessments as one of the key features of an action plan for better regulation, and argued they should be an integral part of the policy-making process - rather than just a bureaucratic add-on – at both EU and the national level. In its action plan included in the final report, the Mandelkern Group therefore suggested the establishment of 'a new, comprehensive and suitably resourced impact assessment system covering Commission proposals with possible regulatory effects'. The action plan also provided a set of recommendations for the methodological procedure which would later feed into the guidelines for the EU's IA-model. Most notably, the report recommended a two-step approach, consisting of a preliminary assessment to check alternative policy options and second, an extended impact assessment of the benefits and costs of the preferred regulatory proposal. (Mandelkern Group, 2001).

The preparatory work from the White Paper and the Mandelkern report finally culminated in the Commission's Communication on 'European Governance: Better Law-making' in June 2002. In it, the Commission highlights that impact assessments are to feature as a major policy tool to improve the overall quality of EU regulatory management, 'as a decision-making aid', 'but not taking the place of political judgement'. Also, systematic impact assessments are to be seen 'in the same line of thinking as the European sustainable development strategy' as they will help provide policy-makers with 'more accurate and better structured information on the positive and negative impacts, having regard to economic, social and environmental aspects (EC, 2002b: 3). The Communication was accompanied by an Action Plan for Better Regulation which introduced a set of eight targeted communications, including one on Impact Assessment (see Box 2). The latter was accompanied by a document with Guidelines for commission staff on how to conduct Integrated Impact Assessment.²²

Box 2: Elements of the 2002 Action Plan for Better Regulation

1. General Principles and minimum standards for consultation (COM (2002) 704);
2. Collection and use of expertise (COM (2002) 713);
3. Impact Assessment (COM (2002) 276);
4. Simplifying and improving the regulatory environment (COM (2002) 278);
5. Proposals for a new comitology decision (COM (2002) 719);
6. Operating framework for the European Regulatory Agencies (COM (2002) 718);
7. Framework for target-based tripartite contracts (COM (2002) 709); and
8. Better monitoring of the application of Community law (COM (2002) 725).

Source: Allio, 2007.

The Integrated Impact Assessment model entered into force as of January 2003. As a product of the regulatory reform process on the one hand, and drawing from the EU sustainability strategy on the other

²² For the current guidelines, last revised in 2009, please see: http://ec.europa.eu/smart-regulation/impact/commission_guidelines/docs/iag_2009_en.pdf

hand, the process through which it came to be reflects a transition from a ‘deregulation approach’, based on the CBA-model, to a ‘better regulation’ approach, taking into account considerations of good governance and sustainability (Janowski et al.: 20). In line with its dual origin lays its core aim to safeguard EU competitiveness and help improve the quality and coherence of EU policy-making, while at the same time contributing to the effective implementation of the EU sustainable development goals as outlined in the 2002 Communication towards a Global Partnership for Sustainable Development (EC, 2002b).²³ As such, the new model incorporates not only economic considerations but also aims to take into account the social and environmental impact of the proposal concerned. It is worth noting in this regard that, while the design of the new Impact Assessment model certainly draws heavily from the suggestions outlined in the Mandelkern report, the Commission’s Action Plan for Better Regulation and the Communication on Impact Assessment went considerably further than the Mandelkern report, which did not include any indication on the scope and comprehensiveness of the impact to be assessed (Renda, 2006: 51).

The Integrated Impact Assessment system introduced in 2003 required all ‘major initiatives’ to undergo an impact assessment. Essentially this implied all legislative and policy proposals included in the Annual Policy Strategy or in the Commission Work Programme, provided they were believed to bear potentially significantly economic, social and/or environmental implications and/or require regulatory measures for their implementation. However, of the proposals submitted to the Work Programme and/or Annual Policy Strategy, only regulatory proposals (e.g. directives and regulations) and other proposals with an economic, social or environmental dimension, such as white papers, expenditure programmes and negotiating guidelines for international agreements, would require an impact assessment (EC, 2002a: 5)

Proposals that fulfil those requirements would then be subjected, to a ‘preliminary assessment’ which served as a filter for the College of Commissioners to decide which proposals should undergo a second-stage ‘extended’ impact assessment. The preliminary assessment thus provided a brief overview of the potential problems identified, outline the main policy options available to achieve the set objectives, the foreseen impacts and the sectors affected, and a description of the policy process so far, including studies and consultations. In the end, this preliminary stage was to result in a short statement indicating whether or not an extended impact assessment would be advisable. Based on this advice, the College of Commissioners then had to decide which proposals would have to undergo a second, extended impact assessment, based on whether they would result in ‘substantial’ impact and/or whether the proposal represented a major policy reform in one or several sectors. If deemed necessary, an extended impact assessment would then provide a more in-depth analysis of the identified potential impacts and facilitate consultations with stakeholders and experts. Besides information gathering and validation of results, such a consultation process would also facilitate discussions on the wider, ethical and political, considerations of a policy proposal (EC, 2002b: 7).

During the ensuing years, the Commission has continued to develop and fine-tune the procedures and analytical steps of its IA-system. Following a 2004 stock-taking exercise to evaluate early experiences with the first model, a number of shortcomings were addressed in a 2005 revision of the Guidelines on Impact Assessment. Most importantly, the two-stage distinction between preliminary and extended assessments

²³ http://ec.europa.eu/regional_policy/archive/innovation/pdf/library/globalpartner_sustaindev_en.pdf

was abandoned in favour of so-called ‘Roadmaps’, prior to conducting the impact assessments, which would apply from then onwards to all proposals in the Commission’s Legislative and Work Programme (CLWP) (TEP, 2006: 2).

Several revisions of the guidelines have followed since then, including the adoption of the 2005 Inter-Institutional Common Approach to IA, which clarified the roles of the Council, the Parliament and the Commission (EC, 2005; see Box 3). Subsequently, in November 2006, an Impact Assessment Board was established to provide independent quality control and support for Impact Assessments executed by the Commission staff (EC, 2014a). The latest in this series of revisions took place in 2009.²⁴ It extended the scope of the IA-system to implementing, or ‘comitology’, measures which in fact constitute a significant source of EU legislation.²⁵ Since 2009, additional complementary guidance was developed in various areas, e.g. regarding competitiveness and micro-enterprises, fundamental rights of EU citizens, social and territorial impacts. Finally, in 2012, the Commission announced to conduct a third formal revision of its impact assessment guidelines in 2014, inter alia to update and streamline the aforementioned sectoral guidance.²⁶

The sections below provide a comprehensive description of the procedural and methodological features of the current practice in EU Impact Assessments, with a particular focus on the treatment of human rights and development concerns therein.

Box 3: Impact Assessment in the European Parliament and the Council of the EU

Under the Inter-Institutional Agreement on Better Law-Making (IIA), concluded in 2003 between the Commission, the EP and the Council, the three institutions recognise the potentially positive role of impact assessment in improving the quality of EU legislation. It further notes that the results of the Commission’s integrated IA process for major legislative proposals are to be made available to the EP, the Council, and the public in general. Where the co-decision procedure applies, both the EP and the Council are encouraged to undertake their own IAs in advance of any substantive amendment, ‘either at first reading or at the conciliation stage’. In follow up to the IIA, the Council and the EP were to evaluate their respective in-house experience with carrying out IAs in view of possibly developing a common methodology (EC, EP and Council, 2003:4).

As such, the subsequent Inter-Institutional Common Approach to Impact Assessment stipulates that each of the three institutions is responsible for assessing the impact of its own proposals or modifications, and

²⁴ For a Commission memo on the main changes in the 2009 Impact Assessment Guidelines compared to the 2005 Guidelines, see:

http://ec.europa.eu/smart-regulation/impact/commission_guidelines/docs/revised_ia_guidelines_memo_en.pdf

²⁵ The comitology-system consists of some 250 comitology committees which oversee the delegated acts implemented by the European Commission. Composed of representatives of the MSs and chaired by the Commission, these committees are mandated to regulate certain delegated aspects of the secondary legislation adopted by the Council and, in case of co-decision, the European Parliament. Some 2600 measures are adopted by comitology committees each year (ECA, 2010: 9).

²⁶ While at the time of writing the new guidelines have not been issued yet, a public consultation with relevant stakeholders took place between July and December 2014, see: http://ec.europa.eu/smart-regulation/impact/docs/iag_pc_questionnaire_en.pdf

for choosing the means and organisational resources to do so. For the EP and the Council this implies examining the Commission's impact assessment reports which accompany the legislative proposals under co-decision procedure, as well as assessing the impact of their own respective 'substantive' amendments. What constitutes a 'substantive' amendment however, is for the respective institution to decide, keeping in mind considerations regarding the overall significance of the potential impact, the potential short- and long-term costs and benefits of the proposal, including regulatory and budgetary implications (EC, 2005: 1-2).

In practice, both the EP and the Council have only recently started implementing the above commitments. The Council in particular has paid rather limited attention to impact assessment in the past, and despite pressures from some of the MSs, calls for the Council Secretariat to establish a small IA-unit have so far not been acknowledged. Recent developments indicate positive signs however. For instance, following a set of pilot initiatives, Council Working Parties are now expected to examine relevant Commission IAs by running them by an indicative check list, which includes, inter alia, stipulations in the area of fundamental rights and the protection of vulnerable groups (CoEU, 2014: 27).

On the side of the EP, it was not until June 2011 that the institution developed an own-initiative report on 'guaranteeing independent impact assessment', better known as the 'Niebler report'²⁷, which suggested to renew the institution's attention for IAs by developing a stronger common procedure and methodology across the various committees (EP, 2011). In response to the Niebler report, the Parliament's Bureau established in 2012 a Directorate for Impact Assessment and European Added Value, including a dedicated Ex-Ante Impact Assessment Unit. The latter's mandate is to routinely undertake initial appraisals of the quality of IAs produced by the Commission, to scrutinise their solidity, consistency and completeness, as well as provide on-demand support to parliamentary committees, including: i) more detailed appraisals of Commission IAs; ii) substitute or provide complementary IAs on policy proposals; and iii) outsource impact assessments on substantive parliamentary amendments to external experts (EPRS, 2014: 9). Between its establishment in June 2012 and December 2014, the unit prepared over 90 initial appraisals of Commission IAs for diverse parliamentary committees and four IAs of substantive EP amendments (EPRS, 2015: 3). To do so, the EP has its own Impact Assessment Handbook, which was revised most recently in 2013. The Handbook now explicitly states that, like the Commission guidelines, all IAs must respect the EU treaty obligations in view of fundamental rights, non-discrimination and adequate levels of social protection. IAs are also required to incorporate potential spill-over effects outside the Union, including on international trade and on developing countries (EP, 2013:5).

²⁷ Called after MEP Angelika Niebler, rapporteur of the EP Committee on Legal Affairs.

2. The practice of EU Impact Assessments

European Commission (EC) Impact Assessments (IA) follow a standard format which is outlined in the Guidelines for IAs, directed at Commission staff executing IAs on their respective policy proposals. The current version of these Guidelines was issued in 2009 and has been under revision since mid-2014.

With regard to the involved commission services, the Guidelines stipulate that the lead units responsible for the legislative proposal should also draft the IA, albeit with support from a specialized IA unit within their respective DGs. Other support involves an ad-hoc, inter-DG 'IA Steering Group', which consists of representatives from all affected and/or interested DG's, as well as the central Secretariat-General of the Commission (EC, 2009: 6).

The Secretariat-General also chairs and facilitates the work of the Impact Assessment Board (IAB), established in 2006 to perform internal scrutiny on the quality and proceedings of draft IAs. The IAB's composition differs depending on the subject of the IA. Initially, the Board was made up out of five permanent members, including the Deputy Secretary-General for Smart Regulation who acts as chair, though from 2012 onwards, the IAB has included four rotating members selected from a pool of eight Commission directors – though it is worth noting that in the IAB they act in their personal capacity. Rotating members are appointed by the Secretary-General of the Commission with confirmation by the President, for a two-year, renewable, term. Their selection to serve in the Board overseeing a particular IA is done with a view of avoiding conflicts of interest, while ensuring an overall balanced attendance of Board meetings. According to its mandate, the IAB's work is to evaluate draft commission IAs on their application of the Guidelines and other agreed standards, and to afterward formulate an opinion as to whether the IA is proportionate in scope to the potential range of economic, social and environmental impacts associated with the policy proposal under investigation. Finally, the core task of the IAB is to evaluate if the IA draft is of sufficient quality in terms of data and methodological rigour. Considering it is well placed to do so, the IAB may upon request also advise the Secretariat General on the overall design and revision of the IA-system as such (EC, 2006a).

Every IA report has to present its findings according to a standard format, as described in the Guidelines. First, it should present the procedural issues encountered, as well as list the main outcomes from consultations with relevant stakeholders. A second step then describes the problem in need of being addressed, and analyses the policy context, taking into account issues of subsidiarity in order to assess whether action at the EU-level is justified and whether the proposed course of action is proportionate with what is deemed necessary. Step three then outlines the particular objective of the policy under scrutiny, while a fourth step maps out the different strategic options for achieving it, usually including a non-action option. Next, a fifth step develops the actual impact assessment, weighing, in a balanced manner, the likely positive and negative economic, social and environmental impacts. Based on this assessment, the sixth step identifies and justifies a preferred policy option from the different strategies outlined in step four. Finally, step seven considers future provisions to monitor and assess the actual impact of the policy and suggests indicators to establish whether the implemented policy initiative delivers upon the initially intended objectives. In theory, according to the current Guidelines, all this

should account for a self-standing document of no more than 30 pages (summary and annexes including stakeholder consultations and expert reports not included), though in theory, IA-reports often run up to a couple of hundred pages (EC, 2009).

When a draft IA is sent to the IAB, it is accompanied by a transmission letter signed by the Director-General of the DG responsible for the policy proposal. The IAB, supported by its staff at the Secretariat-General then has four weeks to analyse the Commission's draft IA before responding to the lead DG with an initial assessment of the report's compliance with the Guidelines and any questions regarding the IAs overall scope and quality. Subsequently, a private meeting is organized at the end of which the IAB adopts by consensus a positive or negative opinion about the IA, and potentially points out areas in need of improvement (ERPS, 2015: 3). In case of a negative IAB opinion, the IA has to be revised and subsequently be scrutinized by the IAB again. According to the Commission's internal rules, all initiatives with an expected significant impact should be accompanied by an IA and a positive opinion from the IAB. In reality however, there have been occasions in the past where the Commission tabled proposals without a positive IAB opinion on the accompanying IA (EC, 2014a: 7).

Once a positive IAB opinion is issued, the final version of the IA report should include a brief memo on how the Board's recommendations have been addressed through changes to the original draft. An Explanatory Memorandum accompanying the proposal then further briefly outlines the options that have been considered and their respective potential impacts. During Inter-Service Consultation with the affected or other interested DGs, additional observations can be made to the IA, which have to be included in the final proposal 'file' before the latter is forwarded to the College of Commissioners (EPRS, 2015: 3).

Even when a proposal is not adopted, an IA is still to be produced and scrutinised by the IAB, and should explain why the proposal was declined. Either way, both the IA and the IAB opinion are to be published online, alongside the policy proposal. Occasionally, information can be considered confidential and or too sensitive, in which case restricted or delayed publication is possible (EC, 2009: 11). After adoption by the College of Commissioners, the policy proposal, including the IA and the IAB opinion are submitted to the Council, and under co-decision, the EP. Besides scrutinising the Commission IA, both institutions have also made a commitment to assess the impact of their respective 'substantial' amendments to the proposal (see Box 3). In light of these amendments, the Commission as well may decide, on a case-by-case basis, to update the original IA (EC, 2005).

3. Overall assessment of the EU impact assessment-system:

An evaluation by the European Court of Auditors (ECA) in 2010 found that, 'on balance' the Commission's IA system is a comprehensive and increasingly effective policy tool in supporting the decision-making of the EU institutions. The number of IAs produced by the Commission each year has obviously fluctuated over the years, from 21 in 2003, to 135 in 2008, back to 97 in 2013 (EC, 2014b).²⁸ Overall, the IA-system has reportedly become an integral part of the Commission's policy development procedures and is

²⁸ In 2014, only 25 were submitted to the IAB, largely due to a changeover in the legislature of the EP and the Commission

appreciated by EU staff as an essential and useful tool for the legislative work across the EU institutions (ECA, 2010: 6).

Despite the general sense of appreciation noted above, several shortcomings in its design and application have been identified over the years, ranging from the selection criteria for assessment, to the composition of the Impact Assessment Board. The aforementioned Court of Auditors' report, as well as annual IAB reports and expert evaluations, identified a number of areas in need of improvement in order for the EU's Impact Assessment system to better contribute to the quality and effectiveness of EU policy-making. While some of these challenges have been addressed, a number of shortcomings in the IA system remain. Under impetus of the revision of the 2009 Guidelines, and in particular the launch of a public consultation from July to September 2014, the debate on these issues has been renewed, both among NGOs, the EU Member States and within the EU institutions. Below, we list some of the key concerns identified in this debate:

- First, it remains difficult for Commission IAs to be adequately updated in accordance with the changes made along the legislative procedure. Due to the historically limited commitment of the Council and the EP to conduct their own IAs on their respective amendments, once a Commission proposal is significantly amended, the potential impact of the final legislative package remains partly unassessed (ECA, 2010: 24-26). The EP has since taken this criticism on board, and reacted in 2012 with the creation of a Directorate for Impact Assessment and European Added Value (see Box 3). The latter includes a designated Ex-Ante IA Unit with the mandate to, inter alia, evaluate the impact of any 'substantial' amendments made by the Parliament. So far however, only 20 such IAs for major amendments have been produced by the EP (EC, 2015: 7). At the Council level as well, some recent positive developments are visible and Council Working Parties are now required to use a checklist when considering the Commission's IAs during debates on specific legislative proposals (EPRS, 2014). Until now however, the Council's IA report is yet to come (EC, 2015: 7). Despite modest improvements, the scope of an IA still hardly corresponds with the adopted proposal when it is altered after submission to the College of Commissioners. The EP, in its annual resolution on Better Law-Making, therefore requested the Commission that the revised guidelines ensure that IAs are updated along the legislative process, to ensure continuity between the IA and any proposal that is finally adopted (EP, 2014: 21).
- Second, the Court of Auditors' report identified a perceived need for the Commission to be more transparent in its selection and targeting of the IA work. In general, IAs are required for all major new initiatives and/or proposals with a significant impact. According to the 2009 guidelines, this implies all legislative proposals in the CLWP, a selection of non-CLWP legislative proposals with an anticipated significant impact, as well as major non-legislative proposals which define future policies (White Papers, action plans, expenditure programmes and negotiating guidelines for international agreements) (EC, 2009: 6). These rules however left considerable leeway for interpretation and, according to the ECA, the decision on whether or not to execute an IA was therefore often not clear in practice.

The selection of legislative proposals for IA is done based on a case-by-case screening by the Commission Secretariat-General, in consultation with the concerned DG services, and informed

by planning documents called roadmaps.²⁹ This selection process however happens on a case-by-case analysis, regardless of any quantifiable considerations to mark objective thresholds. Moreover, for non-legislative initiatives or proposals outside the CLWP, the reasoning behind their selection to be subjected to an IA was not made public. Also, the Commission's monthly reporting on legislative activity did not indicate for which of those proposals an IA was to be undertaken. As such, IAs on proposals beyond the CLWP were not visible beforehand outside the Commission services (ECA, 2010: 29). Following the ECA evaluation, the Commission since 2010 publishes lists of planned impact assessments and prepares roadmaps for all initiatives with a significant impact, including the ones outside of the CLWP (EC, 2011a: 6). In the draft revised Guidelines, made available for comments during the public consultation, the Commission leaves more room for interpretation by the leading DG to decide whether or not a proposal requires an IA or not. The EP has expressed its concern in this regard and argues to retain current practice, which involves the IAB to advise on selecting eligible proposals (EP, 2014: 20).

- Third, there is a problem with the use and timing of stakeholder consultations to inform the IA process. In the 2009 Guidelines public consultations are presented as an essential part of the IA work, which can be used at different stages of the process. Their application is subjected to a core set of minimum standards, as stipulated in the Commission's general principles for consultation, which are attached in an annex to the Guidelines (EC, 2002c). In terms of timing, the Guidelines suggest that 'consultation should start as early as possible to maximise its impact on policy development and it should take as long as needed'. The minimum timeline for (written) public consultations was therefore set at eight weeks though over time this was extended to a minimum of twelve weeks (EC, 2012: 28). After the consultation, the Commission is required to report back to the stakeholders and the public on how their input will feed into the ongoing IA work. Moreover 'ideally, feedback should be given in various phases of the consultation process' (EC, 2009b: 14-16).

Despite such minimum standards, the Guidelines remain silent on which stages of the IA-process are to include a public consultation. While the evaluation of the IA-system concluded that the vast majority of the consultations executed so far were indeed in line with the rules outlined in the guidelines, including minimum consultation periods and reporting requirements, the ECA report stresses the need to perform consultation on draft reports too (ECA, 2010: 29). Public scrutiny mechanisms like consultations are meant to serve as a verification check to ensure that IAs address the most relevant issues and offer a balanced and comprehensive assessment of all feasible policy options. The lack of such public scrutiny on IA drafts is all the more problematic as the Commission seems to use IAs mainly to gather and analyse evidence to improve its proposed initiative, rather than to actually question whether or not to go ahead with a proposal (ECA, 2010: 17). In addition to the issue of timing, the IAB has warned continuously about the way in which stakeholders' views are presented in draft IA reports. Concretely, the Board's opinions have repeatedly stressed that draft reports should present more transparently the different views distilled from stakeholder consultations and, in order to enhance the IA's accountability, explain better how stakeholders' concerns were taken into consideration (IAB, 2014:7; IAB, 2013: 4).

²⁹ While the IAB does not have the mandate to require DGs to initiate specific IAs, it can advise the Secretariat-General and the DGs in identifying initiatives that in their view require IA work (ECA, 2010: 32).

- Fourth, the quality reviews of the Impact Assessment Board were found to be carried out too late in the process. Overall, the report by the Court of Auditors notes that the establishment of the IAB as an internal review body has improved the transparency and quality of the DGs' work in carrying out IAs. With regard to the timing of the Board's involvement however, the ECA argues that, considering the lengthy procedure, Commission initiatives have to go through, and the often substantial nature of the IAB opinions, the IAB's review of the IA can only have a meaningful effect on the final version of the underlying initiative if it takes place early enough in the process (ECA, 2010: 31).

4. Human rights and development in the EU impact assessment system

With regard to the scope of Commission IAs, it is worth looking into two specific types of potential impacts which recently gained more attention and are of particular relevance for this study. Notably i) the consequences of legislative proposals on developing countries, as well as ii) the potential implications for human rights.

With regard to developing countries

- Ever since the 2009 IA Guidelines came into force, any IA is formally required to assess whether and in how far the proposed policy options may have an impact on the EU's relations with third countries, including, and in particular, on developing countries. Specifically 'initiatives that may affect developing countries should be analysed for their coherence with the objectives of the EU development policy. This includes an analysis of consequences (or spill-overs) in the longer run in areas such as economic, environmental, social or security policy' (EC, 2009: 42). This commitment is further detailed in the guidelines and includes a number of considerations. First, whether the concerned policy may affect any international obligations and commitments of the EU in the area of development cooperation (e.g. arising from the Cotonou Agreement or the Millennium Development Goals). Secondly, regarding the potentially differentiated impact on countries at different stages of development, including whether a policy-option implies adjustment costs for developing countries or affects particular goods and services produced or consumed by developing countries (EC, 2009: 34-36). Impact Assessment provisions on the development dimension are particularly relevant in view of the EU's Policy Coherence for Development (PCD) Agenda, which stipulates that all EU policies should work toward fulfilling its objectives in the area of development cooperation. Article 208 of Lisbon Treaty constitutes the most recent legal anchoring of the PCD-principle and notes in this regard that 'The Union shall take account of the objectives of development cooperation in the policies that it implements which are likely to affect developing countries'.

The implementation of the development provisions in the 2009 Guidelines have been limited. A screening of Commission IAs by CONCORD Denmark³⁰ showed that from 2009 to mid-2011, only

³⁰ The Danish branch of CONCORD, the European NGO confederation for relief and development, see: http://www.concordeurope.org/images/The_European_Commissions_Impact_Assessments_continue_to_disregard_Developing_Countries.pdf

7 out of 77 relevant IAs actually met the obligation of looking into potential impacts on developing countries. A second screening showed that, between 2009-2013, only 19% out of 177 relevant IAs (out of a total of 402 executed IAs) looked at development concerns (CONCORD Denmark, 2013). In its contribution to the public consultation on the 2014 revision of the IA Guidelines, CONCORD therefore issued a number of suggestions in order for the IAs to better address development considerations. These include making explicit references to the EU's PCD commitments, broadening the entry points for CSOs to better inform and scrutinise the IA work at all stages, opening up the IAB to non-Commission stakeholders and development specialists, and finally, to strengthen the capacity of DG International Cooperation and Development - EuropeAid (DG DEVCO, from here on referred to as EuropeAid) to support other DGs in assessing the development impacts of their policy proposals (CONCORD, 2014).

With regard to Human Rights

- In 2005, the EC decided that Fundamental Rights have to be taken into account in the EU's Impact Assessment system, which means that all legislative proposals are to be assessed against the EU Charter of Fundamental Rights (COM, 2005: 5). In terms of terminology, 'Fundamental rights' imply the concept of human rights within a specific EU internal context, including EU citizen's rights. As such, the term has traditionally been used in a constitutional setting, whereas the term 'human rights' is used in international law. Both terms cover similar substance, and a full list of the specific rights covered under the Charter is attached to the Guidelines in an annex. The Charter of Fundamental Rights includes a comprehensive set of rights, freedoms and principles, which are to be considered as relevant concerns under all three pillars of the IA, across the economic, social and environmental dimensions of sustainable development. Depending on their nature, some fundamental rights (e.g. the prohibition of torture, inhumane, degrading treatment, the prohibition of slavery and forced labour) are considered absolute and can therefore not be limited or subject to derogation, while others (e.g. the protection of personal data) can. This implies that policy measures interfering with the latter type of rights 'subject to limitations' can be justified under certain conditions (EC, 2009: 39.).

In 2011, following the Commission's 2010 'Strategy for the effective implementation of the Charter of Fundamental Rights by the EU' (EC, 2010b), a specific guidance document developed by DG Justice C.1 was made available to Commission staff, so as to describe for each methodological step of the IA-process just how the fundamental rights aspect should be taken into account. Regarding external policies and their impact on human rights, these 'Operational Guidelines on taking account of Fundamental Rights in Commission Impact Assessments' state that 'the Charter applies equally to the internal and external actions of the European Union'. As such, it follows that the Union should - in all its actions, externally as well as internally, in legislative as well as in its policy interventions - respect the provisions of the Charter. Since 'compliance with fundamental rights' and active 'human rights promotion' are obviously two fundamentally different issues, it is worth noting that the IAs task is not to verify the legal compliance of the proposal with the Fundamental Rights Charter, although it does do some groundwork before such a 'fundamental rights check' takes place later in the legislative process.

In fact, ‘assessing the impact on fundamental rights’ goes beyond such a mere legal compliance analysis:

‘The Impact Assessment should be used to identify fundamental rights liable to be affected, the degree of interference with the right(s) in question and the necessity and proportionality of the interference in terms of policy options and objectives. However, the Impact Assessment does not include examination of compliance with fundamental rights.’ (EC, 2011b: 10).

Following from the Charter of Fundamental Rights and its operational interpretation as outlined in the 2011 Operational Guidelines by DG JUST, the EC’s DG’s are expected to assess how their respective policy and legislative proposals will impact FRs, including in third countries outside the EU.

In addition to the legal requirement under the Commissions framework for Integrated Impact Assessments, The European Council, in its 2012 ‘Strategic Framework and Action Plan for Human Rights and Democracy’, called for the Commission to *‘insert human rights in Impact Assessment, as and when it is carried out for legislative and non-legislative proposals, implementing measures and trade agreements that have significant economic, social and environmental impacts, or define future policies’* (CoEU, 2012a: 6). A recently released Joint Communication ‘Keeping human rights at the heart of the EU agenda’ by the Commission and the HRVP, outlines suggestions for a new Action Plan for 2015-2019. In it, the two respective institutions acknowledge *‘The steps taken towards integrating human rights considerations in the impact assessments carried out for legislative and non-legislative proposals’* as one of the achievements so far under the former Action Plan. For the new AP, the Joint Communication identifies ‘deepening the effectiveness and results culture in Human Rights and democracy’ as one of the five strategic areas for EU action, and reinforces the previous commitment to strengthen the contribution of IAs to the protection of Human Rights. It aims to do so, by *‘[b]uilding on the existing assessment of the impact of EU actions on fundamental rights’*, the AP aspires to improve the incorporation of HR in Commission IAs for proposals with an external effect and likely significant impacts on HR. It concludes that *‘this should be done, as necessary, by developing further guidance on the analysis of HR impacts, strengthening the expertise and capacities for this type of analysis and ensuring robust consultations of relevant stakeholder groups exposed to major HR risks’* (EC and HRSFAP, 2015:19).

As a brief scoping exercise to get an idea of how human rights have featured so far in the EU’s impact assessments, we scanned a number of impact assessment reports by DG DEVCO, as well as their corresponding reports by the IAB, for their use of (human) rights language and whether or not they consider the impact of the concerned policy proposals on citizen’s rights. In order to keep the sample manageable, we chose to select the 11 IA reports published since 2011, the year when DG JUST adopted its operational guidelines on taking into account fundamental rights in EU impact assessments. Annex 1 provides a detailed overview of the way in which human rights are referred to across the IA reports covered.

Scanning through these reports, we identify a variety of ways in which different types of human rights language, generalised or specific, feature throughout DG DEVCO's impact assessments. Among the different contexts in which reference is made to human rights issues, a majority of the selected IA-reports mentions human rights in a general manner, as one of the core principles and objectives of international cooperation and EU development policy. This includes notions of the universality and indivisibility of human rights, as well as broader treaty language on the promotion of human rights, principles of good governance, rule of law and democratic principles. Reference is also made to human rights issues when it comes to the alignment of different aid instruments, e.g. the DCI and the EIDHR, as fundamental pillars of partnership agreements with third parties, or in sections of the report outlining the national or regional socio-economic context in which the policy or regulation at hand aims to operate. Finally, it is interesting to note that, among the IA reports covered, quite a few of them include human rights language in the context of the public consultations held during the process of the IA report. Stakeholders involved in these formal consultations generally tend to push for a stronger link between EU development assistance and the human rights discourse and track record of the concerned partner.

While this scoping exercise is too small to be representative of DG DEVCO's IA reports, let alone of the EU's IA reports as a whole, it is striking given the timing (post-2011), that none of the concerned reports seems to look into the potential human rights-related issues that may arise from the proposed development policy or regulation. More substantive research, similar to the aforementioned analysis done by CONCORD on development impacts, is necessary however, to allow for a proper understanding of the EU's practice on taking into account human rights issues into its impact assessments, beyond the guidelines and into the reports that is.

5. Better Regulation for better impact assessments

Recently, in May 2015, European Commission First Vice-President Frans Timmermans announced his agenda for Better Regulation, including the long-awaited new guidelines for the Commission's impact assessment system. This section therefore presents a brief overview of the Better Regulation package in general and subsequently outlines what it implies for the practice of impact assessment, particularly on development and human rights.

The broad objective of the Better Regulation agenda is to make the various processes of EU policy- and rule-making more straightforward, evidence based and open to public input and scrutiny. It aims to provide 'better regulation for better results', contributing to the new Commission's overall ambition to focus 'on the things that really do need to be done by the EU and making sure they are done well' (EC, 2015:3). As a tool-kit for better policy making, the agenda offers a comprehensive set of guidelines covering the whole policy cycle, from planning to evaluation and revision. Highlights include a reappraisal of the Commission's Regulatory Fitness and Performance Programme (REFIT), aimed at cutting red tape and reducing regulatory costs, and the establishment of a new Regulatory Scrutiny Board (RSB) which will replace the Impact Assessment Board (IAB) that had been in place since 2006.

Indeed, in response to some of the critiques on the function of the IAB, the Better Regulation Package includes the establishment of a Regulatory Scrutiny Board (RSB). This new Board will not only scrutinize

Impact Assessments, but will also cover all major evaluations and ‘fitness checks’ of existing legislation. In terms of composition, the RSB will consist of six members, three of which will be recruited from outside the EU institutions and all will work full-time in their capacity of board member. In response to a leaked draft version of the Better Regulation agenda, critics have voiced concerns that new members from outside the institutions would likely be rather ‘business friendly’ (Crisp, 2015). However, opening up the IAB to non-commission stakeholders (incl. civil society and the private sector) has equally been a long-time request from CSOs like the European NGO confederation CONCORD, and at the time of writing it remained to be seen who exactly will serve in the RSB (CONCORD, 2014: 3).

In order to make EU policy-making more inclusive, the Better Regulation agenda also includes reforms to the public consultation procedures, including regarding its timing. Stakeholders will from now on be able to share their views on the entire lifecycle of a given policy and twelve-week public consultations will be held not only for policy proposals but also for evaluations and fitness checks of existing legislation. Also, from now on four-week public consultations will also cover delegated acts, which stipulate the technical or specific elements needed to implement the legislation adopted by the EP and the Council. The Commission will publish an indicative list online of such upcoming acts in order to allow stakeholders to plan ahead on their opinions (EC, 2015: 4-5).

In addition to the Regulatory Scrutiny Board and the new rules for public consultation, the Better Regulation Package includes the long-awaited revised guidelines for EU Impact Assessments (IA). These new guidelines strongly build on the previous ones from 2009, though seem to have taken on board some of the previously mentioned criticisms by the ECA and others. One of the main critiques concerns the perceived lack of political will and organisational capacity at Council and EP-level to conduct their own IAs on amendments to Commission proposals. As such, the Commission’s Proposal for an Inter-institutional Agreement on Better Regulation, calls again on the EP and the Council to carry out their own impact assessments, hoping that ‘the new political mood’ in both institutions will provide ‘not just to commit to the principles of better regulation – but to make those principles stick’ (EC, 2015: 7).

The Better Regulation agenda comes with a comprehensive ‘Better Regulation Toolbox’ which provides extensive conceptual and methodological guidance on when and how Commission staff should take into account the different types of impacts of EU policy proposals, including, inter alia, on development and human rights issues. With regard to development considerations, the Toolbox guidelines reflect a good understanding of PCD and identify some of the ‘usual suspects’ when it comes to EU policies with a likely harmful spill-over effect. More importantly though, the guidelines provide basic methodological guidance and a checklist of development concerns per impact area (EC, 2015b: 219-225). How this upgraded guidance will be used in practice remains to be seen as the legal requirements for EU policy-making to take into account development objectives (Art. 208 TFEU) stay the same. At the very least though, these new guidelines provide the development community with more specific ‘handlebars’ to refer back to when holding the Commission accountable against its own commitments.

As discussed earlier in this section, since 2005 the EU’s IA system also has to take into account Fundamental Rights, which implies that all legislative proposals are to be assessed against the EU Charter of Fundamental Rights. In 2011, DG JUST issued specific operational guidance for Commission Staff in this

regard, stating that ‘the Charter applies equally to the internal and external actions of the European Union’. Essentially the IA-system in place has thus for long been mandated to assess whether human rights, inside and outside the Union, were likely to be affected by EU policies. The extent to which this mandate has been applied so far is questionable however, which may be why the new guidelines explicitly state that when assessing the impacts of initiatives with an effect outside of the EU, additional consideration should be given to international Human Rights instruments’. This includes a ‘fundamental rights check list’, against which all identified policy options should be screened in order to ensure that the correct methodology is used (EC, 2015b: 178).

In sum, the new guidelines offer promising signs of a renewed impetus for a cross-policy commitment toward better development and human rights promotion. In how far these detailed provisions will allow the EU IA system to be used as an effective tool for human rights and development will however, at least to some extent, depend on the practical (e.g. time and capacity) space and the ideological willingness to seriously consider a policy’s impact on those issues, and in how far the new Board will focus its scrutiny role in that regard. In short, the tools and the commitments are in place for the EU to get more serious about the HR and development impacts of its policies, yet whether this will actually make a difference is something that remains to be seen.

6. Conclusion

Ever Since 2003 the EU has used a system of Integrated Impact Assessments to assess the potential economic, social and environmental impacts of its policy, regulatory and legislative initiatives. By assessing the overall impact of such ‘major initiatives’, the IA system aims to improve the quality and coherence of the policy development process, as well as to contribute to a more coherent implementation of the EU strategy for Sustainable Development (EC, 2002a: 1). The present chapter has detailed the origins and the rules of procedures of the current IA system as it is regulated under its previous guidelines from 2009, and provides a forward looking overview of some of the main changes under the recently issued new guidelines for impact assessment and better regulation. As such, we identified the IA system’s main flaws and shortcomings, in general, as well as in the area of human rights and development specifically.

While the IA system is generally regarded as a valuable policy tool and an intrinsic part of the Commission’s policy development procedures, a number of critical weaknesses have been identified over the years. Some of these – though not all- have now been addressed in the new guidelines for IA, as part of the Commission’s agenda for ‘Better Regulation’, released in May 2015. Fundamental handicaps in the EU’s impact assessment system include the following issues:

- Based on the 2005 Inter-Institutional Common Approach to Impact Assessment, the Commission, the Council and the EP should each assess the impact of their respective proposals and amendments, and develop the organisational means and resources to do so. Current practice however shows that, at the level of the EP and the Council, the implementation of these provisions has been limited to non-existent. Limited in the case of the EP, which in 2012 established a Directorate for Impact Assessment and European Added Value and has since produced some 20 IAs for major legislative amendments. Non-existent for the Council, because they have assessed none so far. As a result, once a Commission proposal is significantly amended, the potential

impact of the final legislative package remains, at least to some extent, unassessed. In its Proposal for a new Inter-institutional Agreement on Better Regulation (to be adopted by the end of 2015), the Commission again calls upon the EP and the Council to carry out their own impact assessments on any substantial amendments they raise during the legislative process, hoping that *'the new political mood'* in both institutions will provide *'not just to commit to the principles of better regulation – but to make those principles stick'*.

- Secondly, there is a perceived need for the Commission to be more transparent in its selection and targeting of its impact assessment work. In general, IAs are required for all major new initiatives and/or proposals with a significant impact. According to the 2009 guidelines, this implies all legislative proposals in the CLWP, a selection of non-CLWP legislative proposals with an anticipated significant impact, as well as major non-legislative proposals which define future policies (White Papers, action plans, expenditure programmes and negotiating guidelines for international agreements) (EC, 2009: 6). These rules however left considerable leeway for interpretation and, according to the European Court of Auditors, the decision on whether or not to execute an IA was therefore often not clear in practice.
- Third, there is a problem with the use and timing of stakeholder consultations to inform the IA process. Public scrutiny mechanisms like consultations are meant to serve as a verification check to ensure that IAs address the most relevant issues and offer a balanced and comprehensive assessment of all feasible policy options. Opinions from the IA Board have repeatedly stressed that draft IA reports should present more transparently the different views distilled from stakeholder consultations and, in order to enhance the IA's accountability, explain better how stakeholders' concerns were taken into consideration. The lack of such public scrutiny on IA drafts is all the more problematic as the Commission seems to use IAs mainly to gather and analyse evidence to improve its proposed initiative, rather than to actually question whether or not to go ahead with a proposal. It is fortunate in this regard that the Commission's Better Regulation package includes new guidelines on stakeholder consultations. Among the new stipulations is the provision that stakeholders will from now on be able to share their views on the entire lifecycle of a given policy. Also, for the first time, public consultations will be able to also scrutinize delegated acts, which stipulate the technical or specific elements needed to implement the legislation adopted by the EP and the Council.

In theory, EU impact assessment are obliged to look into the potential impact of EU policies on human rights and developing countries. For development, any IA is formally required since 2009 to assess whether and in how far the proposed policy options may have an impact on the EU's relations with developing countries. This provision relates strongly to the EU's Policy Coherence for Development Agenda, which stipulates that all EU policies should work toward fulfilling its objectives in the area of development cooperation. The implementation of this obligation has however been limited to say the least, as analysis by CONCOR Denmark showed that between 2009 and 2013, less than 19% of the relevant IA reports actually took into account development considerations. While the new guidelines under the Better Regulation Toolbox indeed provide improved guidance here, it remains to be seen in how far this will translate into better practice. At the very least though, the new guidelines provide the development community, in- and outside the institutions, with more specific 'handlebars' to refer back to when holding the Commission accountable against its own commitments.

In view of human rights impacts, the European Commission is since 2005 obliged to assess its policy proposals against the EU Charter of Fundamental Rights. In 2011 then, DG JUST issued operational guidance describing for each methodological step of the impact assessment process, just how the fundamental rights aspect should be taken into account. Regarding external policies and their impact on human rights, these guidelines state that the Charter of Fundamental Rights applies equally to the internal and external actions of the Union. As such, it follows that the Union should - in all its actions, externally as well as internally respect the provisions of the Charter. The extent to which this mandate has been applied so far is questionable however, which may be why both the 2012 and the 2014 EU Action Plans on Human Rights and Democracy, as well as the Better Regulation Toolbox, strongly emphasise that human rights consideration should be integrated in the ex-ante impact assessments of EU policies.

While it is not within the scope and capacity of the current study to analyse all EU Impact Assessments (more than 700 between 2007 and 2014 alone), we scanned a number of impact assessment reports by DG DEVCO since 2011, for their use of (human) rights language and whether or not they consider the impact of the concerned policy proposals on citizen's rights. Across the 11 IA reports considered, we identified a variety of ways in which different types of human rights language, generalised or specific, feature throughout DG DEVCO's impact assessments. yet none of them seemed to look into the potential human rights-related issues that may arise from the proposed development policy or regulation. Too small a sample to be representative, we conclude that more substantive research, similar to the aforementioned analysis done by CONCORD on development impacts, is necessary in order to gain a better understanding of the EU's practice on taking into account human rights issues into its impact assessments, that is beyond the guidelines and into the reports.

IV. Human Rights in EU Trade impact assessments

Trade policies have a very high profile, and though they are not necessarily the ones which carry the most obvious human rights impacts given their seemingly purely economic nature, they have for a long time been the subject of scrutiny on this account. Trade policies carry with them the promise of increased international sales for domestic corporations, and usually result in higher employment rates, wages, etc. Such effects, if verified, have a potentially virtuous impact on human rights, notably for what concerns the right to a decent standard of living (Sykes, 2006: 70).

However, trade (and investment) policies are also generally associated with liberalisation, i.e. the lifting or lowering of all barriers which might hinder the free flow of goods, services and/or capital across borders. This concerns quotas and tariffs of course, but also non-tariff measures, such as domestic regulations seeking to achieve non-trade related purposes. It is often argued that trade liberalisation leads to deregulation, which then in turn might pave the way for all sorts of human rights violations. One can for example think of a generalised lowering of environmental standards, which would then lead to increased levels of pollution, negatively affecting the people's right to health (Sheldon, 2006).

In order to address such impacts, trade policies have been adapted in a number of ways to ensure that they, overall, would contribute positively (or at least be neutral) to the human rights situation in the countries and regions concerned. As was extensively described in another FRAME Report (Beke *et al.*, 2014), in the EU such adaptations have espoused several forms of conditionality. First of all, 'human rights clauses' have been included in trade agreements, making the benefits of such agreement (for example, preferential market access) conditional on respect for human rights. Second, the Generalised System of Preferences is a unilateral mechanism by which a number of developed countries grant developing countries preferential access to their markets against certain commitments in terms of human rights and other public interest objectives (Beke and Hachez, 2015). Finally, the EU has also enacted regulations to ensure that certain goods (e.g. timber) whose production is often linked to human rights violations would only enter the EU market when produced responsibly. (Beke *et al.*, 2014).

However, beyond these specific conditionality mechanisms, voices have risen to request that no trade policy would be adopted or implemented without ensuring that, in its regular daily operation, it does not have adverse effects on human rights. Assessments of human rights impacts have therefore started to be carried out *ex ante* (before the adoption of policy) and *ex post* (after the adoption and implementation of policy) (Andreassen and Sano 2007: 288). Although generally, in the context of trade agreements 'impact assessments' are often understood to be studies 'carried out *prior to* the signing of the trade agreement in order to identify and, where necessary, mitigate possible adverse impacts through accompanying flanking measures.' (Cote, 2014: 113-114)

Some have forcefully argued that, for the EU, given notably the strong commitment to human rights enshrined in the Treaties, conducting impact assessments with a view to protecting, promoting, and fulfilling human rights through trade was a matter of legal obligation (FIDH 2015: 7). Though this is more of a programmatic document, the 2012 EU Strategic Framework and Action Plan for Human Rights and

Democracy was planning to ‘[i]nset human rights in Impact Assessment, as and when it is carried out for legislative and non-legislative proposals, implementing measures and trade agreements that have significant economic, social and environmental impacts, or define future policies.’ (Council of the EU 2012, Action I, 1), whereas the Joint Communication of the Commission and the HR/VP on the new action plan proposes actions to ‘[s]trengthen [...] the contribution of impact assessments (IAs) to the respect of Human Rights’ (EC and High Representative of the European Union for Foreign Affairs and Security Policy 2015: Action 27).

The preceding chapter already provided ample details about impact assessments as well as their strengths and weaknesses. In this chapter, we first focus on the particular challenges and opportunities that the field of trade poses for human rights impact assessments. We will illustrate such challenges and opportunities with the theoretical foundations of the EU’s assessment of the human rights impacts of its trade policies.

Second, we will test the ways in which EU trade policies have been able to assess their impacts, *ex ante* or *ex post*, and how EU trade policies adapt accordingly. In this regard, this chapter will review the methodology, findings and influence of the different impact assessments which have been conducted so far, and will subsequently attempt to design a methodology for *ex post* impact assessments in countries with which the EU has concluded a trade agreement. This last section will focus on the evolution of the right to freedom of association and collective bargaining (FACB) before and after the adoption of trade agreements in a number of countries and will be based on a very rich dataset, allowing us to reach reliable results.

