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增进和保护所有人权——公民权利、政治权利、
经济、社会和文化权利，包括发展权

食物权问题特别报告员奥利维尔·德舒特的报告

增编

贸易和投资协定对人权的影响评估指导原则*

内容提要

本报告载述了贸易和投资协定对人权的影响评估指导原则。这些指导原则意在指导各国如何以最佳方式确保它们缔结的贸易和投资协定与其根据国际人权文书所承担的义务保持一致。

* 本访问报告的内容提要以所有正式语文分发。报告附于内容提要之后，仅以原文分发。

Annex

Guiding principles on human rights impact assessments of trade and investment agreements

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Introduction to the guiding principles

1. In paragraph 34 of its resolution 13/14, the Human Rights Council encouraged the Special Rapporteur to explore, in consultation with Member States and relevant stakeholders, ways and means of raising the capacity of countries, particularly developing countries, including least developed and net food-importing countries, to ensure the realization and protection of the right to adequate food for their populations, and to report his findings to the Council. The guiding principles on human rights impact assessments of trade and investment agreements (see appendix) are one contribution in the fulfilment of this part of the mandate. The guiding principles are intended to provide States with guidance on how best to ensure that the trade and investment agreements they conclude are consistent with their obligations under international human rights instruments.

2. Human rights treaty bodies and special procedures of the Human Rights Council have regularly called upon States to prepare human rights impact assessments of the trade and investment agreements that they conclude.¹ Human rights impact assessments can be an important tool for States in negotiating trade and investment agreements, particularly to ensure that they will not make demands or concessions that will make it more difficult for them, or for the other party or parties, to comply with their human rights obligations. Yet, States have been provided with little guidance as to how such human rights impact assessments should be prepared, what is specific to a human rights impact assessment (as distinct, for instance, from sustainability impact assessments or social impact assessments), and how the conduct of human rights assessments relates to the undertakings of States under human rights treaties.

3. The guiding principles are intended to provide such advice. They are also intended as an operational tool that may be useful for human rights treaty bodies and the special procedures of the Human Rights Council, to the extent that their mandate includes assessing the consistency of trade and investment agreements with the human rights undertakings of States. In addition, these guiding principles could serve as a source of inspiration for companies carrying out human rights due diligence, in order to identify, prevent, mitigate and account for the human rights impacts of their activities, particularly in the negotiation and conclusion of investment agreements with the host States in which they invest.² Since the preparation of human rights impact assessments is a way for the State to discharge its human rights obligations, by ensuring that it does not conclude agreements that make it more difficult or impossible for the State to comply with such obligations, it is recommended that the process of preparing human rights impact assessments be stipulated in legislation, rather than left to the ad hoc choices of the Executive.

4. The guiding principles are also a response to a key recommendation of an international expert seminar held under the auspices of the mandate in Geneva on 23 and 24 June 2010. The seminar, at which a variety of stakeholders from all regions were represented, underlined the need for a set of principles for conducting human rights impact

¹ See, for example, Committee on Economic, Social and Cultural Rights, concluding observations regarding Ecuador (E/C.12/1/Add.100), para. 56; Committee on the Rights of the Child, concluding observations regarding El Salvador (CRC/C/15/Add.232), para. 48; Committee on the Elimination of Discrimination against Women, concluding observations regarding Colombia (CEDAW/C/COL/CO/6), para. 29, regarding the Philippines (CEDAW/C/PHI/CO/6), para. 26, and regarding Guatemala (CEDAW/C/GUA/CO/6), para. 32; report of the Special Rapporteur on the right to food on his mission to the World Trade Organization (A/HRC/10/5/Add.2), paras. 37-38.

² See the Guiding Principles on Business and Human Rights (A/HRC/17/31), principle 17.

assessments of trade and investment agreements.³ This set of principles is intended to provide a methodology. It is also aimed at maximizing the effectiveness of such assessments and ensuring that they are not undermined by actors who misappropriate the term “human rights impact assessment.”

