

Blueprint for a Human Rights Impact Assessment of the comprehensive free trade agreement between EFTA and Mercosur¹

Key Messages

BACKGROUND

European Free Trade Area (EFTA) countries (Iceland, Liechtenstein, Norway and Switzerland) have recently agreed to a trade agreement with Mercosur (Argentina, Brazil, Paraguay and Uruguay). The scope of the agreement is broad, including many provisions which can significantly impact on the Sustainable Development Goals (SDGs) and human rights.

EFTA countries have a legal obligation to carry out an assessment of likely impacts of the trade agreement under negotiation. Yet the Swiss government has been reluctant to carry out human rights impact assessments (HRIAs). The reasons it puts forward include that the issues at stake are too complex, that disaggregated data is lacking, or that HRIA findings lack practical application.

Alliance Sud is a Swiss coalition of development NGOs which has consistently called for human rights impact assessments (HRIA) of Switzerland's planned trade agreements. In this spirit, Alliance Sud has commissioned a "Blueprint" for a HRIA of the EFTA-Mercosur trade agreement, which this paper summarizes. The Blueprint illustrates why and how a human rights-based assessment of the trade agreement is feasible. It presents how the relevant methodologies can be applied to three areas of concern from a human rights point of view, and how the approach can yield valuable, readily applicable insights for policy-making. In short, this exercise has resulted in a roadmap for carrying out a full HRIA.

METHODOLOGY

Alliance Sud began this exercise by undertaking stakeholder consultations, in accordance with HRIA methodology. These served as a basis for information-sharing with groups and individuals working on a broad range of topics (such as human rights, social policy, labour rights, biodiversity, Indigenous rights, health, or economic policy) about the content and implications of the planned agreement. The following priority areas of concern for human rights-based analysis emerged from these consultations:

- Intellectual property provisions impacts on the rights to health and to food
- Government procurement provisions impacts on social policies and programmes

¹ By Caroline Dommen, January 2020.

- Reduced tariff revenues impacts on social policies and programmes
- Increased export of agricultural commodities impacts on the right to an adequate standard of living of those who depend on the land for their livelihoods
- Exports of raw materials and import of high value-added goods and services impacts on Mercosur countries' economic development strategy
- Impacts of the planned trade agreement on women's rights, with a particular concern for lower wages and labour rights
- Impacts of the planned trade agreement on the rights of Indigenous peoples
- Impacts of intensive agricultural production methods on the right to health.

Bearing in mind that the objective of the study for this blueprint was to demonstrate how and why HRIA should be undertaken, three areas of concern were chosen to illustrate the application of HRIA methodology: (1) intellectual property provisions affecting access to medicines, (2) women's rights, and (3) agriculture trade provisions affecting Indigenous rights.

For each of these, an extensive literature review was undertaken as well as interviews with key informants, to gauge the impacts that comparable provisions in other, existing trade agreements have had on the human rights under discussion. These resulted in identification of risks that warrant attention from the human rights perspective, choice of relevant methodologies for undertaking the assessment, and identification of indicators.

INTELLECTUAL PROPERTY AND ACCESS TO MEDICINES

All EFTA and Mercosur countries have legally enshrined the right to health. Access to medicines is an integral part of this right. The EFTA-Mercosur trade agreement is likely to contain provisions on intellectual property (IP) that are more extensive than those set out in the WTO Agreement on Trade-Related Aspects of Intellectual Property Rights (TRIPs). These could affect pharmaceuticals policy in all Mercosur countries, which currently still retain considerable TRIPs flexibility.

Past experience shows that high IP standards affecting pharmaceuticals can influence the availability and price of medicines; *ex post* studies find higher medicine prices following increased IP protection. Price is only one of a number of determinants of access to medicines, nevertheless increased prices constitute a *prima facie* indication of retrogression from the enjoyment of the right to health, contrary to human rights law and policy.

Switzerland and others argue that medicine price increases are offset by other benefits that trade liberalisation and stronger IP regimes can bring. But as the State bears the duty of ensuring that medicine prices do not contribute to retrogression from realization of the right to health; the onus is on the State to demonstrate how benefits that can derive from more extensive IP rights or other benefits under the trade agreement directly compensate for the effects of medicine price increases. Aggregate numbers will not suffice; consideration of impacts on those most vulnerable to price increases must be considered. Even in the absence of concrete data due mainly to the fact that the texts of the EFTA-Mercosur trade agreement are not yet public, there are sufficient indications of risks for human rights for this area to warrant assessment from a human rights perspective.