A. Challenges and opportunities of human rights impact assessments in an EU context

1. High expectations, low potential?

First of all, a proper appraisal of challenges and opportunities of HRIAs must start with a clear delineation of what HRIAs are able to achieve.

As explicitly noted, human rights impact assessments are an aid to decision-making, not a substitute to it (European Commission C, 2009: 4). HRIAs therefore aim to provide guidance to policy-makers and treaty negotiators on how to produce the most human rights friendly text. IAs are however not binding, and policy-makers are therefore free to disregard them. And indeed, it has been evidenced that the traction exercised by impact assessments on final policies varied widely (Chanchitpricha and Bond 2013; Bakker *et al.* 2009: 437).

One of the reasons for this is that HRIAs, although they have been considered a very useful tool for mitigating the adverse effects of trade liberalisation on human rights (UN Economic and Social Council, 2002: 11)³¹, have not yet convinced all policy makers of their effectiveness. Many HRIAs have been

³¹ The report goes: ‘A human rights approach requires a constant examination of trade law and policy as it affects the enjoyment of human rights. Assessing the potential and real impact of trade policy and law on the enjoyment of

deemed methodologically weak and ideologically tainted (Berne Declaration et al. 2010: 9, Harrison and Goller, 2008: 601). At times, regulators have also been found to have too little expertise on social issues to make meaningful use of HRIAs, or to place demands on consultants which are not ambitious enough to produce relevant assessments (Esteves, Franks and Vanclay 2012: 36). Conversely, some HRIAs might also be too complicated to use, and therefore of little help in trade negotiations.

Moreover, recommendations have at times lacked strength or relevance (Cote 2014: 118; FIDH 2015: 16), or have sounded unrealistic. Notably, HRIA proponents must be aware of and accept the fact that the activities of trade negotiators have World Trade Organization (WTO) law as a limiting framework, and that any recommendation must be compatible with WTO law (Berne Declaration et al. 2010: 4).

Additionally, HRIA drafters must be wary of any instrumentalisation of their work, as HRIAs may be used as a pretext or as an additional reason to adopt a trade agreement which should normally not be adopted, either because the partner country does not want it, or because the human rights costs are still too high. HRIAs must therefore avoid any complacency, make sure that their findings are clear, and opt for recommendations which are genuinely likely to avert negative human rights impacts. Indeed, authors have described cases in which weak safeguards were considered ‘close enough’ to good practice to warrant the conclusion of a trade agreement which retained its negative impacts. As was rightly underlined by a group of experts (Berne Declaration et al. 2010: 8), there is a

“danger that HRIAs will be used to justify concluding trade and investment agreements rather than challenging the existing model of trade and investment, which advocates liberalization and deregulation. [...] HRIAs may undermine resistance to the current model of trade and investment agreements, by providing options for countries to conclude agreements with limited safeguard provisions.”

To sum up on the above, in order to be effective and weigh on negotiations, HRIAs need to be convincing and credible, which will inevitably require that they rest on sound methodology that ensures relevant and ideologically neutral findings and recommendations (Esteves, Franks and Vanclay 2012).

2. Methodological challenges

As indicated above, predicting the impacts of a contemplated policy and establishing causality between an agreement and certain impacts is always more or less of a gamble (Andreassen and Sano 2007: 281). HRIAs therefore need to be precise and univocal in order to be credible and convincing. Many HRIAs are vague, or extrapolate human rights conclusions from unsuitable or partial data. Therefore, the importance of sound methodology has been restated many times. However, HRIA methodology is still emerging, as the theory and practice of HRIAs can only count on 10-15 years of hindsight (Berne Declaration et al. 2010: 6; Boele and Crispin 2013; Harrison and Goller, 2008 595).

Although there is admittedly no “one size fits all” approach to HRIAs, which are heavily dependent on context, the largest methodological flaw found in HRIAs so far is when HRIAs are included in, or derived

human rights is perhaps the principal means of avoiding the implementation of any retrogressive measure that reduces the enjoyment of human rights.’

from, wider impact assessments such as ‘social impact assessments’ or ‘sustainability impact assessments’ (De Beco 2009: 141). In such cases, the specificity of human rights tends to be diluted into macro-economic analyses of how a trade agreement might influence certain economic indicators such as growth or employment rate. Typically, those macro-assessments use hypothetical, scenario-based methods for modelling the possible impacts of trade liberalization on the target country’s economy (Cote 2014: 130) and from then on, interpret positive or negative economic evolutions in human rights terms (Harrison and Goller, 2008 605). For example, increased economic activity due to higher trade volumes will be thought to result in a lower unemployment rate, which would then logically result in a general improvement of the right to an adequate standard of living.

The most used modelling methodology is the computable general equilibrium (CGE) model, which Kyle Cote (2014: 130) found to be used in 16 of 18 surveyed EU SIAs. The CGE method consists of confronting a set of data relative to a country with equations describing reactions to certain changes in policy or other circumstances.

There are several problems with such an approach. First of all, there is widespread doubt that modelling methodologies can lead to reliable simulations of consequences linked to human rights in relation to different scenarios. As stated in a detailed study in relation to labour standards and the decent work agenda, there are known limitations on the ability of CGE modelling to simulate the impacts of trade on employment and wages in developing countries, where certain assumptions about labour market elasticities may be less applicable given high levels of informal employment and uneven access to information about employment opportunities. In addition, quantitative data may be poor and unreliable, particularly time-series data. (Ergon Associates 2011: 22)

Second, modelling disregards the fundamentally normative and standards-based character of human rights, calling for a ‘dedicated’ approach, ‘providing an evidence base for alignment with international human rights standards (Kamp and Vanclay 2013: 91). A proper human rights impact assessment should start from the catalogue of rights and benchmark the trade agreement to be negotiated against it rather than working the other way around and try to link any predicted impact to a human right (Bakker *et al.* 2009: 439 and 443). This approach highlights the fact that governments have human rights *obligations* which must not be breached by trade agreements but should be fulfilled by them (Harrison 2011: 176).

Third, such macro-economic approach tends to unduly ‘aggregate’ the human rights impacts, and to overlook or condone potential trade-offs between human rights progress and regress caused by the trade agreement (Harrison and Goller, 2008 612). For example: a general raise in wages might also be accompanied by growing inequality, which the macro-economic model might not perceive. Thus, there is a need to disaggregate impacts to ensure that all rights are respected each in their own right.³²

Additionally, modelling also tends to consider society as one whole, and will not properly consider the situation of vulnerable groups, as such models will normally only record heavy tendencies expressed in aggregate terms (Harrison and Goller, 2008: 593 and 612). The gender dimension of trade liberalisation, for example, is at risk of being overlooked or underestimated (Bakker *et al.* 2009). This is a major flaw in

³² See a discussion of a tool specifically dedicated to the assessment of Women’s rights in Bakker *et al.* 2009.

methodology, since human rights are primarily concerned with the interests of the weaker and poorer in society, and HRIAs should place ‘emphasis on enhancing the lives of vulnerable and disadvantaged people, and in particular [have] a specific focus on improving the lives of the worst-off members of society’ (Esteves, Franks and Vanclay 2012: 40). In this respect, it has been underlined that HRIAs must not ‘confiscate’ the assessment of the human rights situation from those who live it (Boele and Crispin 2013: 130; Esteves, Franks and Vanclay 2012: 35). Namely, modelling takes a very theoretical and hypothetical approach, whereas an HRIA should be based on the real-life experience of those who might be impacted (Harrison and Goller, 2008: 600).

Harrison and Goller (2008, 607) have conclusively documented the difficulties associated with such modelling methods and conclude that, for an HRIA to be successful, it must be based on an explicit evaluation of the impact of trade law obligations on relevant, codified human rights obligations that apply to the state in question. Relevant obligations should be clearly and fully explained. Guidance from expert bodies, such as the General Comments of CESCR, should be utilised to ‘flesh out’ the content of obligations. The impacts of trade law obligations must then be measured against the relevant human rights standards to see if violations of human rights have occurred. If impacts are not comprehensively referenced back to relevant human rights standards, as set out in relevant international and national law, the added value of utilizing a human rights methodology is largely lost and additional risks arise.

An additional problem for HRIAs is their ability to demonstrate that its approach and its models rest on reliable factual bases, namely on sufficient and reliable data. HRIA practitioners often point out to human rights indicators for testing hypotheses and verifying predictions *ex post* (Andreassen and Sano 2007: 278). However, reliance on indicators and quantitative data may be insufficient, since variation will not necessarily be conclusive in terms of causality. This is why experts (Harrison and Goller 2008: 609) recommend that such hard data be complemented ‘with “on the ground” studies of affected populations to gauge the extent to which these changes have led to human rights violations. Such studies will also ensure a strong participatory element in the HRIA.’

3. Scope

When HRIAs are included in a broader IA, choices must be made in the preparatory phase of the assessment regarding the ‘themes’ that will be analysed due to the likely occurrence of certain impacts. This phase is absolutely crucial in order to make sure that the HRIA actually does investigate the relevant issues with complete understanding of the local context. In this exercise, widespread and meaningful consultation of affected stakeholders is of course among the most appropriate methods of data collection and priority setting (Boele and Crispin 2013: 130-131).

Poor scoping has been found to lead to arbitrarily excluding a number of issues from the analysis. As Harrison and Goller recall (2008: 598), for example, ‘the EU WTO study on the agriculture sector excluded health and education as themes requiring in-depth consideration because they were not “directly affected” by liberalisation of trade in agriculture, but [...] this is debatable from a human rights perspective.’

So far also, HRIAs have tended to record or predict impacts on Economic and Social rights rather than on Cultural Rights or Civil and Political Rights (Berne Declaration et al. 2010: 10; Harrison and Goller, 2008: 592). This is probably due to the extensive use of modelling methodologies, which first map out the economic impacts of trade liberalisation, before extrapolating related human rights impacts. Logically, those economic impacts translate in economically labelled rights connected with the labour market, which is heavily dependent on the health of the general economy.

This is also a major flaw in any HRIA, given the ‘indivisibility’ of human rights. HRIAs claim that these rights are mutually reinforced and that no human right should/is supposed to take precedence over another (Donnelly 2003: 27).

Moreover, the reduced scope of HRIAs might result in a severe underestimation of the impacts and therefore fail to induce negotiators to take such impacts seriously. Furthermore, certain impacts on human rights might be entirely ignored, so that no appropriate safeguard will be included in the agreement.

These scoping problems will probably remain as long as no proper guidelines will exist on properly defining the impacts which require particular examination (Harrison and Goller, 2008: 599).

4. Best practices

HRIAs are still an inchoate discipline but since they were incepted, a number of standards and benchmarks for good practice in HRIAs has been developed. In this section we will briefly review such good practices, in order to confront them to EU practices in the next section.

The most authoritative guidance in this regard is the ‘Guiding principles on human rights impact assessments of trade and investment agreements’ (United Nations General Assembly, 2011) issued by the former UN Special Rapporteur on the Right to Food, Professor Olivier De Schutter. The Guiding Principles (hereinafter the ‘Guiding Principles’) are the result of extensive consultations with governments and other stakeholders. They clearly envision the conduct of HRIAs as a State’s duty, which derives from its obligations to protect, respect and fulfil human rights,³³ and therefore not to enter into (trade) agreements which could put these obligations into jeopardy (Guiding Principles 1 and 2). Namely, ‘the Guiding Principles constitute a tool to help States fulfil their human rights obligations, avoid unintended consequences of trade and investment agreements, and achieve nationally established human development goals.’ (Guiding Principles, p. 4).

Quite importantly, the Guiding Principles insist that the very process through which HRIAs are conducted should also be human rights compliant, and in this connection they recall the ‘right of every citizen to take part in the conduct of public affairs’ (Guiding Principles, p. 5; ICCPR, art. 25). This implies that HRIAs must be conducted transparently and be part of a *public* debate conducted by a freely elected parliamentary assembly.

³³ Both the human rights of its own citizens as the human rights of citizens of other countries (p. 7).

The Guiding Principles then insist on the effects HRIAs should have on the negotiation and conclusion of trade agreements. In particular, HRIAs must not only be a cosmetic exercise. HRIAs should reflect the extent to which they conclude that a contemplated agreement might have negative impacts, or that a negotiated agreement does in fact have negative human rights impacts following an ex post evaluation. This can be done through concrete measures such as the inclusion of safeguards in the agreement or the adoption of remedial measures after the agreement has been adopted (including termination if necessary, p. 8). As for the issues that concern the utility of *ex ante* HRIAs, the Guiding Principles therefore recommend that they are conducted early on in the negotiation process, so as to render possible alterations should such alterations be recommended by the HRIA.

Regarding methodology, the Guiding Principles insist that this aspect is key in an HRIA's credibility and hence, effectiveness. As outlined above, HRIAs are riddled with difficulties, among which '(a) the difficulties of establishing causality between human rights outcomes and specific trade/investment reforms or initiatives; (b) the paucity of data, especially in least-developed countries; and (c) the limitations of quantitative and qualitative methods in capturing dynamic effects of trade/investment reforms' (Guiding Principles, p. 10). To put it briefly, the difficulties which HRIAs will encounter in trying to reach convincing results and to formulate relevant recommendations should not be augmented by a general lack of credibility resulting from a poorly designed process. Therefore, the following minimum process requirements are listed: independence, transparency, inclusive participation, expertise and funding, and status. Without these minimal elements, regardless of its contents, an HRIA will not be credible and practices going astray from those requirements even risk putting all HRIAs into disrepute (Guiding Principles, p. 10).

Only after such guarantees of credibility are secured can decisions be made on the appropriate methodology to measure the impacts of the agreement, which naturally will depend on the context. However, as indicated above, such methodology should refer to and be based on human rights standards, rely on indicators and make sure that undue tradeoffs are not inappropriately accepted (Guiding Principles, p. 11).

Box 4: The Guiding Principles on HRIAs of trade and investment agreements

1. All States should prepare human rights impact assessments prior to the conclusion of trade and investment agreements.
2. States must ensure that the conclusion of any trade or investment agreement does not impose obligations inconsistent with their pre-existing international treaty obligations, including those to respect, protect and fulfil human rights.
3. Human rights impact assessments of trade and investment agreements should be prepared prior to the conclusion of the agreements and in time to influence the outcomes of the negotiations and, if necessary, should be completed by ex post impact assessments. Based on the results of the human rights impact assessment, a range of responses exist where an incompatibility is found, including but not limited to the following:
 - (a) Termination of the agreement;
 - (b) Amendment of the agreement;
 - (c) Insertion of safeguards in the agreement;
 - (d) Provision of compensation by third-State parties;

- (e) Adoption of mitigation measures.
4. Each State should define how to prepare human rights impact assessments of trade and investment agreements it intends to conclude or has entered into. The procedure, however, should be guided by a human rights-based approach, and its credibility and effectiveness depend on the fulfilment of the following minimum conditions:
- (a) Independence;
 - (b) Transparency;
 - (c) Inclusive participation;
 - (d) Expertise and funding; and
 - (e) Status.
5. While each State may decide on the methodology by which human rights impact assessments of trade and investment agreements will be prepared, a number of elements should be considered:
- (a) Making explicit reference to the normative content of human rights obligations;
 - (b) Incorporating human rights indicators into the assessment; and
 - (c) Ensuring that decisions on trade-offs are subject to adequate consultation (through a participatory, inclusive and transparent process), comport with the principles of equality and non-discrimination, and do not result in retrogression.
6. States should use human rights impact assessments, which aid in identifying both the positive and negative impacts on human rights of the trade or investment agreement, to ensure that the agreement contributes to the overall protection of human rights.
7. To ensure that the process of preparing a human rights impact assessment of a trade or investment agreement is manageable, the task should be broken down into a number of key steps that ensure both that the full range of human rights impacts will be considered, and that the assessment will be detailed enough on the impacts that seem to matter the most:
- (a) Screening;
 - (b) Scoping;
 - (c) Evidence gathering;
 - (d) Analysis;
 - (e) Conclusions and recommendations; and
 - (f) Evaluation mechanism.

Besides this official, UN-mandated guidance, academic debate has yielded interesting indications and advice on successful HRIAs. Notably, an important message concerns the need to recognise the specificity of human rights issues, and therefore to design specific assessment methods for such issues (Boele and Crispin 2013). We already mentioned above the fact that HRIAs were often part of wider IAs. Although SIAs 'may have similar methodologies to HRIAs', they 'do not use human rights as the guiding framework,' which should be seen as a weakness given that SIAs can be 'partial and arbitrary', whereas HRIAs 'have a strong normative framework that is based on international treaties and conventions, which have codified states' human rights obligations. This framework puts pressure on duty-bearers, engages international human rights institutions and emphasizes the importance of transparency, participation and empowerment. It shifts the perspective from the aggregate to addressing the disaggregated needs of the poorest and most vulnerable.' (Berne Declaration et al. 2010: 2010 9)

B. The EU methodology: The SIA Handbook

In this section, we evaluate how the EU has defined its policies related to the conduct of HRIAs, and whether it can be said, theoretically, to be positioned on the right side of the challenges, opportunities and best practices outlined above. In the next section, we will examine how the EU HRIAs have fared in practice.

In the EU, there is no practice of conducting standalone ‘*Human Rights Impact Assessments*’ in relation to trade policies. However, ‘*Sustainability Impact Assessments*’ (SIAs), have been conducted in respect of all trade agreements since 1999.³⁴ This follows a general practice in the Commission to conduct impact assessments in respect of ‘the most important Commission initiatives and will have the most far-reaching impacts. This will be the case for all legislative proposals of the Commission's legislative and Work Programme (CLWP) and for all non-CLWP legislative proposals which have clearly identifiable economic, social and environmental impacts (EC, 2009: 6). In 2005, the Commission issued the ‘*Impact Assessment Guidelines*’, which were updated in 2006, 2009 and 2015.³⁵ In relation to trade, such general IAs are conducted whenever a new agreement is contemplated, and in order to decide whether a Council mandate to negotiate should be handed to the Commission (Handbook, p. 11).

Such general IAs, although very broad, have been conducted in relation to FTAs only recently (FIDH 2015: 9). They are quite decisive for future SIAs, as they will already make a preliminary assessment of economic, social and environmental impacts and serve as a basis for the selection of particular issues on which the subsequent SIA should focus. The SIA will therefore largely prolong the general IA (EC, 2006: 11). Moreover, the IA Guidelines have been complemented, in 2011, by the ‘*Operational Guidance on Taking Account of Fundamental Rights in Commission Impact Assessments*’ (EC, 2011).

However, despite these welcome developments, a study has concluded that in respect of all FTAs which were the subject of an IA, the treatment of the human rights component has been minimal, sometimes even leading to the conclusion that a contemplated treaty has no impact on human rights because its sole objective is trade (FIDH 2015: 9). This of course questions the very relevance of HRIAs in the field of trade altogether.

In order to define SIA practices and procedures, DG trade has adopted the 2006 ‘*Handbook for Trade Sustainability Impact Assessment*,’ (hereafter the ‘*Handbook*’) used explicitly as a way to solidify their methodology after a few years of practice (Handbook, p. 6). Partly as a follow up to the Commission’s Better Regulation Agenda and of the issuance of the new Impact Assessment Guidelines (see above, section **Error! Reference source not found.**), DG Trade has recently released a draft second edition of the Handbook (European Commission 2015, hereinafter the ‘*Draft New Handbook*’), which is currently under public consultation.³⁶ In this chapter, given that the second edition of the handbook is not yet final, we will principally review the current handbook while at times confronting our critical analysis of it to the

³⁴ According to Cote 2014: 118: the EU is apparently one of the few members of the WTO to do this consistently.

³⁵ They were preceded by EC, ‘*Communication from the Commission on Impact Assessment*’, 5 June 2002, COM(2002) 276 final.

³⁶ The public consultation page can be accessed here: http://trade.ec.europa.eu/consultations/index.cfm?consul_id=186

proposed Draft New Handbook to identify potential progress. At the same time, we will keep in mind that the latter is likely to be significantly amended at the close of the consultation phase.

As the name indicates, Sustainability Impact Assessments, which DG trade states are ‘the most sophisticated form of impact assessment used by the EC (Handbook, p. 7) seek to look beyond the purely trade aspects and effects of agreements but their scope is much wider than human rights, and the assessed impacts belong to three pillars, namely economic, social and environmental impacts. The Draft New Handbook (p. 3) adds a fourth dimension: Human Rights.³⁷

As indicated above, this examination of human rights within the broader framework of sustainability may have advantages, as it evidences the links that human rights have with a number of other sustainability issues.³⁸ Yet, such inclusion of human rights, which should rank as absolute priorities both for the EU and the partner country³⁹ within such a melting pot of other issues, might dilute their importance and bring them into competition with other types of objectives such as economic development (Harrison 2011: 180).

The Handbook (p. 7) states that SIAs ‘are carried out for all the EU’s major trade negotiations.’ This vague formulation arguably leaves discretion to the Commission to actually conduct an SIA or not. The Draft New Handbook (p. 9) reiterates this approach.

A number of principles govern SIAs (Handbook, p. 8), which pertain to the actors involved, the scope of the SIA, the methodology, and the outcomes of HRIAs for the policy considered. The Draft New Handbook (p. 5) takes a different approach to the principles governing SIAs, focusing on the key qualities guaranteeing their relevance, namely integrated analysis of all impacts; independence of the assessor; basis in evidence; transparency; scope and depth proportional to assessed impacts.

1. Actors

For conducting the SIA, the Commission drafts Terms of Reference (ToR) and hires independent consultants, based on tender procedures, who work independently, within the framework and specifications defined by the Commission. In practice, a relatively small group of consultancies have performed all SIAs (Cote 2014: 130).

The handbook does not list specific criteria which consultants should meet, simply mentioning that they have to be selected based on a public tender (Handbook, p. 8)

Stakeholders are also important players in the SIA process. Stakeholder consultation is one of the keystones of SIAs, and one of the major duties of consultants, along with data analysis. Each SIA section must contain information in this regard, such as who were the stakeholders engaged, what was the quality of the responses, and how they were integrated in the analysis (Handbook p. 26). In terms of which actors should be consulted, the Handbook states that ‘[t]he widest possible range of stakeholders is consulted’,

³⁷ Though apparently the Draft New Handbook still considers that sustainable development strictly speaking is composed of the original three pillars (p. 4).

³⁸ One might for example think of all the rights connected to a clean and well preserved environment, such as the right to food or water, the right to health, etc.

³⁹ For the EU, this is made mandatory by Art. 2 and 21 TEU.

it being essential for 'involvement and legitimacy in the use of Trade SIA results' and 'to build in quality check for results' (*id.*).

The Handbook states that 'all stakeholders should be given an opportunity to take part in the analysis of issues and impacts,' that SIAs should be conducted 'in cooperation with third country partners' and that they should 'include external consultations' (Handbook, p. 15).

The range of stakeholders to be involved includes other interested Commission DGs, which are gathered in an inter-service group which follows the process and may pass its views to the Consultant (called the 'Steering Committee', in line with the general IA terminology, in the Draft New Handbook), but also other institutions like the Council and the Parliament, and Member States (Handbook, p. 24). Third country governments are also involved in the process, for the following reasons:

[t]hey are very sensitive to the sovereignty issue of a study which assesses impacts outside the EU. They often fear protectionist motives on the part of the EC and expect clear messages from it on the use and goals of Trade SIAs. They have to be associated from the beginning of the Trade SIA process as key players facilitating the consultation process abroad. Debate on Trade SIAs should also involve legislators and civil society of third countries (Handbook 24).

Concerning civil society, the handbook explicitly includes 'business, academics and NGOs', and states that '[t]heir inherent diversity in terms of views expectations and capacity to interact with the Trade SIA is a key parameter of the consultation process as the Trade SIA project seeks a balanced approach between views and expectations.' (Handbook, p. 24)

In this regard, the Handbook also states that 'Consultants have to make a major effort to engage fully in a credible consultation exercise' and notably, carry out 'a thorough stakeholder analysis [...] to provide a clear picture of all parties engaged.' (*id.*)

Table 1: Stakeholders involved in EU Trade SIAs⁴⁰

Private sector	Public sector	Civil society
Corporations and businesses	Ministers and advisors (executive)	Media
Business associations	Civil servants and departments (bureaucracy)	Churches/religious groups
Professional bodies	Elected representatives (legislative)	Schools and universities
Individual business leaders	Courts (judiciary)	Social movements and advocacy groups
Financial institutions	Political parties	Trade unions
Think tanks	Local governments/councils	National NGOs
	Military	International NGOs
	International bodies (Bretton Woods institutions, UN, etc.)	Local communities

The Draft New Handbook restates the importance of stakeholder consultation, and actually raises its profile as one of two equal components of an SIA (in line with the language of recent ToR), along with data analysis and modelling (p. 9). Stakeholders are to be consulted at every stage of the consultation process (p. 26)

2. Scope

As indicated above, the scope of Trade SIAs is quite encompassing, and seeks to provide information about economic, social and environmental impacts, i.e. the three pillars of the concept of sustainable development.

Its stated purposes are to (Handbook, p. 12):

- provide an in-depth assessment of likely changes caused by the trade agreement on economies, social development and the environment in any potentially affected geographical area;
- provide information to help clarify trade-offs derived from trade liberalisation and the limits of trade negotiating positions, as well as a full package of complementary policies;
- build an open process of consultation around trade policy creating a basis for an informed discussion with a broad range of stakeholders, including civil society;
- improve the EU's institutional and political dialogue on sustainable development with its trading partners;

⁴⁰ Source Handbook p. 25 and European Commission, 'Towards a reinforced culture of consultation and dialogue - General principles and minimum standards for consultation of interested parties by the Commission', 11 December 2002, COM(2002) 704 final.

- shed light on how trade policy can contribute to internationally agreed processes on sustainable development, in particular the Millennium Development Goals and the targets set by the 2002 World Summit on Sustainable Development in Johannesburg;
- propose *ex-post* monitoring measures to be put in place during the trade agreement's implementation.

SIAs are therefore not only a tool to help negotiators negotiate and set appropriate goals, but they are also aimed at enriching the democratic debate, and at furthering general public policy objectives such as sustainable development.

In terms of where human rights (and which human rights) fit in such wide scope and purposes, little guidance is offered by the Handbook, and as a matter of fact, the phrase 'human rights' does not appear even once in it, which is fortunately no longer the case of the Draft New Handbook, according to which human rights impacts are to be analyzed on the same footing as economic, social and environmental impacts (see above).

3. Methodology

a) Process

As stated multiple times above and by all actors involved, there is of course no single blueprint for all SIAs, but, in line with the main international best practices (notably the UN Guiding Principles), the Handbook identifies a number of five key steps which all SIAs should follow:

- Preliminary assessment
- Detailed trade SIA
- Full trade SIA package
- Mitigation and enhancement measures
- Monitoring and evaluation

The *preliminary assessment* comprises a screening phase and a scoping phase. The screening phase seeks to determine which contemplated measures are likely to have an impact on economic, social and environmental conditions which cannot be appropriately addressed by existing regulatory frameworks, whereas scoping seeks to determine the breadth of coverage of the SIA according to the results of the screening.

The preliminary assessment phase is crucial, as indicated above, since it can result in leaving out relevant issues of the analysis, which has been the case before. Therefore, this phase should already rely on precise data, indicators and scenarios, and present causal links between relevant measures and potential impacts.

The criteria for the selection of themes during this first phase are 'Coverage – the themes should cover the issues comprehensively; Exclusivity – themes should not overlap; Balance – between the pillars of sustainable development' (Handbook, p. 28).

The *detailed assessment* phase 'revisits the subject matter of the preliminary assessment in greater detail by using more refined scenarios and [a]nalyzing separate components of the trade measure and their cumulative impact; [u]sing detailed causal chain analysis; [f]ine tuning the indicators (or themes); [c]oping

with variations within country groupings (or single countries) by selecting contrasting countries (regions).’ (Handbook p. 18). The detailed assessment specifications therefore insist on the precision of the data (via indicators) and on the carefulness with which causal links between measures (taken individually or together) and certain predicted impacts (via causal chain analysis, disaggregated measure analysis, and country variation comparisons).

The detailed assessment might also warrant a sector by sector analysis.

This phase should also identify potential changes in negotiating positions, potentially valuable additions to the negotiated texts, and provide an analysis of the tradeoffs (Handbook, p. 19).

This phase ends with a presentation of the results of the assessment in terms of predicted impacts on the three pillars, formulated as major or limited, positive or negative effects. It has been stated that SIAs typically do not identify major negative effects. The reason for this might be that often, trade agreements themselves are unlikely to produce serious impacts on their own, but it is rather domestic policies which create such impacts (Berne Declaration et al. 2010; Handbook, p. 19.).

The *Full trade SIA Package* seeks to provide an integrated impact assessment across the whole range of negotiations of complex agreements, giving a ‘final and comprehensive assessment of the expected outcome of the negotiations.’ (Handbook, p. 21).

The *mitigation and enhancement measures* phase seeks to formulate recommendations aimed at improving the overall impact of the trade agreement. Namely, amendments or ‘flanking measures’ should be formulated to mitigate negative impacts and enhance positive impacts.

Such measures may concern the EU or the third party and may, for example, include amendments to the text of the agreements to include safeguards, or suggestions for alternative policies (Handbook, p. 22).

The *ex post monitoring, evaluation and follow up* phase concerns what happens after the SIA had been handed and the agreement adopted, meaning that the effects of the agreement will be assessed no longer in a predictive manner, but in an empirical one. This is a quite crucial phase, as it also facilitates measuring the quality and predictive value of the SIA.

Technically, the consultancy who drew up the SIA is no longer involved in this last phase, but a range of stakeholders should be part of it. Additionally, an ‘independent body of specialists and stakeholders might be given the task of reporting on the impacts of trade policies using studies and ex-post analysis’ (Handbook, p. 23).

The Draft New Handbook significantly simplifies the SIA process by identifying three phases: i) the inception report, in which the methodology is developed and the key issues to be investigated are identified (this includes screening and scoping); ii) the interim report, which consists of ‘an in-depth assessment of the economic, social, human rights and environmental impacts arising from the expected outcome of the trade negotiation’; and iii) the final report, which refines the overall analysis and formulates recommendations (Draft New Handbook, pp. 11-14). Between each phase, stakeholders are invited to comment.

b) Tools

The handbook identifies a number of tools which should be used by the Consultants in drawing up the SIA, or perhaps these tools ‘must be used’, since the Handbook designates such tools under a ‘checklist’. These tools are aimed at collecting the ‘scientific evidence’ which should be the basis of the Consultants’ work (Handbook p. 8).

The first tool which the Consultants should develop are *scenarios*. Scenarios ‘reflect the likely range of realistic outcomes in any given negotiation’ (Handbook p. 28), for example different levels of tariff reductions. Impacts are thereafter assessed according to each of the scenarios. The Handbook insists that scenarios must be detailed enough, so as to ensure that impacts can be properly differentiated between those that are caused by trade liberalisation and those that are caused by external factors (Handbook, p. 28).

Further tools which should be used by consultants are *indicators* and *data*. Human rights indicators are ‘piece[s] of information used in measuring the extent to which a legal right is being fulfilled or enjoyed in a given situation’ (Green, 2001: 1065, and Starl *et al.* 2014).

Indicators allow for a clear, if simplified, view of the human rights situation before and after a trade agreement is enacted. In that capacity, they are supposedly the bread and butter of impact assessments. However, indicators abound are also marred with methodological difficulties, so that a poor choice of indicator can lead to more confusion than clarity. This is why the Handbook specifies a number of criteria for an appropriate selection to be used in EU SIAs:

- There should be coherence and consistency between the indicators used in the preliminary and detailed assessments;
- There should be relevance for other general policy objectives;
- There should be coherence among different possible approaches to sustainable development;
- They should cover all three pillars of sustainable development;
- They should be specific and reliable;
- The indicators should be credible and their selection transparent and justified;
- They should be measurable and illustrate trends over time (Handbook p. 29).

Data is the raw material of indicators and the Handbook warns against insufficient or unreliable data, which of course would also lead to skewed conclusions about impacts. Data can be of a quantitative nature or a qualitative nature, and data collection techniques differ between these two types. The consultants may use existing databases, or build their own, but should in any event indicate the source of the data used (Handbook, p. 32). As indicated above, field research is an absolutely necessary component of qualitative data collection in regards to human rights (Ergon Associates 2011: 21-22, given the paucity of human rights data, especially in developing countries, and also given the nature of human rights standards and violations, which are not always amenable to a quantified expression (European Commission 2011: 17).

Another tool which should be used in an SIA are *significance criteria*, which are scores given to particular impacts in relation to a number of factors. The scores determine the extent of the possible positive or

negative consequences of such impacts. Each impact receives a score for each of the following criteria: magnitude and direction of changes; existing conditions; distribution of the impacts; reversibility; risk; capacity to change.

Table 2 -- Significance criteria⁴¹

Significance criteria	Description	Scoring	Comment on scoring
Magnitude and direction of changes	Value of the impact size	(--, -, 0, +, ++)	++: greater significant positive impact --: greater significant negative impact
Existing conditions	Relates to existing economic, social and environmental conditions and stress	(--, -, 0, +, ++)	--: important existing stress ++: absence of existing stress
Distribution of the impacts	Characterises the diffuse versus localised nature of the impact.	(--, -, 0, +, ++)	--: highly localised on specific social groups or geographical areas ++: highly diffuse
Reversibility	Characterises the reversible/irreversible nature of the impact (mostly environmental or social)	Yes / no	Potential species extinction, irreversible social effect
Risk	Provides information about the probability of occurrence of the impact	(L,M,H)	L: low risk M: medium risk H: high risk
Capacity to change	Institutional and regulatory capacity of the country in which the effect is expected to implement flanking measures	(L,M,H)	L: low risk M: medium risk H: high risk

For each measure and related impact, a multidimensional table of consequences is therefore produced, allowing to get a better idea of its potential significance or negligibility, either in the positive or the negative.

Consultants are also instructed to use the proper *country groupings* to aggregate information at an appropriate geographic scale. Country groupings facilitate the analysis by limiting the number of individual countries to be surveyed, but must also be precise enough so as not to dissimulate important intra-group variations (Handbook p. 34). This absence of obligation to conduct country specific studies, even in the context of bilateral negotiations, has been severely criticized as leading to results which lacked in depth and precision (FIDH 2015: 13).

In order to properly identify impacts, a number of *quantitative and qualitative assessment tools* are also at the disposal of consultants who are encouraged to use a combination of the two (see also Harrison 2011: 174-175).

⁴¹ Source: Handbook, p. 32.

First, causal chain analysis will allow analysts to identify the true cause of a hypothetical impact. By regressing the causes of such impact to their original cause, a potential causal link between a policy measure and that impact will be uncovered.

Second, consultants are encouraged to conduct case studies in particular regions, sectors, or among a particular affected group. Case studies yield results which are more concrete than quantitative methods, but the Handbook warns against case studies which would ‘induce a bias whereby negative impacts may be overestimated relative to positive impacts, given that in trade policy, positive impacts are global and diffuse, whereas negative impacts affect limited local areas or specific social groups.’ (Handbook p. 35).

Such ‘warning’ is quite problematic in a number of ways. First of all, the affirmation that positive impacts are necessarily diffuse, and negative impacts are necessarily delimited is not supported by facts and a number of counter examples can be found. Investment provisions of a trade agreement may induce a foreign investor to build a factory in a partner country, thereby directly benefitting the families of the hired workers. Conversely, trade liberalisation can have a diffuse negative effect on a number of factors, such as depreciation of wages or increase in inequality, etc. Second, the idea that consultants should be mindful of balancing ‘specific’ negative impacts with ‘diffuse’ positive impacts when conducting a case study is very troubling, especially when negative impacts qualify as human rights violations. Indeed, in such case, as there can be no balancing of human rights violations, which should be eliminated or remedied.⁴²

Another tool which consultants are invited to use is *modelling*, which uses quantitative data to predict the likely effects of certain policies. The Handbook (p. 36) lists a number of examples of modelling methods such as ‘Computable General Equilibrium (CGE), econometric, input-output models or gravity models’

While the Handbook commands modelling for ‘offer[ing] quantitative information which relies on clear and transparent hypotheses’, it also warns that they might ignore ‘a huge part of the trade agenda, such as trade in services, trade rules and investment’, and therefore encourages the use of multiple modelling techniques (Handbook, p. 36).

Finally, the last tool recommended by the handbook is *networking*, i.e. calling upon a network of experts (whose names should be published) having the required international, national, regional or local expertise to provide meaningful advice.

The Draft New Handbook is less detailed on the tools to be used, which roughly remain the same (pp. 15-17), with some omissions. There is for example no more mention of significance criteria. On the contrary, the Draft New Handbook contains succinct guidance on the assessment of all four poles of the SIA (pp. 18-23, see below).

c) Outcome

Naturally, SIAs are meant to weigh in significantly on policy and negotiations, though they are not binding on the Commission. After an SIA is complete, DG trade drafts a ‘Position Paper’ on its conclusions, stating

⁴² The EU itself insists on this elsewhere: See European Commission 2011: 20.

where it agrees or disagrees, adding to the analysis, and suggesting concrete actions notably in relation to the negotiations (Handbook, p. 13).

Such position papers are then circulated to Member States, to the European Parliament, EU delegations, and are made public for the benefit of civil society (Handbook, p. 13). Committees composed of all relevant Commission services are then set up to ensure that the SIA recommendations are implemented and monitored (*Id.*).

However, studies of position papers have shown that the Commission sometimes chose to contradict SIA results (notably by pointing to additional positive impacts) or to ignore recommendations without proposing alternatives. Moreover, the Commission has at times argued that national governments were ultimately responsible to enact certain policies, particularly social and environmental policies (FIDH 2015: 17-18).

Table 3: Overall assessment Cycle in DG trade⁴³

Phase	Steps	When	How		Who
			Analysis	Consultation	
1. Impact Assessment (IA)	IA Extended IA	Before proposing a negotiation mandate to the Council	Preliminary in-house analysis	Internal and external consultation	European Commission under DG Trade lead
2. Real Time Trade Sustainability Impact Assessment (Trade SIA)	Preliminary Assessment	During the negotiations	Detailed analysis including: 1. Screening 2. Scoping 3. Assessments (qualitative & quantitative) 4. Flanking measures 5. <i>Ex-post</i> and monitoring	1. Meetings for inception, midterm and final phases of each study 2. Possibly local workshops 3. Direct communication with the consultant	External Consultant financed by DG Trade
	Sector studies				
	Final Trade SIA				
3. Integration of Trade SIA results into policy making	Position papers	During negotiations	Synthesis of actions endorsed by the Commission	Meetings to discuss draft position papers	European Commission under DG Trade lead

d) Conclusions on the theoretical framework of EU HRIAs

On paper, the EU SIA Handbook looks like a well thought out piece of guidance. The insistence on the three pillars of sustainable development introduces a welcome dose of balance between the interests of business and other stakeholders, and a genuine concern for the general interest both in the EU and abroad.

Concerning human rights, as indicated above, we cannot fail to notice that the current Handbook does not explicitly mention the term. On top of this being a strong indication that human rights are not a central issue in SIAs, such lack of focus does not ensure that human rights will be addressed in their own specific way, with an analysis of impacts expressed in terms of compliance with the internationally agreed

⁴³ Source: Handbook, p. 14.

standards. Rather, the methodology seems to include human rights as part of its assessment of social standards. In that sense, the EU trade SIA Handbook diverges from the recommendations of the UN Guiding Principles.

Since 2012, all specifications of tenders for SIAs contain a reference to human rights and the Charter of Fundamental Rights, and thereby oblige consultants to specifically consider human rights impacts (FIDH 2015: 11). However, such specifications do not amount to a proper methodology for conducting HRIAs and therefore, Consultants are still left to their own devices when considering human rights impacts in the context of an SIA. As indicated above, the Draft New Handbook specifically includes human rights as a variable to be analysed on the same footing as the rest, and contains specific though limited guidance as to this, showing a steady evolution towards recognising the specificity of human rights impacts. The Draft New Handbook (p. 20) furthermore states that the analysis of human rights impacts

is not intended to pass a judgement on the actual human rights situation in a country, nor to decide whether the country is eligible for the conclusion of trade negotiations; but rather, to bring to the attention of negotiators the potential impacts of the trade measures under negotiations and thus, to support sound policy making.

This statement might be problematic in the sense that it dilutes the trade-human rights nexus from the outset, by specifying that the discovery of human rights violations on the part of the partner government would not necessarily be a barrier or even an impediment to the negotiation of an FTA. While it is true that any avenue which might lead to an improvement of human rights is worth considering, at the very least SIAs could also be viewed as a safeguard preventing the EU from closing trade deals with human rights killing governments.⁴⁴ Anything to the contrary would, for example, run counter to the approach followed by the GSP+, which requires serious commitments and results in terms of human rights and good governance before trade benefits are granted (Beke and Hachez, 2015).

Nonetheless, the Draft New Handbook requires the human rights component to follow a 'normative approach' referring to the most important human rights standards such as the EU Charter of Fundamental Rights, the 'core' UN Treaties and Conventions, the ILO Core Labour Conventions and the European Conventions on Human Rights, in addition to relevant customary international law (p. 21). In conducting the analysis, consultants should identify the rights likely to be affected, how they will be affected (notably with a focus on how the FTA might enhance the partner country government's capacity to meet its human rights obligations), and identify particularly affected groups (*id.*).

Additionally, even though the Handbook recommends a diversified approach using a 'mix' of tools with regard to methodology, economic modelling (especially the CGE method) has been found to be the dominant method over case studies or other more direct social science methods (Cote 2014: 130). While the Handbook recommends that three or more scenarios should be taken into consideration in the selection of scenarios, including unexpected outcomes of 'worst case scenario situations, generally only

⁴⁴ Although this aspect might be taken up by the general IA preceding the start of the negotiations.

two scenarios have been researched This thereby limits the precision with which impacts can be assessed and induces a larger risk that the IA might miss the mark (Cote 2014, p. 120 and Handbook, p. 28 and 37).

The Draft New Handbook is likewise quite succinct on methodology specific to human rights impact assessments, and insists on the use of quantitative data (while recognising that it might be scarce) and on the important role of stakeholder consultations (see pp. 12-22). No indication is to be found, however, with regard to the particular nature of human rights measurement and tools such as indicators, which are of crucial importance, but must be used with caution given their diversity and variable quality (see Bakker *et al.* 2009: 439-440; Starl *et al.* 2014). The Draft New Handbook moreover contains no guidance at all as to how to select the particularly relevant and affected groups or rights. This is an important shortcoming as we have seen above that the existence of human rights impacts had in the past been summarily dismissed given the ‘purely economic’ nature of trade agreements (Boele and Crispin 2013: 130-131).

The Draft New Handbook however recommends that consultants refer to the ‘Operational Guidance on taking account of fundamental rights’ (European Commission 2011) which is used in general IAs, which, even though it is not specifically tailored to measure the impacts of trade policies, contains very useful clarifications which might alleviate some of the shortcomings of the Handbook and Draft New Handbook which we have been identified above. Notably, the Operational Guidance is firmly rooted in a normative approach anchored in the Charter, but also in relevant other European and United Nations standards, as appropriate (European Commission 2011: 8-9). This breadth in scope makes the Operational Guidance suitable to assessing the rights of non-EU citizens, despite its explicit focus on ‘fundamental’ rights. Moreover, the Operational Guidance insists on the fact that quantitative data on human rights is difficult to collect, and sometimes made impossible due to the nature of the right (*id.*: 17). Additionally, the Operational Guidance contains very useful indications as to the non-derogable nature of a large number of rights, thereby warning against illegitimate aggregation of results and hasty acceptance of tradeoffs between positive and negative impacts on different rights. The document states in this regard:

When comparing the different options, it is necessary to take into account the special nature of the impacts on fundamental rights and to **avoid adding together impacts of various kinds**, which could lead to a distorting result. For example, if it has been established that a given policy option would have such a negative impact that it would *violate* (i.e. restrict without justification) the rights of the child (Article 24 Charter 20), this negative impact cannot be counterbalanced by a positive impact regarding another fundamental right or other impacts. This is a legal consequence of the obligation to comply with fundamental rights. (*id.*: 20, emphasis in original)

Finally, the Operational Guidance contains an interesting ‘Fundamental Rights “Check-List”’ which is the closest attempt to a true HRIA methodology produced by the EU to date (see Figure 1).