5. The guiding principles have been prepared in consultation with the experts who participated in the June 2010 seminar, as well as other special procedures mandate holders, the human rights treaty bodies and the Human Rights Council Advisory Committee. The Special Rapporteur also launched a public consultation on the guiding principles, inviting comments from States, United Nations departments and agencies, national human rights institutions, civil society and other relevant stakeholders. Thus, the guiding principles are informed by extensive consultations with a variety of stakeholders.

6. The guiding principles’ normative contribution lies not in the creation of new international legal obligations, but in elaborating the implications of pre-existing international human rights norms and standards for States when negotiating trade and investment agreements. Broadly speaking, 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. Each Principle is accompanied by commentary, further clarifying its meaning and implications.

7. The guiding principles are not intended as a one-size-fits-all solution. While the principles themselves are applicable universally, the means by which they are implemented will reflect national contexts and capacities (human, financial, technical and political).

³ The report of the seminar is available from http://www2.ohchr.org/english/issues/food/docs/report_hria-seminar_2010.pdf.

Appendix

Guiding principles on human rights impact assessments of trade and investment agreements

I. The duty to prepare human rights impact assessments of trade and investment agreements

1. All States should prepare human rights impact assessments prior to the conclusion of trade and investment agreements.

Commentary

1.1 By preparing human rights impact assessments prior to the conclusion of trade and investment agreements, States are addressing their obligations under the human rights treaties. First, since States are bound by these pre-existing treaty obligations, they are prohibited from concluding any agreements that would impose on them inconsistent obligations. Therefore, there is a duty to identify any potential inconsistency between pre-existing human rights treaties and subsequent trade or investment agreements, and to refrain from entering into such agreements where such inconsistencies are found to exist.⁴ Human rights impact assessments are a tool to ensure consistency and coherence between the obligations of States under international law and other international agreements to which they are parties, and thus to overcome, or at least mitigate, the problems resulting from the fragmentation of international law.⁵

1.2 Second, the right of every citizen to take part in the conduct of public affairs, recognized under the International Covenant on Civil and Political Rights (art. 25 (a)), implies that no trade or investment agreement should be concluded in the absence of a public debate, which in principle should be conducted by freely elected parliamentary assemblies for approval to ensure that the free expression of the will of the electors shall be fully respected (art. 25 (b) of the Covenant).⁶ Human rights impact assessments serve to inform such public debate.

1.3 Third, since compliance with the obligations imposed under trade and investment agreements typically is ensured by the threat of economic sanctions or reparations authorized or awarded by an agreement-specific dispute settlement mechanism or international arbitral tribunals, it is important that any inconsistency with pre-existing human rights obligations imposed on the State are identified beforehand, to the fullest extent possible. Where an inconsistency between the human rights obligations of a State and its obligations under a trade or investment agreement becomes apparent only after the entry into force of the said agreement, the pre-existing human rights obligations must prevail. This follows both from the duty of all States to cooperate towards the full realization of human rights under the Charter of the United Nations,⁷ and from the specific

⁴ Vienna Convention on the Law of Treaties, arts. 26 and 30, para. 4 (b).

⁵ See the report of the Study Group of the International Law Commission on the fragmentation of international law: difficulties arising from the diversification and expansion of international law (A/CN.4/L.682).

⁶ This is also in line with article 2, paragraph 3, of the Declaration on the Right to Development.