A detailed methodology exists, which was developed specifically to assess right to health impacts of new IP standards contained in trade agreements.² Application of this methodology has yielded specific, actionable policy recommendations for governments and other actors. The Swiss government should apply this HRIA methodology to assess the provisions of the IP chapter of the EFTA-Mercosur trade agreement that can affect pharmaceutical production and prices in the Mercosur countries and implement the conclusions that emerge from the assessment.

GENDERED IMPACTS OF TRADE AND TRADE RULES

All EFTA and Mercosur countries are bound by their legal commitments to ensure non-discrimination, including against women. All four Mercosur countries score poorly on gender equality. The planned trade agreement is not expected to specifically mention women, but they will inevitably be affected by it. In some areas the agreement may offer new opportunities for women, in others it can exacerbate discrimination. It is therefore necessary to pay due attention to possible differential impacts of the trade agreement on women, in order to not further entrench the discrimination which they face.

A number of methodologies exist to assess impacts of policy changes on women. This Blueprint suggests drawing in particular on the macroeconomic and microeconomic trade and gender analytical framework developed by the UN Conference on Trade and Development (UNCTAD)³, and overlaying it with the human rights-specific elements of HRIA methodology.

This approach offers insights into areas of risk and of opportunity for women that the agreement poses, based on which concrete and targeted interventions can be designed and implemented. The Swiss government is encouraged to pursue this line of enquiry in the context of HRIA of this and other trade agreements.

AGRICULTURAL COMMODITY EXPORTS AND INDIGENOUS PEOPLES' RIGHTS

All EFTA and Mercosur countries are bound to respect, protect and fulfil Indigenous peoples' rights, through legally-binding human rights treaties as well as the UN Declaration on the Rights of Indigenous Peoples (UNDRIP). Human rights recognizes the right to participate in policy-making; this obligation is drawn into much sharper focus where Indigenous peoples' rights are concerned. There is no indication of Indigenous groups having been consulted on, or participated in, the process towards adoption of the planned trade agreement, which is a prima facie indication of non-respect of Indigenous rights.

New agricultural exports from Mercosur could particularly affect the rights of Indigenous peoples. Even if EFTA only accounts for a tiny fraction of the beef, soy and other agricultural products exported from the region, the planned trade agreement is a systemic contribution to increased exports of these goods. In some cases liberalization of trade or investment in extractive industries

² Simon Walker (2009) *The Future of Human Rights Impact Assessments of Trade Agreements*, p. 123 & sqq.

³ UNCTAD (2018) *Trade and Gender Linkages: An Analysis of Mercosur*.

have provided Indigenous peoples with opportunities for employment or revenue generation. Meanwhile, however, commercial agriculture has accounted for most of the deforestation in Latin America over recent decades, destroying resources that are essential for the livelihoods and culture of many Indigenous groups.

Established HRIA methodology is suited to assessing possible impacts on Indigenous rights of the planned EFTA-Mercosur agreement. Additional insights can be drawn from the the Akwé: Kon Guidelines on the conduct of impact assessment of developments that take place or are likely to impact on Indigenous and local communities.⁴ These guidelines are particularly helpful for ensuring effective Indigenous participation in all stages of impact assessment. Application of these methodologies make it possible to identify concrete steps towards making trade agreements more supportive of Indigenous rights, including ways to involve Indigenous groups in a meaningful way in decision-making related to trade policy.

It is important to note that as Indigenous people often act as stewards of natural resources, their views are uniquely valuable in designing trade-related rules that embrace environmental and sustainability imperatives, and can thus help all countries design policies that meet today's challenges.

FINDINGS

The research undertaken for this blueprint confirms that agreements such as the comprehensive free trade agreement between EFTA and Mercosur can bring economic benefits for some sectors of the population, but they can also lead to adverse effects for other sections of the population.

This blueprint demonstrates that methodologies exist for meaningfully assessing human rights impacts of trade agreements, in a way that helps identify the least human rights-adverse options, as well as flanking or mitigating measures necessary to safeguard the human rights of those who risk being adversely affected. In addition to being a means for Switzerland to comply with its human rights obligations, HRIA can be a central tool for ensuring coherence in Switzerland's foreign policy.

This blueprint confirms that HRIAs do not seek to predict what will follow from a trade agreement; rather their aim is to indicate areas of risk, in a way similar to a risk assessment or a due diligence approach. It also recalls that even the economic modelling techniques often used to inform trade negotiating positions do not seek to predict outcomes but provide insights into possible consequences of defined scenarios, often based on incomplete information.