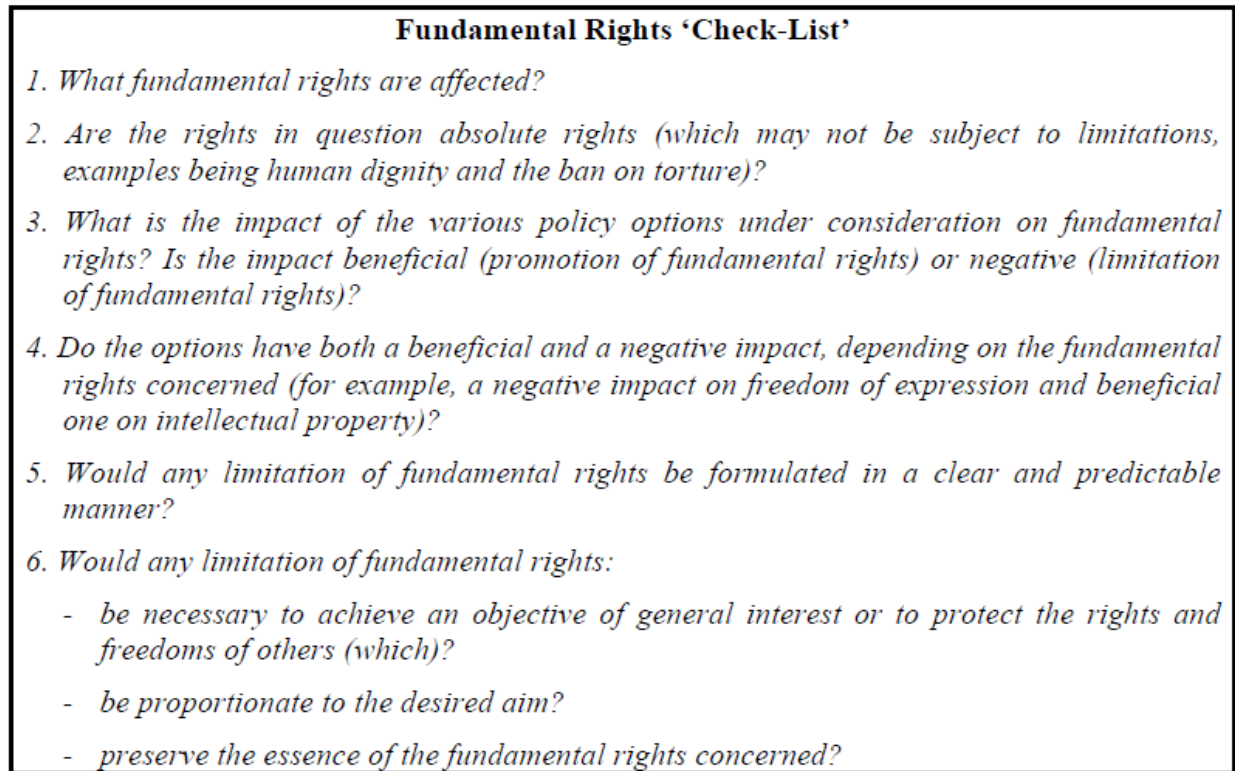


Figure 1: Fundamental Rights Check-List⁴⁵

In addition to the critique about their lack of focus on human rights, in their current shape, EU IAs have also been criticized for not abiding by the prescribed balance between the three pillars of sustainable development. In reality, economic impacts would be given more prominence, social impacts being extrapolated from the latter as trickle down effects. Therefore, many reports have considered that ‘the effects to employment, income, and the price of goods are the main drivers of social impact.’ Also, the selection of themes might leave a number of social impacts unconsidered (Harrison and Goller, 2008 598). Likewise, in the Draft New Handbook, the distinction between what is identified as a social impact, (described as including the whole ‘decent work’ issue as well as distributional impacts such as inequality), and as a human rights impact (described as including issues covered by core labour conventions), does not seem very rigorous, and might lead to the situation in which different human rights impacts are assessed according to different methodologies depending on whether they are labelled ‘social’ or ‘human rights’.

Finally, in terms of the consistency of the practice of conducting IAs, it has been noted before that though the Handbook indicates that SIAs will be conducted for all the major negotiations, the Commission retains a relatively high level of discretion in this regard, and has at times failed to carry out the necessary assessments. Most recently, the European Ombudsperson issued a decision which concluded that the Commission decision not to conduct an SIA in respect of the EU-Vietnam FTA being negotiated constituted maladministration. The Commission argued that the fact that an SIA had been conducted in the

⁴⁵ Source: European Commission 2011: 7.

framework of parallel negotiations with ASEAN was sufficient, and would make a new HRIA redundant. The Ombudsperson notably reviewed Art. 21 TEU and the EU Strategic Framework and Action Plan on Human Rights and Democracy, and stated that '[al]though [she] agrees with the Commission that there appears to be no express and specific legally binding requirement to carry out an HR impact assessment concerning the FTA with Vietnam, she is of the view that it would be in the spirit of the legal provisions mentioned above to carry out an HR impact assessment.' (European Ombudsman 2015, para. 24)⁴⁶

Therefore, an analysis of the EU official methodology in light of the general challenges which have been outlined above makes us suspect that trade SIAs might not be properly assessing human rights impacts, notably by ignoring the specificity of human rights and overly relying on economic modelling. The Draft New Handbook represents in this regard a very welcome clarification that human rights impacts must be assessed specifically, and by clearly endorsing a normative approach based on the standards. This is made yet more explicit through the reference to the Operational Guidance on taking account of Fundamental Rights in Commission Impact Assessments. However, the Draft New Handbook is in general much less detailed than the old one, and with respect to only the analysis of human rights impacts, the almost complete lack of methodological guidance is again likely to lead to weak results.

In the next section, we will review the trade SIAs which have been conducted to date, in order to investigate this preliminary conclusion.

C. EU Impact assessments in practice

1. Ex ante

This section is based on an examination of all SIA reports which have been issued in relation to EU trade agreements.⁴⁷ In Annex 2, a table details the main elements pertaining to human rights which were found in the SIA reports completed to date. This section will only briefly highlight the most striking characteristics of such SIAs, and will briefly confront them to the challenges and opportunities and best practices outlined above.

a) Scope and nature of findings

In terms of scoping, i.e. the width and specificity of human rights issues addressed, the year 2012 can be regarded as a wedge moment among the different reports. This is to be expected because in 2012, the Commission started to include the analysis of human rights impacts into the mandatory terms of references of SIAs. Before 2012, no specific analysis of human rights impacts is to be found, and none is in fact required. In the event human rights are incidentally discussed, they mostly belong to the category of economic and social rights, and impacts are in majority seen as positive and deriving from the modifications of the market induced by the different liberalisation scenarios (most often two: one modest, one ambitious, see above).

⁴⁶ European Ombudsman, 'Draft recommendation of the European Ombudsman in the inquiry into complaint 1409/2014/JN against the European Commission' 26 March 2015, available at <http://www.ombudsman.europa.eu/cases/draftrecommendation.faces/en/59398/html.bookmark>.

⁴⁷ All SIAs are available on the webpage of DG Trade: <http://ec.europa.eu/trade/policy/policy-making/analysis/sustainability-impact-assessments/assessments/>

The typical argument for positive impacts goes as follows: trade liberalisation will boost productivity, which will increase the demand for labour and drive wages up, thereby reducing unemployment and poverty levels and thereby also increasing the average standard of living. In some instances, these virtuous impacts might be mitigated for certain sectors or by the fact that inequality might also increase. The gender dimension has been rather well mainstreamed in all reports since the beginning, but only a few reports (like the one concerning the EU-Ukraine agreement) venture into a more sophisticated analysis of specific rights such as the right to good health. As is evident, these findings are generally uninformative, and it is no surprise that the Commission, in its Position Papers, almost always endorses them and finds them 'coherent with its expectations'.

For SIA reports issued after 2012, one notices a giant leap in the quality and depth of human rights impacts analyses. SIA reports contain specific sections dedicated to human rights, included in the social impacts section, with a right by right screening of different categories of rights. In practice, impacts on civil and political rights are generally found to be either non-existent or very limited and indirect, as mentioned in the Armenia, Jordan and Egypt reports, for instance. All in all, if the human rights analysis has been more credible since 2012, then the findings do not vary much and still mostly address impacts on social rights induced by market changes due to liberalisation. This might be due to methodology issues, as we will see in the next subsection.

In terms of recommendations, the influence of the SIAs has been found to be unequal. A very successful recommendation of SIAs has been the inclusion of sustainable development chapters in FTAs, which is now the case in the new generation of EU agreements (Beke *et al.* 2014: 72 ff.). However, some recommendations have been criticised by the Commission as being too vague (such as the Mediterranean report), as being limited to a small portion of the negotiated issues (such as in the GCC report), or they are deemed the responsibility of the government of the other party (such as the China report). This confirms the assessment done by previous literature that the influence of SIAs on policy-making has generally been underwhelming.

b) Methodology

In terms of methodology, most reports claim to be based on two equally important components: data analysis and stakeholder consultations.

In practice, the nature of the findings in which widely similar human rights impacts are repetitively extrapolated as trickle down effects from economic scenarios tends to accredit the thesis that modelling is the most decisive method used to formulate conclusions, even though some reports explicitly acknowledge a crippling lack of quantitative data (such as the GCC report). In many reports, datasets are admittedly complemented with stakeholder consultations, while modelling results are tested by case studies in specific sectors.

When taking a close look at the way and extent to which consultations are conducted, a very disparate picture emerges (Ergon 2011: 27 ff). The consultations conducted do not, in most cases, allow for large segments of affected stakeholders to meaningfully provide input as part of the process. This is particularly

true of vulnerable groups whose rights are particularly at stake (notably civil and political rights and indigenous people's rights, which are virtually absent from the SIA reports).

All reports describe an elaborate consultation process which includes in most cases a dedicated SIA website (including Facebook pages) and several meetings with civil society and other stakeholders, in Brussels and in the relevant country. Head to head meetings and interviews with experts are also frequent. Questionnaires and surveys are more rarely used, and response rates are sometimes admittedly low (such as in the Georgia report). This seems to suggest that the approach which consists in organising events and leaving the initiative to participate open to whichever stakeholder organisation is interested or affluent enough might be insufficient. Except for a few one-on-one meetings or interviews with particular experts, consultants do not display active efforts to reach out to those groups which would not spontaneously participate, and which are probably those whose interests are not well represented and whose protection of rights are in need of particular scrutiny.

Likewise, critics have pointed out the little effort which consultants threw into presenting their preliminary results to stakeholders and seek feedback (FIDH 2015). Hopefully this will change with the requirement made by the Draft New Handbook to seek stakeholder input and feedback between all phases of the research.

2. Ex post

As indicated above, *ex post* HRIAs are typically not conducted by the EU (FIDH 2015: 22), even though they are crucial to understanding the real (as opposed to predicted) impacts of policies. Many of the methodological challenges identified in respect of *ex ante* HRIAs are also valid in this context.

In this section, we therefore take a hands on approach to *ex post* HRIAs by showing an example of how such assessment could be conducted in practice, with a view to provide the beginning of a framework for possible future EU *ex post* HRIAs.

In order to do so, we proceed on the basis of a specific human rights standards analysis, namely the rights to freedom of association and collective bargaining in a number of countries with which the EU has an FTA. In this context, we focus our analysis not on the economic impacts of the 'liberalising' provisions of trade agreements, but rather on the impacts of the so-called human rights clauses which have been included in all EU agreements since 1995 (Beke *et al.* 2014). The reason for this choice is that such clauses are an express statement to the effect that trade agreements can and must be a positive force for human rights: it is therefore time to test this assumption.

a) Introduction

There is currently very little research available on the actual impacts of trade agreements on human rights and notably the effectiveness of existing human rights provisions in FTAs (see Campling *et al.* 2015). A case-based qualitative research agenda has been suggested to address this question (*Id.*). We pursue and further develop this approach in section ** where we present a detailed case study of Colombia. In this section we try to explore the impact for a wider number of cases.

As already mentioned above, data collection constitutes a key challenge in this regard. One barrier to a systematic assessment of the impact is data availability on specific rights. Since most trade agreements include the most specific language on labour rights, notably the ILO Declaration on Fundamental Principles and Rights at Work which covers the core rights and standards laid down in four principles and eight conventions (*infra*), an assessment on the impact of trade agreements should focus *inter alia* on these specific rights. However, relatively little data is available to assess the degree in which human rights and more specifically, these labour standards have been protected. Several general human rights indicators and indices exist, such as Freedom House and the Cingranelli-Richards (CIRI) Human Rights indicators (see also Starl *et al.* 2014), but these indicators and indices are not always suitable to assess the impact on the protection of specific labour rights (Kucera, 2001, 2002; Mosley, 2011). We will further discuss this in section **. As a result, additional data needs to be gathered to make an assessment of the impact of trade agreements on the protection of labour rights.

This report aims to contribute to this effort by specifically focusing on the protection of freedom of association and collective bargaining (FACB rights) in a selected number of countries with which the EU has signed a free trade agreement which includes provisions on the protection of these labour rights. FACB rights are chosen on substantial grounds as well as methodological grounds which we will elaborate below. Building on the work by David Kucera (2001; 2002) and Layna Mosley (2011) this research presents new empirical results of a data collection effort aiming to capture the degree in which FACB rights are protected. The paper extends the initial time-series developed by Mosley (1985-2002) with an additional ten years providing a time-series covering almost 30 years for 73 countries, including most countries which have concluded a trade agreement with the European Union (Marx *et al.* forthcoming). From this sample of 73 countries we select 13 countries with whom the EU signed a trade agreement which contains specific language on the protection of labour rights. In addition, we selected a control group out of the 73 countries to compare the results of the 13 countries. Our analysis shows an overall deterioration on the protection of FACB rights in these countries.

This section proceeds as follows. First we introduce FACB rights and substantiate the focus on these rights for research into the effectiveness of including labour rights provisions in trade agreements. This section will also provide the selection of cases which will be further analysed. (This selection is based on those countries/cases with which the EU signed a trade agreement which includes substantial provisions on the protection of FACB rights.) Next, we present the construction of the FACB rights index, including a differentiation between rights protection in law and in practice. In a third step, we present the main findings and provide a brief discussion.

b) Freedom of Association and Collective Bargaining Rights

In order to analyse the impact on labour rights, we decided to focus on two specific rights, namely the freedom of association and the effective recognition of the right to collective bargaining. FACB rights are key-components in the international treaties and declarations referred to in the trade agreements, including the ILO Declaration on Fundamental Principles and Rights at Work adopted in 1998,⁴⁸ the Universal Declaration of Human Rights, and the 2008 Declaration on Social Justice for a Fair Globalization,

⁴⁸ See: <http://www.ilo.org/declaration/thedeclaration/textdeclaration/lang--en/index.htm>

which identified freedom of association and the right to collective bargaining as key pre-conditions for the attainment of inclusive economic growth and decent work. In addition, several policy documents of international organisations point to the importance of these two rights for inclusive and sustained economic growth (see for example the World Commission on the Social Dimension of Globalization, 2004). The ILO Declaration on Fundamental Principles and Rights at Work covers the core rights and standards laid down in four principles and eight conventions. These principles are (1) freedom of association and the effective recognition of the right to collective bargaining, (2) elimination of all forms of forced or compulsory labour, (3) effective abolition of child labour and (4) elimination of discrimination and respect of employment and occupation. As stipulated by the ILO, the '*Declaration makes it clear that these rights are universal, and that they apply to all people in all States - regardless of the level of economic development*'.⁴⁹ The principle of freedom of association and the effective recognition of the right to collective bargaining is laid down in two conventions. The freedom of association and protection of the right to organize convention (ILO Convention No 87) came into force on 4th July 1950 and was, in 2014, ratified by 153 states. It refers to the right of workers to create collective organizations without interference (ILO, 2008). The right to freedom of association is also recognised as a basic human right in the Universal Declaration of Human Rights (Article 20). Linked to the right of freedom of association is the right to collective bargaining. The convention concerning the application of the principles of the right to organise and collective bargaining (ILO Convention No 98) came into force on 18th July 1951 and has been ratified by 164 states. This right allows workers to freely negotiate their working conditions. These rights were chosen for further analysis for two distinct reasons, substantial and methodological.

c) The substantive importance of FACB in the context of HR

In the context of trade policy, these rights are of specific importance. First, these rights are considered basic rights since they allow workers to organize themselves and increase their capacity to negotiate other labour standards. Several scholars consider FACB as process or enabling rights which make the pursuit of other rights possible. Ten years ago, in 2004, the World Commission on the Social Dimension of Globalization underlined the importance of freedom of association and collective bargaining:

Labour market institutions, including appropriate legal frameworks, freedom of association, and institutions for dialogue and bargaining are also essential in order to protect the fundamental rights of workers, provide social protection and promote sound industrial relations. Social dialogue is an important component of good governance, and an instrument for participation and accountability. (p. 56, see also p. 62, p. 91)

Second, the importance of the protection of these rights is illustrated by the fact that a violation of FACB rights was invoked to suspend the EU's GSP+ trade preferences for Belarus (EU Regulation 1933/2006; see also Yap, 2013). This suspension of GSP+ has only been applied in three cases (Myanmar, Sri Lanka and Belarus).

⁴⁹ See <http://www.ilo.org/declaration/thedeclaration/lang--en/index.htm>

Third, and of key importance in this section, in a proliferating number of EU bilateral, trilateral or multilateral (economic and trade) agreements, social clauses which directly refer to the relevant ILO conventions, have been taken on board.

Some of those agreements have very weak or general provisions referring only to human rights in general. For example, Article 2 of the Euro-Mediterranean agreement between the EU and Kingdom of Morocco states:

Respect for the democratic principles and fundamental human rights established by the Universal Declaration of Human Rights shall inspire the domestic and external policies of the Community and of Morocco and shall constitute an essential element of this Agreement.

Equally weak provisions, or the lack thereof, can be found in agreements with Algeria, Egypt, Jordan, Mexico, the Palestinian Territories, South Africa, Tunisia and Turkey. The agreement with Chile contains some stronger commitments in article 44 on social cooperation. This provision states that:

the Parties recognise the importance of social development, which must go hand in hand with economic development. They will give priority to the creation of employment and respect for fundamental social rights, notably by promoting the relevant conventions of the International Labour Organisation covering such topics as the freedom of association, the right to collective bargaining and non-discrimination, the abolition of forced and child labour, and equal treatment between men and women.

Other trade agreements contain far more elaborate provisions on labour rights and even include monitoring instruments. Article 72 of the EU-Cariforum agreement (including Antigua & Barbuda, Bahamas, Barbados, Belize, Dominica and Dominican Republic) addresses the behavior of investors, and stipulates that:

The EC Party and the Signatory CARIFORUM States shall cooperate and take, within their own respective territories, such measures as may be necessary, inter alia, through domestic legislation, to ensure that: [...] (b) Investors act in accordance with core labour standards as required by the International Labour Organization (ILO) Declaration on Fundamental Principles and Rights at Work, 1998, to which the EC Party and the Signatory CARIFORUM States are parties. (2) [...] These core labour standards are further elaborated, in accordance with the Declaration, in ILO Conventions concerning freedom of association, the elimination of forced labour, the abolition of child labour and the elimination of discrimination in the work place. (c) Investors do not manage or operate their investments in a manner that circumvents international environmental or labour obligations arising from agreements to which the EC Party and the Signatory CARIFORUM States are parties.

Article 73 deals with the maintenance of standards and requires that:

The EC Party and the Signatory CARIFORUM States shall ensure that foreign direct investment is not encouraged by lowering domestic environmental, labour or occupational health and safety

legislation and standards or by relaxing core labour standards or laws aimed at protecting and promoting cultural diversity.

Furthermore, the agreement includes specific provisions on objectives and multilateral commitments under article 191 which refer to the ILO Declaration and the conventions included in the ILO declaration. Article 191 includes that:

1. The Parties reaffirm their commitment to the internationally recognised core labour standards, as defined by the relevant ILO Conventions, and in particular the freedom of association and the right to collective bargaining, the abolition of forced labour, the elimination of the worst forms of child labour and nondiscrimination in respect to employment. The Parties also reaffirm their obligations as members of the ILO and their commitments under the ILO Declaration on Fundamental Principles and Rights at Work and its Follow-Up (1998)[...] 3. The Parties recognise the beneficial role that core labour standards and decent work can have on economic efficiency, innovation and productivity, and they highlight the value of greater policy coherence between trade policies, on the one hand, and employment and social policies on the other.

Building on this provision, Articles 192 and 193 refer to the level of social protection and stipulate that parties cannot lower their level of protection to attract investment.

Similar elaborate provisions, as in the EU-Cariforum agreement, can be found in the EU-Colombia and Peru (and recently Ecuador) agreement. Article 269 of this agreement addresses Multilateral Labour Standards and Agreements and declares, *inter alia*:

3. Each Party commits to the promotion and effective implementation in its laws and practice and in its whole territory of internationally recognised core labour standards as contained in the fundamental Conventions of the International Labour Organisation.

Subsequent articles contain provisions on upholding standards (Article 277), monitoring mechanisms which consists of reviews of sustainability impact (Article 279), institutional and monitoring mechanisms (Article 280), and domestic monitoring mechanisms (article 281).

The agreement between the EU and Central-America (Costa Rica, El Salvador, Guatemala, Honduras, Nicaragua and Panama) also contains several provisions on the protection of labour rights. Article 2 (Objectives) states that the parties agree that the objectives should, *inter alia*:

(g) at least maintain and preferably develop the level of good governance, social, labour and environmental standards achieved through the effective implementation of international conventions of which the Parties are part of at the time of entry into force of this Agreement

Article 42 on employment relations and social protection under paragraph (f) explicitly refers to the ILO's Core Conventions and Article 286 includes similar provisions as above on the multilateral labour standards and agreements again referring to the ILO core convention. This article also includes a provision which reaffirms the commitment to effectively implement a series of ILO conventions, including No's. 87 and 98. This is followed by Article 291 on upholding levels of social protection.

Finally, the agreement between the EU and South Korea also contains several provisions on labour standards including references to the ILO conventions. The South Korea-EU trade agreement also includes the objective (Article 1.1):

to promote foreign direct investment without lowering or reducing environmental, labour or occupational health and safety standards in the application and enforcement of environmental and labour laws of the Parties.

Article 13.4§3 (Multilateral Labour Standards and agreements) refers to the ILO Declaration on Fundamental Principles and Rights at Work. Institutional monitoring (Article 13.12) and transparency (Article 13.9) measures that are established to spot possible violations of these rights are also part of the agreement.

The above overview shows that there is significant variation in how the trade agreements integrate the protection of labour rights, and that some agreements have substantial provisions on labour rights. The specificity of language on rights, as well as the design of the enforcement architecture, has, by several scholars, been seen as an indication of commitment towards a goal. A report from the International Labour Organisation (ILO) on codes of conducts of companies, stressed that there is quite some variation on the stringency of standards in relation to labour standards (Mamic, 2004). In this respect they refer to 'hard' and 'soft' language. Hard language is specific, precise, fully-defined and provides a high level of commitment to a standard. Soft language is general, broad, loosely defined and displays a low level of commitment. (Mamic, 2004, p. 24). In trade agreements, one cannot expect to have very precise labour standards, but the identification of specific ILO conventions can be considered as more specific than a general reference to human rights. In addition, the inclusion of enforcement mechanisms in terms of monitoring can be considered as an essential element to enforce these rights through free trade agreement institutions. (Ostrom, 2005) For this reason, a focus on labour rights and specific labour rights to assess the impact of the trade agreements is justified.

The countries with whom the EU signed a trade agreement with strong provisions are Chile; the EU-Cariforum agreement with Antigua & Barbuda, Bahamas, Barbados, Belize, Dominica and Dominican Republic; the EU-Colombia and Peru agreement; the EU-Central America agreement with Costa Rica, El Salvador, Guatemala, Honduras, Nicaragua and Panama; and the EU-South Korea Agreement. We were able to collect data for 13 of these partner countries (*infra*). These are Antigua and Barbuda, Bahamas, Barbados, Belize, Chile, Colombia, Costa Rica, Dominica, Dominican Republic, Ecuador, South Korea, Panama and Peru (hereafter the Group of 13).

d) *The methodological importance of FACB rights*

A focus on FACB rights is also based on methodological grounds. There are three distinct reasons to focus on FACB rights for this exploratory attempt at an *ex post* assessment of the effects of FTAs on human rights. First, they constitute a more valid and reliable indicator to measure the impact of the protection of rights in a trade agreement. Several general human rights indicators and indices exist and have been used in previous studies to assess the protection of human (and labour) rights, such as Freedom House and the Cingranelli-Richards (CIRI) Human Rights indicators (i.e., Elkins, Ginsburg and Simmons, 2013;

Simmons, 2009; Hafner-Burton, 2005, 2008). Although these measures include labour rights they also include other aspects not related to labour rights, such as freedom of the press and religious freedom, which limits the validity for an analysis specifically focused on labour rights. The use of composite indicators in such cases makes them vulnerable to ecological fallacy type of errors (Robinson, 1950), i.e. drawing conclusions from observations on the level of the composite indicator which might not hold for its components separately. In other words, a composite indicator might show general improvement while specific components might be deteriorating (more violations). Especially in relation to the Cingranelli-Richards indicators, the measurement of indicators is relatively 'rough' and the transformation of information in a three order ordinal scale generates a significant loss of information and variation which would be interesting for those interested in a more fine-grained analysis.

In order to address these limitations, David Kucera (2001, 2002) developed a new indicator which specifically aimed to capture the degree to which two specific core labour conventions are protected, namely ILO convention 87 (Freedom of Association and the Protection of the Right to Organise Convention) and ILO convention 98 (Right to Organise and Collective Bargaining). Layna Mosley used this indicator to develop a time series, from 1985 to 2002, on the protection of freedom of association and collective bargaining. Her study showed that the protection of FACB rights was declining on a global scale, which raises doubts about the global protection of at least two core labour conventions for the period of 1985 to 2002. These efforts provide us with an already interesting time-series.

This generates a second methodological advantage. Time-series allow us to analyse an evolution over time. By expanding the time-series developed by Mosley we can analyse the evolution of specific rights over an almost thirty year period generating insights over long-term trends and developments.

Third, the way Kucera and Mosley constructed their index allows for a separation of the evolution of the protection of FACB rights in law and in practice. The coding of the index consists of an assessment of 37 categories (*infra*) which can be divided into the protection of these rights in law and in practice. The categories covering violations in law regard the incorporation of labour rights (derived from ILO conventions 87 and 98) into domestic law; e.g. the absence of the legal right to strike, the absence of the right to collective bargaining or a restriction on the foreign financial contributions a union is allowed to receive. The situation in practice is measured by categories which focus on the protection of these rights in practice such as reports of trade union members who are fired due to union activities or reported interferences with union rights of assembly, demonstration and free opinion.⁵⁰

e) FACB Index: data collection and sample

The principle of freedom of association and the effective recognition of the right to collective bargaining is laid down in two conventions. The Freedom of Association and Protection of the Right to Organize Convention (ILO Convention No 87) came into force on July 4th 1950 and was, in 2014, ratified by 153 states. It refers to the right of workers to create or participate in organizations of their choice without interference or reprisal (ILO, 2008)⁵⁰. The right to freedom of association is also recognised as a basic

⁵⁰ In reference to annex 3. If we found reported violations to categories 6, 8, 13, 14, 15, 16, 18, 19, 20, 21, 22, 24, 25, 26, 29, 30, 32, 33, 34, 35 and 37 we coded them as violations of the protection in law. If we found reported violations to categories 1, 2, 3, 4, 5, 7, 9, 10, 11, 12, 17, 23, 27, 28, 31, and 36 we reported them as violations in practice.

human right in the Universal Declaration of Human Rights (Article 20). Linked to the right of freedom of association is the right to collective bargaining. The convention concerning the application of the principles of the right to organise and collective bargaining (ILO Convention No. 98) came into force on July 18th 1951 and has so far been ratified by 164 states. In a nutshell, this right allows workers to freely negotiate their working conditions.

David Kucera (2001, 2002) developed an index of freedom of association and collective bargaining, based on 37 evaluation criteria considering both *de jure* and *de facto* violations of these two labour rights. The author identified the 37 evaluation criteria based on the two ILO conventions: Freedom of Association and the Protection of the Right to Organise Convention (No. 87) and the Right to Organise and Collective Bargaining (No. 98). The analysis, carried out following Kucera's FACB-index, is based on a content analysis of three distinct sources: the International Confederation of Free Trade Unions' Annual Survey of Violations of Trade Union Rights, the U.S. State Department's Country Reports on Human Rights Practices, and the International Labour Organization's (ILO) Reports of the Committee on Freedom of Association⁵¹.

The strength of this measure lies in its fine graded framework (composed of 37 issues related to FACB rights – see Annex 3) and in the use of three sources to collect information, which minimizes the bias from specific sources. A limitation of Kucera's measure is its cross sectional nature (only one single measure for each country summarising data collected from text reports between 1993 and 1997) which doesn't allow for a longitudinal analysis. To fill this gap, Mosley (2011) used Kucera's template to code FACB rights from 1985-2002. Layna Mosley used this time series in an analysis of the determinants of labour standards, considering both the overall measure and two derived measures of rights in law and in practice.

The indicators developed by Kucera and Mosley show that a more fine-grained indicator for specific labour rights can generate different results from the Freedom House and CIRI indices and hence, the ecological fallacy and rough measurement problems are relevant in the context of analysing the protection of specific labour rights. As an illustration of the ecological fallacy problem, consider Cyprus in 2000. In 2000 Cyprus had the best possible score on civil liberties (1) but its score on freedom of association and collective bargaining (from Mosley, 2011) was below the average (6.35). As an illustration of the rough measurement problem, consider the cases of Peru and Lithuania. In 2000, workers' rights were occasionally violated in Peru and Lithuania, according to the CIRI dataset (both score 1 out of scale going from 0 to 2)). However, if we look at the Mosley index of FACB rights, violations were much more common in Peru (score of 3.5) than in Lithuania (score of 7.4).

f) Data collection and methodology⁵²

The basis of the data collection, following Kucera and Mosley, lies in an analysis of three sources per year, per country. These sources are the annual Human Rights Reports by the U.S. State Department⁵³, the ILO Freedom of Association cases⁵⁴ and ILO Supervising Reports⁵⁵, and finally the International Trade Union

⁵¹ For more discussion on the sources, see annex 4

⁵² For more on coding see annex 4

⁵³ <http://www.state.gov/j/drl/rls/hrrpt/>

⁵⁴ <http://www.ilo.org/dyn/normlex/en/f?p=NORMLEXPUB:20030:0::NO::>

⁵⁵ <http://www.ilo.org/dyn/normlex/en/f?p=1000:11000:0::NO::>

Confederation's (ITUC) Annual Reports on the Violation of Trade Union Rights.⁵⁶ These sources are used to code a 37 category coding template which was developed on the basis of ILO conventions 87 (freedom of association) and 98 (right to collective bargaining). Within the above mentioned sources, the coders⁵⁷ looked for any references to violations of the 37 items for each of the countries and years identified (see Annex 4). Violations on each of the 37 items were measured as a dummy variable. When one or more of the sources reported a violation for a specific country, a score of '1' was given to that country. If none of the three sources provided indications for a violation a, '0' was given.

Each category was also assigned a specific weight, since some violations are more serious than others. The weight depends on how severe a violation is, usually ranging from 1 to 2. Three severe types of violations have an especial weight of 10: the ban on all unions (category 6), the absence of any union activity due to social/economic breakdown (category 7), and the general prohibition of collective bargaining (category 24).⁵⁸ As a result, the score for a given country and year is the sum of all scores (0 or 1) for each of the 37 categories multiplied by the weight for the specific category. Theoretically, the highest score on this scale is 86.5. However, the highest score observed in the research population was 29.75, for Turkey in 2007. The lowest theoretical score, 0, was observed several times.

In order to make the results more easily and visibly understandable, we reversed the scores and re-scaled them on a 0-10 scale. This means that a higher score (10 or close to 10) refers to better labour rights situations with fewer violations on FACB, and a lower score indicates more severe violations. In other words, an upward trend indicates an improvement in the protection of FACB, a downward trend a deterioration.

To further refine the analysis we made a distinction between two groups of categories: categories covering violations in law on the one hand and violations in practice on the other hand⁵⁹. The categories covering violations in law regard the incorporation of labour rights (derived from ILO conventions 87 and 98) into domestic law. For example, the absence of the legal right to strike (category 32), the absence of the right to collective bargaining (24) or a restriction on the foreign financial contributions a union is allowed to receive (23). The situation in practice is measured by the remaining practice-categories, covering issues such as trade union members who are fired for union activities (10) or an employer limiting the agenda in collective bargaining (28). This distinction between law and practice becomes relevant when we analyse the results. Some countries turn out to have a spotless record in law, but have a contrasting situation on the ground. Another potential important difference between the two types of categories concerns the dynamics. The score on violations in practice changes more profoundly under the influence

⁵⁶ The ITUC's sources were gathered with the help of the ITUC itself: 2003 and 2004 were available in a paper format only, 2006, 2007 and 2013 were available online, and the others were sent to us as pdf-files.

⁵⁷ The authors coded the violations. In case of doubt, the authors decided on how to code a specific instance. A list of decision of doubts is included in the methodological note available in annex 4

⁵⁸ There is a small difference between Kucera and Mosley on using the weights. We follow the procedure followed by Mosley.

⁵⁹ The law-categories are: 6, 8, 13, 14, 15, 16, 18, 19, 20, 21, 22, 24, 25, 26, 29, 30, 32, 33, 34, 35 and 37. The practice-categories are: 1, 2, 3, 4, 5, 7, 9, 10, 11, 12, 17, 23, 27, 28, 31, and 36.

of domestic disturbances or economic downturns. At the same time, changing existing law can take a long time, therefore resulting in a much more stable score for violations in law.

g) Sample

Our sample differs from Kucera and Mosley. While these authors worked with a global sample this was not possible for this research project due to time and resource limitations. Instead, data was collected for only a number of countries, mainly EU Member States and all countries that have ratified Free Trade Agreements (FTA) which contain labour rights clauses, based on a recent study prepared for the ILO (2013)⁶⁰. Table 4 provides an overview of all countries included in the sample. It is important to note that our sample is biased in that it mostly contains high income countries and almost no least developed or low income countries. Thus, the results apply to the top tier in the class to a certain degree.

Table 4: List of countries included in our sample

Algeria	Czech Republic	Jordan	Singapore
Antigua & Barbuda	Denmark	Latvia	Slovakia
Argentina	Dominica	Libya	Slovenia
Australia	Dominican Republic	Lithuania	South Africa
Austria	Ecuador	Luxembourg	South Korea
Bahrain	Egypt	Macao (SAR)	Spain
Barbados	Estonia	Malta	Sweden
Belgium	Finland	Mexico	Switzerland
Belize	France	Morocco	Taiwan
Brazil	Germany	New Zealand	Thailand
Brunei	Greece	Norway	The Bahamas
Bulgaria	Hong Kong (SAR)	Oman	The Netherlands
Canada	Hungary	Palestinian Territories	Tunisia
Chile	Iceland	Panama	Turkey
China	Ireland	Peru	United Kingdom

⁶⁰ This selection is mainly based on the purpose of the wider research project on which this chapter is based, namely the impact of FTAs on the protection of labour rights.

Colombia	Israel	Poland	United States
Costa Rica	Italy	Portugal	Uruguay
Croatia	Japan	Romania	Venezuela
Cyprus			

h) Relationship with other Human Rights Indicators

As noted above several general human rights indicators and indices exist and have been used in previous studies to assess the protection of human (and labour) rights, such as Freedom House Civil Liberties (FH - CL) and the Cingranelli-Richards (CIRI) Human Rights indicators. When we compare the FACB index for our sample with these indicators (see Table 5) we see that they correlate, but that these correlations are not that high as to assume that the indicators measure the same thing. This means that countries can score significantly different on the different indicators and that the FACB index captures different realities than the composite indicator. One could even argue that the overall correlation is rather low given that OECD countries are a substantial component of the sample and that they skew the correlation upwards since they tend to score high on most indices. Note also that Freedom House and Cingranelli-Richards do not perfectly correlate.⁶¹

Table 5: Relationship between different human rights indicators

		FACB Rights	FACB Rights Law	FACB Rights Practice	CIRI_INDEX WORKER RIGHTS	FREEDOM HOUSE
FACB Rights	Correlation	1	.850**	.845**	.572**	-.554**
	N	2037	2037	2037	1600	1622
FACB Rights Law	Correlation	.850**	1	.437**	.511**	-.583**
	N	2037	2037	2037	1600	1622
FACB Rights Practice	Correlation	.845**	.437**	1	.460**	-.358**

⁶¹ Note that the negative relationship with Freedom House indicator is the result of the fact that Freedom House uses a reverse scale in which high scores (range from 1 to 7) indicate a high violation of rights.

	N	2037	2037	2037	1600	1622
CIRI_WORKE R	Correlati on	.572**	.511**	.460**	1	-.601**
	N	1600	1600	1600	1600	1539
FH_CL	Correlati on	-.554**	-.583**	-.358**	-.601**	1
	N	1622	1622	1622	1539	1622

Before we proceed with exploring the evolution of FACB rights for the countries with whom the EU has a trade agreement, we will briefly discuss some general results.

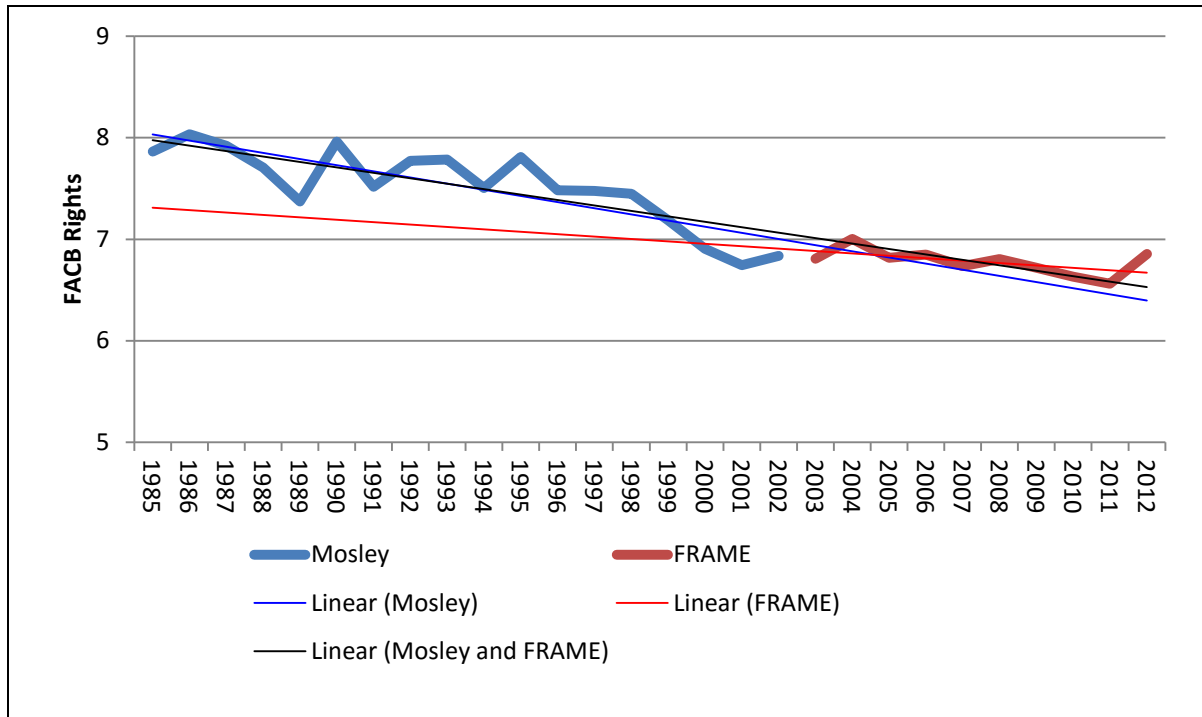
i) FACB Rights Protection - Trends since 1985

presents the main results of the data collection and plots the protection of FACB rights over a 30-year period for all 73 countries in the sample (average of all countries per year). The figure shows a clear downward trend on FACB rights over the whole period. The FACB index is scaled 0-10, where 0 represents the worst case (more violations reported), and 10 represents the theoretical maximum of no violations. To avoid differences caused by the different sample of countries, the Mosley index was re-scaled considering only the 73 countries included in our sample.

The average scores for the period 1985-2002 (measured by Mosley) are plotted in blue and the average scores for the period 2003-2012 are plotted in red. Figure 2 also includes three trend lines (linear approximation⁶²), one for each period and one for the whole period 1985-2012. Although the negative trend for the period 2003-2012 is less outspoken in comparison with the previous period, the trend for the whole period (thin black line) is clearly negative, indicating that FACB rights are less protected over the last three decades as seen in the average of almost all countries in the sample.

62 Note that the time series do exhibit a degree of non-linearity and there is substantial variation between years. The trend line aims to capture the overall trend over the studied period. Yearly fluctuations would require more in-depth research at the country level.

Figure 2: Evolution of FACB Protection: 1985-2012



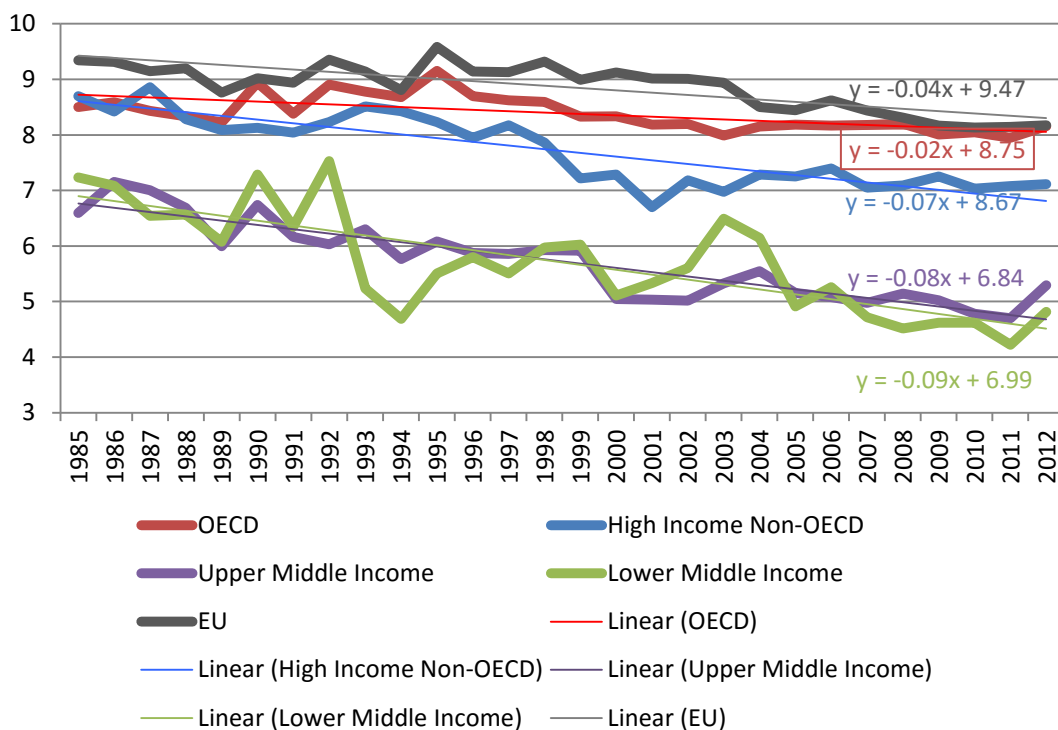
Source: Mosley, 2011 (1985-2002) + own calculations 2003-2012

Next, we differentiate the trend between 5 categories of countries: EU countries, OECD countries, high income non-OECD countries, higher middle-income countries and lower middle income countries, all based on World Bank categorisations (Figure 3)⁶³. We also include the linear trend coefficient to indicate the strength of the trend. Figure 3 reveals three interesting facts. First, it shows that the downward trend on FACB rights is independent of the countries’ income level, as can be seen by the negative coefficient in all linear equations. Although the EU averages the highest score, their coefficient reveals that FACB rights are decreasing faster in the EU compared to OECD countries (note that there is overlap in membership, meaning that the Non-EU OECD countries significantly raise the trend line to a steadier pattern). Second, the figure also shows that there are substantial differences between the different groups’ level of protection of FACB rights. The EU and OECD members score highest for the whole period. Other high-income countries that are not OECD members also scored high until the end of 1990s, but their scores decreased substantially since then. The average scores of lower- and upper-middle income countries are substantially lower than high income countries indicating, as could be expected, that the protection of FACB in lower income countries is lower. Third, while the trends for OECD countries point to stability, decreasing very slowly, trends for lower- and upper-middle income countries show that FACB rights in these countries have deteriorated much faster, mainly for the group of lower-middle income countries, whose average dropped from 7.2 in 1985 to 4.8 in 2012. The overall trend line differs as much as a four

⁶³ A t-test on the mean to capture statistically significant differences confirms that the OECD is higher than "high income non-OECD" mean, and that the mean of these 2 groups are higher than the mean of middle income countries.

times between groups. This sharp downward trend for developing countries raises great concerns. For these countries the drop in FACB protection is very significant⁶⁴.

Figure 3: Evolution Protection of FACB Rights by Country Income Level

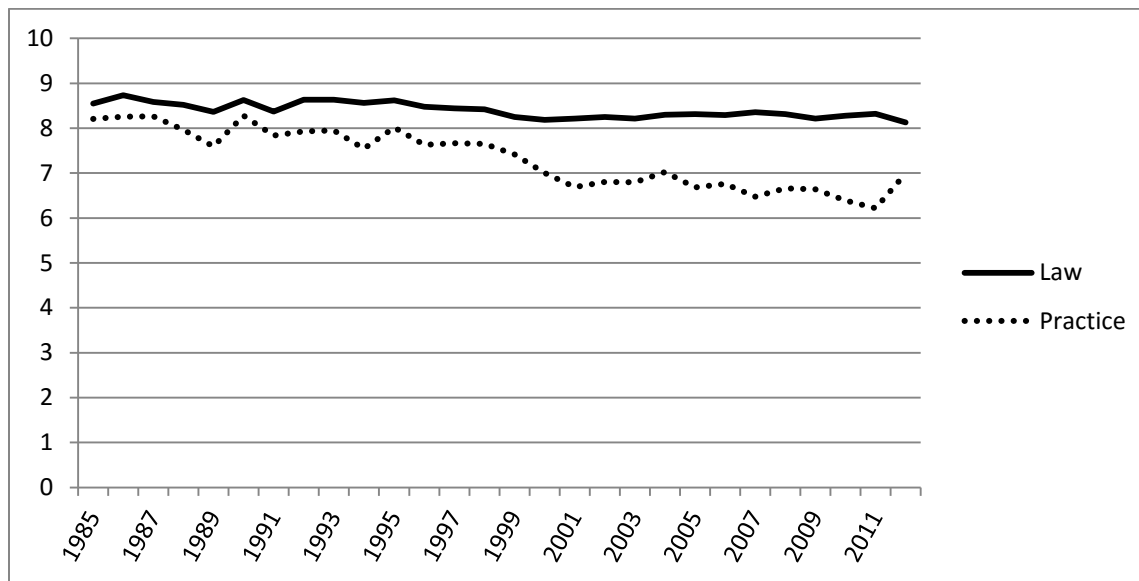


Source: authors calculations

The results presented above report on the protection of FACB rights in general and might bias results upward since the measurement includes the protection of FACB rights on paper (legal protection). Several authors have argued that countries sometimes ratify international conventions and adopt legislation concerning FACB but do not respect these rights in practice (Simmons, 2009; Mosley, 2011; Hafner-Burton, 2013). In order to explore this further we make a distinction between protection of FACB in law and in practice and analyse these differences. Figure 4 presents the average scores of FACB rights in law and practice. The graphs shows that rights are better protected in law than in practice. Note the strong increase in the protection of rights in practice in the last year which probably is caused by changes in reporting methods of ITUC.