⁷ Article 103 of the Charter provides that: "In the event of a conflict between the obligations of the Members of the United Nations under the present Charter and their obligations under any other international agreement, their obligations under the present Charter shall prevail."

nature of human rights treaties that generate rights for individual human beings and do not depend entirely on reciprocity among States.⁸ It also follows from the fact that human rights are *jus cogens* norms, accepted and recognized by the international community of States as a whole as norms from which no derogation is permitted, so that treaties or provisions within these treaties inconsistent with human rights should be considered void and terminated.⁹

II. The purpose of preparing human rights impact assessments 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.

Commentary

2.1 States cannot ignore their human rights obligations in the conclusion of trade or investment agreements, whether at the multilateral or bilateral level.¹⁰ The specific purpose of human rights impact assessments, which distinguishes them from other impact assessments (such as social, environmental or sustainability impact assessments), is to ensure that States will not be facing inconsistent obligations, imposed respectively under human rights treaties and under trade or investment agreements, and that they will not face obstacles in the realization of human rights they have committed to guarantee as a result of having entered into such agreements. In other words, the human rights impact assessment should measure the potential impact of the trade or investment agreement on human rights outcomes and on the capacity of States (and non-State actors, where relevant) to meet their human rights obligations, as well as on the capacity of individuals to enjoy their rights. This is in conformity with the expectation that States shall “maintain adequate domestic policy space to meet their human rights obligations when pursuing business-related policy objectives with other States or business enterprises, for instance through investment treaties or contracts.”¹¹

2.2 Human rights impose on States three levels of obligations. First, States must *respect* human rights. They are thus precluded from entering into trade or investment agreements

⁸ Inter-American Court of Human Rights, *The Sawhoyamaya Indigenous Community v. Paraguay*, Judgment of 29 March 2006, Series C No. 146, para. 140.

⁹ Vienna Convention on the Law of Treaties, arts. 53 and 64; and the conclusions of the Study Group of the International Law Commission on fragmentation of international law: difficulties arising from the diversification and expansion of international law, *Official Records of the General Assembly, Sixty-first Session, Supplement No. 10 (A/61/10)*, chap. 12, para. 251 (41).

¹⁰ Committee on Economic, Social and Cultural Rights, general comments No. 12 (1999) on the right to adequate food, paras. 19 and 36 (“States parties should, in international agreements whenever relevant, ensure that the right to adequate food is given due attention”); No. 14 (2000) on the right to the highest attainable standard of health, para. 39 (“In relation to the conclusion of other international agreements, States parties should take steps to ensure that these instruments do not adversely impact upon the right to health”); No. 15 (2002) on the right to water, paras. 31 and 35-36 (“States parties should ensure that the right to water is given due attention in international agreements and, to that end, should consider the development of further legal instruments. With regard to the conclusion and implementation of other international and regional agreements, States parties should take steps to ensure that these instruments do not adversely impact upon the right to water. Agreements concerning trade liberalization should not curtail or inhibit a country’s capacity to ensure the full realization of the right to water.”).

¹¹ Guiding Principles on Business and Human Rights (A/HRC/17/31), principle 9.

that would require them to adopt certain measures, such as lowering a tariff or strengthening intellectual property rights, that would result in an infringement of human rights they have agreed to uphold.¹²

2.3 Second, States should *protect* human rights. They must therefore ensure that they will not be precluded from the possibility of controlling private actors whose conduct may lead to violating the human rights of others, for example as a result of an excessively high level of protection of foreign investors established on their territory or because of a broad understanding of the prohibition of imposing performance requirements on such investors.

2.4 Third, States should *fulfil* human rights. This requires that States refrain from concluding trade and investment agreements that will render impossible the adoption of policies that move towards the full realization of human rights, insofar as it relates to rights that are subject to progressive realization by States to the maximum of their available resources. While taking into consideration the unique country context, this requires that the fiscal and economic sustainability of trade and investment agreements be carefully examined. States should refrain from concluding agreements that would affect their public budgets or balance of payments in a way that would impede the full realization of human rights, making the fulfilment of human rights impossible or delayed.