Being clearly rooted in the human rights normative framework and narrowing in on selected issues for rigorous analysis, HRIAs can yield clearly-defined findings of practical application even when the issues under negotiation are complex and causality hard to establish. This has been demonstrated by past practice in this area. The HRIA of the African Continental Free Trade

⁴ Secretariat of the Convention on Biological Diversity (2004) *Akwé:Kon Voluntary Guidelines for the Conduct of Cultural, Environmental and Social Impact Assessment regarding Developments Proposed to Take Place on, or which are Likely to Impact on, Sacred Sites and on Lands and Waters Traditionally Occupied or Used by Indigenous and Local Communities*.

Agreement,⁵ for instance, put forward specific proposals for changing the wording of the draft texts, which were taken up by negotiators, as well as recommendations for implementation and future monitoring of the agreement. By their very nature, these recommendations responded to the complexity of the issues at hand – by providing for ongoing monitoring, for instance, they contribute to better understanding the differentiated impacts of trade agreements on different groups.

At present, there is little monitoring of the economic impacts of trade agreements after their entry into force, let alone on different groups within a country. Impact assessment – *ex ante* and *ex post* – is a key step for generating the knowledge and data that the world currently lacks. Developing HRIA practice will contribute to this, through efforts to gather relevant data and through raising awareness amongst both the trade and the human rights communities about the objectives and challenges of each other's work. The blueprint argues that this improved understanding and collaboration around economic policy can lead not only to increasingly robust HRIAs, but also, more importantly, more robust trade agreements.

The results of some of the wide-ranging impact assessments of trade agreements have been disappointing. This blueprint shows that through selecting a specific focus and rigorously applying HRIA methodology, it is possible for HRIAs to produce useful results, including through the very process of undertaking them. Their potential to generate valuable knowledge, to contribute to sustainable trade policy-making, and to ensure foreign policy coherence justify the investment of time and resources they require.

The purpose of this blueprint was to provide insights into the practice of human rights impact assessments. Although it did not seek to generate recommendations for the outcome of negotiations, one point so clearly emerges from the study undertaken that it can already be highlighted: human rights and sustainability issues have to be considered in every part of a trade agreement. EFTA countries deserve credit for including trade and sustainable development chapters into their trade agreements. However, as currently worded, these are insufficient. Future trade and sustainable development chapters need, at the very least, to integrate monitoring and oversight functions with respect to all the other chapters of the trade agreement. The chapters should, amongst other things, set out measurable indicators and specify dates for the Joint Committee to either undertake, or delegate, ongoing assessment over time.

RECOMMENDATIONS

- The Swiss government should carry out systematic *ex ante* and *ex post* HRIAs of its trade agreements.
- The Swiss government should review existing trade agreements (FTAs) with developing countries with regard to their human rights impacts and use the results of such reviews to identify particular risk areas and further develop the methodology for *ex ante* analyses of future FTAs.
- The Swiss government should include a broad range of views and experience when formulating positions and options in trade policy negotiations. An independent body should be entrusted

⁵ UN Economic Commission for Africa & Friedrich-Ebert-Stiftung (2017) *The Continental Free Trade Area (CFTA) in Africa – A Human Rights Perspective*.

with carrying out and implementing a HRIA and this independent body should necessarily include the views of local groups that do not usually participate in trade negotiations, such as Indigenous communities, small-scale farmers, local governments, women's groups or health ministry officials. Such consultations should engage with specific trade-related topics, and should involve in-depth discussions based on hard data or the best available relevant data.

- The Swiss government should include a broad range of views and experience in trade negotiations by including in its negotiating delegations include a minimum number of women and officials from other, non-trade, ministries.
- The Swiss government should make negotiating positions and the basis for these publically available
- The Swiss government should encourage other EFTA States, as well as the EFTA Secretariat to make negotiating positions and the basis for these publically available
- The Swiss government could spearhead initiatives, at the national and international level, to ensure that economic modelling on which trade negotiating scenarios and positions are developed include more sophisticated consideration of differential impacts on different groups.
- The Swiss Parliament, before its deliberations on the ratification of the agreement with Mercosur, should demand that the Federal Council carry out a HRIA. Without such an assessment, Parliament will lack sufficient basis for decision-making. Indeed, to be able to make a fully informed decision, Parliament needs a systematic analysis of the implications of the planned agreement in terms of human rights and of its consequences for global sustainable development.