⁶⁴ Looking at these downward trends, one should be aware that these negative trends could be, in theory, a consequence of successful efforts made by unions and NGOs to report all sorts of violations in a country, instead of actual more violations. These efforts for more precise reporting would be more relevant in new democracies, in which activists now have more freedom to act, than in stable democracies, where activists were free to report violations during the whole period of our analysis, and where the degree of FACB rights has been more stable and far less dire. However, as Figure 3 shows, the downward trend is evident in every type of country.

Figure 4: Trends on FACB rights protection: difference in protection by law and by practice



These results show a decrease in the protection of FACB rights. It goes behind the scope of this report to explain these trends for the sample of the 73 countries however we briefly discuss some relevant issues related to the data-collection method.

A first explanation for this downward trend might be found in the data-collection process. The data on violations is based on *reported* violations in three different sources. One possibility could be that over time more and more violations get reported. This can be the result of several dynamics. First, due to increased attention for the protection of freedom of association and collective bargaining (because they are included in so many agreements, arrangements, etc.), awareness is raised and several stakeholders are more likely to report violations. Second, due to developments in information technology, social media and news sharing, stakeholders can more easily report violations. Third, the increase in number of international NGOs, watchdogs, etc. contributes to better detection and reporting of violations. Hence, it is reasonable to think that these three factors are contributing to more accurate and increased reporting of violations, resulting in more reported violations, and not necessarily in a real increase in violations in the countries observed.

It should be noted that the way in which the FACB index is constructed the number of violations is not important. It is actually one of the weaknesses of the index. We do not count the number of violations in one country but rather, whether one violation of one of the 37-item questionnaire occurred. If a violation occurred, it is coded as a violation for that item for that country. If in that country many more violations are reported, this will not affect the score. The arguments above mainly influences the reported number of violations but not necessarily the reporting of single violations. With this in mind the influence of these factors might not be too significant on our measurements.

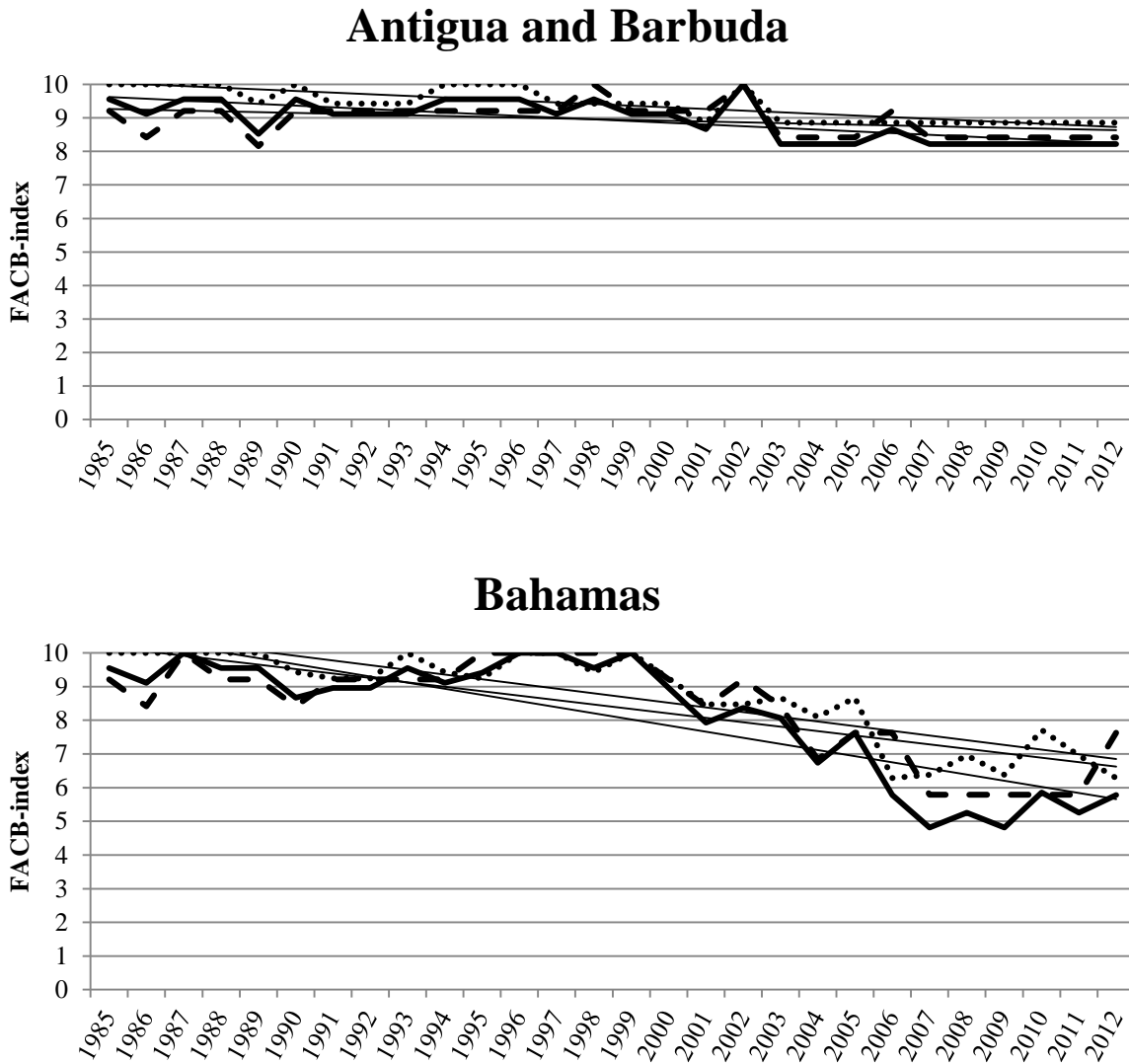
A second related explanation focuses on the fact that the observation of an increase in reported violations could be attributed to the fact that in the last decades the number of (international) monitoring mechanisms has increased significantly. This increased monitoring might reveal more violations and hence generate an increase in reported violations. The implementation of the two ILO conventions are monitored via different mechanisms. First, the ILO Declaration itself has a follow up mechanism that requires states that have not ratified the conventions to report on the steps they are taking to ratify the convention. In addition, the ILO has a Committee of Experts on the Application of Conventions and Recommendations (CEACR), which monitors compliance with ratified Conventions. Furthermore, the ILO has three complaint mechanisms, which help to monitor the enforcement of the standards and conventions (Zandvliet and Van der Heyden, 2015).

Secondly, in a proliferating number of bilateral, trilateral or multilateral (economic and trade) agreements social clauses that directly refer to the relevant ILO conventions have been taken on board. In a recent publication, the ILO (2013) provided a full overview and discussion of social clauses in trade and economic partnership agreements. In addition, they identify the monitoring and sanctioning mechanisms for non-compliance. Thirdly, reference to the two ILO conventions can also be found in many other international or regional agreements and conventions such as the International Convention on Civil and Political Rights; the International Convention on Economic, Social and Cultural Rights; the European Social Charter; European Convention on Human Rights, etc. Each has its own enforcement and monitoring mechanism. Some of them are stringent since courts, which can offer binding rules, are linked to these agreements and conventions. As Karen Alter (2014) showed in her recent book, an increasing number of international and regional courts are emerging which use international conventions in their ruling. Finally, one can also observe an increasing number of private regulatory mechanisms which aim to enforce and monitor these rights (Abbott and Snidal, 2009; Marx, 2013). Many of these private governance and monitoring systems are diffusing globally. It is plausible that these different monitoring systems contribute to an increase in reporting of violations.

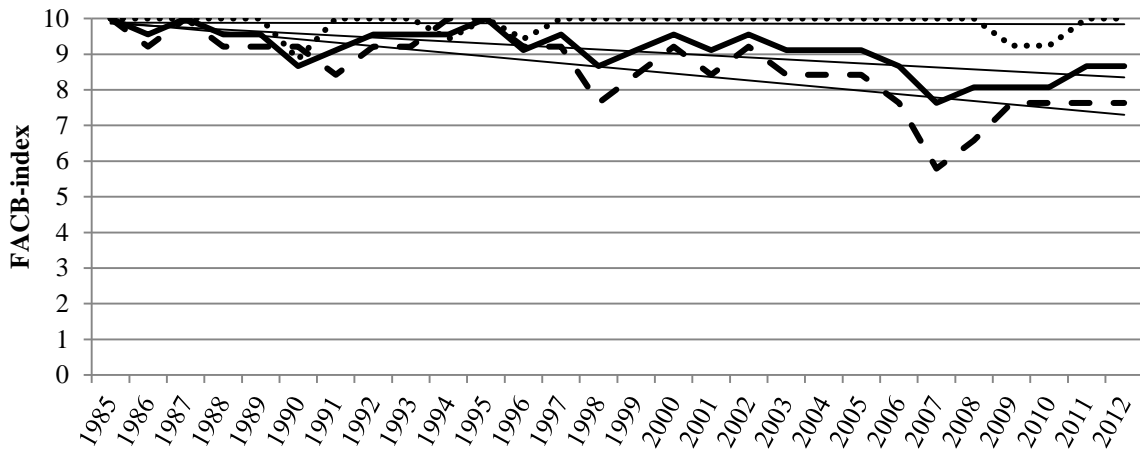
j) The protection of FACB rights with selected trade partners

Graph 1 shows, for the selected Group of 13, the overall trend in the protection of FACB rights (full line), the protection in law (dotted line) and the protection in practice (striped line). In addition, we have included for each a linear trend line. These graphs reveal several interesting observations.

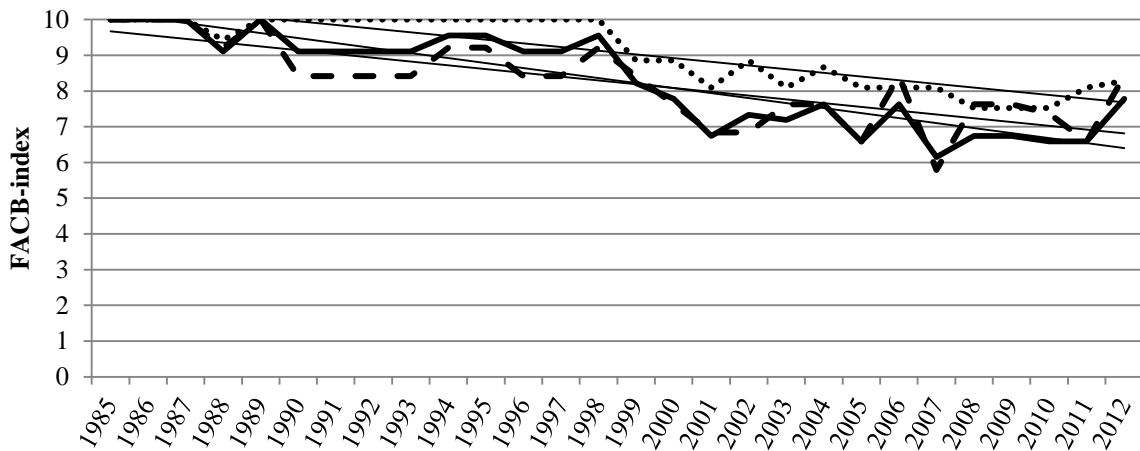
Graph 1: Evolution of the protection of FACB in rights in total, in law and in practice for 13 countries



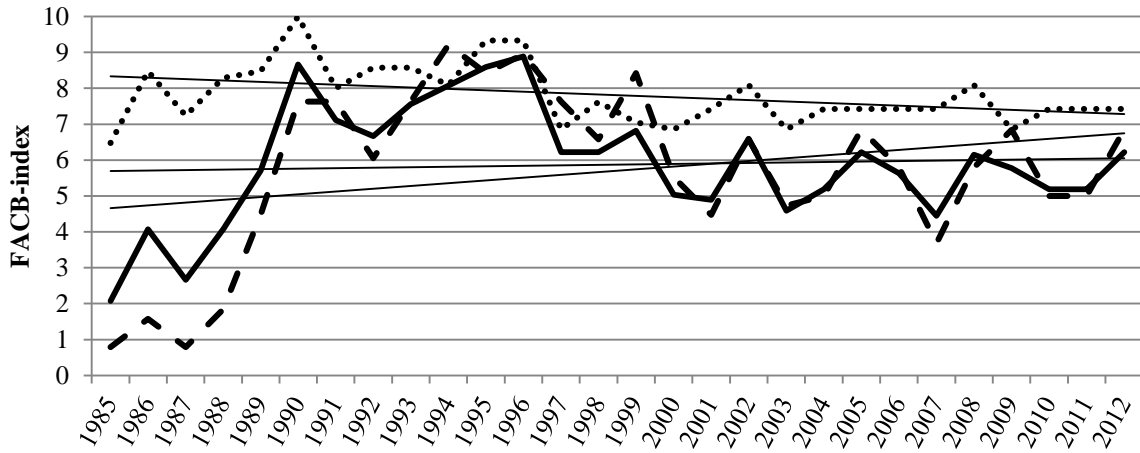
Barbados



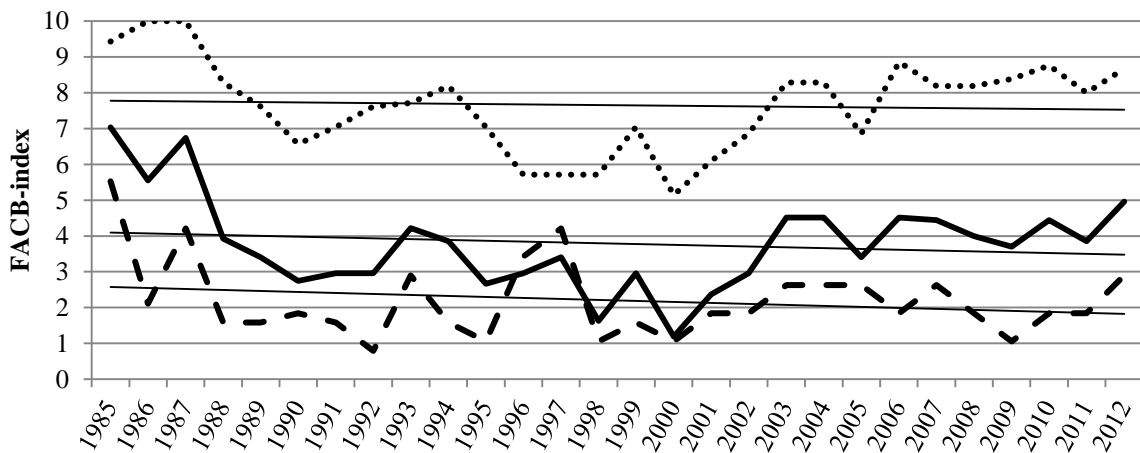
Belize



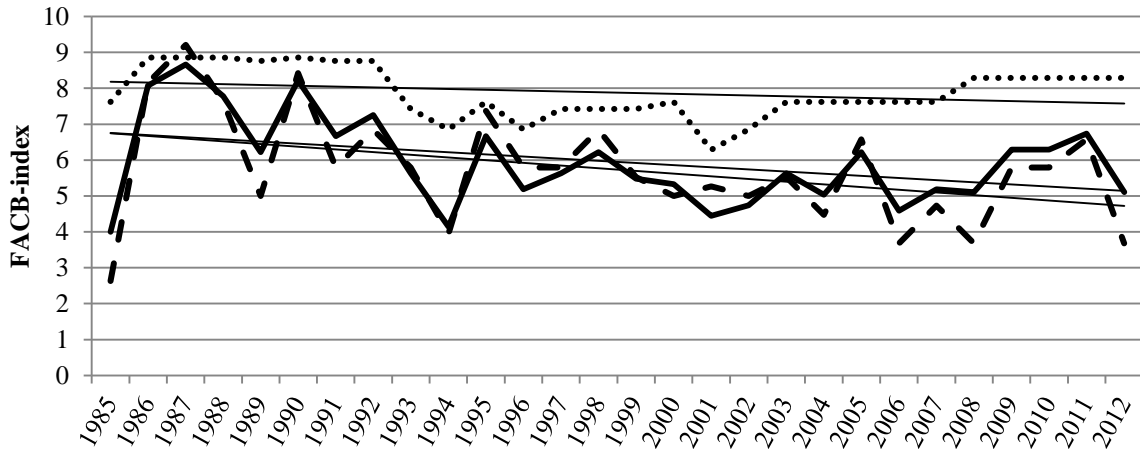
Chile



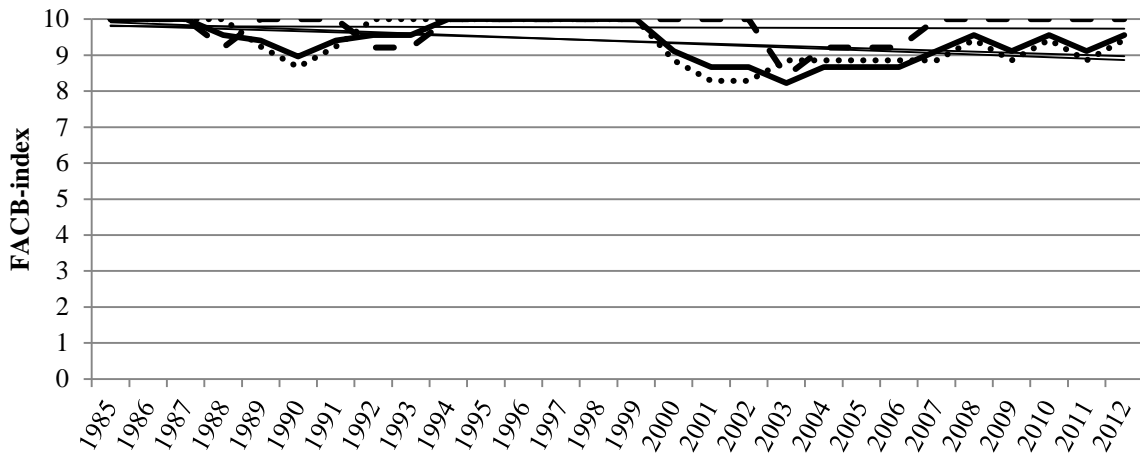
Colombia



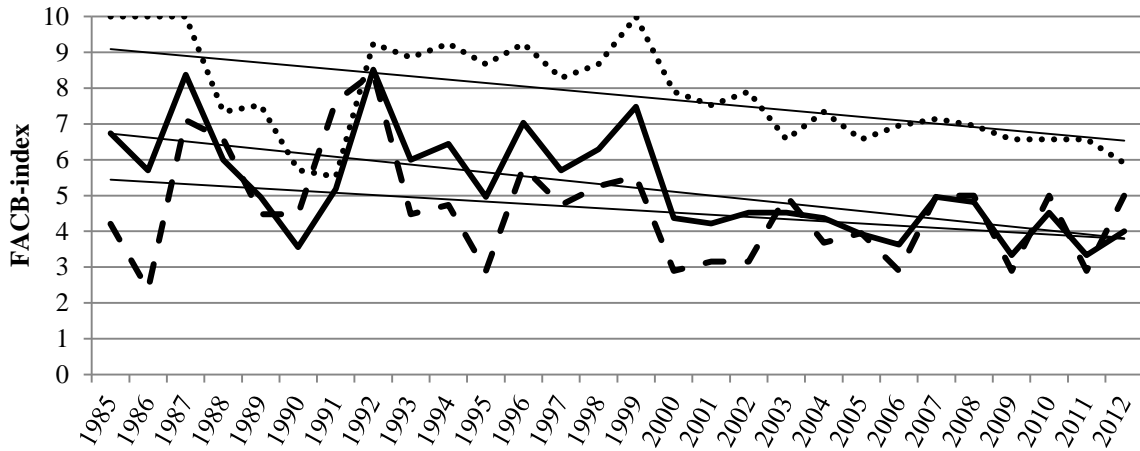
Costa Rica



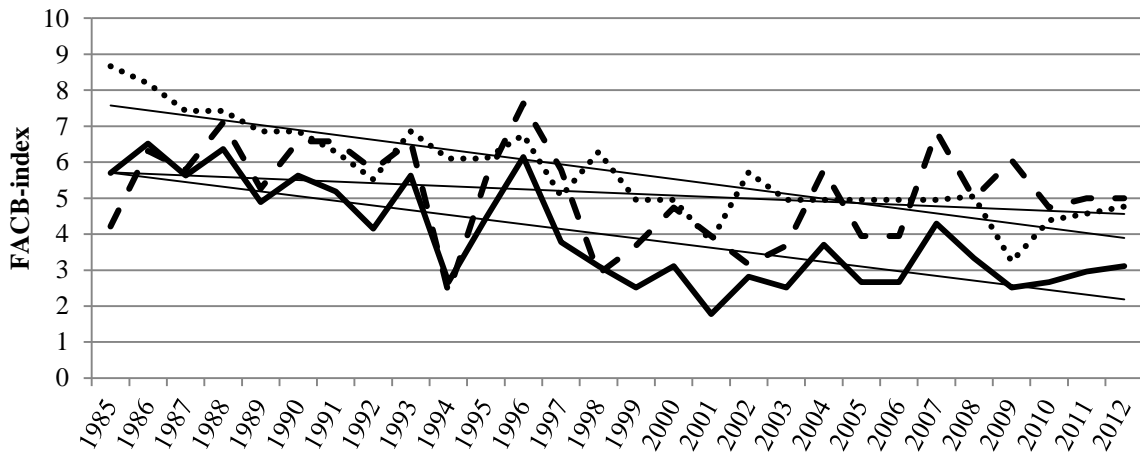
Dominica



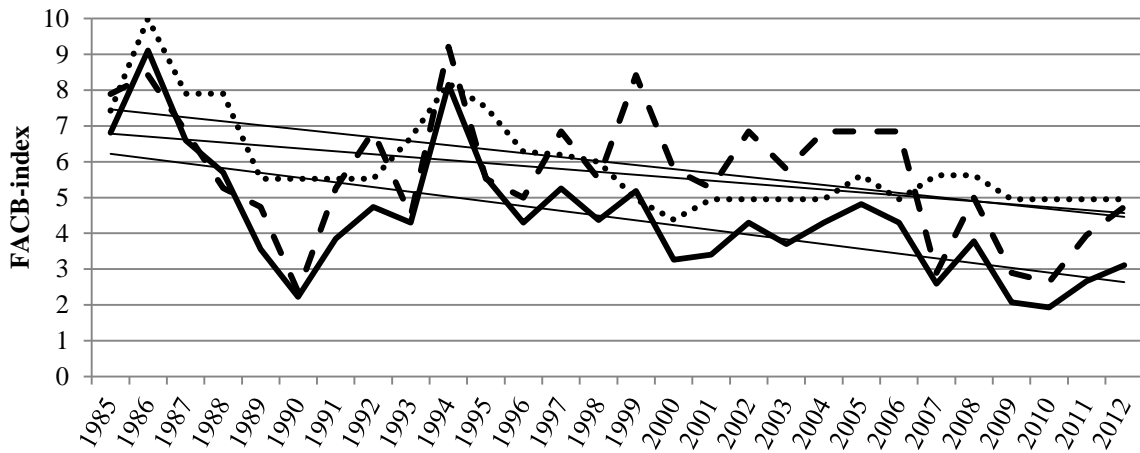
Dominican Republic



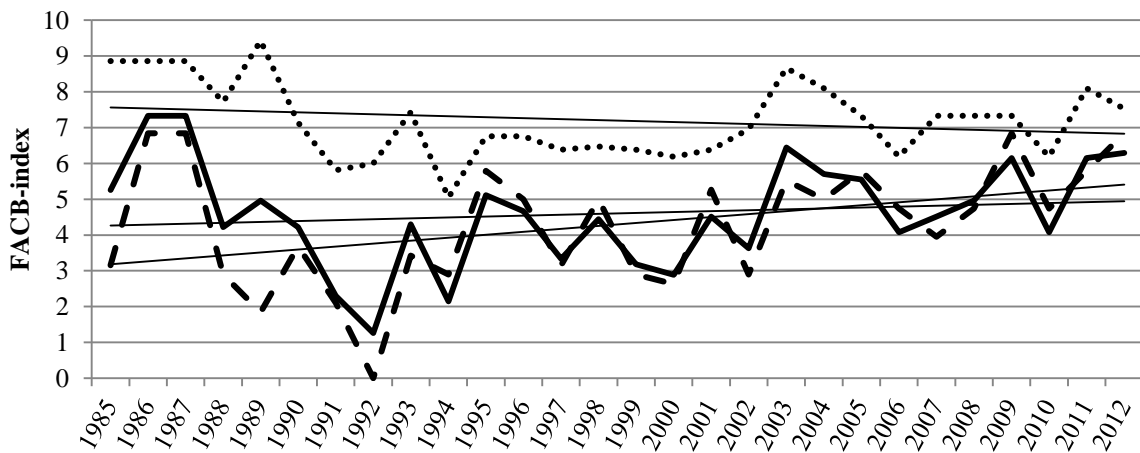
Ecuador



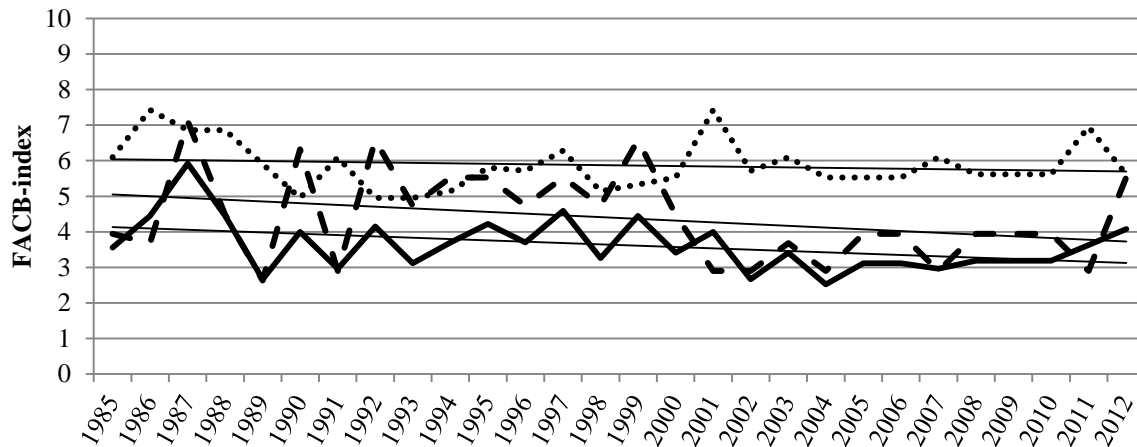
Panama



Peru



Republic of Korea



Source: period 1985-2002 (Mosley, 2011); period 2003-2012 (Marx, Soares and Van Achter, forthcoming).

First, for all countries included in the analysis, violations of FACB rights are present in all cases notwithstanding that all of them ratified the relevant ILO conventions. Hence, the empirical data clearly shows a compliance gap with regard to the enforcement of international conventions. This finding corresponds to earlier research which shows the difference in ratifying international commitments and agreements, and the effective compliance with obligations embedded in these international commitments and agreements (Simmons, 2009; Mosley, 2011; Hafner-Burton, 2013).

Second, there is very significant variation between countries in the overall level of protection of FACB rights. The scores range from approximately a perfect 10 for some countries, mostly in the 1980s, to very low scores of 2 and 3 out of 10 for other countries in the overall period. To compare, the average score for EU Member States over the same time period is approximately 8.5 (see Marx et al, 2015). Some countries, such as Barbados or Antigua and Barbuda, have a high overall score in the last years, while others, such as Ecuador, have a very low score. In the latter countries, there are not only many violations of FACB rights, they are also systematic over time. Although we include linear trend lines to capture the overall trend, we should also note that the time series do exhibit non-linear patterns and show strong variation between two, three or four consecutive years. The latter is especially the case for Chile (overall period), Costa Rica (period before 2000), Dominican Republic (in the 1990s), Ecuador (early 1990s), Panama (all period) and Peru (all period). How to further interpret these strong fluctuations will require further case based research. Overall, given the ratification of the relevant ILO conventions by these countries, these scores show a very significant enforcement/compliance gap.

Third, most of the analysed countries show a clear decline in the protection of FACB over time. Aside from Chile and Peru, all other countries show a downward trend over the studied period. Admittedly this linear trend might hide non-linear fluctuations, but the overall trend is negative. In some cases, this downward trend is very drastic, as is the case for Ecuador and Belize. In other cases, the negative trend is less

outspoken. Considering that the trade agreements (including provisions related to the protection of FACB rights) entered into force during the studied period, one may question their impact. Our results indicate that the protection of FACB rights does not increase with the inclusion of FACB rights in a trade agreement, although admittedly, these stronger provisions on FACB rights are a rather recent development. We can further explore this by comparing different periods on the country level.

Table 6 presents an average score on the FACB index for the first 5 years of measurement and for the last 5 years as well as the percentage change between the two periods. For our group of 13 countries (with strong provisions on FACB rights) we observe a decline of FACB rights protection from 27%, to 16% for the overall population of 73 countries for which we have data (see above). Hence, we observe a stronger decline of FACB rights protection. However, the group of 73 is biased since it includes all EU and other OECD countries. If we compare the trend against a control group selected out of the 73, we observe a weaker decrease since the FACB index decreased by 35% in the control group. This control group consists mainly of other countries with which the EU or U.S. signed trade agreements, with less strong labour provisions, and includes the following countries: Algeria, Argentina, Bahrain, Brazil, Brunei Darussalam, China, Egypt, Jordan, Libyan Arab Jamahiriya, Mexico, Morocco, Oman, South Africa, Taiwan, Thailand, Tunisia, Turkey, Uruguay and Venezuela. The latter comparison suggests that the group of 13 are doing slightly better than other comparable cases. However, to make this analysis more robust, more data on other countries needs to be collected. These results might suggest that the inclusion of the FACB rights in trade agreements might have some (marginal) effect (slowing down the decline in the protection of these rights) but is not able to reverse a downward trend. To be sure, the downward trend can be explained by several factors such as better reporting and monitoring as discussed above. These effects should, however, hold for all countries and will influence our group of 13 to the same amount as the control group. The point being made here is that we do not observe an immediate effect of a trade agreement on the protection of FACB rights. It is of course possible that these FTAs with human rights clauses have contributed to the protection of FACB rights, and that the downward trends observed have been caused by another factor, not considered in this study. However, looking at these downward trends it is clear that these agreements have not been effective enough (or not as strong/enforceable as expected).

Table 6: Comparison of FACB Index scores of the Group of 13 with other groups

Period	1985-1990	2008-2012
Average Score 13-Countries	7,132764	5,585185
Percentage Change	-27,7086%	
Average Score All Countries	7,804972	6,714764
Percentage Change	-16,236%	
Average Control Group	6,734503	4,97232
Percentage change	-35,4399%	

We can concentrate even further on this by focusing more on the periods right before and after the FTA. Table 7 provides an overview of when the negotiations were concluded, the agreements were signed and when they entered into force. The table also shows FACB scores before and after a trade agreement was negotiated. Since negotiations started some time before the agreement entered into force, one could expect some anticipatory behaviour, both in an economic as well as political respect. Hence, as a cut-off point we take the date of when the negotiations were concluded and compare the average FACB scores before and after the negotiations were concluded. We study equivalent periods. Henceforth, if the negotiations were concluded in 2007, we calculated the average on the basis of the six years after (2007 included) and the six years before. If they were concluded in 2009 (the EU-Korea FTA) we calculated the average of four years before and after. For the 2010 agreements, we calculated the average over three years and for Chile we calculated the averages on the basis of 11 years. For Ecuador we do not have data to compare.

Table 7: Comparing FACB rights protection: before and after the conclusion of a trade agreement

	Trade Agreements			FACB Index	
	Negotiations Concluded	Signed	Entered into Force	Before	After
Antigua & Barbuda	2007	2008	2008	8,66	8,22
Bahama's	2007	2008	2008	7,41	5,29
Barbados	2007	2008	2008	9,11	8,19
Belize	2007	2008	2008	7,18	6,76
Chile	2002	2002	2003 (2005 for services)	6,91	5,56
Colombia	2010	2012	2013	4,04	4,41
Costa Rica	2010	2012	2013	5,53	6,04
Dominica	2007	2008	2008	8,59	9,33
Dominican Republic	2007	2008	2008	4,19	4,16
Ecuador	2014	-	-	-	-
Panama	2010	2012	2013	2,81	2,56
Peru	2010	2012	2013	5,20	5,50
South Korea	2009	2010	2011	3,09	3,51

Table 7 shows that there is no clear evidence that the protection of FACB increases after finalising a trade agreement. Some countries show a rather stable pattern with overall rather low scores on the protection of FACB rights and some small improvements (Colombia, Costa Rica, Peru and South Korea) or decline (Antigua and Barbuda, Panama) of FACB rights. Some other countries show a marked decline such as Bahamas, Barbados and Chile. Overall, the conclusion of a trade agreement does not seem to create a watershed moment in which we observe a marked increase in the better protection of specific rights.

Fourth, as could be expected, the cases show a difference in the protection of FACB rights in law (dotted line) and in practice (striped line). In all cases⁶⁵, the protection in law is stronger than the protection in practice. This indicates an implementation or enforcement gap. These differences can be very outspoken, as the case of Colombia illustrates. In this case, there is a marked difference between the two.

In general, the trend lines for the protection in law and the protection in practice follow a similar pattern, both in direction (upward/downward) and strength. In some cases we can observe a divergence in which the protection in law (dotted line) remains rather stable, while the protection in practice (striped line) decreases significantly. One explanation might be that governments in countries with low regulatory quality and low rule of law can create regulations and laws that they do not intend to respect of rights, as a short term response to international (in the case of trade agreements) or domestic pressure (Levi et al., 2013; see also discussion in Simmons 2009 on false positives).

One could expect that countries which are bound by trade agreements with strong FACB rights provisions exhibit an increase in the protection of FACB rights in law. However this must not necessarily be followed by an increase in in the protection of these rights in practice. These are the so-called ‘false positives’ (Simmons, 2009), i.e. countries which signal compliance to international rules by translating it into domestic law without following it up with real enforcement.

One could even hypothesise a divergence or stagnation between protection in law and protection in practice after a trade agreement was negotiated which could indicate that the institutional (in law) changes also remain limited following the entry into force of a trade agreement and hence that trade agreements generate relatively little impact. We do not observe such a strong divergence. However, we do observe a significant difference between the protection in law and the protection in practice and more importantly we do observe a low level of protection of FACB rights in practice. This might be caused by economic pressures not to strongly enforce labour laws.

The conventional argument holds that higher labour standards in general will inhibit competitiveness and growth due to increasing costs and reducing flexibility of labour markets. Several dynamics play out here. At the start, labour standards may increase cost and lead to decreased competitiveness (and export). As a result, manufacturing might move from one country to another due to the fact that companies will source from countries with the lowest costs. Countries might be played out against one another not to enforce labour standards especially in a context of short term ownership and mobility of factories. Within

⁶⁵ Except for some specific and short periods.

several manufacturing industries some factories, or the capital sustaining them, are highly mobile. They are constantly searching for locations with the lowest input costs (Levi et al. 2013). Hence, as Levi et al., note '[w]hen challenged by workers forming unions or pressured by MNCs trying to induce compliance with private regulatory schemes, many factories will simply shut their doors without paying severance to workers and re-locate.'

These dynamics provide incentives for countries to not strictly enforce labour standards, including FACB rights, in order to attract business opportunities. As Levi et al. (2013) establish, states fail to comply with labour standards for at least three interrelated reasons. The first is opposition by state actors to enforce compliance with labour standards. The state may oppose compliance because it would lose some measure of authority, be obliged to expend resources, or no longer be able to promote certain export sectors by ignoring labour standards violations. The second explanation is opposition by private actors who have captured state policy: domestic and multinational businesses may oppose compliance to reduce cost and preserve flexibility. Finally, the state may lack the capacity to implement; many developing countries face 'a severe dearth of the requisite scientific, technical, bureaucratic, and financial wherewithal to build effective domestic enforcement systems' (Chayes and Chayes 1993, p. 194).

k) Discussion

These exploratory results show no clear evidence that trade agreements which include labour provisions result in increased protection of freedom of association and collective bargaining, two core labour rights. To the contrary, we find a steady decline in the protection of these two core labour rights. This is not to argue that these provisions have no effect. Indeed, we do not have any information on the counterfactuals, i.e. what would have happened without the inclusion of labour provisions in trade agreements. In addition, the protection of these rights are influenced by many different factors. The protection of these rights is determined by a set of international and domestic factors. These do not only include the ratification of treaties or conventions or the inclusion of these rights in specific agreements, but also include government composition, nature of the political system, trade-openness, foreign investments and a range of other factors. Changes in these factors might also contribute to the decline of the protection of these rights.

In this context special attention might turn to trade openness. Several studies have analysed the impact on labour standards protection of trade openness, measured by the ratio of the sum of imports and exports to GDP. The results of these studies are mixed, mostly pointing to a negative relation between trade openness and labour standards protection. Busse (2004) analysed 71 developing countries and found a robust negative effect (reducing compliance) in a panel data analysis for data from 1970 to 2000. Neumayer and De Soysa (2006), on the other hand, found a positive effect of trade openness on labour standards in their cross-sectional analysis using Kucera's measure of FACB rights, a result that is robust across various specifications, including different control variables and samples (only developing countries versus all countries). However, the studies published by Layna Mosley (2011) present evidence of an opposite (negative) effect of trade openness. Layna Mosley argues that the effect of trade openness is different from foreign direct investment. Foreign direct investment contributes to better practices. However, trade openness, especially through subcontracting, causes more violations of labour rights, since governments are tempted to reduce the provision or enforcement of such rights, due to cost

competition (Mosley and Uno, 2007; Mosley, 2011; see also Levi et al. 2012). Given the exponential growth of international trade over the last decades, it might well be hypothesised that trade openness generates downward pressures on the protection of FACB rights which may/cannot be off-set by international conventions or inclusion of the protection of these rights in trade agreements. This analysis suggests that the overall pattern of FACB protection over the last 30 years is downward. This coincides with an ever increasing volume of trade. Over the last half century the growth of international trade has been spectacular. With an almost thirty-fold increase over 50 years it has truly transnationalised economic activities (Hoekman, 2014). In addition, and more fundamentally, the nature of international trade is changing.

D. Conclusions on impact assessments in the field of trade

To conclude on this chapter concerning the field of trade, the most obvious comment to be made is that human rights impact assessments are not conducted in relation to EU negotiated FTAs. Human rights impacts are beginning to be assessed in earnest, but always in the framework of a wider Sustainability Impact Assessment.

EU practice on assessing human rights impacts *ex ante* is, however, steadily improving, as is shown by the Draft New Handbook on trade SIAs or by the Operational Guidance on taking account of fundamental rights. Yet, such practice is still deficient on a number of counts.

First, the inclusion of human rights impacts in the middle of a wide array of other issues tends to dilute human rights issues whereas they should be considered a top priority. Second, such an approach negates the specificity of human rights as based in legal standards, and fails to put such normative framework front and centre of the assessment. This encourages findings in which human rights impacts are not expressed in terms of compliance or violations of the catalogue of rights, but as extrapolations of economic scenarios.

Methodologically, HRIAs as practiced by the EU are also flawed in a number of ways. There is no guidance or accepted framework for conducting a proper screening of relevant human rights likely to be affected. This leads to a quasi-systematic omission of civil and political rights from the scope of the assessments, on the premise that they bear no direct connection to economic policies such as trade. With respect to the analysis of the impacts as such, official EU methodology mandates that consultants base their work on two mutually reinforcing methods: data analysis through modelling and stakeholder consultation. In practice, however, the first method has been found to be much more decisive than the second in the conclusions of the different reports. This is problematic given the paucity and lack of reliability of many datasets, especially in developing countries. Moreover, as indicated above, this tends to keep the focus on social rights directly impacted by economic variations, to the detriment of other types of (non-quantifiable) rights.

Regarding the extent to which stakeholders are effectively consulted, the picture is also mixed. If stakeholder consultations are conducted in all cases, the efforts put by the consultant to reach out to vulnerable stakeholders who do not have the means or resources to participate spontaneously in the

consultation is insufficient, and leads to truncated findings. Regarding the use of the information gathered through consultations, as indicated in the above paragraph, it comes only second to quantitative data and modelling, thereby causing stakeholders to be inadequately anchored in the experience of affected stakeholders.

As for the effectiveness of HRIAs in terms of the influence they have on the decision making process, the analysis is also inconsequential. Given the processual shortcomings described above, the recommendations which are formulated are generally rather shallow and over-generalised, sometimes to the point of self-evidence. In any event, SIA findings have never seriously challenged the usual course of action of the Commission.

The Commission has recently taken steps to update its Handbook on Trade Sustainability Assessments, and the Draft New Handbook contains a very welcome clarification that human rights should be part and parcel of the impacts studied. However, the Draft New Handbook is also very general on methodological aspects and is unlikely, in its current shape, to address the flaws identified above. Hopefully the consultation process to which the Draft New Handbook is currently subject will cause redress for this weakness.

Finally, concerning the ex-post evaluation of the protection of human rights which are included in FTAs, most of the work still needs to be done. We do not yet understand well how the integration of social clauses in FTAs affects the protection of specific human rights. Little or no evaluations and data are available to assess the impact. In this chapter we presented the results of an exploratory study which focused on freedom of association and collective bargaining, two of the key rights in FTAs. The focus on these rights was chosen because academic literature and data is available on which we were able to build. This exploratory study did not find any direct observable impact on the protection of these rights. To the contrary, we find less protection over time. However, we are cautious in drawing any strong conclusions on the basis of these findings. They can be explained by a series of factors and do not establish a strong causal link between the integration of specific rights in FTAs to a country's protection of these rights.

V. Case study on labour rights protection under the EU-Colombia trade agreement

A. Introduction

Previous chapters of this report have aimed to assess in how far the EU's systems for evaluation and impact assessment are equipped to take into account the human rights impact, ex-ante and ex-post, of the Union's trade and development policies. The present chapter takes a different approach to 'assessing the impact of human rights provisions', in the sense that it provides a case study on the use and the perceived impact and effectiveness of one of the EU's most promising mechanisms for human rights promotion through trade.

EU international trade agreements since recently include sustainable development chapters which offer provisions aimed at protecting labour standards, human rights and environmental regulation. Arguably, such provisions can address concerns regarding the deregulatory effects of trade liberalisation on social and environmental protection. So far however, little attention has been paid to the practical application of these provisions and their perceived effects in a given country context. The present case study aims to provide a first empirical contribution to this discussion by looking into the operational specifics of the labour rights provisions in one of the EU's new generation Trade Agreements, notably the one concluded with Colombia in 2013.

Ideally, the results of this research will enable policy-makers and other stakeholders to gain a better understanding of the dynamics, the potential and the limitations of the use of trade provisions as an instrument for rights-promotion. As such, this case study impinges on a wider debate on the use of trade as a means for international regulation and standard-setting through the various strands of governance.

Before going into the specifics of the trade agreement with Colombia, the sections below offer an introduction to this debate on governance through trade and describe the general features of EU Sustainable Development & Trade chapters. Afterward, the case study describes the negotiation and implementation process of the Trade Agreement so far, including a mapping of perceptions regarding its impact and effectiveness when it comes to the protection of labour rights.

1. The European Union and governance through trade

When it comes to global governance and international policy-making, it has become increasingly commonplace to question the effectiveness of multilateral institutions. Indeed, several observers have pointed out the limits of the consensual structure of multilateral negotiation fora based on the sovereign equality of states. An example of this stagnation in multilateral law-making includes the disappointingly slow reform of the global trade system under the Doha Development Round (Marx et al., forthcoming: 1).

In the absence of multilateral progress, other forms of international policy-making are rapidly expanding, including through informal law-making (Pauwelyn et.al, 2014), non-consensual transnational law-making (Krisch, 2014), unilateral action (Scott, 2013) and governance *through* trade. While power *in* trade refers to access to an actor's domestic market based on export conditions, power *through* trade implies using

market access power as a means to ‘export’ certain values, norms, standards and laws (Meunier and Nicolaïdes, 2006). As such, it is a strategy typically favoured by normative international actors seeking to promote global public goods.

The EU is a prime example of such an actor, whose guiding norms and values are enshrined in EU primary law, most notably in the Lisbon Treaty. These include respect for human dignity, freedom, democracy, equality, the rule of law and human rights, as well the commitment to preserve and improve the quality of the environment and the sustainable management of global natural resources (Art. 2, TEU). In addition, Article 21 of the Lisbon Treaty has firmly anchored the EU’s role as a normative global actor in this regard, and requires all areas of its external action to consistently and coherently ‘consolidate and support democracy, the rule of law, human rights and the principles of international law’ (Art. 21, 2-b, TEU). These objectives also apply to the EU’s Common Commercial Policy (Art. 205 TFEU), an exclusive EU competence (Art. 3 TFEU).

As a major global trade and investment power, and given the treaty obligations described above, the EU constitutes an interesting case of governance through trade. Moreover, The EU’s capacity to do so has recently been enhanced by the establishment of a new generation of trade policies which include particular provisions for ‘non-trade objectives’. Essentially, EU governance through trade under this new generation of trade agreements aims to use the size of the Union’s common market as leverage to promote policy changes abroad, including on environmental protection, labour standards, human rights protection and ‘more generally to shape new patterns of global governance’ (Meunier and Nicolaïdis 2006, 907).

While the debate on trade liberalisation and its effects on environmental and social standards is a long-standing one, little is known about the specific mechanisms that determine the way in which trade affects the protection of public goods (Aaronson and Zimmerman, 2007). Also, regarding their actual effectiveness, the empirical evidence on the impact of these trade measures is still very much missing. With regard to labour rights, a 2013 report by the International Labour Organisation (ILO) which mapped out the social dimension of recent trade agreements concluded that there is hardly any empirical work available on the effect of the integration of labour rights provisions in trade agreements (ILO, 2013).