2.5 Each of these obligations must be discharged in ways that are compatible with the requirement of non-discrimination.¹³ In human rights law, discrimination constitutes any distinction, exclusion, restriction or preference or other differential treatment that is based on any ground such as race, colour, sex, language, religion, political or other opinion, national or social origin, property, birth or other status, and which has the purpose or effect of nullifying or impairing the recognition, enjoyment or exercise by all persons, on an equal footing, of all rights and freedoms. It also includes any action or omission that, whether intended or not, disproportionately affects members of a particular group, in the absence of a reasonable and objective justification, thus constituting *de facto* discrimination. Furthermore, in order to eliminate *de facto* discrimination, States may be under an obligation to adopt special measures to attenuate or suppress conditions that perpetuate discrimination. In human rights law, such measures are legitimate to the extent that they represent reasonable, objective and proportionate means to redress *de facto* discrimination and are discontinued when substantive equality has been sustainably achieved.

2.6 Finally, States owe these obligations both to the individuals on their territory, and to individuals on the territory of the State with which they conclude a trade or an investment agreement, to the extent that the conclusion of the agreement may affect such individuals' ability to enjoy human rights.¹⁴ Thus, where, using its economic leverage or other means of influence at its disposal, one State requires that another State accept the inclusion in a trade

¹² For instance, the Committee on Economic, Social and Cultural Rights has recently expressed its concern that the "TRIPs-plus" provisions concerning accession to the International Convention for the Protection of New Varieties of Plants, which are routinely included in free trade agreements, may increase food production costs, seriously undermining the realization of the right to food. Concluding observations on Switzerland (E/C.12/CHE/CO/2-3), para. 24.

¹³ Human Rights Committee, general comment No. 18 (1989) on non-discrimination; Committee on Economic, Social and Cultural Rights, general comment No. 20 (2009) on non-discrimination in economic, social and cultural rights.

¹⁴ Thus the obligation to carry out human rights impact assessments may be derived from the requirement of States to respect, protect and fulfil human rights. For example, the Committee on Economic, Social and Cultural Rights in its concluding observations on Switzerland recommended that "the State party undertake an impact assessment to determine the possible consequences of its foreign trade policies and agreements on the enjoyment by the population of the State party's partner countries, of their economic, social and cultural rights" (E/C.12/CHE/CO/2-3), para. 24.

or investment agreement of a provision that will prohibit that State from complying with its human rights obligations towards its own population or that will impede such compliance, the former State may be seen as coercing the latter State, which engages its international responsibility.¹⁵

III. The link between human rights impact assessments of trade and investment agreements and the conclusion of such agreements

- 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.**

Commentary

3.1 Even by initiating the human rights impact assessment before negotiations are well advanced, the final results of the assessment may only become available when negotiations have advanced to a point such that anything more than cosmetic changes may become extremely difficult. As such States are encouraged to finalize a feasibility study that incorporates a human rights impact assessment prior to entering into the final phase of formal negotiations.

3.2 Where the impact assessment indicates the possibility of potential human rights violations resulting from the draft agreement, the draft may have to be revised to remove any incompatibility that has been found with pre-existing human rights obligations of the State concerned. Where an incompatibility is found, such incompatibility should be removed before the agreement can be signed or ratified by the State. Removing the incompatibility can be achieved either by the adoption of measures at the domestic level that ensure that the agreement will be consistent with the human rights obligations of the State, for example, by the introduction of measures that will ensure an adequate level of protection of vulnerable groups that may be harmed by the agreement, such as – in certain cases – women, or by introducing within the agreement itself clauses, such as flexibilities or exceptions, that will allow the State to comply with its human rights obligations. Moreover, the precautionary principle should be applied: if a human rights impact assessment identifies that there are reasons to believe that the agreement may cause harm, even where those potentially harmful effects are not demonstrated or cannot be quantified,

¹⁵ Under article 18 of the draft articles on Responsibility of States for internationally wrongful acts, adopted by the International Law Commission at its fifty-third session (2001) (*Official Records of the General Assembly, Fifty-sixth Session, Supplement No. 10 (A/56/10)*, chap. IV, sect. E, subsect. 1): “A State which coerces another State to commit an act is internationally responsible for that act if: (a) The act would, but for the coercion, be an internationally wrongful act of the coerced State; and (b) The coercing State does so with knowledge of the circumstances of the act.”

the burden of proof that it is not harmful falls on the Governments negotiating the agreement.