It is in this area we have made a first contribution in this report, notably by assessing the impact of labour rights language (particularly on freedom of association and collective bargaining) in EU trade agreements with 13 countries. Their results show no clear evidence that trade agreements which include labour provisions result in an increased protection of freedom of association and collective bargaining (FACB). On the contrary, they find a steady decline in the protection of these two core labour rights. However, in the absence of counterfactuals, one cannot argue that these provisions had no effect at all, and further case-based research is required to assess the actual use and effectiveness of such mechanisms in a given country-context.

2. Sustainable development chapters in EU Free Trade Agreements

EU bilateral and regional trade agreements have included human rights clauses since 1995, which make the application of the trade regime conditional upon a party's human rights performance and respect for democratic principles. As an 'essential element' of the agreement, the violation of a human rights clause allows the other party to take 'appropriate measures', including – though only 'as a measure of last resort'- the suspension of the agreement (Bartels, 2005).⁶⁶ Over the past two decades, human rights clauses have been evoked on numerous occasions, though exclusively under the framework of the Cotonou Agreement with the ACP-states.⁶⁷

Since recently, beginning with the 2008 EU-Cariforum Economic Partnership Agreement (EPA), EU trade agreements also include so-called sustainable development chapters. These contain obligations to respect labour and environmental standards (see Box 5) and flow from the Lisbon Treaty's provision for the EU's external policies to 'foster sustainable, economic, social and environmental development of developing countries, with the primary aim of eradicating poverty' (TEU, Art. 21). Sustainable Development chapters are now part of the 2008 EU-Cariforum EPA, the 2010 EU-Korea Agreement, and the 2012 EU-Central America and EU-Peru/Colombia agreements. Reportedly they are also included in the negotiations of agreements currently still under negotiation, including the EU-US Transatlantic Trade and Investment Partnership (TTIP).

Box 5: Core elements of Sustainable Development chapters

In terms of the commitments and operational provisions they contain, all recent trade agreements in force seem to revolve around a common core composed of several elements (not always in the same order):

- A reference to the following instruments:
 - The Rio Declaration on Environment (Colombia/Peru) and Development and Agenda 21 on Environment and Development of 1992 (Central America, South Korea, Colombia/Peru)
 - The Johannesburg Plan of Implementation on Sustainable Development of 2002 (Central America, South Korea)
 - The 2006 Ministerial Declaration of the UN Economic and Social Council on Full Employment and Decent Work (Central America, South Korea, Cariforum)
 - The Cotonou Agreement (Cariforum)
 - The Millennium Development Goals (Colombia/Peru).
- A reaffirmation by the parties of their general commitment to promote trade in a way that fosters sustainable development (Central America, South Korea).
- The reaffirmation that States have the freedom to define their own level of social and environmental protection, and that social and environmental standards should not be used

⁶⁶ Taking 'appropriate measures' must be in accordance with international law and priority must be given to measures that least disrupt the functioning of the agreement, See: Bartels, L. Human Rights Conditionality in the EU's International Agreements (Oxford: OUP, 2005).

⁶⁷ Since 1996 the 'essential elements clause' under the ACP agreement has been invoked 23 times to initiate a consultation procedure, see (Beke et al, 2014: 118).

- for protectionist purposes, though parties should strive to ensure high social and environmental standards (Central America, South Korea, Cariforum, Colombia/Peru)
- A commitment to strive towards high levels of social and environmental protection by:
 - Implementing the ILO Conventions and other multilateral instruments applicable to the parties (Central America, South Korea, Cariforum)
 - Respecting, promoting and realising in their laws and practice the core labour standards and associated ILO Conventions proclaimed in the ILO Declaration of Fundamental Principles and Rights at Work of 1998, namely
 - the freedom of association and the effective recognition of the right to collective bargaining;
 - the elimination of all forms of forced or compulsory labour;
 - the effective abolition of child labour;
 - the elimination of discrimination in respect of employment and occupation. (Central America, South Korea, Cariforum, Colombia/Perú)
 - Implementing a list of multilateral environmental agreements (Central America, Colombia/Peru)
 - A commitment to cooperate to develop trade schemes and trade practices favouring sustainable development, notably in respect of particular themes such as forestry, fisheries, climate change (Central America, Colombia/Peru), fair trade and corporate social responsibility (South Korea, Colombia/Peru), biological diversity (Colombia/Peru), migrant workers (Colombia/Peru).
 - A commitment not to lower or fail to apply social and environmental standards with a view to encouraging trade or attracting investment (Central America, South Korea, Cariforum, Colombia/Peru).

Source: (Beke et al., 2014: 74).

While the EU seems committed to make it part of its trade policy to systematically include a sustainable development chapter in its future trade agreements, little is known about their actual effects and how these chapters relate to the aforementioned policy of human rights clauses. Indeed, in terms of content, there is quite some overlap since most of the provisions under the sustainability chapter are in principle also part and parcel of the human rights clause.

Sustainable development chapters contain labour and environmental standards, and both include two types of obligations. A first set of minimum obligations relates to the implementation of certain multilateral commitments and therefore add nothing substantially new compared to the human rights clause. For instance, the ILO core labour standards provided under the sustainability chapter are already binding on the parties through their membership of the ILO and are 'human rights covered' under the clause. As far as the environmental standards are concerned, the obligations under the chapter amount to no more than a reaffirmation of those obligations under the respective multilateral agreements. A second type of obligations requires the parties i) not to reduce their current levels of social and environmental protection; and ii) encourages them to raise those levels as long as this is not done for protectionist purposes. While the former arguably constitute an effective guarantee against regulatory decline, the latter is only 'a best endeavours provision' (Bartels, 2013: 309). In sum, while the two sets of provisions (the human rights clause and the sustainability chapters) are to some extent different indeed

– e.g. there is no equivalent for democratic principles in the sustainability chapters – there are also significant areas of overlap, which raises questions about their respective added value, as well as about the different implications for monitoring and sanctioning. Indeed, depending on whether a labour rights violation is perceived as a human rights violation or as a breach with the labour provisions under the sustainability chapter, different procedures apply in terms of dispute settlement and sanctioning (Bartels, forthcoming:18).

Given their limited added value in terms of ‘hard law’, the main innovation of sustainability chapters is to be found in the monitoring mechanisms they provide (which human rights clauses do not). Indeed, sustainability chapters under most TRADE AGREEMENTs establish specialised bodies which are meant to meet on a regular basis to discuss the ongoing implementation of the chapter. As such, the EU-Korea, -Colombia/Peru, and -Central America agreements have set up ministerial contact points, specialised committees/boards of senior officials for the purpose of implementing the trade and sustainable development chapter. Most importantly, bilateral (sub-) committees are set up to specifically address sustainable development issues on a ‘government-to-government’ basis. The mandates of these committees have a varying breath however. The Trade and Development Committee established under the EU-Cariforum EPA can discuss any sustainable development issues, and is not limited to discuss only those matters directly linked to the implementation of the chapter.⁶⁸ Likewise, though somewhat more narrow, the Sub-committee on Trade and Sustainable Development under the EU-Colombia/Peru agreement is mandated to oversee the implementation of the chapter, including cooperation activities that contribute to its implementation, as well as to discuss matters of common interest related to the sustainability chapter.⁶⁹ The Trade and Sustainable Development Board in the EU-Central America agreement however is only mandated to oversee the implementation of the sustainable development chapter.

Besides bilateral meetings between the EU and the partner countries concerned, sustainable development chapters also provide a forum for civil society involvement, in various forms, ranging from unilateral advisory groups and/or bilateral meetings with CSOs. The former includes domestic mechanisms, as provided under the EU-Colombia/Peru agreement, under which each party is bound to consult domestic labour and environment or sustainable development committees or groups, or create such fora if they do not exist. Stipulations regarding the constitution and consultation procedures for these groups are to be in accordance with national law but should guarantee a balanced representation of relevant interests. With regard to the latter, bilateral meetings with CSO, the sustainability chapter foresees parallel meetings between the designate (sub-) committee and CSOs and ‘the public at large’. Here as well the mandate of such meetings differs from ‘trade related aspects of sustainable development’ to matters related to the implementation of the sustainability chapter. Given the broad definition of sustainable development as interpreted under these chapters, Lorand Bartels argues that discussing ‘trade related aspects’ could well include matters falling under the human rights clause (Bartels, forthcoming: 15).

⁶⁸ Article 230 (3) (a) of the EU-Cariforum agreement.

⁶⁹ Article 280 (4) of the EU Colombia/Peru agreement.

Beyond monitoring and dialogue, none of the sustainability chapters provide binding unilateral enforcement mechanisms, nor can violations arising from the sustainable development obligations be addressed through the normal dispute settlement procedures established under the trade agreement.⁷⁰ If disputes were to arrive, one party can request the other for a governmental consultation, and if deemed necessary ask for the (sub-) committee to convene to consider the matter. If a bilateral consultation cannot resolve the matter in a mutually satisfactory way, the complaining party may forward its grievances to a Group of Experts. Such a Group is then mandated to assess and provide a report on whether or not one of the parties has indeed failed to comply with the obligations formulated in the chapter, as well as formulate non-binding recommendations to resolve the matter.⁷¹

Given the lack of proper enforcement mechanisms and the limited added value beyond more detailed labour and environmental standards, the EU's promotional approach of sustainable development chapters has been criticised as being too soft, particularly compared to similar provisions under US or Canadian trade agreements (Lukas and Steinkeller, 2010: 11-12).⁷² It is but the question however, if stricter, more sanctioning-oriented mechanisms automatically translate into better protection of social and environmental standards. Indeed, initial research in that regard seems to point in the opposite direction (Marx et al., 2014)⁷³. The question thus remains if and how sustainable development chapters actually make a difference in the setting and implementing of labour and other rights standards.

3. Methodology and scope

The key objective of this case study is to gain a better understanding of what the integration of labour rights issues into EU trade agreements entails in practice. How the practical application of such provisions and mechanisms plays out in a particular country context, and how the different stakeholders involved perceive the usefulness and effectiveness of the sustainability chapter as an instrument to protect and promote labour rights standards.

The aim of the present study is thus not to offer an analysis of the actual *impact* of the trade agreement. To identify the isolated effects of a single trade actor's policy intervention is methodologically speaking a daunting exercise, and either way the recent implementation of the trade agreement makes it far too early to look at substantial, long-term impacts. However, this case study aims to provide insights on the different types of challenges encountered in the application of specific provisions under the sustainability chapter of the EU-Colombia agreement, and its overall potential benefits and limitations in terms of contributing to changes in the realm of labour rights. The main aim of this exercise is thus to gain a better understanding of how governance through trade plays out in the targeted 'recipient' country, in this case Colombia.

⁷⁰ Except under the EU-Cariforum EPA where the normal dispute settlement procedures apply, though the suspension of concessions is not possible. See: Article 213 (2) of the EU-Cariforum agreement.

⁷¹ Article 282 -285 of the EU-Colombia/Peru agreement.

⁷² Karin Lukas and Astrid Steinkellner, Social Standards in Sustainability Chapters of Bilateral Free Trade Agreements (Ludwig Boltzmann Institute of Human Rights 2010) available online , 5

⁷³ For what regards TRADE AGREEMENT elements which may positively impact labour rights practices, see Social Dimensions of Free Trade Agreements (n 535), chapter 4, 97 ff.

To do so, one needs to go beyond focusing exclusively on legal and institutional changes but also look at i) the practical application of the mechanisms foreseen under the trade agreement sustainable development chapter and ii) the practical implications for the policy areas and economic sectors concerned. This implies, *inter alia*, mapping out the main features of the trade agreement when it comes to the protection of labour rights, their application and effects so far. How do the mechanisms for consultation, monitoring and compliance provided under the sustainability chapter work and what are their perceived strengths and weaknesses? How do the present provisions and mechanisms compare to similar instruments for labour right promotion under other trade agreements with Colombia, notably with the US?

In terms of methodology, we conducted a thorough review of existing primary and secondary sources on labour rights in Colombia, governance through trade and on the social and economic dimension of the EU-Colombia/Peru trade agreement. In order to verify and complement this desk research with more detailed information, the authors conducted some 30 semi-structured interviews in Bogotá and Brussels (a full version of the questionnaire used to guide the interviews is available in Annex 5). A wide range of relevant stakeholders were consulted, including representatives from the Colombian government, EU officials, labour unions, NGOs, business representatives and academic experts on both sides of the agreement (a list of Interviewees is available in Annex 6).

With regard to the case-selection, the EU trade agreement with Colombia was identified as an interesting case study for several reasons. First, labour rights violations are still a major concern in Colombia, which offered a likely case to observe changes if potential follow-up research were required when the agreement has been in place for a longer period of time. Second, labour rights –and human rights at large – feature relatively prominent on the domestic agenda, both within government as well as in the public sphere. Ever since the early 2000s, with domestic conflicts in a receding state, Colombia has witnessed increasing economic growth and the Colombian government has embarked in a process of economic liberalisation, including in its trade relations with some of the world’s largest economies.⁷⁴ A major concern in this regard has been how such increased trade openness affects labour standards. Alongside this neo-liberal economic agenda, the Colombian government also aspires to reflect the image of a modern, upper middle-income country, with due consideration for global human rights frameworks. Balancing economic growth and overall attractiveness to foreign investment with an image of normative accountability remains a challenge and one that has not been settled through institutional and legislative reform (Lizarazo et al., 2014: 831-834). A third consideration for taking Colombia as a case study is to be

⁷⁴ Colombia currently has fifteen trade agreements in force. This includes trade agreements with Nicaragua (partial agreement) 1980, Canada 1993, Mexico 1995, CARICOM (partial agreement) 1998, Cuba (complementary preferential agreement) 2001, Mercosur 2005, Chile and Guatemala 2009, El Salvador and Honduras 2010, EFTA and Canada 2011, the USA, Venezuela (partial agreement) 2012 and the EU 2013. Another five trade agreements have been signed but are not applied yet (these include the Pacific Alliance, Costa Rica, Israel, Panama and South Korea). Meanwhile three trade negotiations are ongoing, notably with Turkey, Japan, and the multilateral TiSA agreement (MCIT 2014).

found in the provisions on the protection of labour rights under the trade agreement with the EU. According to the ILO, the EU-Colombia/Peru agreement is one of the trade agreements with comparatively substantial provisions in this regard. Fourth and finally, the presence of recently established trade agreements with the US and Canada, which both include similar labour standard obligations, yet different approaches to their monitoring and enforcement, offers some opportunities for comparison.

B. Context: Labour Rights in Colombia and the US-Colombia Free Trade Agreement

1. Labor Legislation in Colombia: Provisions and Outstanding Issues

Before getting into the analysis of the Colombia-EU Trade Agreement, and of its labour rights provisions and monitoring mechanisms, it is important to present a brief overview of the main legal structures, fundamental changes, and outstanding issues that constitute the Colombian legal framework with specific reference to provisions on the rights of freedom of association and collective bargaining (FACB rights), two key rights included in the agreement (*supra*). From a legal perspective, labour rights are fully protected in Colombia. The ILO Conventions relevant to FACB rights (No. 87 on Freedom of Association and 98 on the Right to Organize and Collective Bargaining) were ratified by the government in 1976. In addition to sector-specific legislation and international conventions, Colombian national law recognizes and protects FACB rights through three key legal documents: the National Constitution of 1991 (Articles 39, 53, 55 and 56), the Substantive Labour Code (Articles 8, 12, 353-358) and the Procedural Code of Labour and Social Security.

In view of increasing pressure from the ILO and prospective trade partners like the US and the EU, Colombia has put in place a series of significant improvements to its legal and institutional framework for labour rights protection. Most importantly, in 2011, the government re-established a separate Ministry of Labour, which had previously been merged with the ministries of social security and health into one Ministry of Social Protection. In addition, a number legal reforms were applied in order to strengthen and combat the misuse of Associated Work Cooperatives and Temporary Service Agencies (see below), as well as to criminalise employers who evade their FACB obligations (USDL 2011: 3, 16-7; MRE 2014). In its accountability report of 2014, the Colombian Ministry of Labour presents a brief overview of the government's achievements in FACB rights protection (MINT, 2014a: 16-7, 22-3). In relation to freedom of association, it notes that 791 trade unions were established in 2012-2013, representing a 48% increase compared to the 536 unions created in 2010-2011 (MINT, 2014a: 23; 2014b: 14). The report further notes that i) the number of labour contracts between employers and labour unions rose from 114 to 1582 that same period; and that ii) registration procedures for new trade unions became less restrictive (MINT, 2014b: 15).

In spite of recent efforts and the comprehensive legal framework in place, enforcing labour rights protection in practice remains challenging. While figures by the Colombian government reflect an improvement in the protection of FACB rights, data compiled by Colombian NGOs tends to point in the opposite direction. According to them, the percentage of workers organized in trade unions has fallen from 10% since the beginning of the 1980s to 4.4% in 2010. Within this group of unionised workers, only 1.2% is covered by collective bargaining agreements (USDL, 2011: 16; JFC, 2014). The ILO has argued that

this drop in unionisation has to do with anti-union discrimination at the firm level, and the lack of governmental support to address such discriminatory practices (ILO, 2011). Another reason for low participation in trade unions is the increasing number of workers involved in informal employment. According to the NGO Justice for Colombia (JFC, 2010), out of the 18 million Colombian workforce, no less than an estimated 11 million work in the informal economy and are therefore not protected by the legal framework on labour rights. Moreover, even within the remaining 7 million who do enjoy formal employment, only 4 million have permanent contracts, leaving the other three million working in temporary services. Arguably, Colombia's low rates of unionisation among its workforce have, to some extent, to do with the contested reputation of unionism in the country. Private sector and business owners particularly tend to be rather unsupportive of the idea of unionised labour. Over the years, employers have exploited a number of legal loopholes that allow them to, more or less legally, circumvent the labour regulations in place, particularly concerning unionisation and collective bargaining rights. These legal loopholes relate to associated work cooperatives⁷⁵, collective pacts⁷⁶ and temporary service agencies⁷⁷.

Trade unions in Colombia have argued that a stronger labour inspection system is required in order for anti-union tendencies in business to be avoided (as well as to tackle abusive forms of hiring). The Colombian government has reinforced increasingly its labour inspections since the US LAP (*infra*): in 2011 it passed the Decree 1228 for the creation of one hundred new posts for Labour and Social Security Inspector (as agreed in the LAP); it ratified Decree 2025 of 2011, defining the legal and illegal forms of contracting, and imposing sanctions and fees for those that restrict unionism in their businesses; it has proposed the creation of 480 new posts between 2010 and 2014 for the strengthening of the administrative section of the labour inspection unit (CGT 2015: 13-15). However, the CUT (2014: 32-36) has argued that the Labour Inspection System put in place is insufficient for preventing and sanctioning the labour norms put in place. They argue that the promised 480 new posts, first, were never achieved and, second, would be insufficient to ensure protection of the worker, be it due to the fact that the

⁷⁵ Colombian law allows workers to be part of self-governed and autonomous enterprises where they are considered as associate partners, hence not protected by employee rights (*Cooperativas de Trabajo Asociado* – CTAs). As such CTA members/workers are not allowed to form unions, nor to collectively bargain with their employer. The Colombian government has put forward provisions and criteria aimed at ensuring that CTAs are not used as a vehicle to bypass labour standards, yet both the ILO and the US Department of Labour agree that the existing restrictions are inadequate to ensure this.

⁷⁶ Colombia's Substantive Labour Code allows the use of collective pacts, which are contract agreements concluded between non-union workers and their employers and tend to be used to subvert collective bargaining standards. Through individual (or non-union) agreements, many employers have managed to avoid the labour standards demanded by unions, and to convince workers to leave their unions in order to get better contracts (CGT 2015: 10-11). The ILO has explicitly stated in this regard that 'collective accords with non-unionized workers should only be possible in the absence of trade unions' (ILO 2014). Colombian union leaders however argue that these type of pacts are still being used as a means to subvert their capacity to collective bargaining (ENS 2014: 30, 32, 34-38). It is worth noting that actual collective bargaining in Colombia is a rather marginal phenomenon since formalised agreements between unions and employer cover only 1.2% of all workers (USDL 2011: 12; ILO 2011).

⁷⁷ Colombian law allows special agencies (*Empresas de Servicios Temporales*) to foresee in the ad hoc, short-term labour requirements of businesses. As in most countries, Colombia regulates and limits the use and the renewal of temporary contracts, yet they are used extensively.

inspector-workforce ratio would still be very large 1:32500, and because many of the new positions are in administration, and not in actual inspection (CUT 2014: 33).

Concerning violence against labour activists and union workers, an improvement can be seen in comparison to the past, but problems of threats and impunity remain high. Indeed, homicide rates have gone steadily down over the past decade (from 102 in 2003 to 35 murders in 2013) (GAO 2014a: 55-6), yet punishment and convictions for past or current homicides are still lacking in nearly all of these cases (Fritz 2010: 6). The Colombian government has made some concrete institutional steps to address these issues. In 2006 for instance, a Labour sub-unit to the Human Rights Unit of the Prosecutors Office was established for the exclusive investigation and prosecution of violent crimes committed against trade unionists, and in 2009, Law 1209 passed, which increased the penalties for labour violence. The government also expanded the category of crimes included under this heading, and imposed a higher minimum jail time for labour violence, including threats against labour activists (USDL 2011: 4, 21, 25). Despite these legal changes, the US Government Accountability Office notes that, while numbers of homicides on labour activists have dropped, threats to possible unionists have actually increased, and arguably constitute a strong deterrent for workers to unionize (GAO 2014a: 55). Indeed, an ILO mission to Colombia in 2011 concluded that, despite the fact that overall violence against organised labour is decreasing, the impunity toward offenders and threats against unionists have not been addressed in practice (ILO 2011: 2-3). Figures from the National Union School (ENS), a Colombian NGO and think-tank on labour and union issues in Colombia, confirm such findings and argue that although homicide rates of unionists have fallen during the last decade, general violence has not changed and has even increased in some respects (ENS 2014: 62). The CUT (2015), registered some 321 violations against the life, liberty and integrity of union members in 2014 alone. In addition, nearly 1.000 murder threats against unionists have been recorded since 2011, and six labour activists have disappeared (ENS 2014: 62; AFL-CIO 2014: 7). Regarding punishment, these organizations argue that impunity is still predominant with an 86.8% for murder and a 99.9% for murder threats against unionists (AFL-CIO 2014: 7; ENS 2014: 63; Oidhaco 2014b: 10). Hence, violence towards labour activists remain an outstanding challenge. Labour-related violence and threats are arguably among the key outstanding problems in Colombian labour policy. Impunity in particular has been identified as a 'structural problem' in the country by the UN Human Rights Council (HRC, 2013: 11), and the government's inability to even begin to deal with the reported threats has led some to argue that violence against organised labour has not decreased, yet simply 'transformed its manifestations' (Oidhaco 2014b: 10).

2. US-Colombia Free Trade Agreement and Its Labour Rights Conditions

Before its trade deal with the EU, Colombia signed a bilateral trade agreement with the US which was ratified by the Colombian Congress in 2007, and one year later its Constitutional Court confirmed its conformity with the Colombian Constitution. On the US side however, it took until October 2011 before the agreement passed US Congress, under the newly arrived Obama administration, the US Congress demanded the Office of US Trade Representatives to push for a revision of Colombian human rights and labour standards. This led to the creation of a separate charter plan in 2011 (the US Labor Action Plan, US LAP), which imposed conditional requirements to the Colombian government regarding labour standards

in the country. After the LAP was signed, the agreement passed the US Congress and entered into force as of May 2012.

The US LAP formulated strong labour commitments with which the Colombian government had to comply with, in order for the trade agreement to be implemented. The three fundamental commitments put forward in the document require the Colombian authorities “to protect internationally recognized labour rights, prevent violence against labour leaders, and prosecute the perpetrators of such violence” (USG 2011: 1). These general commitments are elaborated into more detailed clauses, in which specific changes to Colombian law and institutions, as well as proper enforcement mechanisms to ensure the protection of these rights are defined. An overview of such specific demands is presented in box 6 below:

Box 6: Provisions under the US Labour Action Plan

- The creation (or re-establishment) of a specialized Ministry of Labour, as the most appropriate instrument for a more thorough protection of labour rights, was in the first clause (USG 2011: 1);
- A reform of the Criminal Code to establish stronger penalties to companies that undermine labour rights (USG 2011: 1-2, 4);
- Faster implementation of Article 63 of the 2010 Law on the Formalization and First Employment, where any misuse of cooperatives or other vehicles that may affect labour rights are prohibited, giving special priority to the monitoring and inspection of the palm oil, sugar, mines, ports, and flower sectors (this process carried out through consensual work with the US Government) (USG 2011: 2-3).
- Increasing the number of agents in charge of prosecuting violence against labour activists (USG 2011: 6-8);
- The implementation of a regime that restricts the use of Temporary Service Agencies (USG 2011: 3-4);
- A closer cooperation with the ILO, where advice, technical assistance and help in the implementation of the abovementioned measures would be strengthened through their cooperative work (USG 2011: 5);
- The expansion of the category of potential persons protected by the Colombian government’s protection programs, so to include labour activists, people trying to establish unions, as well as former unionists, with a special emphasis on protection programmes for unionized teachers (USG 2011: 5);
- Follow-up mechanisms, reviews and evaluation reports are to be carried out at the level of both technical and senior officials (USG 2011: 8).

In order to support Colombia in carrying out these reforms, the US Department of Labour dispersed some \$23.9 million for technical assistance between 2011 and 2013, of which 13 million were addressed to assist in the protection of labour rights (Government Accountability Office 2014a: 16-17). In addition to this direct support to the Colombian government, the US State’s office reserved another 500.000 US dollars for the promotion of core labour rights in Colombia to the ILO, and the US Department of Labour granted an approximate of 7.8 million US dollars to the ILO office in Colombia, earmarked specifically to strengthen i) the Ministry of Labour and the effective enforcement of labour laws; ii) dialogue among stakeholders; and 3) the institutional capacity of the government to protect labour activists from violence

(USDL 2014: 6). Beyond budgetary support, the Department of Labour also provided technical assistance by sending an expert staff to Colombia for the initial implementation steps of the LAP. In addition, the Labour Department established a project with the National Union School (ENS) in Colombia to open workers' rights centres in four Colombian cities, which will provide free legal advice and raise awareness on issues related to their labour rights and claims (GAO 2014a: 17; USDL 2014: 4-6; USTR 2014). The commitments and provisions noted in box 6 include a clause on accountability for meeting labour obligations (just as with commercial obligations) where trade sanctions and fines may be imposed if violations occur (Bolle, 2012: Summary; USTR 2014).

An update report issued by the US Labour Department (2014) on progress under the LAP acknowledged progress of Colombia's efforts on labour protection in various areas. Most notably, a number of institutional reforms have taken place since the LAP was jointly announced in April 2011, including the protection of labour activists by the National Protection Unit and the creation of a specialized Ministry of Labour. Other areas of progress noted in the report include the enactment of new legal provisions and regulations to punish violations of labour rights, increased resources for law enforcement, investigation and prosecution in the areas of violence against union leaders and labour activists, and the reduction in homicide rates of labour activists (USDL, 2014: 2-5).

Despite improvements at the level of institutional and legal reform, the update report also voices concerns about the implementation of certain other aspects of the LAP. The main concerns here include the low collection rates of assessed fines, prosecution of recent labour-related threats, violence and homicides, as well as the combatting of newer forms of abusive contracting (GAO 2014a; Sánchez-Garzoli 2014). First, regarding the lack of collection of fines levied on companies that have been found guilty of labour violations (USDL, 2014: 1, 5-6). The *Servicio Nacional de Aprendizaje* (SENA) is the institution responsible for collecting these fines, yet because collection is barred if companies file a judicial appeal (and most, if not all, companies have appealed), the rates of return are close to zero (GAO 2014a: 20). The Ministry of Labour has responded to this complaint, arguing that a Resolution (No. 2123) was issued in November 2013 to eliminate the possibility of sanctions being suspended due to judicial appeals (MINT 2014b: 12). Second, the low conviction and prosecution rates of labour related homicides, as well as an increase in the number of threats against labour activists constitute a major concern (USDL 2014: 3-4). Although homicide rates of unionists in Colombia have decreased exponentially in the last decade,⁷⁸ intimidation, threats and other forms of violence have actually increased according to the ENS (GAO 2014a: 21, 56). Finally, in the fight against new forms of abusive contracting the number of illegal or abusive cooperatives has dropped, yet companies are increasingly finding alternative –legal- ways of avoiding relationships of direct employment with their employees and in doing so they avoid direct responsibility over violations of labour rights (GAO 2014a: 20-1).

In addition to the rather critical update reports of the US Department of Labour, the implementation and the impact of the LAP have also been criticised by the American Federation of Labour and Congress of

⁷⁸ The ENS recorded 102 murders of union members and labour activists in 2003, while in 2013 their records have gone down to 35 murders (GAO 2014a: 55-56). For a thorough analysis of the various sources of data on labour related murders in Colombia, see Bolle 2012: 4-8.

Industrial Organizations (AFL-CIO). Through direct contact with Colombian workers and labour unions, the AFL-CIO conducted a bottom-up assessment of the effects of the US-Colombia trade agreement on labour standards. While acknowledging the efforts made in terms of juridical and institutional reform, their findings argue that the implementation in law of the measures for the protection of labour rights is insufficient as long as the enforcement mechanisms are not sufficiently stringent to ensure compliance (AFL-CIO, 2012).

Regarding the monitoring and enforcement procedures foreseen by the US government, the Government Accountability Office (GAO) found that *“although the agencies [US Trade Representatives, and US Department of Labour] have taken several steps since 2009 to strengthen their monitoring and enforcement of trade agreement labour provisions, they lack a strategic approach to systematically assess whether partner countries’ conditions and practices are inconsistent with labour provisions in the trade agreements”* (GAO 2014b; GAO 2014a: 32-45). The GAO report further emphasizes that, although both the US Trade Representative and Department of Labour gather and analyse information, assess implementation and identify compliance, they do not seem to have a plan to address recurrent problems (GAO 2014a: 38).

It seems relevant to note that, so far, no formal complaints of violations of the Colombian LAP have been submitted to the US Department of Labour (GAO 2014a: 23, 26). One union representative has informed GAO that Colombian unions have intended to file formal complaints to the USDL but that they were either unaware of the existence of such a process, or they did not understand how a complaint should be submitted. In addition, both the national government and the US agencies in charge of advertising and promoting such a process are not doing any additional efforts (apart from having the webpage where complaints are submitted) to inform non-governmental stakeholders about the labour complaint process to the USDL (GAO 2014a: 29-30).

C. The EU-Colombia Trade Agreement

1. In a Nutshell

In 2006, negotiations on an Association Agreement between the EU and the Andean Community were announced by the parties involved. When the Andean bloc disintegrated in 2008, as Bolivia and Ecuador abandoned the process, the EU changed its interregional strategy for a bilateral approach with Peru and Colombia, later also joined by Ecuador (Parra, 2010). The formal negotiations between the remaining three parties concluded in March 2010 during the EU-LAC (Latin America and Caribbean countries) Summit in Madrid. The agreement was then signed by each party in June 2012, and was approved by the European Parliament in December that same year. In terms of domestic ratification on the Colombian side, Colombian Congress ratified the agreement in June 2013, allowing the government to provisionally implement the commercial part of the agreement as of August 2013. In May 2014 however, the Constitutional Court of Colombia sentenced the *provisional* application of the trade agreement as unconstitutional (Sentence C-280/14) due to the fact that this condition is only given by the Colombian Constitution to dealings with international organizations but not to bilateral commercial agreements. This sentence affected only the provisional application of the agreement, and was revoked by the same Constitutional Court in June 2014 (Sentence C-335) which led, in November 2014, to the decree 2247

issued by the Colombian government, under which the provisional commercial application of the agreement could continue.

On the EU-side, it is not until all 28 EU MSs have domestically ratified the agreement that it formally entered into full force. Until then its application remains provisional, though in practice this does not affect trade, and businesses are expected to benefit fully from the agreement since August 2013, when trade barriers between the EU and Colombia were effectively lifted. Furthermore, it is worth noting that in July 2014, negotiations were concluded for the accession of Ecuador to join the agreement, and internal procedures among the respective parties to apply the agreement with Ecuador are currently close to being finalised.

Broadly speaking, the EU-Colombia agreement was introduced by the EU as a trade regime that will offer a more transparent, predictable and enforceable business environment, which will create significant opportunities for businesses and consumers on both sides. After a transition period, the trade agreement will eliminate all customs duties on fisheries and industrial products, while trade in agricultural goods will become considerably more open. As a result, exporters on both sides are expected to save as up to €500 million annually in tariffs alone. The agreement further includes provisions to improve access to state contracts, services, and investment markets, reduce technical barriers to trade, and to adopt common rules regarding intellectual property transparency, and competition.

2. Negotiation Process and Labour Rights Considerations

Given Colombia's history on human rights and labour standards, it should not come as a surprise that labour rights featured prominently throughout the negotiation process. It is worth noting that, while previous negotiations in the run up to the US-Colombia trade agreement had evoked CSO reservations which focused predominantly on justice reforms and the protection of labour activists, critical voices alongside the EU-Colombia negotiations also included concerns about the *social* implications of the agreement's *economic* impact.

On the EU side, a cross-party group of MEPs who visited Colombia wrote a joint letter to the Commission in December 2010, in which they warned that contrary to the Colombian government's assurance of improvements in the human rights situation, the interviews with people directly affected by the situation made clear that no improvements could be identified, hence the trade agreement should not go forward (Bearder et al. 2010). Although a study commissioned by the EU on the possible economic impact of the trade agreement estimated an increase in real wages for both skilled and unskilled labour (0.25% and 0.45% respectively), leading to a small reduction in inequality and poverty (Francois et al. 2012: 41). Alternative studies argued that, although absolute increases in wages were indeed plausible, vulnerable social groups (especially peasant farmers, indigenous groups, and Afro-Colombian communities) would not see an increase on their own income due to inherent characteristics of the trade agreement (Garay et al. 2006).

Likewise, NGOs, human rights activists and trade unions argued that the EU should not sign the agreement, or at least to include stringent assurances and conditional requirements for labour rights protection, so as to ensure that the impact of the agreement would not make the situation in Colombia

worse than it already is (FIDH 2012; Oidhaco 2013; Manrique 2012). ODHACO⁷⁹ and all of its partner institutions also argued against the agreement, focusing on three core reasons. First, the human rights violations in Colombia are reportedly so dire that Europe should not condone them, nor “reward” the Colombian government with a commercial agreement, as long as its human rights’ situation is sustained. Second, due to the asymmetrical economic relation between the EU and Colombia, which would allow the EU (and business elites in Colombia) to gain most of the benefits from the trade agreement, while leaving the most vulnerable population groups affected by it. Thirdly, ODHACO argues that, because of its disrupting impact on the Andean community, the EU would go against its own policy of fostering regional integration - the primary ideal of enhancing unity among Andean countries was broken by the transformation of the multilateral agreement into a bilateral agreement.

The International Federation for Human Rights (FIDH) asked MEPs to take into account the human rights’ situation in Colombia during their appraisal of the agreement (FIDH 2012: 3). In doing so, FIDH pointed out that previous attempts by the ILO and the EU had been unsuccessful in achieving actual positive changes against human rights violations in Colombia. As such, they argued that more stringent human rights stipulations under the agreement would be required, in order for them to pressure the Colombian government to take real action. Moreover, FIDHR reminded the EU to always to take into account the impact that economic or diplomatic actions may have on the social realm (FIDH 2012: 4, 17-18; Olivet and Novo 2011: 6).

Interestingly, at the level of the EU MSs, the British Trades Union Congress (TUC), tried to show that the standards and sanctioning mechanisms of the current trade agreement were even weaker than those included under the former GSP+ regime (TUC 2010; Fritz 2010: 19; Olivet and Novo 2011: 6). While GSP+ allowed the EU to withdraw trade preferences in case of systematic violations of ILO standards, the sustainability chapter does not provide any such sanctioning measures, nor does it provide a binding mechanism for dispute settlement (Stevens et al. 2012: 21; Raison 2010: 159-60). Indeed, it has been argued that, since the sustainability chapter offers less rigorous monitoring and enforcement mechanisms compared to the GSP+, and given the limited effectiveness of the latter system in taking labour rights forward, it arguably seems farfetched to expect anything more, or even the same, from the new trade agreement (Saura Estapà 2013: 12-22). In the same vein, Fritz (2010) has argued that *‘the lack of provisions for sanctions makes the number of standards included in the sustainability chapter irrelevant’* (Fritz 2010: 19). Jorge Gamboa Caballero, union leader of the CUT (Central Unitaria de Trabajadores de Colombia), pleaded to Europe that, before even thinking about ratifying a new trade agreement, the EU should make use of the monitoring mechanisms available under the GSP+ regime and put pressure on the Colombian government to improve the situation of its workers (Gamboa Caballero, 2010: 79).

In addition to NGOs and labour unions, business associations and guilds in Colombia who felt that their economic interests could be harmfully affected by provisions under the agreement also raised their voice in the debates surrounding the negotiation process. The Federation of Cattle Breeders (FEDEGAN), the

⁷⁹ The International Office for Human Rights Action on Colombia (ODHACO) is a network of 36 non-governmental organizations in Europe. It’s main mission and objective is to support the initiatives of Colombian civil society, acting as a representative of these groups in front of the European Union.

Milk Producers' Association (ANALAC), and the Association of Motor Vehicles (ANDEMOS), for example, opposed some of the provisions in the agreement, due to their inability to compete with the imports that would be coming from Europe in these sectors (Portafolio 2010b; Rettberg et al. 2014: 153). In response to these pressures, the EU ensured the provision of €30 million between 2010 and 2017, to support the technical development of the dairy sector and ensure that when the agreement came into place, they would be prepared to compete with the imported products (Portafolio 2010a).

As a response to pressures from the European Parliament asking for more stringent human rights requirements in the agreement with Colombia, Karel De Gucht, European Commissioner for Trade, presented the Human Rights' situation in Colombia and Peru in relation to the trade agreement and the ongoing efforts by the EU to tackle them (De Gucht 2012). In his speech to the European Parliament, De Gucht identified human rights as a priority area for EU-Colombia relations, including through its development cooperation under the 2007-2013 Country Strategy for the country, or the projects carried out by the European Initiative for Democracy and Human Rights (EIDHR) which spent around 50 million euro (till 2012) in abolishing child labour, supporting union organizations, and improving the labour rights issues in relation to ILO standards (De Gucht 2012: 2). Besides direct support to human rights promotion through EU development cooperation, De Gucht argued that the trade agreement already contains explicit enough clauses on human rights and labour standards and that pressures to impose more stringent commitments (such as those imposed by the US-Colombia Action Plan) were therefore not required in this case:

"I know some in this house are in favour of establishing some sort of action plan on implementation with Colombia like the US has done. But the situation is not identical. The US-Colombia free trade agreement does not contain a human rights clause which is why the Action Plan is necessary in their case. Nothing that you could put in any Action Plan would be as effective as what is already in our agreement with Colombia and Peru" (De Gucht 2012: 4).

In spite of DG Trade's defence, the European Parliament asked the Colombian government to outline a roadmap that would define their commitments and future steps in the promotion of human rights in general, with a special focus on labour and environmental rights (Lefeuvre and Mouline 2013). The Resolution written by the Parliament (EP 2012) acknowledged Colombia's efforts to reduce human rights violations during the past decades, but argued that many violations (especially the dangers to labour activists and union leaders) are still challenging issues, since there is no binding dispute settlement mechanism in place to safeguard the labour rights provisions under the sustainability chapter, they wanted the Colombian government 'to ensure the establishment of a transparent and binding road map on human, environmental and labour rights', taking into account the Colombia- US Action Plan as a model to follow for their bilateral agreement on labour rights issues (EP 2012: Art.15).

The Colombian government responded with the design and the sovereign implementation of such a roadmap, yet as an existing part of the National Development Plan, which shows the fundamental structure and main objectives of the governmental policies to be carried out by the President during its mandate (RepCol 2012: 3). The roadmap offers clear and defined objectives, tied to a specified schedule and contingent to results on each of the topics. While the roadmap is not an annex to the trade agreement

itself, nor does it constitute any other form of a legally binding commitment to the EU, it showed goodwill on behalf of the Colombian government and managed to convince the EP to take forward its ratification of the agreement. The below commitments of the Colombian government in this roadmap can be considered as directly linked to the protection of labour rights:

1. To inform the Sub-committee on Trade and Sustainable Development of the Trade Agreement T on the specific measures that will be taken to fulfil the requirements of Title IX;
2. To promote transparency and public participation in the tasks of the aforesaid Sub-committee;
3. To strengthen the country's institutions so to achieve the commitments under Title IX of the Trade Agreement (for which they ask to continue receiving the official development assistance granted to Colombia by the EU);
4. To review, monitor and evaluate the impact of the Trade Agreement on labour and environmental rights;
5. To promote sessions of the abovementioned Sub-committee that include civil society in general;
6. To appoint to the National Commission on Concertation of Wage and Labour Policies as responsible for monitoring a sustaining compliance with the labour commitments in the Trade Agreement.
7. The creation of a Technical Group on Trade Agreements and Human Rights, within the framework of Human Rights and International Humanitarian Law protection of the Colombian government, with the mandate to monitor and follow up on the trade agreements signed by Colombia, with a space for participation of civil society groups (RepCol 2012: 4-5).

Finally, it is worth noting that Colombian government representatives involved in the negotiations of the trade agreement, emphasized during interviews the multi-ministerial approach they took and have taken regarding the Trade Agreement negotiations with the EU. While the Ministry of Commerce was responsible for negotiating the Trade Agreement, it received substantive input from the ministries of Labour and Environment regarding the negotiations on the Sustainable Development Chapter (Title IX). Coordination was noted as a central element in this regard, particularly since the Ministry of Commerce does not have the capacity to build expertise on all the different issues under the Trade Agreement.

D. Stakeholder perceptions on the effects of the Trade Agreement

In order to allow us to comprehensively assess the implications of the labour provisions under the EU-Colombia trade agreement, we interviewed some 30 stakeholders, in Bogotá and Brussels. The perceptions voiced in the sections below represent the views of a diverse mix of i) the parties involved in the negotiation and the application of the agreement, and its sustainability chapter in particular, notably EU staff and Colombian ministry officials; ii) as well as of those stakeholders which arguably stand to be affected most directly by the agreements labour stipulations, notably sectorial business representatives and labour unions.

1. Perceptions on the current state of labour rights in Colombia

As illustrated in the section above on legislation, all stakeholders agree that the Colombian legal framework on labour rights protection is comprehensive and adequate. Likewise most, if not all, relevant international treaties on human rights and labour standards have been adopted. The implementation, monitoring and enforcement of these legal and institutional structures however reflect a different story

entirely and interviewees referred to a mix of different reasons behind this implementation/enforcement gap.

a) Perceptions concerning the efforts to enforce labour rights

First, there is the basic understanding among all parties concerned, including external stakeholders and domestic non-state actors, that improving the labour rights situation in a country requires a significant amount of time. New laws take time to be applied and enforced in practice and particularly in a field like labour rights which involves a variety of different actors and interests. Moreover, attributing the impact of legal efforts on the labour rights situation of employees is not a straightforward exercise given the many actors and sectorial dynamics involved.

Second, most interviewees point to a fundamental lack of governmental capacity to implement its legislation. On the one hand, this has to do with the socio-demographic constitution of the country. Colombia is a rather large country in size and nearly one third of the country's total area is covered in rainforest. Remote areas, often home to indigenous people, therefore tend to be far less developed than the country's urban centres, making it hard for governmental control to penetrate to the local level. As such, implementing, monitoring and enforcing labour legislation is extremely challenging, particularly in geographic areas far beyond the major cities, where governmental presence is low, absent or disputed by a variety of paramilitary groups. On the other hand, stakeholders emphasised that Colombia is a country that faces a multitude of grave human rights violations, and still involved in on-going peace negotiations with FARC-rebels. This is not to diminish the importance of labour issues, though it is worth putting things into perspective, particularly given the limited capacity of the authorities responsible. Interviewees on behalf of Colombia's trade partners mentioned in this regard that pretty much any government agency working on labour, human rights or justice-issues, is chronically overburdened. The office of the General Attorney in particular suffers from such a lack of capacity and therefore tends to focus on structural processes to drive legislative reform, rather than to deal with individual cases of rights-violations.

Third, a number of stakeholders questioned the credibility of the government's commitments to bridge the implementation gap between legislation and practice. As such, it was suggested that the lack of implementation is not necessarily exclusively due to issues of incapacity, but that it also stems from an overall sense of disinterest and a lack of political will to prioritise the enforcement of labour regulations. In a globalizing economy states face incentives not to enforce social or environmental standards (Levi et al., 2013) the presence of these disincentives were confirmed by the interviews. NGO and trade union representatives argued that the Colombian government signs laws and creates institutions to show formal progress, while leaving sufficient loopholes in the system so that businesses can keep on working as usual (*supra*). Every new restriction comes with an outlet that allows business to comply with law, while avoiding changing its actual relation with the employee. One business representative admitted in this regard that it is all in all fairly simple for employers to comply with legal requirements without applying any substantial changes in practice. Trade union representatives further argued that the changes in labour policy put forward in the National Development Plan (PND) are incapable of promoting change since its overall focus on economic neoliberal strategies overruns social protection.

b) Perceptions on the protection of labour rights

Concerning the current state of labour rights in the country, interviewees generally identified two key challenges. Violence against labour activists and the associated juridical impunity thereof on the one hand, and widespread breaches of FACB rights and anti-unionism on the other hand. Concerning the latter, stakeholders noted that anti-unionism is perceived as an inherent part of the business strategy in Colombia. Essentially, the absence of unionized labour is presented as a comparative advantage to competitors and a guarantee of trustworthiness to interested clients and investors. Business representatives argue that unionisation in Colombia is not necessarily perceived as being part of good business practices. Further to this logic, trade unions' perceived dogmatic and outdated ideological convictions are not believed to match the needs and interests of today's Colombian workforce. It was stressed by private sector representatives that such sentiments are shared by the workforce, which would explain the low levels of unionisation (4.4%). Business representatives therefore suggested alternative means to ensure that employees organise themselves to ensure their labour rights are protected. Allowing employees to bargain collectively directly with the company, or to establish individual deals, were argued to be more effective approaches than being a member of a larger union. Trade union representatives, on the other hand, both in Colombia as well as in Europe however noted that the wide-spread narrative on anti-unionism is not rooted in the inherent behaviour of labour unions, but rather in the conservative, right-wing and neoliberal essence of the Colombian political and economic elites. Indeed, Colombia is conservative, right-wing neo-liberal country in a predominantly outspoken leftist region and has fought a long and violent struggle with so-called communist militias like the FARC. As such, government propaganda and media are deemed to have invested in painting a bad image of anything resembling organised labour. A local academic expert also referred to these two counterbalancing arguments and noted that anti-unionism could be interpreted in various ways. It could be part of a neoliberal discourse, the consequence of inherent issues in Colombian trade unions as argued by business representatives and parts of the government, or it could be that non-unionized collective bargaining mechanisms indeed work out better for both the employer and the employee, hence decreasing the relevance of trade unions as representatives of the Colombian workforce.

Adding to these perspective, EU and US stakeholders noted in this context that the international community often tends to, somewhat 'blindly', propagate the promotion of labour unions, without much consideration for the domestic context, and without exploring alternative vehicles for labour protection. Interestingly, trade union representatives in Europe and Colombia confirmed that foreign unions and union representations played a considerable role, often via their respective domestic governments, in pushing the Colombian government to protect and promote unionisation. Union representatives in Colombia believe that if it were not for the international pressure put forward by international NGOs and foreign trade unions, unionism in Colombia would have ceased to exist a long time ago. The case for the National Protection Plan for unionized workers for instance, was acknowledged by Colombian unions as an achievement of the international community.

A second critical concern about the current state of labour protection in Colombia relates to the high levels of violence against labour activists and the lack of juridical response to address this. Impunity in particular, notably in view of threats and violence, remains one of the priority concerns for the

international community in Bogotá. Reportedly there is a 97% impunity rate for death threats, many of which are directed to HRDs, including trade unionists. It is worth noting in this regard that, while the number of HR-related deaths has decreased, the number of threats toward them has increased, without any noteworthy juridical consequences. So far, only 1 case of threats against trade unionists has been solved. Such statements deserve some perspective however, given the variety, and hierarchy perhaps, of criminal offences with which the authorised government authorities are to deal with. The Attorney General in particular, tends to focus on structural adjustments in the legal system and within the wide array of crimes on his plate, e.g. murder, crime and violence against humanity, threats are arguably not his highest priority.

Finally, interviewees agree that, while the number of murders on labour activists has indeed fallen and the existing protection scheme is universally recognised as one of the most progressive in the world, the current system is perceived to be unsustainable. Not only does the protection scheme come with a huge administrative framework and is it very expensive to maintain, focussing on the protection of people under threat only treats a symptom, without touching upon the structural root causes, or offering a real solution to the problem. The type of ‘hard’, militarised measures provided under the protection system are there therefore perceived to lack a holistic vision since not enough attention goes to juridical prosecution, leaving Impunity to remain a major problem.

2. Perceptions on the EU trade agreement and the EU as a value driven actor

Looking into the negotiation process and the ‘coming into being’ of the labour provisions under the EU-Colombia trade agreement, interviewees raised concerns about both the role and the credibility of the EU as a normative trade actor.

A relevant concern put forward by most of the Colombian stakeholders is the possibly negative impact of the imposition of European labour standards on the Colombian society. Union representatives in Colombia argued that the conditions and standards put forward in the agreement are not the conclusion of a negotiation between equal partners, but rather have been imposed by the EU as if they are a universally applicable template. Similar concerns were raised about the roadmap for the EP. Trade union representatives stated that they had not been consulted to help define its objectives and many of the points in the roadmap were actually not new but confirmed to the ones in the US LAP.

Trade union representatives in Europe argued that, in general, the EU’s promotion of human rights is predominantly rhetorical. In practice, the EU’s commitment is limited in the sense that it repeatedly and explicitly prefers a soft touch diplomatic approach, despite having the means in place to take a tougher stand. Referring to the perceived lack of teeth under the sustainability chapters, it is felt that without even those means in place, it is highly unlikely for the agreement with Colombia to make a difference to the promotion and protection of labour rights in the country. Indeed, the vast majority of the stakeholders consulted, in Europe and in Bogotá, considered the EU labour rights language in the agreement to be too broad to be meaningful or credible. The lack of any clear monitoring or sanctioning mechanisms in case of non-compliance further added to this impression. One interviewee went as far as to argue that, while overall the EU is taken serious on other issues in Colombia, it is not recognised as a credible actor when it

comes to labour rights protection. As such, the labour provisions under the trade agreement are perceived as little more than a tick the box exercise on domestic treaty obligations. Interestingly, in view of these human rights obligations in the area of trade since the Lisbon Treaty, some stakeholders believed that this legal mandate could actually reduce the premium on consequences because these clauses give the other contracting party the impression of obligatory window dressing without much real meaning. One final key consideration in view of the critical concerns about the EU's credibility as a normative trade actors revolves around the behaviour of European companies in Colombia. According to union representatives, most of the foreign investors arriving in Colombia demand their Colombian managers to pursue union-busting strategies. Some interviewees noted the lack of control of European governments on European companies operating outside Europe.

3. Labour rights in sensitive sectors

It was generally noted that the subsequent trade agreements have over the years led the Colombian government to focus its economic growth efforts on increasing production in the sectors that enjoy high international demand, *i.e.* mining and palm oil. The problem with these two industries is they are vulnerable to human and labour rights violations since they are controlled to a certain degree by paramilitary or other illegal groups (Forero 2014).⁸⁰ Laura Rangel (2012: 6-9) from the Transnational Institute says that, from an economic perspective, there is no doubt that palm oil will benefit greatly from the trade agreement with the EU, but argues that the distribution of benefits will not arrive to all those working in the sector: "The success that the palm growers will enjoy [from the EU-TA] is based on land grabbing, the displacement of Afro-Colombian, indigenous and peasant farming communities, as well as the sacrificing of trade union leaders" (Rangel 2012: 9). The guilds in this sector are very powerful, with much influence on, and benefiting support from, the government. Peasant farmers, indigenous and Afro-Colombian communities, on the other hand, are left in a bad position, having to decide between working for palm oil in precarious conditions or being violently displaced from their land by paramilitary groups who act as the hand of law in many of these territories (Rangel 2012: 7-8). The interviewees did not expect the trade agreement to change much in these sectors. From the perspective of the interviewed business representatives, sustainability and labour standards have been imposed by the EU in a generic manner, not taking into account the Colombian situation, nor the specificities of each sector's needs and requirements. For this reason, according to them, there are export oriented sectors that have problems dealing with the labour requirements put forward by the trade agreement. Business representatives argue that there are sectors and cases that cannot or should not be regulated by the standards in the trade agreement. Many feel that some of these rules and demands are a unilateral imposition by a foreign arbitrator (in this case the EU); establishing standards that do not necessarily take into account the social reality of the country. Despite that there are some regulations that can be considered as beneficial (due to the fact that they have managed to improve working conditions in many sectors) others could have a direct negative effect on the working populations. In this context reference was made to child labour standards. In relation to child labour laws, a business representative mentioned that many of the families in the communities that work in the agricultural sector in Colombia depend on their children helping out

⁸⁰ For a thorough state of the art of the mining industry in Colombia, and its ecological and social impacts, see Garay Salamanca 2013. It is relevant to note that coal is not included in the EU-TA. This resource had free market access to the EU before the TA (Rangel 2012: 3-5).

in order for them to stay afloat. Many single mothers cannot cope with the work required for taking care of their children. Due to this (in some cases) not allowing children to work (at least some hours and of some age) can actively harm them. A business representative argued that there are alternative ways to create a safe environment for the children in agricultural communities (opening schools, creating extracurricular programmes, opening hospitals, football fields, etc.) that protect their rights, needs and future interests, while, at the same time, allowing them to support their families when it is needed.

Colombian business representatives, however also affirmed some improvements in labour standards and in the protection of labour rights during the last couple of years. The quantity of temporary or informal labour has fallen in both the industrial and the agricultural sectors. Business representatives from both the industrial and agricultural sectors have mentioned that since labour requirements for exporting to the EU and the US have changed in the last five years, companies have shifted from a contracting system that depended almost exclusively on *Cooperativas de Trabajo Asociado* (CTA, *supra note 76*) and *Empresas de Servicios Temporales* (EST, *supra note 77*), to a formal and direct contracting system where temporary services are only used when required. An interviewed trade union representative agreed that there are workers in some sectors that have benefited overall from the different trade agreements. The example identified was the textile industry, where more jobs, higher salaries and standards have been achieved.

4. On Monitoring and Dialogue Mechanisms

Most stakeholders generally found that the labour provisions under the sustainability chapter lack the appropriate monitoring and enforcement mechanisms to usefully and credibly contribute to significant improvements in Colombia's labour situation. Essentially, one interviewee noted, the agreement lacks the teeth required to really capture the attention of the Colombian authorities. Some interviewees referred back to the sanctioning mechanisms under the GSP-system which formerly governed EU-Colombia trade relations. Indeed, under the GSP-system there is the possibility to evoke sanctions if the partner country does not comply with specific requirements by lifting the preferential treatment.

EU representatives note however that the FTA with Colombia and Peru is a partnership agreement, not a preferential treatment, and is therefore different in nature and spirit from the GSP – most notably when it comes to conditionality and monitoring of compliance with labour rights. It was further noted that, in the past, the Colombian government 'felt' like the EU was asking too much, the FTA is of a different 'spirit'. Nonetheless, the development provisions in the FTA arguably go beyond the GSP-system since it includes a comprehensive Sustainable Development chapter including environmental standards, labour rights and corporate social responsibility.

An EU official further noted that the EU-Colombia is to be judged for what it is, a trade agreement. The agreement is thus about improving trade and investment in both ways and the labour provisions are there simply to ensure that trade and Investment do not harm labour rights in both economies. In order to do so, the trade agreement provides domestic mechanisms on labour rights, either using existent bodies or via the creation of new ones. In the case of Colombia, they use an existing mechanism. Such committees may submit opinions and make recommendations on the Trade and Sustainable Development Chapter (T&SD) (Chapter IX) and their procedures are stipulated under domestic law. Secondly, the Sub-Committee on T&SD is a bilateral government to government meeting and organises once a year a parallel

open working-group with any CSO who wishes to participate and raise issues regarding Chapter IX. On top of that, there is the ongoing political dialogue and a human rights dialogue which would allow us to address issues under the FTA if that were to be necessary, so far those fora have however not been used to discuss compliance with the FTA's LR provisions. In addition to the labour-rights specific provisions under Chapter IX, the HR-clause provides an essential element of the agreement and can therefore be a ground for 'proportionate measures', including the suspension of the agreement. The HR-clause has however never been evoked to justify restrictive trade measures.

Interviewees from both the Colombian and the European sides have emphasized the importance of the EU trade agreement on the development of strong structures of social dialogue, where the government, businesses and workers can discuss labour issues. Colombian government representatives stated in this regard that some of the biggest steps forward regarding labour standards in the country were made through the creation of tri-partite institutions of social dialogue. The Sub-commission of International Affairs within the Ministry of Labour, offers such a space where workers, unions and businessmen can present and discuss their concerns regarding all impacts of international relations on the labour standards in Colombia. Another relevant institution is the Tripartite Commission for Conflict Resolution for ILO Complaints (CETCOIT), which intends to put into the domestic discussion all issues arising from ILO conventions. Trade unions have argued that the tripartite social dialogue mechanisms put forward by the Colombian government have not been inclusive enough to ensure that something of relevance comes out of them (CUT 2014: 4-7; CGT 2015: 15).

European delegates interviewed in Colombia also emphasized the relevance of social dialogue mechanisms promoted by the trade agreement. They promote the use of domestic mechanisms of dialogue for the relevant Colombian stakeholders to offer their input on the issues that could arise regarding labour standards in the trade agreements. Such institutions may submit opinions and make recommendations on the Trade and Sustainable Development Chapter (Title IX), so that these can be taken to the bilateral, 'government-to-government' meetings. These meetings are chaired by the Sub-Committee on Trade and Sustainable Development where government representatives meet to discuss the issues that have come up in the domestic setting. As well, a parallel open working group is organized once a year. This working group promotes the direct inclusion of civil society in raising issues concerning Title IX. On top of that, there is the ongoing political dialogue and a human rights dialogue which allows both governments to address issues under the trade agreement if that were to be necessary. However, to date these fora have not been used to discuss compliance with the labour rights provisions of the trade agreement.

Interviewed government representatives in Colombia mentioned that the Colombian Ministry of Labour has met regularly (unofficially) with representatives of the European Parliament, government officials of European countries and with trade unions both in Colombia and in Europe to assess the impact of the trade agreement and the "roadmap", debating on the benefits and burdens, the "done" and the "to-do" of their commitments. This has been backed up by the tripartite dialogues put forward by the Colombian government to assess these same issues domestically. The Ministry of Labour does not deal directly with their European counterparts regarding labour rights commitments and clauses of the trade agreement and the roadmap. However, there is coordination between the Ministry of Commerce and the Ministry of

Labour to deal with these issues. Government officials consider that this coordination is fundamental for achieving the labour rights objectives because the Ministry of Labour has much more knowledge and detailed information on how to achieve the commitments. However, it has been mentioned as well that more direct and official mechanisms of dialogue with the EU are missing. This could be strengthened, as is the case in the LAP. The Ministry of Labour does work directly with its US counterparts when dealing with the issues of the LAP. This was considered by some interviewees as a useful asset of the LAP because it allows the Colombian Ministry of Labour to discuss these issues without mediation of the Ministry of Commerce. The Ministry of Labour is only involved indirectly in the EU trade agreement, when the Ministry of Commerce asks them for technical advice or comments on the labour rights commitments. It is considered that much is lost due to this indirect involvement of the Ministry of Labour with the clauses that affect them in the trade agreement. The reports sent to the EU regarding labour rights, and the comments and concerns of civil society that are to be dealt with in the Human Rights Dialogues with the EU, arrive to the European institutions only through the Ministry of Commerce, not necessarily reflecting accurately the concerns of other relevant Ministries such as the one of Labour.

In contrast to the governmental perception of the success of these new spaces for social dialogue, Colombian trade unions and NGOs have declared that they have conflicting feelings towards these mechanisms. The emergence of this type of institutions is a necessary and fundamental step to improvement, but these institutions could actually do much more to improve the situation. An example would be that there should be at least one of these institutions where the government is not present, allowing civil society to discuss these matters without governmental pressures. The government has created some institutions where dialogue is “supposedly” open, but it does not seem to achieve its objectives, as various interviewees stated. Some NGOs believe that the peace process is and could be able to build alternative institutions for real debate. Another issue that arose from interviews with civil society groups concerning these spaces of social dialogue is the uncertainty of the impact these spaces are able to offer. As a European trade union representative argued, Colombian trade unions are rightfully critical and less likely to engage with these types of dialogue mechanisms since they know from experience the meagre impact these institutions have on labour standards. Trade unions interviewed in Colombia acknowledge the existence and potential of these spaces but none of them believe that anything (at least up till now) has come out of them. A major concern put forward, in interviews is that there has been a lack of diffusion, transparency and dialogue to and with civil society regarding the issues that arise from the trade agreement. An NGO representative, however, has mentioned that mechanisms such as the Domestic Advisory Group promoted by the trade agreement to discuss issues of human rights have worked, at least partially. Although it does not have power in itself to improve human rights issues in Colombia, it has made the situation in Colombia more visible, opening up spaces and platforms where these issues can be discussed.

Overall, there seems to be a consensus among NGOs, trade unions in Colombia and Europe, and some business representatives that the current institutional mechanisms are actually ineffective in including civil society into the discussion. An NGO representative mentioned that these social dialogue mechanism, such as the Human Rights Dialogues promoted by both governments, could work much better than they do. Both the EU and the Colombian government do consult civil society before the meeting, but the actual

meetings are behind closed doors and almost nothing is known of what was said in them. In theory, the outcome of the meetings are later made public, but the reports that come out say close to nothing. Trade union representatives in Colombia complained that for the last Human Rights Dialogue of February 2014 in Lima, neither the Colombian government nor the EU offered any support to ensure the attendance of Colombian union representatives. These were invited to the event but could not attend due to lack of resources. Another concern raised by trade unions in this respect is that civil society is invited to attend and listen to *part* of these dialogues, but that they do not have the chance to take an active part in the discussions. Regarding the upcoming dialogue of June 2015 in Bogotá there have been efforts by the European side to ensure that civil society groups in Peru are able to attend. The worry remains in the fact that they cannot take an active role in the discussions.

E. Discussion and Recommendations

The overarching objective of this case-study was to provide insights on how labour rights provisions in the sustainability chapters of EU trade agreements play out in practice, notably in the implementation of the 2013 EU-Colombia trade agreement. Given its recent implementation, it is but normal that our findings do not provide much evidence of concrete substantial initiatives aimed at enforcing the labour rights enshrined in the sustainability chapter of the EU-Colombia agreement. As document throughout the study, Colombia already had a well-developed legal and institutional framework in place to address human rights and labour issues - part of which was established or reformed in response to previous trade agreements, notably the one with the US. As such, labour provisions under the EU's sustainability chapter arguably have little to add in terms of 'hard law'. The responsibility of compliance with the legal and institutional framework is explicitly left to the Colombian authorities. Given the many other human rights and security issues at hand, the capacity and political will of these authorities to effectively prioritise, monitor and enforce the implementations of these labour rights in practice, is unclear.

With regard to the impact of the roadmap and the labour stipulations under the sustainability chapter of the agreement, it was observed that the commitments put forward by the Colombian government regarding *institutional* changes have been partially achieved in the sense that the Colombian government has opened institutional spaces for social dialogue where the government, businesses and workers can discuss and resolve labour issues arising from the EU trade agreement and from other international relations in general. However, it seems as, although the institutions and spaces are put in place, the involvement of civil society has been generally passive and the discussions have not been satisfactory for all parties. Concerning the protection of labour rights in practice, it can be considered that the situation in Colombia has improved in some aspects, while lagging behind in others. It is clear that homicides against labour activists have fallen during the last five years. General violence against labour activists remains high however, and impunity of the perpetrators of this violence is all-encompassing and is considered to be a structural problem. Moreover, anti-unionism in the country is generally considered as troubling. Overall, interviewees have emphasised the presence of a clear enforcement gap, notably when it comes to the enforcement and protection of labour standards. This has to do with limited governmental capacity, particularly in geographic areas where governmental presence is low and/or disputed. As such, one needs to look into the possible tools available to the EU for improving its enforcement mechanisms in order to address the enforcement gap.

Too soon to judge on their actual impact, we identify three critical considerations in order to further strengthen the enforcement of labour provisions under the EU-Colombia trade agreement. First, the lack of ‘teeth’ on the monitoring and dialogue mechanisms under the sustainability chapter is perceived as a fundamental weakness of the agreement and hampers the EU’s credibility as a normative trade actor. Second, a comparison between the EU and the US approach is discussed in order to identify opportunities for mutual learning. Third and finally, we explore the potential to strengthen the trade agreements through private mechanisms for the governance of labour rights. We stress that each of these routes requires further analysis in order to properly assess whether they have a chance of improving EU governance through trade with regard to the protection of labour standards in Colombia.

1. Monitoring and enforcement of labour provisions

As long as the labour commitments cannot be properly enforced, through monitoring and sanctioning, the majority of interviewees considered them to be little more than paper tigers, often perceived by academics and CSOs as a half-hearted way to ‘tick the box’ on its treaty obligations. Interviewees noted that the monitoring mechanisms envisioned under the TA are formulated rather top-down and formal. It was suggested that the monitoring instruments become more inclusive and promote social dialogue. The latter was also stressed by government officials interviewed in Colombia. Hence, according to several interviewees, a fundamental quality of a well-working monitoring mechanism is its ability to include and empower civil society in its process. Trade unions in Colombia (CGT 2015: 1-2) argue that spaces for discussion (where civil society is included as an active party) is a fundamental part of the process of monitoring and enforcement of the commitments put forward in the roadmap.

An exclusively governmental and unilateral approach to monitoring cannot ensure an objective assessment of the enforcement of the provisions under the trade agreement. This inclusive approach should not only apply to civil society, but also to government branches that do not have a direct say on issues affected by the agreement. A fundamental improvement for the monitoring and impact assessment process of the labour rights clauses in the EU trade agreement, and a concrete way to operationalize the capacity-building dynamics, would be to develop a more direct involvement of the Colombian Ministry of Labour. The approach, interests and objectives of the Ministry of Commerce (main contact in the context of the agreement) and the Ministry of Labour are different. Involvement of the Ministry of Labour (or the sectors of civil society that it represents) would generate additional insights on the implementation of the labour provisions of the agreement. In addition, elaborating a strategy to enhance the capacity of the Colombian government to comply with the provisions could be another priority. In this context, the potential of complementary action via development cooperation policies could be explored further, especially programs for state capacity building.

Colombia, according to one union representative, does not have the technical capacities or the knowledge to monitor the compliance with labour standards. For this reason it is suggested that the EU should, if not monitor by itself, at least help the Colombian government to develop the skills and institutions required for it to monitor compliance in the country. Colombia does not have the required tools for data collection, the monitoring and inspection capacities, nor a specified objective-based strategy that can ensure that the general commitments will transform into actual benefits for the Colombian workers. Trade union representatives interviewed in Colombia consider that the general commitments signed in the trade

agreement regarding labour rights, and the general guidelines put forward in the roadmap should be carried out through a set of specific and quantifiable objectives in the mid and long term so that an impact assessment can be carried out without interpretative approaches.

Interviewees on the EU side of the agreement made it clear however that there is no obligation or mandate for the EU to monitor developments in, or compliance with, labour rights legislation in Colombia. Moreover, the roadmap on Human, Environmental and Labour Rights is an annex to the agreement and expired in 2014, and it is not formally part of the Agreement. As such, labour rights and standards are to be considered as a responsibility of the Colombian government, meaning that it is their own responsibility to monitor and implement them. In addition, they note that trade agreements are in practice not a tool to enforce labour rights standards in the sense that they are not meant to function as an actual policing mechanism. Labour right provisions under the agreement's sustainability chapter are simply there to: 1) indicate that labour standards are a mutual concern for the contracting parties; and 2) to provide a commercial level-playing field in order to allow Colombian enterprises access to European markets. EU officials argued that the trade agreement with Colombia is to be seen as a partnership agreement, not a preferential treatment, and it is therefore different in nature and spirit – most notably when it comes to conditionality and monitoring of compliance with labour rights as is the case as other trade measures such as GSP (see Beke and Hachez, 2015; Yap, 2015). Both sides are seen as equals, both commit to the same clauses and ensure that the same provisions are met. It should be clear that it is not up to the EU to monitor Colombian labour rights legislation, which is the task of the Colombian government.

This position is not shared by all stakeholders. Article 286 (On Cooperation on Trade and Sustainable Development) under Title IX of the TA (EU-CO/PE 2013) emphasizes “the importance of cooperation activities that contribute to the implementation and better use of this Title”, covering, among others: a) the evaluation of impact of the TA on labour; b) the investigation, monitoring and effective implementation of the fundamental ILO Conventions; c) the study of labour standards and mechanisms to monitor them; j) exchange of information on good practices and CSR; and k) activities on the interlinkages between trade and employment, core labour standards, social protection and dialogue. Despite that the agreement is clear in that each of the Parties is responsible for ensuring that the standards are met within its territory, this does not imply that the other parties cannot or should not cooperate and assist in achieving this objective. In addition, as a European trade union representative noted, the EU is an economic superpower (and a major donor) which gives it the leverage to push for certain policy reforms in its partner countries, though it often hesitate to do so (Damro, 2015). The EU likes to stress that it does not believe in a punitive approach, preferring the “road of dialogue.” But this does not imply that there are no alternative mechanisms to enforcement that the EU could use to reduce the enforcement gap in Colombia.

Being aware of the difficulties faced by the Colombian government to implement and monitor the labour standards put forward by the agreement, the EU could offer its expertise and technical assistance to improve the Colombian government's capacity to ensure for itself that the commitments under the sustainability chapter are met in practice. This request for further support was explicitly mentioned in interviews with Colombian government representatives. In the Ministry of Labour it is believed that follow-up of the agreement's commitments is fundamental for ensuring an improvement in the labour

rights situation in Colombia, and that *the involvement of the EU* in the monitoring of the Colombian situation would be fundamental to ensure full compliance with the commitments of the roadmap and under the trade agreement. The Ministry of Commerce, in this respect, is interested in receiving help and support from the EU to develop the technical skills to monitor the situation. They intend to address this issue during the June 2015 dialogue in Bogota, and they hope the EU is willing to support this motion in order for them to be able to work better in improving the impact of the agreement on labour and environmental standards. In this context, development cooperation policies will play an important complement to *governing through trade* policies.

2. Perceptions on the US vs. EU approach

A comparison with the US Free Trade Agreement (FTA) was suggested by various stakeholders/interviewees to assess the commitment of the EU regarding its involvement with labour issues in Colombia. This led to the discussion of whether the conditional approach used by the US in its agreement with Colombia works better in ensuring compliance than the promotional stance taken by the EU.

Interviewed officials in the Colombian government have mentioned that in both the Canadian and US case, the clauses regarding labour rights are much more specific (see Box 6 for stipulations under the US LAP), hence making their implementation by part of the Colombian ministries much easier. They have also mentioned that, contrary to the EU case, both the US and Canada have regularly monitored the implementation of labour standards since the ratification of their respective trade agreements. This has been corroborated by an interviewed business representative, who said that both the US and Canada have monitored compliance with the labour and environmental standards more closely. Another interviewee noted that, despite that the EU has a more explicit discourse of human rights as part of their foreign policies, their approach does not include stringent measures to ensure that these objectives can be achieved. The EU, from this perspective, is often perceived as the good friend who wishes well but does not dare use its power to really push things, while the US is more like an 'intrusive' external agent who imposes standards and makes things happen.⁸¹

Consequently, some interviewees mentioned that the US model offers a possible example for the EU on how to improve its enforcement. The US agreement uses a number of benchmarks on how to work with the Colombian government, there are quarterly visits from officials, and there are a number of dedicated

⁸¹ It should be noted that this assessment is not shared by the European delegates we interviewed. EU delegates interviewed in Colombia stated that, regarding labour standards, the EU-TA is more comprehensive than the US agreement due to the fact that the latter does not have a Human Rights clause (i.e. Article 1 of the EU agreement), nor specific clauses on the various labour standards required since the LAP is a voluntary pact outside the direct realm of the US-FTA which cannot be considered as part of the agreement. Due to this, it was said that the EU-TA is more expansive and ambitious regarding its social objectives (be them human, labour or environmental standards).

members of Congress who follow-up on the compliance, both normatively/institutionally and in terms of implementation. Union representatives interviewed in Europe believe that finding a middle point between the conditional approach taken by the US and the rather weak positioning of the EU, combining their respective positive qualities would be the model of best practice concerning monitoring of labour standards. It seems that monitoring and sanctioning is either lacking or not being used as it could be. Contrary to the situation with the US, the EU has not made the best possible use of the tools it has at its disposal to press for an improvement of human and labour rights in Colombia. Monitoring has been minimal, and the mechanisms for monitoring have not been used as they could have been used; the annual reports asked by the EU from the Colombian government are rather superficial, and focus mostly on the institutional and legal aspects, leaving the impact on the ground aside. In sum, it was argued by a majority of interviewees that, despite its shortcomings, the US trade agreement offers a number of improvements when it comes to the monitoring and enforcement of labour rights stipulations under trade agreements as identified above (benchmarks, quarterly visits, monitoring through MEPs).

3. Strengthening Public-Private Governance of Labour Rights

Colombian business representatives emphasized in interviews that compliance with labour and environmental standards in many sectors in Colombia has been actually achieved mainly through market pressures and voluntary sustainability standards (VSS), not through political pressures, linked to a trade agreement. This point leads to a potential other route that could be taken in order to ensure a more thorough enforcement of labour standards in Colombia. The links between private and public initiatives that promote sustainable development could be strengthened so that their respective deficiencies can be overcome by joint efforts towards the same goals. Working with already existing initiatives which aim to enforce labour rights in economic activities and value chains could help bridge the enforcement gap in the Colombian context. Our interviews revealed that voluntary sustainability standards (VSS) and mechanisms of CSR are two of the most relevant factors in the current shift of labour policies in Colombian businesses. Most of the business sector representatives interviewed defined voluntary standards of sustainability (including CSR practices) as the main promoters of improvement of labour standards in their own sectors. They note that these initiatives impose standards that a company or a sector need to enforce. The flower sector, for example, has very high labour and environmental standards prior to the ratification of both the US and the EU trade agreements due to these voluntary standards. In the case of the palm oil sector, the specific standards demanded to export to the EU have not been directly imposed by the political agreement, but rather through the private standardization process of the RSPO (Roundtable on Sustainable Palm Oil), which imposes a set of restrictions regarding labour standards for the Colombian companies that have just begun exporting to the EU since the ratification of the TA.

This seems to indicate that voluntary standards might play an important role in strengthening the enforcement of labour rights. What are these standards? The United Nations Forum on Sustainability Standards (UNFSS)⁸² (2013, p. 3) defines VSS as “*standards specifying requirements that producers,*

⁸² In the spring of 2013 the United Nations Forum on Sustainability Standards (UNFSS), a joint initiative by five UN agencies (FAO, UNIDO, ITC, UNEP and UNCTAD), was launched. The UNFSS is a platform created to generate knowledge and information on voluntary sustainability standards (VSS) with a particular focus on their potential contribution to development.

traders, manufacturers, retailers or service providers may be asked to meet, relating to a wide range of sustainability metrics, including respect for basic human rights, worker health and safety, the environmental impacts of production, community relations, land use planning and others.” This collection of voluntary standards⁸³ comprises many different initiatives. Although some voluntary systems are governmental, most of them are private initiatives. The Ecolabel Index database counts more than 450 initiatives. The international standards map of the International Trade Centre counts more than 160 which include the Fairtrade Labelling Organization (FLO), the Forest Stewardship Council (FSC), the Fair Labour Association (FLA), Social Accountability International (SAI), the Marine Stewardship Council (MSC), GLOBALGAP and many roundtables on Palm Oil, Biofuels, etc.

Why are they relevant in the context of enforcing labour rights? How do VSS enforce labour rights? They do this in three distinct steps. First they embed the sustainability standards they develop in international law by including international legal commitments in their foundational principles. Second, they translate these principles in measurable indicators and action. In a third step, they develop a comprehensive institutional framework to monitor compliance with these standards. Let us further elaborate each step. First, they integrate existing international rules and agreements, often developed in a multilateral context in their set of rules and standards. In this way, they integrate public rules and standards in a private set of procedures. Especially relevant in this context is that a majority of VSS (based on the ITC standards map) integrate, as does the EU trade agreement, the 1998 ILO Declaration on Fundamental Principles and Rights at Work. Second, these VSS translate general rules and norms in specific standards and benchmarks. They stipulate clear, unambiguous and precise standards which allow for conformity assessment with these standards. Often VSS initiatives start with defining general principles as noted above and delegate the formulation of specific standards and compliance benchmarks to working groups or committees which can take local conditions into account. These benchmarks contain more specific criteria which are related to each of the broad principles. This approach allows on the one hand to define specific benchmarks which can be monitored, and on the other hand accommodate country-level specificities. The importance of the latter was mentioned in several interviews. Third, and most importantly in this context, VSS put systems in place to monitor compliance with standards by rule-takers and actually enforce these standards. In the context of VSS, conformity assessment and monitoring are key components. Monitoring is a control-mechanism which allows for the assessment of the compliance with standards. Monitoring in VSS is a function of two interrelated aspects, namely the design of top-down monitoring/auditing systems and the design of bottom-up complaint systems (Marx & Wouters, forthcoming). Top down monitoring refers to the assessment of conformity with standards and labour rights by independent third parties. This often takes the form of auditing sites according to an auditing protocol (for a critical discussion see Marx & Wouters, 2015). Some VSS also use bottom-up complaint or dispute settlement procedures to complement monitoring via auditing.

⁸³ There is no general agreed upon specific definition of a standard. According to ISO (ISO/IEC Guide 2:1996, definition 3.2) a standard is “a document, established by consensus and approved by a recognized body, that provides, for common and repeated use, rules, guidelines or characteristics for activities or their results, aimed at the achievement of the optimum degree of order in a given context.”

Many of these VSS are active in Colombia. According to the International Trade Centre Standards map there are currently 64 VSS active in Colombia in a diversity of sectors. It might be an interesting route to explore what the further potential of VSS is in enforcing labour rights. The idea of further integrating VSS in trade agreements, or at least exploring the possibilities and limitations of this, is not that far-fetched. The EU is actually already taking this approach in some extraterritorial regulatory acts. One case in point is the EU Timber Regulation (EU Regulation 995/2010) on the prohibition of selling illegally harvested timber on the European market, although the integration of VSS in this regulation is indirect (see Marx, 2015). However, in some cases the integration of VSS in legislation is more direct and legislation directly recognizes VSS. For example, the 2009 EU Renewable Energy Directive (RED) (2009/28/EC) and the EU Fuel Quality Directive (FQD) (2009/30/EC). Under RED, the Commission set up an accreditation system for VSS in order to prove compliance of biofuel providers with the directive. The list currently comprises 19 VSS including inter alia International Sustainability and Carbon Certification, Bonsucro, Round Table on Responsible Soy, Roundtable of Sustainable Biofuels, Red Tractor and Roundtable on Sustainable Palm Oil (European Commission, 2015). As Ponte and Daugbjerg (2015) and Schleifer (2013) point out this type of hybrid governance is based on deep and mutual dependence and interconnection between public and private elements. Why is the EU taking this approach in these regulatory acts? The main reason is that they have to govern behind their borders and govern through trade (Meunier and Nicolaidis, 2006; Wouters, Marx, Geraets and Natens, 2015). In the case of biofuels the EU needs VSS to reach beyond its borders. The fact that sustainability cannot be observed in products when they cross the EU border, but are largely based on production process characteristics means that sustainability has to be assessed at the place of production (Ponte and Daugbjerg, 2015). Since VSS provide this type of monitoring and assessment capacity they offer a regulatory service which is absent for the EU as an actor. In this way, they close a regulatory gap which cannot be closed by a government itself. They enable governments or regulatory agencies to transcend the scope of their national regulatory capacities and work towards global sustainability goals. VSS do not only set standards, but more importantly also enforce (monitoring, sanctioning and withdrawing certificates) them and hence provide capacity to enforce regulation. In this way they solve a major governance problem for sovereign states, namely the issue of monitoring and sanctioning.

The recognition of this potential is also considered in the context of the EU Generalised System of Preferences (GSP) scheme. In a report by the *Deutsche Gesellschaft für Internationale Zusammenarbeit* (GIZ) on behalf of the German Federal Ministry for Economic Cooperation and Development on 'Tariff preferences for sustainable products: an examination of the potential role of sustainability standards in generalized preference systems based on the European model (GSP)' proposals are being put forward to further support the adoption of VSS through a system of state recognition and the extension of the existing trade policy tools for sustainable development (Schukat et al. 2014, p. 420). The integration of commitments towards VSS in trade agreements might further fuel the adoption of these standards. To be clear, we do not advocate that this should happen, but that, if one is serious about enforcing rights through trade agreements, it is a route worthwhile exploring. A thorough assessment of the strengths and weaknesses of such a regulatory design would be advisable. This would fit in wider shifts in governance approaches in which public and private actors 'co-regulate' (Schukat et al., 2014), develop forms of hybrid

governance (Schleifer, 2013; Ponte and Daugbjerg, 2015) and complement each other (Lambin et al. 2014).

Taking together these four considerations might strengthen the enforcement of labour provisions in trade agreements.

VI. Conclusions and recommendations

Ever since the Lisbon treaty, all EU policies are under the obligation to contribute to the promotion and protection of human rights. As such, both the Union's Common Commercial Policy and its development cooperation are to be guided by the EU's human rights principles and objectives. In follow-up to this treaty obligation to upgrade the political status of human rights in EU external action, the 2012 Strategic Framework for Human Rights & Democracy stipulates that trade is to work 'in a way that helps human rights', while in international cooperation, the Council committed the EU to start working 'towards a rights based approach in development cooperation (CoEU, 2012b: 2).

A previous report under this work package, by Beke et al. (2014), provided a comprehensive mapping of the tool-box at the EU's disposal to foster human rights considerations throughout the various branches of its trade and development policies. While the EU indeed faces numerous challenges when it comes to the coherent and consistent implementation of its human right obligations under the new legal and political framework post-Lisbon, their mapping found that, on the whole, the EU is 'more than ever equipped to effectively foster human rights in all the aspects of its trade and development policies' (Beke et al., 2014: 138).

In spite of this recent proliferation of legal and political commitments since the Lisbon treaty, and the availability of the tools for their implementation, little is known about the actual impact and effectiveness of these human rights provisions in EU trade and development policies. Indeed, assessing the impact of the EU's arsenal of human rights provisions in trade and development, on the actual human rights of citizens in EU partner countries, would be methodologically daunting and is infeasible within the scope of this –and arguably any– report. Rather, the present report aims to assess to what extent the EU itself is equipped – and willing – to adequately assess and evaluate the effects and the impact of its human rights policies in the areas of trade and development.

In order to do so, we analysed the Union's various evaluation and impact assessment procedures, ex-ante and ex-post, to see in how far they take into account human rights considerations, in their scope and objectives, as well as throughout their procedures. We first described the general underlying principles and objectives of a Human Rights approach to Impact Assessments and ex-post evaluations. In view of recent EU commitments towards a Rights Based Approach to Development, we then looked into the EU's evaluation system for development cooperation, notably to see in how far its current evaluation function is equipped to conduct rights-based evaluations. In a next section, we provided a comprehensive analysis of the EU Integrated Impact Assessment system, which allowed us to see in how far development and human rights concerns are taken into account in both the policy and practice of the Commission's ex-ante

impact assessments. A third section took a more targeted approach by mapping out the particular assessment challenges and opportunities within the field of EU trade policy. Finally, a fifth section offered a case study on the practical application of rights-provisions under one of the EU's new generation trade agreements, notably the 2012 EU-Colombia agreement.

Human rights based approaches to impact assessment

Human Rights based approaches to impact assessments, both ex-ante and ex-post, have been around for over two decades now and arguably offer a policy tool to systematically identify and measure the potential and the real effects of a policy or a project-intervention on the realm of human rights. They can analyse a wide range of different activities, ranging from development programmes, over national legislation, to the activities of transnational corporations and non-governmental organisations.

While there is significant overlap with other types of Impact Assessments, particularly in comparison to Sustainability or Environmental Impact Assessments, it was found that HRIAs arguably carry substantive added value in terms of scope and rationale. Unlike other types of impact assessments, HRIAs are based on a normative framework of binding international human rights legislation and relate to international and national legal human rights actors, institutions, instruments and mechanisms. Also, in undertaking HRIAs, rights-holders are not perceived as passive study-subjects, instead they are encouraged to participate and contribute to the assessment, giving legitimacy to both its undertaking and the eventual findings. While other assessments often also include notions of equality, participation, transparency and accountability, HRIAs do so in a more systematic and comprehensive manner, including throughout the process of conducting the impact assessment. Finally, HRIAs are meant to fully embrace the notion of human rights as being universal and interlinked. As such they offer an assessment tool, which comprehensively covers both political and civil rights, as much as economic, social and cultural rights. Despite these potential benefits and a recent proliferation of methodological guidance, the practical application of HRIAs is still in its infancy. Indeed, the amount of toolkits and guidelines by far outnumbers the amount of conducted and published HRIA-reports. This in turn raises questions about their overall feasibility and added value as an evaluation tool aimed at contributing to better-informed, human rights-sensitive policy-making. Moreover, given the wide range of different fields of application, and the variety of actors to potentially use them, there is also no universally approved, formalised methodology yet and methodological discussions require further elaboration and fine-tuning, inter-alia through practical application.

The EU is currently in the process of applying such a rights based approach to its development evaluations, yet the policy and implementation frameworks to do so seem to overlook a number of fundamental prerequisites. Indeed, in response to the Council's conclusions on the aforementioned 2012 EU Action Plan on Human Rights and Democracy, the European Commission presented in 2014 a 'Tool-Box' aimed at 'integrating human rights principles into EU operational activities for development, covering arrangements both at HQ and in the field' (CoEU, 2012a: 10). Besides setting out the EU's understanding of what an RBA to development implies, it offers a checklist of questions and considerations, which is to be applied by commission staff at the different stages of the policy or programme cycle, including through its evaluations. In order to provide an assessment of what this rights-based approach would imply for

EuropeAid's evaluation system, we identified three critical considerations in this regard, on which, we argue, hinges the feasibility of effectively applying a HRBA to EU development evaluations.

First, for the EU to apply a rights based approach, it would need to work more politically in development. Applying a RBA throughout the policy and programming cycle of a development intervention means taking a *normative* approach. For EuropeAid's evaluation function, this implies that its monitoring and evaluation systems touch upon political economy issues. Experience shows however, that for the Commission, taking a more political approach to development has so far been little more than a short-lived experience because it is deemed too sensitive. Second, we question whether adequate overall institutional support and guidance is in place to systematically and consistently apply a human rights perspective in EuropeAid's evaluation function. While the tool-box provides some guidance on the application of a RBA, we find that it lacks i) clear identification of 'drivers of change' who will be held accountable for its implementation; ii) a clear implementation strategy; and iii) a roadmap with well-defined targets. Finally, a third consideration revolves around EuropeAid's institutional culture and its readiness to comply with the objectives and principles of a RBA to evaluation. For donors, atoning both human rights concerns and results-based management (RBM) into their M&E systems continues to be challenging, and that is no different for the EU. Moreover, we find that taking on a process-oriented, inclusive approach to evaluation, like the RBA stipulates, rather than a results- or action- oriented one, would make the evaluation process more complex and time consuming and would require a fundamental overhaul in EuropeAid's evaluation culture.

EU impact assessment systems and human rights

The EU has used a system of Integrated Impact Assessments since 2003, to assess the potential economic, social and environmental impacts of its policies and legislative initiatives. By assessing the overall impact of such 'major initiatives', the IA system aims to improve the quality and coherence of the policy development process, as well as to contribute to a more coherent implementation of the EU strategy for Sustainable Development (EC, 2002a: 1). While generally regarded as a valuable policy tool and an intrinsic part of the Commission's policy development procedures, a number of critical weaknesses have been identified over the years. Some of these – though not all- have now been addressed in the new guidelines, which constitute a key part of the Commission's agenda for 'Better Regulation', released in May 2015.

While, based on the 2005 Inter-Institutional Common Approach to Impact Assessment, the Commission, the Council and the EP should each assess the impact of their respective proposals and amendments, practice has shown that, at the level of the EP and the Council, the implementation of these provisions has been respectively limited and non-existent. As a result, once a Commission proposal is significantly amended, the potential impact of the final legislative package remains, at least to some extent, unknown. Also, there is a perceived need for the Commission to be more transparent in its selection and targeting of its impact assessment work since the rules in place left considerable leeway for interpretation. According to the European Court of Auditors, the decision on whether or not to execute an IA was therefore often not clear in practice. Problems have also been noted with regard to the use and the timing of stakeholder consultations. Opinions from the IA Board repeatedly stressed in this regard that draft impact reports should present more transparently the different views distilled from stakeholder

consultations and, in order to enhance the IA's accountability, explain better how stakeholders' concerns were taken into consideration. The lack of such public scrutiny on draft IA reports is all the more problematic as the Commission seems to use IAs mainly to gather and analyse evidence to improve its proposed initiative, rather than to actually question whether or not to go ahead with a proposal. It is fortunate in this regard that the Commission's Better Regulation package provides new guidelines on stakeholder consultations, including on their scope, timing and reporting.

With regard to assessing a policy's potential impact on citizen's human rights in third countries, the European Commission is since 2005 obliged to assess its policy proposals against the EU Charter of Fundamental Rights. Since 2011 operational guidelines by DG JUST are available to Commission staff on how to take into account human rights principles throughout the different methodological steps of an impact assessment. These guidelines explicitly state that the Charter of Fundamental Rights applies equally to the internal and external actions of the Union and thus commit the EU - in all its actions, externally as well as internally, to respect the provisions of the Charter. The extent to which this mandate has been applied so far is questionable however, which may be why both the 2012 and the 2014 EU Action Plans on Human Rights and Democracy, as well as the Better Regulation Toolbox, strongly emphasise that human rights consideration should be integrated in the ex-ante impact assessments of EU policies.

In order to get a first idea of how human rights have featured so far in the EU's impact assessments, we scanned a number of impact assessment reports by DG DEVCO for their use of (human) rights language and whether or not they consider the impact of the concerned policy proposals on citizen's rights. Across the 11 IA reports considered, we identified a variety of ways in which different types of human rights language, generalised or specific, feature throughout DG DEVCO's impact assessments. Yet none of them seemed to look into the potential human rights-related issues that may arise from the proposed development policy or regulation. Too small a sample to be representative, we conclude that more substantive research, similar to the aforementioned analysis done by CONCORD on development impacts, is necessary in order to gain a better understanding of the EU's practice on taking into account human rights issues into its impact assessments, that is beyond the guidelines and into the reports.

Human rights in EU trade impact assessments

While the EU does not conduct human rights impact assessments, ex-post, of the impact of its trade agreements, practice is steadily improving when it comes to conducting ex-ante impact assessments of its negotiation mandates. In how far these ex-ante IAs, guided by DG Trade's Handbook on Sustainability Impact Assessments, take into account human rights considerations has been the subject of vivid discussion lately.