3.3 Not all the impacts of the entry into force of a trade or investment agreement can be anticipated. Therefore, ex ante human rights impact assessments should be complemented by human rights impact assessments performed ex post, once the impacts are measurable. A human rights impact assessment should be conceived of as an iterative process, taking place on a regular basis, for instance, every three or five years. Safeguard clauses should be inserted into the trade or investment agreement to ensure that, should such ex post assessments lead to the conclusion that the State is unable to comply with its human rights obligations within the constraints of the agreement, it should be released from such constraints to the extent of the incompatibility. However, even in the absence of such safeguard clauses, human rights impact assessments that arrive at the conclusion that the obligations imposed under a trade or investment treaty cannot be upheld without violating human rights obligations should lead the State to consider the trade or investment treaty, or the problematic provisions within the treaty, as void, or to denounce it. While the possibility of denunciation or withdrawal should be provided for in any trade or investment agreement entered into by the State, a right of denunciation or withdrawal may be implied in any trade or investment agreement to the extent necessary for a State to comply with its human rights obligations, even in the absence of such an explicit clause. This follows from the fact that human rights obligations prevail over other treaty obligations.¹⁶

IV. The methodology of human rights impact assessments of trade and investment agreements

- 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.**

Commentary

4.1 While the primary purpose of a human rights impact assessment of a trade and investment agreement is to ensure that the provisions of such agreement shall not be incompatible with the normative content of relevant human rights, it also should include an assessment of whether the process of negotiating the impact of the trade or investment agreement has affected human rights. Thus, it should be assessed whether the process of negotiation was participatory, inclusive and transparent, and whether it was conducted with appropriate parliamentary oversight.

4.2 Human rights impact assessments can constitute a complex endeavour, and challenges may be encountered in developing a robust methodology. A number of factors

¹⁶ Vienna Convention on the Law of Treaties, art. 56; and see Inter-American Court of Human Rights, *The Sawhoyamaya Indigenous Community v. Paraguay*, para. 140.

contribute to this, including: (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. For this reason, it is for each State to define the calendar according to which the assessment shall be made; which body shall be in charge of the assessment; and on the basis of which data the assessment shall be prepared. Nevertheless, in order to avoid too widely inconsistent practices that could put human rights impact assessments into disrepute, any human rights impact assessment should be guided by a human rights-based approach in the way it is conducted. It follows, for instance, that the methodology used should not be discriminatory; that it should seek to promote inclusive participation; that it should be conducted with full transparency; and that accountability should be ensured in the way the assessment is carried out. Other minimum principles are listed below.

4.3 *Independence.* Whether it is prepared by a national institution for the promotion and protection of human rights,¹⁷ by experts specifically designated for this task, by a parliamentary committee in which opposition political voices are included, or by others, the human rights impact assessment should be initially prepared by a body or group of experts that is independent from the Executive which is negotiating, or has negotiated, the trade or investment agreement. That initial assessment should not necessarily be determinative, however: since it is to allow for the meaningful participation of citizens in public affairs and for an improved accountability of the Executive to the other branches of Government (see commentary following principle 1), the initial assessment should, ideally, be debated in Parliament. In most constitutional systems, the Parliament is best positioned to identify measures that the State should take in order to remove any incompatibility that has been found to exist, and either to adopt such measures, or to hold the Executive accountable for their adoption. As the issue is ultimately a legal one, of determining whether a trade or investment agreement is compatible with the human rights obligations of the State, courts may also have a role to play, for instance in hearing claims, based on the conclusions of the human rights impact assessment, as to whether the Executive may sign the agreement or should obtain further improvements, or as to whether it should denounce it.