First of all, human rights impacts are naturally but one aspect within a wide array of other issues. However, the perceived economic bias of SIAs tends to dilute human rights issues whereas they should be considered a number one priority. In addition, there is a tendency to negate the specificity of human rights as based on legal standards, hence SIAs fail to put such normative framework front and centre of the assessment. This encourages findings in which human rights impacts are not expressed in terms of compliance or violations of the catalogue of rights, but as extrapolations of economic scenarios.

Methodologically, HRIAs as practiced by the EU are flawed in a number of ways. First of all, there is no guidance or accepted framework for conducting a proper screening of relevant human rights likely to be affected, which therefore leads to a quasi-systematic omission of civil and political rights from the scope of the assessments, on the premise that they bear no direct connection to economic policies such as trade. For what regards the analysis of the impacts as such, official EU methodology mandates consultants to base their work on two mutually reinforcing methods: data analysis through modelling and stakeholder consultation. In practice however, the first method has been found to be much more decisive than the second in the conclusions of the different reports. This is problematic given the paucity and lack of reliability of many datasets, especially in developing countries. Moreover, as indicated above, this tends to keep the focus on social rights directly impacted by economic variations, to the detriment of other types of (non-quantifiable) rights. Regarding the effectiveness of HRIAs in terms of the influence they have on the decision making process, the analysis is also disappointing. Given the procedural shortcomings described above, the formulated recommendations are generally rather shallow and too general, sometimes to the point of self-evidence. In any event, SIA findings have arguably never significantly challenged the usual course of action of the Commission.

The Commission has recently taken steps to update its Handbook on Trade Sustainability Assessments, and the Draft New Handbook contains a very welcome clarification that human rights should be part and parcel of the impacts studied. However, the Draft New Handbook is also very general on methodological aspects and is unlikely, in its current shape, to address the flaws identified above. Hopefully the consultation process to which the Draft New Handbook is currently subject will allow to redress this weakness.

Finally, concerning the ex-post evaluation of the protection of human rights which are included in FTAs most work still needs to be done. We do not yet understand well how the integration of social clauses in FTAs affects the protection of specific human rights. Little or no evaluations and data are available to assess the impact. We presented the results of an exploratory study which focused on freedom of association and collective bargaining (FACB), two of the key rights in FTAs. The focus on these rights was chosen because academic literature and data is available on which we were able to build. Also, we argued that one has to focus on specific rights to analyse the impact and not use composite human rights indicators since these pool together many different rights of which the protection or violation can go in opposite directions within the context of one country. For 13 countries with whom the EU signed a trade agreement and which contain elaborate provisions on the protection of these rights we tried to analyse what the evolution of the protection of these rights was over time. This analysis was based on originally collected data which extended existing academic databases. This exploratory study did not find any direct observable impact on the protection of these rights in terms of a substantial improvement of the rights under investigation (FACB rights). To the contrary, we find over time less protection. However, we also find a downward trend in a large set of countries indicating that this downward trend can be influenced by other factors. Hence, we also caution to draw any strong conclusions on the basis of these findings since they can be explained by a series of factors and do not establish a strong causal link between the integration of specific rights in FTAs on the protection of these rights on the level of countries. For more empirical research, probably with a focus on specific trade-sensitive economic sectors, needs to be

conducted in this context. We would strongly recommend further research on the ex-post impact assessment of EU FTAs.

Human rights provisions in practice: the EU-Colombia trade agreement

In order to further analyse the ex post impact of the integration of human rights provision in FTAs we conducted an in-depth case study of one agreement. As noted in the report it is very hard, methodologically speaking, to isolate the effect of one parameter, notably the ratification of the trade agreement, on the protection of specific rights. It is worth noting therefore, that the analysis presented above concerning the protection of FACB rights, only aims to explore whether one observes a substantial increase in the protection of these rights in countries which signed an FTA with strong provisions without making any causal claims.

However, one can further investigate the ex-post impact of an FTA in other ways, namely by focusing on what happens in terms of ‘follow up’ once an agreement has come into force. This was the specific focus of our case study on the EU-Colombia agreement. We were interested into figuring out what, if anything, happens with specific provisions and rights after an FTA comes into force. What changes does it generate in terms of legislation (*de jure*) and enforcement of rights (*de facto*)? We aimed to explore this via an analysis of literature, official documents, documents from different stakeholders and a set of interviews. As such, we assessed the perceptions voiced by different stakeholders on the potential of this trade agreement to strengthen the enforcement of the protection of labour rights.

Many stakeholders are sceptical however, about this potential and do not observe any changes in terms of concrete action, closing legal loopholes, nor in the monitoring and inspection of labour standards. A partial explanation for this lies in the cooperative nature of these agreements which relies on a spirit of partnership for each party to implement, monitor and enforce their respective commitments and obligations under the various stipulations of the trade agreement. If these commitments do not materialize, the agreement offers little in terms of alternative enforcement potential. In the conclusions of the case study we explore alternative ways to ‘enforce beyond borders’ and suggest that the use of private enforcement mechanisms might be assessed as one alternative route to strengthen the enforcement of labour rights provisions in trade agreements.

Crosscutting issues for further consideration

This report first and foremost offers a comprehensive analytical overview of how the EU assesses the impact and effectiveness of its trade and development policies, and the human rights provisions in there, on the human rights of citizens in third countries. As such, it details the specifics of the various EU systems in place to assess both potential (ex-ante) and real (ex-post) impacts of EU trade and development cooperation. Despite the specific, sometimes technical, nature of the various sections above, some cross-cutting observations can be identified for further consideration.

Overall, there seems to be little evidence of EU impact assessments adequately taking into account human rights considerations. Both in general, as well as for trade-specific SIAs, practice is far more limited than what policy commitments, tool boxes and guidance material would suggest. While further research is

necessary, initial scanning exercises on the IA and SIA reports show very limited analysis on the impact of a policy intervention on the realm of human rights.

On the one hand, methodologically speaking, assessing the impact of EU external action through trade and development remains a daunting task. This holds true in general, as Human Rights Impact Assessments face the fundamental challenge of establishing causality and attribution between an external action, like a trade or development measure, on inherently ill-quantifiable and multi-faced legal standards such as human rights. As described above however, the methodological guidance offered is limited to general principles and/or biased in favour of economic modelling, with little consideration for the 'human' dimension of a measure and what this may entail in a particular country or sectorial context. More 'hands-on', human rights specific methodological guidance per policy area might help EU staff and contracted consultants to take into approach human rights in a more practical, targeted manner when conducting impact assessments. Consequently, one might hope that findings and recommendations of IAs concerning human rights will become more credible and more influential on policy-makers, thereby raising the profile of human rights issues in the policy cycle.

On the other hand, toolkits and methodological guidance can only offer so much as a general starting point since they remain, by definition, theoretical frameworks and templates. Actual insights and best-practice however, have to come from practical experience and comparative learning. So far, knowledge on the human rights impact of EU trade and development policies remains by far the least developed aspect of the post-Lisbon framework for human rights. Current efforts, ranging from commitments toward mainstreaming a rights-based approach to development, to operational guidelines on taking into account fundamental rights in IAs, have been limited to studying and promoting the concept itself, often without much consideration about the practical implications or the overall feasibility of its implementation.

Without proper knowledge-generation feeding into the relevant policy processes, human rights provisions across the spectrum of EU trade and development instruments risk becoming box-checking exercises without much further use. It is more important therefore, to entertain realistic ambitions and doing things right from the beginning, rather than making lofty commitments followed by broad but vague implementation schemes which do not lead to practical follow up or learning. Keeping in mind the methodologically challenging nature of HRIAs in general, and the specific dynamics and particularities of working within the EU policy-making system, it is worth considering a more targeted pilot-approach, focussing on just a few critical policy or human-rights issues. From thereon, a community of practice can be built to help further develop the attitude, skills and capacity required to make human rights a core element of the IA and evaluation systems.

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Annexes

Annex 1. Development impact assessments and human rights

Proposal	Date Adopted	IA Report			IA Board Opinion
		Mention of Human Rights	Context	Impact analysis	
Proposal for a Decision on the position to be adopted by the European Union within the ACP-EU Council of Ministers concerning the multiannual financial framework for the period 2014 to 2020 under the ACP-EU Partnership Agreement	2011/12/7	1. general EU development policy objectives	1. Public consultation for EU external action funding. ⁸⁴		N/A

⁸⁴ the Commission held public consultations on future funding for EU external action based on a questionnaire accompanied by a background paper: 'What funding for EU external action after 2013?' prepared by the EEAS. There were 220 contributors--78% of which supported increased conditionality based on the beneficiary country's respect for human rights.

		2. EIDHR	2. Consistency with external action priorities ⁸⁵		
Communication – Preparation of the multiannual financial framework regarding the financing of EU cooperation for African, Caribbean and Pacific States and Overseas Countries and Territories for the 2014-2020 period (11th European Development Fund)	2011/12/7	same document as the previous listing (proposal)			
Proposal for a Regulation establishing a financing instrument for development cooperation	2011/12/7	3. general EU development objectives	3. Scope of the present Development Cooperation Instrument (DCI) ⁸⁶		N/A

⁸⁵ the instrument that promotes HR and democracy should be mutually coherent with other initiatives such as geographic and thematic cooperation under the DCI (Development Cooperation Instrument), inter alia, as set by the Lisbon Treaty.

⁸⁶ The DCI was established with the primary and overarching objective of eradicating poverty in partner countries and regions in the context of sustainable development, including the pursuit of the MDGs as well as the promotion of democracy, good governance and respect for human rights and the rule of law.

		4. general EU development objectives; includes gender equality	4. Cooperation with partner countries and regions encompasses a wide range of objectives, apart from supporting the MDGs and the promotion of human rights		
		5. general EU development policy objectives	5. public consultation: development policy could take better into account the partner countries' progress on democratisation and respect for basic human rights. ⁸⁷		
		6. general EU development policy objectives	6. good governance, human rights and the rule of law are not sufficiently embedded in the cooperation mechanisms of the DCI ⁸⁸	Achieving the MDGs is often hampered by weak democratic institutions or lack of respect for human rights.	

⁸⁷ Following public consultation and the publication of the Communication on EU development policy, adaptations in EU dev policy are proposed including: to ensure a strong link between EU development assistance and partner countries' commitment to key reforms

⁸⁸ Mid term review of each of the external action financial instruments identifies drivers that hinder the objectives or limit the impact of the DCI

		7. general EU development objectives; includes gender equality	7. the EU as a whole has the critical mass to address and alleviate global issues in a greater capacity than a single Member State. These global issues include: the rule of law, human rights, security and gender equality.		
		8. general EU development policy objective	8. One of the global objectives of EU development policy: promoting human rights		
		9. general EU development policy objective	9. One of the objectives related to the review of the instrument itself: strengthen the inclusion of human rights in the EU fund-allocation and programming mechanisms	this could provide incentives for partner countries to improve/increase respect for HR	
		10. respect for HR. includes protection of minorities and other vulnerable groups	10. One of the objectives: geographic cooperation to focus not only on poverty reduction in the context of inclusive		

			and sustainable development but also, respect for HR		
		11. general EU development policy objectives	11. cooperation with the countries concerned remains strictly in the framework of the existing DCI regulation. The overarching principle of eradicating poverty in the context of supporting HR would continue.		
		12. general EU development policy objectives	12. Strengthen the inclusion of HR ⁸⁹		
		13. general EU development policy objectives	13. implement HR as a key parameter ⁹⁰	Any country that does not follow these principles would be completely excluded from EU development assistance.	
		14. general EU development policy objectives	14. further integrate HR as a driver ⁹¹	Provides greater capacity for reaching the MDG of	

⁸⁹ is already included as a policy objective but status quo would mean that programming and allocation would be carried out without having a clear mechanism for supporting and rewarding progress towards better governance and the reinforcement of HR.

⁹⁰ Policy Option (Amend the DCI regulation): HR as a key parameter in the fund allocation mechanism.

⁹¹ Policy Option (Amend the DCI regulation) EU would further integrate HR as a driver. There would be some linkage between fund allocation and respect for HR but this would not be the only parameter. A strategy would be adapted for countries who don't meet the exact parameters for HR

				erradicating poverty as aid is not the single solution.	
		15. general EU development policy objectives	15. The DCI should be amended to include new trends in EU development policy in addition to the old, general objectives. ⁹²		
		16. general EU development policy objectives	16. strengthen the inclusion of HR in the EU fund-allocation and programming mechanisms. ⁹³		
		17. general EU development policy objectives	17. in amending the regulation, including HR as a key parameter in the fund allocation mechanisms. ⁹⁴	Restrictive and possibly static approach: this might be counterproductive when engaging countries showing progress (countries in crisis, post-crisis and fragile situation)	

⁹² In addition to the overarching principle of eradicating poverty and consolidating and supporting democracy, good governance, human rights, equal opportunities and the rule of law, a reference to global public goods and resources would allow inclusive and environmentally sustainable growth as a primary objective for development.

⁹³ Promoting good governance shall lead to an improvement for EU cooperation results and impact in economic, social and environmental areas. It shall promote good performance, while not neglecting countries in crisis or post-crisis situations. In the case of countries with deteriorating human rights situation, directing aid through civil society, non state actors and international organisations unavoidably leads to an increase of management costs, which in such specific cases is justified.

⁹⁴ Clear message on the paramount importance of respect for human rights

		18. general EU development policy objectives	18. in amending the regulation, strengthening HR in the fund allocation mechanisms. ⁹⁵	Development cooperation, on its own, cannot bring the necessary change on a scale sufficient to pull countries out of poverty (including respect for HR as part of bringing countries out of poverty)	
		19. general EU development policy objective	19. strengthen the inclusion of HR. ⁹⁶		
		20. general EU development policy objective	20. preferred option in the analysis of underlying drivers of the problem = making HR protection the driver of fund allocation. ⁹⁷		
		21. general EU development policy objective	21. MDGS do not measure progress on respect for HR. ⁹⁸	MDGs are not useful in measuring progress in respect for HR. While measuring progress in access to education or health, they do not	

⁹⁵ Fund allocation and continued cooperation would reflect the importance of those values.

⁹⁶ weighing up the positive and negative impacts of the following options: no change of HR in the regulation/status quo; HR as a key parameter in fund allocation; HR as a driver of fund allocation

⁹⁷ HR can best be taken into account as a driver of fund allocation, as opposed to the status quo or with HR as a key parameter in the fund allocation mechanism

⁹⁸ While MDGs are a useful instrument to measure progress in development, they do not provide the full picture and set objectives only for a part of the most affected populations. Notably they do not measure progress on key aspects of development such as good governance and respect for human rights, the rule of law and institutional development

				measure progress in quality.	
		22. general EU development policy objective	22. room for improvement in the inclusion of HR as a current DCI objective ⁹⁹		
Proposal for a Regulation establishing an Instrument for Nuclear Safety Cooperation	2011/12/7	23. general EU development objectives includes rights for minorities	23. public consultations: there is wide support among respondents for exploring conditionality based on the beneficiary country's respect for human rights, minorities,		N/A
Proposal for a Regulation establishing a financing instrument for the promotion of democracy and	2011/12/7	24. EIDHR (European Instrument for Development and Human Right)	24. public consultations: simplification of instruments and the importance of the EIDHR ¹⁰⁰		The Commission is reviewing its multiannual financial framework (MFF) and has prepared a series of follow-up proposals. There will

⁹⁹ This objective should be reformulated to highlight a more comprehensive view of poverty, i.e. supporting reform and modernization efforts in developing countries which contribute to building inclusive and cohesive societies and reducing social exclusion and poverty and protecting the natural resource base on which economic growth depends while ensuring that growth respects the environmental limits of the planet

¹⁰⁰ opinions are mixed regarding a review of EU thematic programmes and a possible reduction in number; many fear that this could imply a decrease in the overall amount available for thematic action, and rather call for a simplification of the rules governing access and implementation of thematic funding. Several thematic issues are highlighted as important such as the reinforcement of the European Instrument for Democracy and Human Rights, climate financing or the current DCI thematic programmes

<p>human rights worldwide</p>					<p>be strengthened support for the development of thriving civil societies and to their specific role as actors for change and in support for HR and democracy. This will include a reinforced capacity for the EU to react promptly to HR emergencies as well as stronger support to international and regional HR observations and mechanisms. The report has a number of issues in regards to HR protection: (1) the report should name the shortcomings of the current EIDHR in the problem definition section providing evaluation evidence; (2) the report should describe the specific objectives more clearly and the IA section should better asses the</p>
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					effectiveness of the proposed options to address the key problems
		25. EIDHR principles	25. public consultations: promotion and mainstreaming of HR in EU external action ¹⁰¹		
		26. international development objective	26. broad scope of HR along with development and security ¹⁰²		
		27. international development objective	27. scope of human rights in the EU ¹⁰³	the EIDHR is highly valued amongst stakeholders and they ask the EU to enhance its potential, safeguard its added value and further develop its speed of delivery, especially for the most urgent cases. → HR will be better protected.	

¹⁰¹ Regarding EU external action on human rights and democracy, all respondents highlighted the need to further promote and support these objectives worldwide both by mainstreaming them within all EU policies and actions and by upholding them in a dedicated, separate but complementary, financial instruments

¹⁰² “Humanity will not enjoy security without development, it will not enjoy development without security, and it will not enjoy either without respect for human rights” --Kofi Annan

¹⁰³ Human rights are universal and indivisible. The European Union therefore actively promotes and defends them both within its borders and in its relations with third countries, living up to its commitments under the EU Fundamental Rights Charter and the Universal Declaration of Human Rights

		28. universal human rights: respect for human dignity, principles of equality and solidarity	28. the universality and indivisibility of human rights and fundamental freedoms ¹⁰⁴		
		29. EU instruments to protect HR	29. predecessor of EIDHR was the European Initiative for Democracy and Human Rights (launched in 2000) ¹⁰⁵		
		30. EU general principles	30. EU tools supporting and promoting HR and democracy ¹⁰⁶		
		31. universal HR includes citizens' access to IT means of communication for political purposes, freedom of expression	31. challenges that many countries still face in regards to HR due to autocratic or dictator governments ¹⁰⁷		
		32. general HR	32. the EU's need and interest to support emerging		

¹⁰⁴ Article 21 of the Treaty on European Union explicitly states that "the Union's action on the international scene shall be guided by the principles which have inspired its own creation, development and enlargement, and which it seeks to advance in the wider world"

¹⁰⁵ the European Instrument for Democracy and Human Rights (EIDHR) is a unique expression of this strong EU commitment to democracy and human rights reflecting its own core values and founding principles, as well as those underlying the international legal order.

¹⁰⁶ The EIDHR inserts itself in, and operationally complements, the wide-ranging EU box of tools supporting and promoting democracy and human rights worldwide, including through diplomatic dialogues and consultations, multilateral action in the UN, the Council of Europe or OSCE, public statements and declarations, Council guidelines on human rights, restrictive and other legal measures, or human rights clauses in agreements with third countries.

¹⁰⁷ certain regimes violate the rights to freedom of expression by arbitrarily depriving or disrupting their citizen's access to IT means of communication for political purposes.

			democracies during cross-border and internal conflicts ¹⁰⁸		
		33. EU fundamental pillar	33. European Consensus on Development: HR is a common EU value ¹⁰⁹		
		34. EU fundamental pillar; lists freedoms of association, assembly and expression, including free media, and the rights to receive impartial justice from independent judges, security from democratically accountable police and armed forces, access to a competent and non-corrupt civil service — and other fundamental rights such as freedom of thought, conscience and religion or belief	34. European Neighborhood Policy underlines that a functioning democracy, respect for human rights and the rule of law are fundamental pillars of the EU partnership with its neighbours.		

¹⁰⁸ Moreover, the existence in many continents of long-standing internal or cross-border conflicts or of structurally failed states continues to generate serious human rights violations. Foremost, however, the need and interest to back up emerging democracies, in particular in the wake of the Arab Spring, makes comprehensive support to democracy and human rights an essential part of the EU’s response to the international challenges in the period 2014-2020.

¹⁰⁹ The European Consensus on Development (Joint Decl by the Council and the Member States) also reaffirms that promotion of respect for human rights and fundamental freedoms is a common value in the EU vision of development. It stipulates that the promotion of democracy, human rights, good governance and respect for international law, with special attention given to transparency and anti-corruption, is a clear added value and a comparative advantage for the EU

		35. general EU HR: rights of the child, against the death penalty, prevention of torture, prevention of violence and discrimination against women and girls, prevention of children involved in armed conflict	35. the 5 core EIDHR objectives ¹¹⁰		
		36. EU fundamental freedoms	36. inextricable link between democracy and HR ¹¹¹		
		37. Human rights defenders; prevention of torture	37. EIDHR assessment ¹¹²	Mid term review of the evaluations was completed in 2010: more than 100 local and central calls for proposals, 400 worldwide projects, representing more than 300 local civil society projects in 70 third countries, 40 projects in countries and regions where	

¹¹⁰ (1) Enhancing respect for human rights and fundamental freedoms in countries where they are most at risk; (2) Strengthening the role of civil society in promoting human rights and democratic reform, in supporting the peaceful conciliation of group interests and, in consolidating political participation and representation; (3) Supporting actions on human rights and democracy issues in areas covered by EU Guidelines, including on human rights dialogues, on human rights defenders, on the death penalty, on torture, on children and armed conflict, on the rights of the child, on violence against women and girls and combating all forms of discrimination against them, on International Humanitarian Law and on possible future guidelines; (4) Supporting and strengthening the international and regional framework for the protection and promotion of human rights, justice, the rule of law and the promotion of democracy; (5) Building confidence in and enhancing the reliability and transparency of democratic electoral processes, in particular through election observation.

¹¹¹ Only in a democracy can individuals fully realize their human rights; only when human rights are respected can democracy flourish

¹¹² several evaluations of core thematic activities were conducted to assess the global and local impact of the EIDHR. They form a good basis for an aggregated evaluation of most the EIDHR's components.

				human rights and fundamental freedoms are most at risk, 13 projects on the fight against death penalty, 32 projects on the fight against torture, 11 large-scale projects with emergency support mechanisms to support human rights defenders	
		38. example of scope of EIDHR; protection against unfair criminalization	38. EIDHR offers independence of action ¹¹³	The defenders of victims, such as lawyers, have in turn to be defended (through the Human Right Defender system) as they risk imprisonment for taking up the cases of pro-democracy activists or rights defenders.	
		39. scope of EIDHR	39. EIDHR works in the most difficult environments and acts as a breath of fresh air focusing on the survival of weakened or	EIDHR helps the advocacy of civil society and diasporas abroad. It tries to protect and/or bring victims of repression out of the country into safety	

¹¹³ allowing working without the need for government consent, which is a critical feature especially in the sensitive areas of democracy and human rights.

			shattered civil society and media.		
		40. scope of EIDHR includes health and sanitation as well as HR violations	40. EIDHR weaknesses; the instrument needs to be more flexible ¹¹⁴		
		41. general EU HR principles includes respect for human dignity, principles of equality and solidarity, respect for principles of the UN Charter of int'l law	41. legal basis of EU action through EIDHR: Art. 209 TFEU and Art 21 TEU	More attention and resources on the more pressing issues of HR violations and cases deemed urgent in very difficult environments	
		42. general EIDHR objectives	42. Problems of the EIDHR: lack of focus	Makes the EIDHR less effective in protecting HR; Broadly defined EIDHR objectives and strategies have caused some degree of fragmentation of approaches and some lack of legibility of the Instrument creating risks of duplication, difficulties in measuring its impact and a certain weakening of the complementarity.	

¹¹⁴ EIDHR resources are often devoted to "soft" issues such as health and sanitation. More resources and focus need to be put on human rights violations and urgent cases

		43. general EIDHR objectives	43. Problems of the EIDHR: red tape. EIDHR's reactivity has been either too slow or achieved at high transaction costs due to red tape. ¹¹⁵	Improving reactivity time is sometimes impossible to implement in the most difficult situations: one cannot expect threatened and frightened civil society actors that live under immediate pressure to answer public and publicised calls for proposals, which might jeopardise their own safety.	
		44. EIDHR objectives and general EU development policies includes providing mental and physical rehabilitation for victims of abuse	44. Consistency with other EU policies as well as Complementarity (of EU and host country) is the basis of HR mainstreaming.	Working without host country consent is a guarantee to avoid censorship and undue interference in sensitive and difficult environments. Worldwide coverage is a reflection of the universalism of human rights and the existing flexibilities are ensuring a minimum potential of reactivity.	

¹¹⁵ The length of calls for proposals, from the launch of the call to the contractualisation of selected beneficiaries of grant, imposed by the steps foreseen in the Financial Regulation, is incompatible with fast delivery. It can indeed take up to 12 months.

		45. general HR	45. EIDHR policy option: targeted support to the development of thriving civil societies by empowering them in their quest to greater HR protection.	EIDHR could be designed as a better enabling regulation, empowering civil societies to increase their role as actors of positive change.	
		46. general HR	46. Promotion of HR has a direct impact on the environmental, social and economic situation of an individual.	supporting activists or human rights defenders involved in the defence of economic, social or environmental rights has a strong impact locally and also generates political pressure on governments to observe the commitments made by a given country in these areas, therefore tending to improve the situation in this regard.	
		47. general HR	47. impact of not including a specific regulation for HR via the EIDHR or by streamlining HR protection through another EU instrument.	It will result in thousands of persons across the world, either human rights activists or victims of abuses, being without means and protection while often in precarious	

				<p>situations or even sometimes in lethal danger. Practically speaking, it will suppress specific working principles, such as the absence of host country consent, thereby impeding most activities and reducing the delivery to easiest or show case activities. It will lower efficiency of operational delivery (e.g. reduced geographical scope, lower economies of scales, higher cost) and create certainly a strong visibility issue (i.e. secondary rather than complementary)</p>	
		<p>48. general EU principles includes respect for HR, minorities, good governance and cultural expressions</p>	<p>48. identifying HR indicators</p>	<p>The objective of identifying indicators for human rights projects is to improve the management of projects by measuring the extent to which the impact of specific projects can be linked to overall changes in the situation of HR in a</p>	

				country; to support tangible results in the promotion and support of HR worldwide.	
Proposal for a Regulation establishing an Instrument for Stability	2011/12/7	49. EU values	49. consistency with external action policies ¹¹⁶		N/A
		50. general EU principles includes respect for HR, minorities, good governance and cultural expressions	50. policy option to increase efficiency and coherency of EU external action in peace in security; migration and HR could be paired together as joint policy strategies.	gains would be realised in terms of coherence and in terms of the timing of their deployment.	
Proposal for a Decision on relations between the European Union on the one hand, and Greenland and the Kingdom of	2011/12/7	51. general EU principles includes respect for HR, minorities, good governance and cultural expressions	51. public consultation: likemindedness and conditionality based on the beneficiary's respect for HR		N/A

¹¹⁶ The Instrument for Stability supports EU action to strengthen security, preserve peace and prevent conflict, and as any EU external cooperation instrument, to safeguard EU values, notably human rights and democracy]

Denmark on the other					
Communication on Increasing the impact of EU Development Policy: an Agenda for Change	2011/12/7	52. general EU values: HR includes rights of women, children, disabled people, indigenous people and minorities	52. public consultation: EU is a value-added organization ¹¹⁷		N/A
Proposal for a regulation establishing a European Neighbourhood Instrument	2011/12/7	53. general EU development policy objectives	53. scope of ENP instrument: The EU-ENP relationship builds upon a mutual commitment to values such as democracy and human rights. ¹¹⁸		N/A
		54. general EU development objectives	54. partly outdated implementation provisions and lack of coherence between EU external action instruments: ENPI work done on HR ¹¹⁹		

¹¹⁷ Green Paper on "EU development policy in support of inclusive growth and sustainable development – Increasing the impact of EU development policy". Many respondents complained that insufficient focus was put on fundamental HR issues]

¹¹⁸ the EU supports partners in implementing reforms to improve their standards of HR

¹¹⁹ in Art. 14 on Eligibility, CSOs (Civil Society Organizations) are not explicitly mentioned, which does not reflect sufficiently the good work already done together with CSOs in the ENP region, especially concerning promotion of good governance, rule of law and human rights.

		55. general EU development objectives	55. coherence in EU external action is necessary: the objectives of development, democracy, human rights, good governance and security are intertwined. ¹²⁰		
Proposal for a Regulation establishing a Partnership Instrument for cooperation with third countries	2011/12/7	56. general EU development objectives	56. consistency with external action policies: chapters in the Instrument will connect cross-cutting priorities and values such as HR		N/A
Proposal for a Council Decision on the association of the overseas countries and territories with the European Union ("Overseas Association Decision")	2012/07/16	57. general EU values: respect for HR, human dignity, the principles of solidarity and equality	57. coherence between external and internal EU policies by preserving EU values set out in Art. 21 TEU		N/A

¹²⁰ The recent people-led movements in a number of countries in the Southern Neighbourhood have clearly highlighted that sound progress on the Millennium Development Goals (MDGs) is essential, but not sufficient.

		<p>58. general EU development objectives</p>	<p>58. new regulation on GSP will grant preferences to countries which effectively implement international labor standards, principles of HR and environmental protection.</p>		
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Annex 2. List of concluded Sustainable Impact Assessments on EU trade agreements

FTA Name	Consultant	HR Issues	Findings	Methodology	Consultations	Position paper
EU-ACP EPA	PWC (2007)	Gender & Inequality; Livelihood of Workers (poverty/decent work)	Suggests development cooperation could be focused on providing basic services to residents and migrant workers and developing basic services to support development, such as telecommunications. Recommends urban infrastructure, particular around industrial zones, to provide adequate basic services to the workers who migrate to work in factories, tourism facilities or other production areas. Suggests removing the few remaining EU tariffs could help develop viable processing industries in the ACP countries, help them add value to their production and create employment, including employment for women who tend to dominate employment in the processing sector. Further discussion of creating employment opportunities for women in different sectors.	The first step involved setting priority sectors and trade measures based on trade and sustainability considerations among different groups of ACP countries. An analysis was performed to identify the impacts of trade-induced changes on economic activity. Quantitative modelling was complemented with the qualitative causal-chain analysis and SWOT (Strengths, Weaknesses, Opportunities and Threats) analysis. Case studies were used to gather empirical data to identify causal links and specialized interviews and field missions helped to supplement research.	It was discovered in the beginning stages of the SIA that EPA and SIA knowledge in the ACP regions was weak. Consultants sought to engage fully and to use a balanced approach between views and expectations: dedicated website for stakeholders to have access on information and updates and to provide comments; stakeholder meetings were organized in the ACP regions either in partnership with local organizations or through existing initiatives. Meetings in Brussels involved the Commission's Civil Society Dialogue.	Commission Services provide overall endorsement of the SIA by PWC: supports greater coherence amongst ACP countries as well as EU-ACP coherence to foster regional integration efforts; classifying certain products as "sensitive" in order to protect against negative effects of reciprocity and to promote economic development, among others.

FTA Name	Consultant	HR Issues	Findings	Methodology	Consultations	Position paper
EU-Andean Community AA	Development Solutions (2010)	Gender & Inequality; Livelihood of Workers (poverty/decent work); Indigenous rights	Stresses the importance of anticipating the possible impacts of trade liberalisation on the quality and quantity of employment opportunities. There is recognition of an urgent need to identify – if not prevent – shortcomings often reported (e.g., an increase in demand for low quality jobs, predatory behaviour of investors, skills mismatch). The high rates of informal employment observed for Andean countries leads to express concerns about labour standards. Particularly critical is the situation of young people and women, for whom unemployment and low labour standards are particularly acute. Unemployment and underemployment in rural areas have also led to practices of lowering work conditions in large companies in the mining and agribusiness sectors. Although wages in such sectors are higher than the average agricultural wage for unskilled labourers, they are lower than what they could be if stronger regulation existed to protect workers from exploitation. A current lack of social insurance and extensive labour hours are related issues of concern. To address some of these problems the government of Colombia, trade unions and other civil society organizations have implemented a broad agreement to protect workers' rights, prevent child labour and produce better	Built on two different scenarios: modest liberalization and ambitious liberalization, run on baseline modelling assumptions which take account of the possible effects of WTO multilateral liberalization and fully integrate the significant preferences given by the EU to Andean community countries (e.g. GSP).	EU-Andean SIA website in both English and Spanish with information on SIA progress, minutes, reports, presentations, background information. It was designed to be user-friendly for a wide range of stakeholders to use and provide feedback. Feedback has been received from research think tanks, academic institutions, NGOs, industry groups and civil society actors. From February to August 2009, the website received 34,537 hits from 3,128 different visits. In addition to the website, an EU-Andean SIA newsletter was distributed electronically to the consultation network and the project team emailed the stakeholder network encouraging wider usage and feedback.	The EU agrees with most recommendations however, it has some alternative approaches to some of the issues raised: democracy and human rights issues should be addressed via a full-fledged EU-Andean Association agreement or BITs between individual countries rather than the trade agreement (although included as a general principle); financial regulation should be addressed either at the national or multilateral level, not EU-Andean

FTA Name	Consultant	HR Issues	Findings	Methodology	Consultations	Position paper
			<p>conditions for the protection of the labour force. More positively, the rural poor's diversified livelihoods have produced incentives for specialisation and more efficient use of available assets. As a result, positive processes of decreasing poverty and local growth have been observed. With regards to the distribution of employment by gender, access to employment has been more favourable for men than women, with differences of about 10 percent in access to labour markets.</p>		<p>Consultation workshops took place in Brussels as well as interviews and questionnaires for key stakeholders.</p>	

FTA Name	Consultant	HR Issues	Findings	Methodology	Consultations	Position paper
EU-Armenia DCFTA	ECORYS (2013)	Employment; Income	<p>The main objective of the TSIA was to assess the potential economic, social, environmental, and human rights impacts of a Deep and Comprehensive Free Trade Area (DCFTA) between the EU and the Republic of Armenia. In depth discussion of impact on employment; finds the DCFTA is likely to contribute to job creation. At the same time employment reallocation between sectors (expected to be necessary for above 7 percent of more skilled workers and close to 10 percent of low skilled workers) may be difficult especially for groups with weaker socio-economic status. The DCFTA may also ignite several forces acting towards either improving or worsening the situation with respect to labour rights. Overall effects in this sphere will be small, but positive forces are expected to prevail. With respect to human rights, the DCFTA is expected to mainly affect economic and social rights and not cultural, civil or political rights. With respect to the economic and social rights, there are various forces at play as indicated above for labour rights, and therefore the expected effects of the DCFTA. The projected increase in welfare is likely to result in positive human rights effects, while at the same time the effects on some human rights are mixed, depending on the sector and if those rights are properly enshrined in</p>	<p>Methodology leaned more towards a model approach: Six methodological pillars were used: screening and scoping analysis, scenario analysis and CGE modelling, additional quantitative and qualitative analysis, sectoral analysis, causal chain analysis, dissemination and consultation with stakeholders. The qualitative (case study) analysis included the examination of available literature or requirements of international conventions in order to analyze possible changes to labor standards, for instance.</p>	<p>Electronic consultation: website, designated email address for stakeholders to send questions and feedback. A Facebook group was created to foster more civil society engagement. Public meetings in Brussels were held, a TSIA workshop in Armenia was held with more than 20 civil society participants</p>	<p>The Commission generally agrees with the recommendations. The EC reiterates that the DCFTA is a blueprint for reforms, making Armenia more attractive for investment and trade.</p>

FTA Name	Consultant	HR Issues	Findings	Methodology	Consultations	Position paper
			<p>domestic Armenian law and effectively enforced. The projected increase in welfare is likely to result in positive human rights effects (e.g. the right to an adequate standard of living), while at the same time the effects on some human rights are mixed (e.g. the effect on the right to safe and healthy working conditions will vary, depending on the sector). Overall the effect is expected to be small but positive. Acknowledges the DCFTA may therefore contribute to a very small increase in inequality driven by differences in income and expenditure patterns.</p>			
EU-ASEAN FTA	ECORYS (2010)	Employment; Gender & Inequality; Livelihood of Workers (poverty/decent work)	<p>Very comprehensive analysis of impact on employment. Overall the FTA is expected to have substantial positive impacts (GDP, income, trade and employment) for ASEAN under all scenarios – across all countries – and small but positive effects for the European Union. For unskilled and skilled labour, the largest percent changes in employment are expected in the leather sector, with around 17 percent decrease in employment for both labour groups. Notes the increased employment opportunities in the TCF sectors in the Rest of ASEAN, Indonesia and Vietnam is expected to facilitate the structural transformation processes taking place in these countries as agricultural workers can quite easily (i.e.</p>	<p>The study is based on two equally important pillars: 50% for modelling and analysis and 50% for stakeholder consultation.</p>	<p>three public meetings in Brussels; a TSIA workshop in Bangkok; joint meeting of the textile and clothing, tanning and footwear and leather sector committees organized by DG Employment; individual meetings and telephone interviews with civil society representatives in the EU and ASEAN countries; online feedback facilities; email newsletter</p>	<p>The EC generally agrees with the recommendations: liberalization of tariffs should be applied gradually and the EC will assess this need on a case by case basis; further integration of ASEAN is needed; a trade and sustainable development chapter shall be included, keeping</p>

FTA Name	Consultant	HR Issues	Findings	Methodology	Consultations	Position paper
			<p>without substantial retraining) be absorbed into these sectors, thus also contributing to poverty reduction. Employment of both skilled and unskilled labour is expected to increase substantially across ASEAN as a consequence of the FTA. The positive economic effects of the FTA in combination with private corporate social responsibility (CSR) and international initiatives, notably the decent work agenda of the ILO and pilot programmes stemming from it, could contribute to the further addressing of labour issues in the region, provided commitments continue to be strong in a period of economic downturn and national legislation and standards are adequately enforced. Expected changes in wages indicate that in some countries in the more ambitious scenarios high-skilled wages will increase more than low-skilled wages leading to increasing levels of relative inequality. This effect is expected to be small though, and overall gains for low skilled workers still substantial. Some discussion of gender but not in reference to the impact of the Agreement.</p>			<p>in mind that the FTA is only one component of ASEAN's broader environmental sustainability agenda.</p>

FTA Name	Consultant	HR Issues	Findings	Methodology	Consultations	Position paper
EU-Canada CETA	Development Solutions (2011)	Employment; Gender & Inequality; Labor Health & Safety	Finds that quality and decency of work could be somewhat improved where the CETA includes a chapter on trade and labour that provides for better implementation and ratification of the ILO's Core Labour Standards and Decent Work Agenda. The projected increase in welfare is likely to result in positive human rights effects, while at the same time the effects on some human rights are mixed, depending on the sector and if those rights are properly enshrined in domestic Armenian law and effectively enforced. Discussion of impact of various clauses on employment exhaustive. Given that many provinces exempt a number of workers involved in agriculture and certain types of processing from minimum employment standards, greater shifts into the sector could lower the overall level of standards that the workforce is exposed to. Further, as agriculture and food processing tend to have some of the highest rates of work related injuries and fatalities, expansion of employment in Canada and the EU's agriculture and food processing sectors could expose a greater number of workers to working conditions that are more unsafe than average. Minimal reference to impact on gender equality.	The CGE, E3MG and gravity models were used. 4 liberalization scenarios were referenced: from limited liberalization of goods and ambitious liberalization of services to 100% lib. of goods and less ambitious liberalisation of services. Desk research which included case studies, credible literature, statistics, policy and regulation reviews were also highly critical to this study.	A project website was developed to keep stakeholders informed and to provide an outlet for feedback; 2 civil society meetings were held in Brussels and 1 stakeholder workshop was held in Ottawa. A wide range and high number of stakeholders were contacted by the study team either asking them to attend the civil society/stakeholder meetings or to provide feedback on the SIA. In some cases, these stakeholders instead relied on their own websites to voice their views and ended up not attending the meetings. Of the 71 stakeholder groups invited to the meeting in Ottawa, 32 confirmed their attendance and only 13 actually showed up (may have been due to inclement weather).	Missing

FTA Name	Consultant	HR Issues	Findings	Methodology	Consultations	Position paper
EU-Central America AA	ECORYS (2010)	Employment; Income; Gender & Inequality; Livelihood of Workers (poverty/decent work)	Finds that social impacts are linked to economic effects. Employment effects in the EU are expected to be negligible, though for FVN and electronics, some regions may be adversely affected to a limited extent. Employment opportunities in the Central American region shift more strongly, caused by workers being drawn into sectors that offer higher wages, either from sectors where no comparative advantages exist or from the informal sector. This effect occurs in all Central American countries except Panama. In Panama wages are going down in the long run, meaning that – overall – unemployment may go up as sectors shed labour. Concluded that, in the short run, the transition process may come with (adjustment) costs in some regions or sectors, the more so for vulnerable social groups and for female employment. In Central America, recommends that special attention needs to be given to gender equality, labour conditions and vulnerable social groups.	50% of the study was quantitative (CGE modelling analysis) and 50% qualitative. Consultation was critical to the qualitative portion.	Several public meetings took place in Brussels, the first meeting (following the publication of the Inception Report) included civil society members from industry associations, NGOs, and academic scholars. A TSIA workshop was held in Nicaragua where Central American civil society/stakeholders provided input. The ILO also held bipartite meetings between Central American trade unionists and employer associations.	The EC generally agrees with the recommendations. The EC suggests, however, that the SIA sometimes implies a narrow field of policy options and margin for national decision-making. For instance, the EC considers that the AA could contribute to avoiding unsustainable social and environmental dumping practices by addressing these issues in the various trade and sustainable development provisions.

FTA Name	Consultant	HR Issues	Findings	Methodology	Consultations	Position paper
EU-Chile FTA	Planistat (2002)	Employment; Livelihood of Workers (poverty/decent work); Land rights	Acknowledges that existing inequalities in terms of practical rights and access to social and economic opportunities will not be challenged by the impact of the agreement. Analysis of impact on employment across sectors. Predicts that in both Chile and the EU, the trade agreement will bring about a combination of an increase in global employment and a reduction in prices relative to wages. Suggests that In Chile, the combination of increases in total employment and a reduction in prices relative to wages as a consequence of the EU-Chile trade agreement will help to increase the standard of living and reduce poverty among the majority of those people who live in urban areas. On the other hand, there are a number of pre-existing socially unstable issues in Chile that will be affected by the EU-Chile trade agreement, although the trade agreement cannot be said to be the root cause of these situations. Poverty is expected to be reduced by the additional employment but is expected to be made worse in the areas where negative employment outcomes are expected. Finds that existing inequalities in terms of practical rights and access to social and economic opportunities will not be challenged by the impact of the agreement. While employment in some sectors where women are employed, such as food	Both quantitative and qualitative methods are used; CGE simulation and previous case studies are used to select sectors and areas of interest for further study. Previous work by external consultants such as WWF and UNEP also helped to provide key sectors.	The report was shared with the Chilean government and the Chilean ambassador offered his endorsement of the SIA along with a list of observations and recommendations for both parties going forward. Various civil society groups including Women in Development Europe (WIDE) and CFFA/ICSF (fisheries) were consulted and offered their recommendations. Certain NGOs complained that the report was not initially presented in Spanish (in English instead) which made the information less accessible for Chilean civil society members. A MERCOSUR/Chile SIA website was developed and there were 407 visitors between June	After the Inception Report, the Commission had a number of issues with the SIA that were subsequently resolved by the study team: preliminary screening of specific sectors needed to be justified; trade diversion from MERCOSUR needed to be examined; consultants need to determine how to achieve a better impact in consequence of the trade changes.

FTA Name	Consultant	HR Issues	Findings	Methodology	Consultations	Position paper
			processing, will increase, no necessary change is created by the agreement to the pre-existing inequalities. Passing mentions of impact on equality and health and safety.		2002 and December 2002.	

FTA Name	Consultant	HR Issues	Findings	Methodology	Consultations	Position paper
EU-China PCA	Emerging Markets Group, Development Solutions (2009)	Labor Health & Safety; Worker Exploitation	Growth in productivity of skilled labour implies a likely rise of skilled wages, while increased employment of unskilled labour in China will likely be absorbed in less developed provinces where jobs, either skilled or unskilled, are in high demand. Notes that unskilled labour has a higher likelihood of labour exploitation, and while the jobs may be welcomed, they may also come with poorer labour conditions. The prospective PCA is expected to lay the foundation for enhanced cooperation, including the enforcement and, where possible, the upgrading of environmental, social, labour and safety standards. Report notes The concerns voiced by stakeholders range from the perceived threat of lowering labour standards to increased gender inequality. There are particular concerns attached to the perceived lack of workers' rights in China, the low level of wages and the increasing number of industrial accidents and product safety recalls due to enforcement of health and safety requirements, despite a increasingly stringent regulatory regime.	The GLOBE CGE Model was used which is an aggregation of models for multiple regions/countries that are linked by commodity trade. The TAPES PE Model is used to analyze highly disaggregated sectors. Face to face interviews/meetings were held between the study team and individual experts who provided advice on quantitative as well as qualitative data (state owned enterprises poverty data, regional modelling within China).	5 meetings took place in Brussels and Beijing between November 2007 and May 2008. The Chinese stakeholder meeting held in Beijing featured Chinese NGOs and business community representatives as well as over 100 civil society and private sector participants. Electronic consultation was also used.	The EC reminds the consultants that responsibility for the development of any system of social protection belongs to Chinese authorities as they have full access to the SIA (in regards to the recommendation on mitigating negative effects of the PCA on Chinese employment). The EC disagrees with the proposal of having a single body assisting Chinese SMEs with REACH compliance given that this is neither a goal of task of the EC and there are already work being done in existing dialogues. In addition to some of the other

FTA Name	Consultant	HR Issues	Findings	Methodology	Consultations	Position paper
						consultant recommendations, the EC reiterates the suggestion of continuing to enforce strong IPRs through existing regulations.
EU-Georgia DCFTA	ECORYS (2012)	Employment; Income	With regard to labour rights, finds that the DCFTA may also trigger various forces acting towards either improving or worsening the situation, but on balance positive forces are likely to be somewhat stronger implying an overall positive contribution. For Georgia, the expected positive economic impact is significant. In Georgia, overall employment and wages are likely to increase in line with rising output (the average wage increase is estimated at 3.6 %). Wage increase combined with a predicted fall in consumer price inflation is expected to support	The standard CGE quantitative model was used as part of the six pillar methodology (screening and scoping analysis, scenario analysis and CGE modelling, additional quantitative and qualitative analysis, sectoral analysis, CCA, dissemination of key findings to stakeholders and civil society).	There were two public meetings in Brussels where the methodology, results and recommendations were presented. Approximately 40 stakeholders participated in the workshop held in Tbilisi where the interim report was discussed as well as relevant issues.	The EC supports most of the consultant's recommendations, notably: including a clause in the DCFTA on preventing the lowering of labor standards providing technical assistance in Georgia and

FTA Name	Consultant	HR Issues	Findings	Methodology	Consultations	Position paper
			<p>improvements in average living standards. The poorest part of the population will benefit less from the DCFTA, mainly because food prices will increase slightly, and less affluent households spend a higher share of their total expenditures on food. The favourable DCFTA impact on equality may come about if and when increasing living standards begin to support gradual changes in societal preferences on equality. worsening of the inequality situation relative to current trends does not appear likely. With regard to labour rights, the DCFTA may also trigger various forces acting towards either improving or worsening the situation, but on balance positive forces are likely to be somewhat stronger implying an overall positive contribution.</p>		<p>Interviews and face to face meetings were held with experts and with the Georgian government. An online survey was distributed in the beginning of the study in order to gather information although there was only a less than 10% response rate.</p>	<p>Moldova's quest to manage and balance their economic structural reform.</p>

FTA Name	Consultant	HR Issues	Findings	Methodology	Consultations	Position paper
EU-GCC FTA	PWC (2006)	Income; Worker Exploitation	Finds that liberalisation of services is likely to impact positively on education, consumer security, health and cultural diversity. The potential impact on productivity or potential risks related to income inequality and social cohesion have not been assessed. One other win-win effect was identified by the Trade SIA: liberalisation of public procurement is likely to promote social development in GCC countries, notably thanks to a positive effect on the job market. No evidence is further provided on the social impact along a number of crucial dimensions such as working conditions, wages and productivity and income distribution and social cohesion.	Scarcity in available data made the collection of quantitative data difficult. In many cases, qualitative data (including case studies) had to be used to measure the changes in trade flows, investment and other issues related to the economic impact of trade liberalization.	Website developed for stakeholders garnered 12,273 hits from January to December 2003; Western Europe, North America and the Middle East were the top 3 regions of the website visitors. Several one-on-one meetings were held with Délégation du Conseil de Coopération des pays Arabes du Golfe, SABIC, EAA, CEFIC, and a number of Islamic studies scholars (the 3 most important groups). The NGO community did not show much interest in the meetings	SIA results are "globally coherent" with the EC's views. However, there were some weakness: the SIA focuses mainly on market access of goods and fails to give a comprehensive picture of EU-GCC negotiations on other areas (services, SPS, customs union, rules, social impact); Social analysis is limited; environmental analysis fails to prioritize, estimate or quantify impacts and risks are not quantified; not enough attention was put on the issue of greenhouse gas emissions; in the sector-specific

FTA Name	Consultant	HR Issues	Findings	Methodology	Consultations	Position paper
						<p>analysis, the SIA failed to provide in depth industrial analysis for aluminum and the model used was inadequate; the SIA fails to make the case that the FTA will bring about a decrease of EC production and conversely, an increase in GCC imports.</p>

FTA Name	Consultant	HR Issues	Findings	Methodology	Consultations	Position paper
EU-India FTA	ECORYS (2010)	Employment; Income	According to the Trade SIA, the FTA is expected to have no significant overall employment, income or social effects in the EU, with the exception of some limited displacement of labour across sectors and regions. On the Indian side, the SIA highlights a number of potentially positive effects: the FTA is in particular expected to lead to significant increases in real wages of both skilled and unskilled workers as well as to moderate pro-poor effects. The reduction in the overall poverty ratio is expected to be more pronounced in the more ambitious FTA scenario due to income effects outweighing price effects. The urban and rural poverty levels are expected to decline in India as a result of the FTA. The study expects no direct effects on health and education in India from the FTA but considers that increases in incomes, real wages, employment opportunities and declining poverty ratios could indirectly have positive effects. Employment effects for financial services and other business services sectors in the EU are expected to be minimal but the possible impact of FDI and outsourcing is not taken into account.	Standard quantitative methods (CGE modelling) were used. Case studies in the rice, auto parts, investment banking, accounting, IT services, telecom, SPS, fisheries, horticulture and high-end apparel sectors were included. CGE modelling was used to support each case study.	Two public meetings featuring civil society and industry associations were held in Brussels. Two workshops were held in Delhi where many civil society groups and industry associations in India voiced their concerns and provided feedback. Bilateral discussions between certain parties were held and stakeholders also had a feedback form available on the SIA website.	The Commission generally agrees with the SIAs findings and lists the ways in which it plans to support the SIA recommendations through its own quest of promoting India's sustainable development initiatives. The EC however, states that the SIA does not support a conclusion that the long term welfare effects would be smaller than the short term effects due to the limitations in economic modelling in measuring these types of effects.

FTA Name	Consultant	HR Issues	Findings	Methodology	Consultations	Position paper
EU-Korea FTA	IBM (2010)	Employment; Income; Gender & Inequality	The agreement might slightly improve the employment gender balance in both, the EU and Korea, in particular due to expansion of services industries. The FTA is not expected to adversely affect employment overall. According to the Trade SIA, the convergence in development levels and the broad similarity in the distribution of income between the EU and Korea tend to limit any significant social impacts.	Case studies by DG Trade were used as well as research on third country long term, indirect and dynamic effects of the potential EU-Korea FTA were analyzed. A detailed literature review of existing results and the outcomes of past studies were consulted when appropriate. Existing quantitative models were referenced when appropriate and new quantitative models were used as well.	Continuing with the usual process of consultations, three meetings were held in Brussels and a workshop was held in Seoul. The workshop had 4 in depth sessions and ended with a round table discussion. The 3 largest groups present were business representatives, industry associations and academic and research institutions. The SIA website and designated email address have been actively used by stakeholders to give feedback and the SIA team has reached out to a number of civil society groups and industry representatives for their input.	For rules of origin, SPS and TBT measures, the Commission claims that it followed the SIA's recommendations as much as possible but that satisfactory (for both parties) compromises were made, as is the case in negotiating most trade agreements. The EC supported the SIA's recommendation of striving for an ambitious, far reaching IPR agenda which goes beyond WTO's TRIPS. The EC disagreed with the SIA's recommendation of implementing a sanctions-based enforcement system and

FTA Name	Consultant	HR Issues	Findings	Methodology	Consultations	Position paper
						<p>instead, negotiated for the settling of differences via an independent panel of experts (mediation) and the further involvement of civil society.</p>

FTA Name	Consultant	HR Issues	Findings	Methodology	Consultations	Position paper
EU-Libya FTA	Development Solutions (2009)	Income; Livelihood of Workers (poverty/decent work); Worker Exploitation	The report finds that the overall effect on unemployment is not expected to be significant. Expansion of the construction industry will increase demand for migrant labour, which will be partially offset by declining demand in agriculture. This may exacerbate existing tensions caused by migrant labour and extensive policy recommendations are spelled out. Predicts that In the longer term, exposure to greater competition will increase incentives for productivity improvement, with potential for higher wage rates. For agriculture this may be accompanied by a further decline in employment, with potentially adverse effects on rural poverty. For the manufacturing industry the influence of liberalisation on wage rates can be expected to follow the level of skill in industrial production. Predicts a beneficial effect on urban poverty, particularly in the short term. Passing reference to gender equality.	The SIA seems to lean more towards a modelling methodology rather than case studies as there was no mention of the latter in the final report. Other forms of qualitative methodologies were used such as stakeholder interviews and questionnaires.	The SIA website available in both English and Arabic, has received 19,900 hits with 1,778 unique users from February to August 2009. Specific feedback concerning mostly quantitative methodology and sectoral analysis was received via email. Feedback stems mostly from government ministries, academic institutions, think tanks, industry groups and NGOs. Civil society workshops were held in both Brussels and Tripoli. An e-newsletter was distributed to stakeholders. Interviews and questionnaires were conducted with key expert informants.	Missing

FTA Name	Consultant	HR Issues	Findings	Methodology	Consultations	Position paper
EU-Mediterranean FTA	University of Manchester (2009)	Employment; Gender & Inequality	According to the study, for agricultural liberalisation the short term effects in MPCs will be mixed, with a negative effect on employment as production shifts between sectors, and a net beneficial effect from falling consumer prices. The price of basic foods is expected to fall, with a beneficial effect on poverty. The longer term impacts in MPCs depend strongly on other factors. European Commission is uneasy about the perspective taken in the conclusions to present the expected impact of the EMFTA, which it finds primarily focused on the negative aspects for MPCs: rise in unemployment, and a fall in wage rates associated with increased unemployment.	The SIA utilizes some 80 economic modelling studies of Mediterranean trade liberalization. Two major case studies were conducted: the first on Morocco due to its close proximity to Europe, readily available research findings, large size and the fact that it has not yet liberalized its trade with the EU compared to the greater liberalization Tunisia has in its trade with the EU. The Morocco case study also referenced the McKinsey study to analyze industrial policy. The second case study focused on the lessons learned from the Morocco case for the other Eastern Mediterranean countries.	Countries and governments were informed of the SIA through meetings and workshops. European and national parliamentarians were helpful, especially through the Circle of Mediterranean Parliamentarians for Sustainable Development (COMPSUD). The European Commission, civil society groups, several NGOs, an advisory committee of regional experts as well as information dissemination were consulted for their input during the process.	The EC states that it is uneasy about the perspective taken in the SIA towards the expected impact of the EMFTA as it focuses mainly on the negative impacts rather than the foreseeable effects, positive or negative, identified in the study itself. This perspective leads to misunderstandings on the impacts of the EMFTA. The EC feels that the SIA is vague when recommending that sustainable development needs to be re-invigorated using "clearly defined economic, social and environmental goals". The EC

FTA Name	Consultant	HR Issues	Findings	Methodology	Consultations	Position paper
						suggests that the goals set out in the Mediterranean Strategy for Sustainable Development might be used for this recommended criteria.

FTA Name	Consultant	HR Issues	Findings	Methodology	Consultations	Position paper
EU-MERCOSUR AA	University of Manchester (2010)	Income; Livelihood of Workers (poverty/decent work); Worker Exploitation	Report finds Agreement could in particular offer large potential benefits through dynamic effects on overall economic performance and generate significant gains in terms of sustainable development and poverty reduction. The Commission services agree with the Consultants' findings that financial services liberalisation could bring significant economic benefits to both region and could generate a long term contribution to reducing poverty in Mercosur. Regarding investment, the Commission services share the Consultants views that an agreement on investment would bring economic benefits to the EU and Mercosur in terms of economic growth and employment.	Six detailed SIAs were included in the Trade Facilitation and Financial Services SIAs provided in Phase 2. The Agriculture SIA included a case study for beef and ethanol. CGE modelling was used to measure quantitative impacts of the EU-MERCOSUR Agreement.	Public meetings and Brussels and Montevideo, Uruguay. Spanish and Portuguese translations of the reports; the website was developed for stakeholders to provide feedback	The EC agrees that the Agreement would likely cause environmental damage along with other potential adverse effects that need to be mitigated/prevented/avoided in a balanced agreement. In the case of financial services, the EC regrets that the SIAs recommendations are not explicitly set out for situations of each party in the Agreement. The EC believes that care needs to be brought for particular sectors as FDI may put additional pressure on natural resource stock capital for

FTA Name	Consultant	HR Issues	Findings	Methodology	Consultations	Position paper
						some MERCOSUR countries.
EU-Moldova DCFTA	ECORYS (2014)	Labor Health & Safety; Livelihood of Workers (poverty/decent work); Worker Exploitation; Income; Gender & Inequality	With regard to labour rights, the DCFTA may also trigger various forces acting towards either improving or worsening the situation, but on balance positive forces are likely to be somewhat stronger implying an overall positive contribution. Predicts that in the long run, the change in national income is estimated to double. Average wages are projected to increase by 3.1% and 4.8 % in the short and long term respectively. Overall employment and wages are likely to increase in line with rising output (the average wage increase is estimated at 3.1 and 4.8 % in the short and long run respectively). The favourable DCFTA impact on equality may come about	Although CGE modelling is primarily used, it does not provide the full picture for certain areas. Alternative social (measuring welfare and the social situation of the population) and environmental (environmental effects of the FTA due to technology change and/or improvements) modelling and analysis are carried out using CGE modelling as the basis in some cases. For the additional analysis	The standard electronic forms of consultation were used. As of August 16, 2012, the website had received 2,715 hits. 2 public meetings were held in Brussels in order to gain feedback from civil society in the EU. 2 workshops were held in Moldova where 25 to 40 stakeholders participated in each workshop. The study team also attended a meeting of the	The EC supports most of the consultant's recommendations, notably: including a clause in the DCFTA on preventing the lowering of labor standards, providing technical assistance in Georgia and Moldova's quest to manage and balance their

FTA Name	Consultant	HR Issues	Findings	Methodology	Consultations	Position paper
			<p>if and when increasing living standards begin to support gradual changes in societal preferences on equality. Other mechanisms of positive influence may be related to international conventions supporting equality and condemning discrimination. Some positive impact (albeit limited) may also be related to increase in women's participation in the labour market e.g. through a growing employment in the textile and clothing sector dominated by female workers. Finds that overall, worsening of the inequality situation relative to current trends does not appear likely. As regards the labour rights, the DCFTA may also trigger various forces acting towards either improving or worsening the situation. Finds that on balance, positive forces are likely to be somewhat stronger compared to the current situation. Suggests that this effect may be further strengthened if administrative capacity to implement labour rights is enhanced and public demand for rising standards in this area increases. With regard to social protection, DCFTA impact may rather be limited and related to budget income and the need to mobilise resources to eradicate poverty. The DCFTA may also have a positive, albeit limited impact on further development of social dialogue.</p>	<p>on environmental effects of the FTA due changes in technology, only qualitative methodology is used. A "mini case study" of the wine sector was carried out in order to analyze Moldova's SPS policies.</p>	<p>European Economic and Social Community (EESC) in Moldova and in Brussels. Personal interviews were held mainly in between the TSIA workshop and in the second phase of the study for the sectoral analysis.</p>	<p>economic structural reform.</p>

FTA Name	Consultant	HR Issues	Findings	Methodology	Consultations	Position paper
EU-Morocco DCFTA	ECORYS (2013)	Labor Health & Safety; Livelihood of Workers (poverty/decent work); Worker Exploitation	With respect to human rights, the SIA provides a comprehensive survey of the existing situation and a general assessment of the potential impact of a DCFTA. The DCFTA is expected to mainly affect economic and social rights and not cultural, civil or political rights. The already existing, horizontal human rights provisions of the Association Agreement will remain untouched and valid also for the future DCFTA component. The overall effect of the DCFTA on the human rights situation in Morocco is likely to be positive and largely indirect. No detailed analysis was conducted by the consultant on the potential implications and specific impacts on human rights at sectoral level or in connection with particular regulatory measures envisaged (such as improvement of business environment, right of establishment, intellectual property, etc.). Nonetheless, given the nature of the DCFTA, any such impact is expected to be very limited and in any case, indirect. The study predicts significant income increase expected as a result of the DCFTA according to the CGE model that may in part be due to job creation rather than wage increases.	The standard CGE quantitative modelling is used for some areas of analysis however, it is not effective for all areas of analysis: social effects such as employment, poverty and welfare. More qualitative methods needed to be consulted for these areas.	The consultants strongly believe in uninterrupted communication with stakeholders. They used the standard electronic methods as well as a designated Facebook page for stakeholders. There were two public meetings in Brussels: one immediately after the submission of the draft inception report and the other after the draft final report. Civil society participants of the workshops in Morocco provided their input for the in-depth policy analysis as well as the phase 2 and 3 policy recommendations. The study team attended an European Economic and Social Community (EESC) meeting to present its reports to EU and Moroccan stakeholders. Face-to-face interviews with experts were also used.	The EC has taken on board most of the recommendations of policies areas that should be dealt within the DCFTA rather than outside the DCFTA. Of the policy areas that the SIA suggests should be managed outside the DCFTA, the EC is still working to see what aspects can be dealt with (e.g. the case for training of businesses in order to allow easier update and upgrade of human capital through technical assistance). The EC says that some of the recommendations have not been brought up in negotiations yet

FTA Name	Consultant	HR Issues	Findings	Methodology	Consultations	Position paper
						<p>but that it still plans to do so. The EC also ensures that the trade and sustainable development chapter will be included in the final DCFTA in order to address the various social, environmental and economic recommendations.</p>

FTA Name	Consultant	HR Issues	Findings	Methodology	Consultations	Position paper
EU-Tunisia DCFTA	ECORYS (2013)	Labor Health & Safety; Livelihood of Workers (poverty/decent work); Worker Exploitation	With respect to human rights, the SIA provides a comprehensive survey of the existing situation and a general assessment of the potential impact of a DCFTA. The DCFTA is expected to mainly affect economic and social rights and not cultural, civil or political rights. The already existing, horizontal human rights provisions of the Association Agreement will remain untouched and valid also for the future DCFTA component. The overall effect of the DCFTA on the human rights situation in Tunisia is likely to be small but positive and largely indirect. No detailed analysis was conducted by the consultant on the potential implications and specific impacts on human rights at sectoral level or in connection with particular regulatory measures envisaged (such as improvement of business environment, right of establishment, intellectual property, etc.). Nonetheless, given the nature of the DCFTA, any such impact is expected to be very limited and in any case, indirect. As regards rights at work, for sectors subjects to the negotiations, the DCFTA is expected to oblige Tunisian products to comply with, amongst others, EU standards directly affecting working conditions (e.g. restrictions on use of dangerous chemical substances). The inclusion of a sustainable development chapter in the DCFTA aims to	CGE modelling was predominately used but qualitative analysis was used to complement the quantitative methodology for the social, economic and environmental pillars. Qualitative analysis consisted of literature review, analysis of official reporting schemes set out in international conventions, interviews with key informants, and interpretation of quantitative results, especially at the sectoral level	The standard electronic forms of consultation were used including a designated Facebook page for stakeholders to be able to interact with each other and not just with the consultant. Two public meetings were held in Brussels, subsequently after the submission of the draft inception report and after the draft final report. A workshop was held in Tunis for stakeholders to provide in-depth feedback. The consultants have not been able to attend other related workshops/conferences but have reached out to some organizers to gain information. Face to face interviews and surveys have been conducted.	The EC has taken on board most of the recommendations of policies areas that should be dealt within the DCFTA rather than outside the DCFTA. In terms of economic policies, the EC is willing to consider the phasing in of tariff reductions as appropriate. The EC notes the importance of addressing technical assistance and discussions have already started with Tunisia in this regards, even though formal negotiations have not started. Tunisia's active involvement will be needed in identifying its

FTA Name	Consultant	HR Issues	Findings	Methodology	Consultations	Position paper
			<p>help maintain a good standard of rights at work. Predicts the increased dynamics in the labour market will possibly create both opportunities for the currently unemployed and a threat to those potentially vulnerable to lose their jobs. Also, the significant wage increase expected as a result of the DCFTA indicates that demand for labour in general will increase. With regard to the labour market in Tunisia, which is characterised by limited job creation and by jobs in predominantly low-skill sectors, the overall impact of the DCFTA in terms of unemployment among less skilled workers is likely to be beneficial. As regards rights at work ,for sectors subjects to the negotiations, the DCFTA is expected to oblige Tunisian products to comply with, amongst others, EU standards directly affecting working conditions (e.g. restrictions on use of dangerous chemical substances). The inclusion of a sustainable development chapter in the DCFTA aims to help maintain a good standard of rights at work. This chapter is likely to create a monitoring mechanism that includes civil society, trade unions and business representatives. The DCFTA may also encourage improvements of labour standards thus complementing the cooperation in the social field as established in the Association Agreement and in the</p>			<p>technical assistance needs. Under social policies, the EC is taking on board most of the recommendations however, it does not feel that the following issues can be directly addressed in the DCFTA: effective implementation of HR treaties with a focus on vulnerable groups; consider creating monitoring mechanisms of the social impact (including HR) of the DCFTA. Under environmental recommendations, the EC has taken on board the monitoring mechanism for environmental impacts of the FTA. It has not</p>

FTA Name	Consultant	HR Issues	Findings	Methodology	Consultations	Position paper
			<p>European Neighbourhood Policy Action Plan for the years 2013 – 2017. With respect to human rights, the SIA provides a comprehensive survey of the existing situation and a general assessment of the potential impact of a DCFTA. The DCFTA is expected to mainly affect economic and social rights and not cultural, civil or political rights. The overall effect of the DCFTA on the human rights situation in Tunisia is likely to be small but positive and largely indirect. No detailed analysis was conducted by the consultant on the potential implications and specific impacts on human rights at sectoral level or in connection with particular regulatory measures envisaged (such as improvement of business environment, right of establishment, intellectual property, etc.). Nonetheless, given the nature of the DCFTA, any such impact is expected to be very limited and in any case, indirect.</p>			<p>however, taken on board the notion of creating incentives for environmentally friendly production and suggests that they be dealt with in other arenas (whether bilateral or multilateral).</p>

FTA Name	Consultant	HR Issues	Findings	Methodology	Consultations	Position paper
EU-Ukraine FTA	ECORYS (2009)	Labor Health & Safety; Livelihood of Workers (poverty/decent work); Worker Exploitation	Finds that growth potential in some sectors might spur investments, entrepreneurship and self-employment, which should, as mentioned above, have positive effects on incomes and poverty reduction in Ukraine. Employment increases were less evident in the short run and more notable in the long run. The nature of employment – required skills and skill levels demand - might be subject to change; consequently, the restructuring of industries might have negative social effects in the short run. The FTA is also expected to encourage an overall improvement of working conditions, health, and safety standards. The increased employment opportunities, increases in wages and the quality of work may also reduce out-migration of labour, and particularly illegal migration and trafficking of women into prostitution. As such it should improve the situation of some of the weakest groups, such as low skilled workers and the uneducated. Women were also expected to reap benefits from a change in the production structure of traditional sectors, such as wearing apparel, leather, and textiles. The Commission services will seek to take on board social aspects of sustainable development in the ongoing FTA negotiations, addressing the effective implementation of international labour standards, such as specific ILO conventions.	As mentioned in other studies, CGE modelling has its limitations in measuring certain economic phenomena (e.g. involuntary unemployment) because of certain assumptions made in the model. For this reason, the consultants further tested the CGE outcome using other, flanking methodologies.	Three public meetings in Brussels, one after each phase of the study; a stakeholder workshop in Kyiv where there were 65 participants from civil society. These participants were highly engaged in the lively debates and different perspectives on the pros and cons of the FTAs were exchanged. The standard electronic forms of outreach were used: the consultants received over 30 comments and questions for clarification during the study. The SIA newsletter that was sent out every 2 months to over 100 people who expressed interest. Bilateral interviews and discussions were held with important stakeholders and experts.	The EC generally agrees with the recommendations and brings them a few steps further for the launch of negotiations: The EC explains that economic recommendations have already been directly or indirectly been a part of the Council's negotiating directives of the Association Agreement, of which the FTA is a crucial part. The EC further explains that the FTA portion will include provisions for Ukraine to gradually integrate its economy closer to the EU economy in terms of market access and regulatory

FTA Name	Consultant	HR Issues	Findings	Methodology	Consultations	Position paper
			<p>The Commission services are promoting the decent work agenda and are working on the gradual approximation of Ukraine to EU standards and practices in the area of employment, social policy, and equal opportunities.</p>			<p>convergence. The EC stresses the importance of improving Ukraine's investment climate by including provisions for improving public procurement procedures--one of the key areas where the EU have offensive interests to conclude an FTA since services in the non-service sector are not liberalized under the GATS.</p>

FTA Name	Consultant	HR Issues	Findings	Methodology	Consultations	Position paper
EU-Egypt DCFTA	ECORYS (2014)	Income; labour protection; poverty; health; gender & inequality.	With respect to human rights, the DCFTA is expected to mainly affect economic and social rights and not cultural, civil or political rights. Both the EU and Egypt are expected to experience a rise in national income from the DCFTA. In the short run, wages for low, medium and high skilled workers are expected to increase by 1.9 percent, 4.8 percent and 0.1 percent respectively. In the long run these expected wage changes may be less positive, and for low skilled workers they even turn negative. Poverty is expected to show a small decrease in the short run; in the long run poverty is estimated to increase again, to 27.2 percent. The differences between income groups are limited, and therefore inequality is not expected to change significantly as a result of the DCFTA. There are various channels through which human rights could be affected, e.g. changes in food safety standards are likely to positively affect the right to health, the loss in tariff revenues might lead to less budget for HR protection at least in the short run, etc. The net effect is difficult to predict. It is expected that the human rights of vulnerable groups could be at risk, since the possible increase in poverty and reduction in disposable income especially for the low-skilled workers in the long run as a result of the DCFTA could negatively affect the	This study used the six pillar methodological approach. The quantitative CGE model was complemented by the qualitative methods of a literature review, consultations, review of official reporting schemes inscribed on respective international conventions and CCA. There were no significant references to or usage of case studies.	The standard set of electronic consultations were used, including social media (Facebook, twitter and LinkedIn). Two public meetings in the EU for EU civil society as well as a TSIA workshop in Egypt; ad hoc consultations including personal interviews. An SME survey (over 80 participants, 20% of which from Egyptian civil society) revealed a lack of knowledge by SMEs on the actual possibilities that could develop out of an EU-Egypt DCFTA	Missing

FTA Name	Consultant	HR Issues	Findings	Methodology	Consultations	Position paper
			<p>right to an adequate standard of living, the right to health (access to medical care), and the right to education for these groups. These negative impacts can however be mitigated by flanking measures of the government. Predicts that pressure from EU-based businesses will improve labour standards. Predicts there will be a change in attitude towards equality, yet shifts in employment opportunities will negatively affect women.</p>			
EU-Jordan DCFTA	ECORYS (2014)	Income; labour protection; poverty; health; gender & inequality.	<p>Comprehensive overview of human rights situation, but the rights the DCFTA impact will be very broad and shallow. The increase in wages in the range of 2-3% in combination with an expected decrease in consumer prices has a positive social effect. Poverty will decrease in relative terms with the share of people living below the poverty line declining from 11.9 percent to 11.2 percent. With respect to inequality, the difference between income groups in terms of the total DCFTA social effect is slightly in favour of the lowest income groups. As with Egypt, predicts that there will be a change in attitude towards equality, yet shifts in employment opportunities will</p>	<p>There was a larger emphasis on case studies than in other SIA. Four case studies were included: pharmaceuticals; financial services; telecom services; and water scarcity, quality and energy. Telecom and financial services in particular were chosen because of the possibility of further liberalization in those sectors. Water was chosen because of the likelihood that the DCFTA will add more pressure to Jordan's natural resources.</p>	<p>The standard electronic forms of consultation were used. Up until August 31, 2014, the website received 1,078 views mostly around the time of the public meetings in Brussels and in the week of the workshop in Amman. Of the total views, at least 24% were from Jordan. More than 30 Jordanian participants from businesses and NGOs were present at the workshop in Amman. Interpreters were</p>	Missing

FTA Name	Consultant	HR Issues	Findings	Methodology	Consultations	Position paper
			<p>negatively affect women. The wages of all workers in Jordan will increase while the European wages remain unchanged. The wages for the high and medium skilled workers are expected to increase more than the wage increase for the low skilled workers (2.8 percent versus 2.4 percent, respectively). The human rights the DCFTA impact will be very broad and shallow. It also depends on the changes in the economic structure, with more positive human rights changes for people working in expanding sectors. Reduced poverty may lead for the large majority of the population to an improved human rights situation.</p>	<p>Pharmaceuticals were studied because of their high share in Jordan's total exports.</p>	<p>present to translate simultaneously between Arabic and English. There were 82 respondents in the SME survey, 8 of which were from Jordan even though SMEs make up almost 99% of private enterprises in the country. Some of the feedback provided by stakeholders included the need for more diverse consultation tools and making the workshops free and open.</p>	

Annex 3. The Kucera template for measuring FACB rights violations

Category	Description	Weight
	Freedom of association/collective bargaining related liberties	
1	Murder or disappearance of union members or organizers	2
2	Other violence against union members or organizers	2
3	Arrest, detention, imprisonment, or forced exile for union membership or activities	2
4	Interference with union rights of assembly, demonstration, free opinion, free expression	2
5	Seizure or destruction of union premises or property	2
	Right to establish and join union and worker organizations	
6	General prohibitions	10
7	General absence resulting from socio-economic breakdown	10
8	Previous authorization requirements. <i>Does not include requirements that unions register with governments, unless these requirements are deemed onerous by the ILO.</i>	1.5
9	Employment conditional on non-membership in union	1.5
10	Dismissal or suspension for union membership or activities. Includes dismissal for strike activities.	1.5
11	Interference of employers (attempts to dominate unions)	1.5
12	Dissolution or suspension of union by administrative authority	2
13	Only workers' committees and labour councils permitted.	2
14	Only state-sponsored or other single unions permitted. <i>Includes allowing only one union per industry or sector.</i>	1.5
15	Exclusion of tradable/industrial sectors from union membership	2
16	Exclusion of other sectors or workers from union membership. <i>Includes exclusion of public sector workers from union membership. Excluding "essential</i>	2

	<i>services” is acceptable, provided the definition of “essential services” is not excessively broad (i.e. following ILO guidelines, limitations on armed forces’ union membership are acceptable).</i>	
17	Other specific de facto problems or acts of prohibition	1.5
18	(No) Right to establish and join federations or confederations of unions	1.5
19	Previous authorization requirements regarding above row	1
	Other union activities	
20	(No) right to elect representatives in full freedom. Includes requirement that union leaders must work full time in a given industry.	1.5
21	(No) right to establish constitutions and rules	1.5
22	General prohibition of union/federation participation in political activities. Includes limits on union contributions to political parties.	1.5
23	(N) Union control of finances. <i>Includes situations in which unions receive a substantial portion of financing from government sources, or rules that unions may not receive financial contributions from abroad or from certain groups.</i>	1.5
	Right to collectively bargain	
24	General prohibitions	10
25	Prior approval by authorities of collective agreements	1.5
26	Compulsory binding arbitration. Includes systems in which compulsory binding arbitration is necessary before a (legal) strike may be called.	1.5
27	Intervention of authorities. Includes unilateral setting of wages by authorities.	1.5
28	Scope of collective bargaining restricted by non-state employers	1.5
29	Exclusion of tradable/industrial sectors from right to collectively bargain	1.75
30	Exclusion of other sectors or workers from right to collectively bargain. <i>Includes the exclusion of civil servants or all public sector workers. Excluding “essential services” is acceptable, provided the definition of “essential services” is not excessively broad.</i>	1.75
31	Other specific de facto problems or acts of prohibition. <i>Includes “no legal right” to bargain collectively (but no legal prohibition on doing so).</i>	1.5

	Right to strike	
32	General prohibitions	2
33	Previous authorization required by authorities. <i>Includes requirement for official approval prior to strike. A requirement to notify officials prior to a strike is not coded as a violation.</i>	1.5
34	Exclusion of tradable/industrial sectors from right to strike	1.5
35	Exclusion of other sectors or workers from right to strike. <i>Includes the exclusion of civil servants or all public sector workers. Excluding “essential services” is acceptable, provided the definition of “essential services” is not excessively broad.</i>	1.5
36	Other specific de facto problems or acts of prohibition	1.5
	Export processing zones	
37	Restricted Rights in EPZs. Includes export processing zones, free trade zones, and/or special economic zones.	2
Source: Kucera (2002). Weights according to Mosley (2011)		

Annex 4. Sources and coding

Sources

The State Department reports are prepared by US embassy personnel, with input from several local and US actors. They then get reviewed by the State Department Bureau for Democracy, Human Rights and Labour with input from other State Department Bureaus and outside experts, after which they are submitted to Congress. The reports cover a range of issues, amongst which are two specific sections on freedom of association for labour organizations and collective bargaining rights.

The ILO's Freedom of Association cases are handled by the Committee on Freedom of Association (CFA). The Committee has nine members, three from each part: governments, employers, and workers. If a complaint against a government violating ILO Convention 87 or 98 is lodged, the Committee first looks if it is relevant. If it is considered relevant, the Committee then consults with the government for a response. When the Committee finds that a violation has occurred, it finally writes and publishes a report outlining ways to resolve the conflict.

The ILO's Supervising Reports are produced by the CEACR (Committee of Experts on the Applications of the Conventions and Recommendations). It only supervises the conventions a given country has actually ratified (in contrast to the CFA who can accept complaints about countries who have ratified neither 87 nor 98). The CEACR's reports on ILO Convention 87 or 98 come out whenever the Committee makes relevant observations on the country's application of core labour standards.

The last source is The International Trade Union Confederation (ITUC, formerly ICFTU), the largest global trade union federation, which reports on collective labour right violations in almost all countries. These reports, the Survey of Violations of Trade Union Rights, are published annually (although recently changed into a regularly updated blog-format), and are based on information by the ILO, NGO's, member organizations and their own observations. Although this is the source with the biggest potential bias, it is also the most elaborate and detailed one.

Coding

We worked with three coders to complete the assessment per country on the basis of the three sources. One should take into account that, although following the same methodology, the codification process includes the interpretation of text documents made by different coders. Then, distinct coders could interpret FACB rights violation in distinct ways, resulting in a kind of coder bias. To avoid this problem, beyond following the same methodology as applied by Layna Mosley, multiple coders were used in this task and, for a random sub-sample of country-years, more than one person codified the same country-year for comparison of results. All issues identified as possible sources for different interpretations were discussed (*infra*).

In addition, systematic coding differences could arise between our coding and the coding of Mosley. In order to spot systematic differences we correlate our index and the one of Mosley with external measures. If differences would be systematic, the index should correlate differently with other external measures (Nardo et al., 2005), i.e., if there are significant differences in interpretation between FACB rights codified for the period 1985-2002 and FACB rights codified for the period 2003-2012, these measures most probably would not correlate in the same way with other measures that are not affected by the coders employed in the codification of FACB rights. To check this potential bias, Table A1 presents the correlation of these measures of FACB rights with two other measures of labour rights discussed before: the Freedom House Civil Liberties and the Worker's Rights index provided by Cingranelli and Richards. The correlation of FACB rights with the CIRI worker's rights is 0.60 for the period 1985-2002 and 0.55 for the period 2003-2012. The correlation of FACB rights and civil liberties is -0.55 for the period 1985-2002 and -0.60 for the period 2003-2012. In both cases, the correlations with the external indices with FACB rights before and after 2002 point to same direction and the differences are not substantial (only 0.05). Based on this evidence, it does not seem that there are systematic coding differences. Consequently, we consider these measures comparable over time.

Table A1: Correlation of FACB rights and other labour rights measures

	2003-2012	1985-2012
CIRI Worker's rights	.60**	.55**
FH Civil Liberties	-.55**	-.60**

** Correlation is significant at the 0.01 level (2-tailed).

During the coding process we noted some issues related to coding which we discuss. First, it is not possible in practice to add up the number of observation of different violations within the same category. The sources with which we work are regrettably not as systematically constructed to get an accurate and reliable picture of the complete number of violations that take place. It is however possible to get a reliable and valid picture of the different types of violations that occur within a certain country. In this way, a global picture of the labour rights situation in any given country is extracted. To this purpose, when a similar violation was observed several times, these observations still count as one violation. As a result, all violations are coded as being either present (1) or absent (0) (dichotomous). This means that cases in which single, solitary events occur are weighted equally as systematic abuses of the same category. A case in point would be category '2': 'Other violence against union members or organizers'. When for example one employee in Belgium in 2009 was threatened with a knife to step down as a trade union leader, this was an isolated incident. This however clearly constitutes a violation of category 2, and was coded as such. In the same year in Colombia there were numerous reports of (death) threats and structural physical violence by employers towards striking or negotiating employees. This was coded in the same way as the Belgian case, even though in Colombia these violations are more common practice, while in Belgium they constitute an exception.

Secondly, even though Kucera's template is elaborate and refined, and Mosley adds a number of coding notes to the template, problems still arise in practice when the observations and coding starts. Some cases fall in between categories, or do not seem to fit any description. Other observations can be interpreted in several ways. In the spirit of full transparency and consistency, we include a list of all the problems encountered, and explain how we dealt with them during the coding process. Inter-coder discussions agreed upon interpretations of sources and the coding of violations:

- Violations in sub-national regions, states, provinces etc., within countries are coded as violations for the country as a whole (e.g. Canada, reported in ITUC, 2011, p. 84).
- When relevant, and given that there is enough information, (semi-) autonomous regions are observed apart from the country they form a part of (e.g. Macau and Hong Kong with regards to China).
- If a government is a party in a collective agreement (e.g. in negotiations with civil servants) the unilateral changing of terms, negotiable terms etc. are considered a violation '27' (e.g. Hong Kong, reported in ITUC, 2011, p. 139).
- The requirement to get approval of a negotiated agreement by the government is not seen as a violation (e.g., Brazil, reported in ITUC, 2011, p. 83). The requirement to get approval to start negotiations on the other hand is a violation.
- If a government or a mediator proposes 'binding' solutions to a conflict, but the parties both have the possibility to reject them, it is not seen as a form of compulsory and binding arbitration (e.g., Uruguay, reported in ITUC, 2011, p. 114).
- Threats, death threats and harassment are considered to be a '2' violation ('Other violence').
- Violation '37' (regarding EPZs) is only coded if there are less rights in the EPZs (it is a law-variable, not a practice-variable).
- 'Yellow' or 'Parallel' unions are considered a violation 11. A pro-management union, taking over the position formerly held by an independent union, is a de facto act of interference by the employer (e.g., Mexico, reported in ITUC, 2011, p. 103).
- Blacklisting union members is considered a violation 9, since the list consists of union-members and organizers in order to shut them out of other jobs (e.g., Macau, reported in ITUC, 2011, p. 155).
- If one sector is allowed to have 'workers councils' instead of unions (e.g. South Korea), it is considered a violation 16.
- If one sector is allowed only one union (e.g., Spain, reported in ITUC, 2011, p. 219), it is considered a violation 17.

- The freezing of union-assets after a strike (e.g., Malta, reported in ITUC, 2006, p. 316) is considered a violation 36 due to its direct link with the strike.
- One allowed state-sponsored union confederation, with only semi-autonomous sub-unions (e.g. Jordan, 2011, p. 241) is considered a violation 14.
- A requirement to notify the management of a union meeting, and a cap on the number of hours per year a union can meet during working-hours (e.g. Portugal, reported in ITUC, 2011, p. 211) is not considered a violation.

In the information for category 16 it is noted that limitations on armed forces' union membership are acceptable. However, the ILO makes an exception for armed forces and the police. Throughout the coding we have followed Mosley's codebook, and have accepted the armed forces as the only limitation on the right to union membership, instead of the ILO definition. The other 'sector exclusion categories' do not mention the ILO definition, but only speak of 'essential services' not being defined too broadly. Here we have used the ILO definition that it concerns sectors, which have an impact on the immediate health and security of the people and society.

Annex 5. List of Interviewees

Albarelo, Michela

General Director. Fundació Pau I Solidaritat within the Confederación Sindical de Comisiones Obreras (CCOO). Spanish Central Trade Union, and its Foundation for Development and International Relations.

April 23, 2015. Barcelona, Spain.

Altintzís, Yorgos

Head of Economic and Social Policy. International Trade Union Confederation (ITUC).

April 28, 2015. Brussels, Belgium.

Bou, Jean-Pierre

Country-desk Officer Colombia. European External Action Service.

April 15, 2015. Bogota, Colombia.

Brando Pradilla, Bernardo

Former CEO in Formfit de Colombia S.A. – Multinational Corporation of the textile industry.

April 14, 2015. Bogota, Colombia.

Comba, Andrés

Advisor on Trade and Sustainable Development. Colombian Ministry of Commerce.

April 14, 2015. Bogota, Colombia.

Cooreman, Jeroen

Ambassador of Belgium. Belgian Embassy to Colombia.

April 16, 2015. Bogota, Colombia.

De Meerleer Sánchez, Jean Pierre

Trade Officer. European Delegation to Colombia.

April 16, 2015. Bogota, Colombia.

Echeverry Fajardo, Tomás

Financial and Executive Manager. Cauchopar (Grupo Madre Tierra) – Holding Company in the agricultural sector.

April 20, 2015. Bogota, Colombia.

García, Amaia

Director. Taula Catalana per la Pau i els Drets Humans a Colòmbia. Conglomerate of Spanish organizations for the advancement of peace and human rights in Colombia.

April 23, 2015. Barcelona, Spain.

García Ferrer, Miriam

First Councillor and Head of the Commercial Section. European Delegation to Colombia.

April 16, 2015. Bogota, Colombia.

Gaviria Ramos, Gloria

Chief Officer of Cooperation and International Relations. Colombian Ministry of Labour.

April 16, 2015. Bogota, Colombia.

Gómez, Julio Roberto

Union President. Confederación General del Trabajo (CGT) – Central Trade Union.

April 17, 2015. Bogota, Colombia.

Hanssens, Renaat

Advisor at the Research Unit of the Algemeen Christelijke Vakbond (ACV) and member of the Strategic Advisory Council International Flanders.

April 1, 2015. Brussels, Belgium.

Hedin, Jessica

Advisor for the Political and Press Section of the European Delegation to Colombia.

April 16, 2015. Bogota, Colombia.

Izquierdo Llanos, Marco

Vicepresident Director of Investments. Corficolombiana Inversiones – Colombian Investment Firm.

April 20, 2015. Bogota, Colombia.

Lennert, Adam J.

Human Rights Officer. Human Rights Directorate at the US Embassy in Bogota, Colombia.

April 20, 2015. Bogota, Colombia.

Mejía V., Katheryn

Director of Social Development. Asociación Colombiana de Exportadores de Flores (Asocolflores) – Colombian Guild for Flower Exporters

April 20, 2015. Bogota, Colombia.

Orjuela García, José Diógenes

General Director of International Relations. CUT – Central Unitaria de Trabajadores de Colombia (Central Union for Colombian Workers).

April 16, 2015. Bogota, Colombia.

Parra Oviedo, Jorge

Legal Assistant. UN High Commission of Human Rights in Colombia.

April 20, 2015. Bogota, Colombia.

Perelló, Sergi

Vice-Secretary General of International Relations. Intersindical – Confederació Sindical Catalana (CSC) – Catalan Central Trade Union.

April 23, 2015. Barcelona, Spain.

Pirson, Luc

First Councillor. Belgian Embassy to Colombia.

April 16, 2015. Bogota, Colombia.

Rettberg, Angelika. Ph.D.

Associate Professor. Department of Political Science, Universidad de los Andes.

April 15, 2015. Bogota, Colombia.

Rubiano, Jorge

Advisor on European Trade Relations. Colombian Ministry of Commerce.

April 14, 2015. Bogota, Colombia

Triana, Miryam Luz

Secretary General. Confederación General del Trabajo (CGT) – Central Trade Union.

April 15, 2015. Bogota, Colombia.

Urueña, René, Ph.D.

Associate Professor and Director of the International Law Programme. Universidad de los Andes

April 15, 2015. Bogota, Colombia.

Vallies, Vicente

General Director. ODHACO – International Office for Human Rights Action in Colombia.

April 1, 2015. Brussels, Belgium.

Vogt, Jeffrey

Head of Legal Affairs at the International Trade Union Confederation (ITUC).

April 28, 2015. Brussels, Belgium.

Annex 6. Questionnaire for stakeholder-interviews

1. **Regarding the trade agreement with the EU.** In how far are you familiar with the EU-Colombia TRADE AGREEMENT? What is your general appreciation of the Agreement?
2. To what extent are you familiar with the provisions **in the Agreement concerning labour rights**. Which are in your view the main features of the TRADE AGREEMENT when it comes to the protection of labour rights? Do you believe they are adequate to improve the past/current labour rights conditions? Can you give an example of how and to what extent they are (potentially) relevant to your work or sector?
3. In how far are you familiar with the **monitoring and compliance mechanisms** under the Trade and Sustainable Development Chapter of the TRADE AGREEMENT? Have they been established and used yet? Does the TRADE AGREEMENT offer credible and transparent enforcement tools for labour rights protection? What are, in your opinion, the minimum requirements for an enforcement mechanism to be credible, accessible and transparent in order to protect labour rights?
4. **How do these mechanisms compare** to the monitoring and enforcement mechanisms provided for in other TRADE AGREEMENTs, e.g. with Canada and the US? What are their respective strengths and weaknesses? In what way do they relate to one another when it comes to labour rights protection?
5. In your perception, have there been **any notable changes** in the past five years in the protection and promotion of labor rights in general and rights concerning Freedom of Association and Collective Bargaining (FACB rights) in particular, both legally and in practice? Particularly, are workers and labour unions better protected now than they were five years ago? To what dynamics would you attribute these changes, if any? Do you see any relation with the EU-TRADE AGREEMENT or other TRADE AGREEMENTs?
6. In what way do the labour rights provisions in the TRADE AGREEMENT relate to **other EU foreign policy branches** (i.e. development cooperation) or EU initiatives aimed at promoting and protecting labour (human) rights in Colombia. In how far are these provisions coherent and/or complementary to the EU's development programmes and sectorial strategies in the country? What additional measures, through trade and otherwise, could complement the TRADE AGREEMENT's provisions in order for them to better serve their potential?
7. **How accessible and transparent** is the TRADE AGREEMENT framework when it comes to dealing with labour rights issues? In your opinion, is it possible to raise labour rights issues under the agreement? Which are the main entry-points for raising violations under the TRADE AGREEMENT framework?
8. How would you describe **the current labour rights situation** in Colombia? Could you identify the most pressing labour issues, the most vulnerable economic sectors and population groups? What are the issues particular to Freedom of Association and Collective Bargaining?