4.4 *Transparency.* The human rights impact assessment should be based on sources of information that are made public. It should work on the basis of a clear methodology, defined in advance of the process and made public. And it should be open to receiving submissions, in order to ensure that its information basis will be as broad as possible.

4.5 *Inclusive participation.* The human rights impact assessment should consider the views of the communities directly affected by the trade or investment agreement by ensuring participation in the conduct of the assessment. For this participation to be meaningful, those consulted should be provided with all the available information on the potential impacts, and the assessment should refer explicitly to their concerns and how these concerns could be addressed.

4.6 *Expertise and funding.* The body or group tasked with preparing the human rights impact assessment should be composed of relevant experts and sufficiently well funded in order to prepare a high-quality assessment. This body or group requires the combination of different methodologies in which different disciplines are represented (including but not limited to human rights and investment/trade), and may also require the commissioning of outside expertise. Funding should be sufficient, in particular, to allow for participatory,

¹⁷ See the principles relating to the status of national institutions for the promotion and protection of human rights, General Assembly resolution 48/134 of 20 December 1993, annex.

inclusive, transparent and meaningful participation in the assessment by, among others, civil society and the most affected rights holders directly or through their representatives.

4.7 *Status.* Human rights impact assessments are a tool for States negotiating trade or investment agreements to ensure that the conclusion of such agreements will not lead these States to violate their human rights obligations or to be unable to fulfil such obligations. Therefore, provided the results of the assessments are taken into account, States may be said to have acted with all due diligence to minimize the risk of such inconsistencies (see commentary following principles 1 and 2). It follows from this very purpose of human rights impact assessments that, while such assessments may be prepared by external experts commissioned for that purpose, or by a body with a purely advisory role such as a national human rights institution for the promotion and protection of human rights, they must then feed into the decision-making process that leads to the conclusion and approval of the trade or investment treaty concerned (ex ante assessments), or that leads to the decision whether or not to denounce such treaty or to withdraw from it (ex post assessments). Ideally, this implies that the results of the assessment will be presented to the Parliament, and that the conclusions to be drawn will be the subject of a parliamentary debate.

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.**

Commentary

5.1 *Explicit reference to the normative content of human rights obligations.* Human rights impact assessments are distinct in that they examine the intended and unintended impacts of trade and investment agreements on the ability of the States parties to these agreements to respect, protect and fulfil human rights (see commentary following principle 2). They therefore should be based explicitly on the normative content of human rights, as clarified by the judicial and non-judicial bodies that are tasked with monitoring compliance with human rights obligations. References in impact assessments to development goals or to poverty, therefore, are not a substitute for a reference to the normative components of human rights. Additionally, specific attention should be given to the impact of trade and investment agreements on gender equality, as required under the Convention on the Elimination of All Forms of Discrimination against Women.

5.2 *Human rights indicators.* Human rights impact assessments should rely on indicators that measure the following:

- (a) Whether the trade or investment agreement will make it more difficult for the State concerned to ratify particular human rights instruments, to adapt its regulatory framework to the requirements of human rights, or to set up the institutional mechanisms, that ensure compliance with its human rights obligations (structural indicators);
- (b) Whether it creates obstacles to the implementation of the State's policy measures and programmes, or to the functioning of institutional mechanisms, that ensure

effective fulfilment of State's human rights obligations, particularly insofar as such obligations require budgetary commitments (process indicators); and

(c) Whether the trade or investment agreement may make it more difficult for a State to make progress in the realization of the human rights it has undertaken to comply with, measured from the perspective of full enjoyment of all human rights by all (outcome indicators).¹⁸

5.3 In order to ensure compliance with the human rights requirement of non-discrimination and that due attention is paid to the situation of the most vulnerable groups, particularly women, it is essential that these indicators provide information broken down by gender, by disability, by age group, by region and by ethnicity, or on other grounds, based on a contextual, country-level appreciation of the groups that are most vulnerable.¹⁹ In addition, the process itself of negotiating and concluding a trade or investment agreement should be assessed as regards its compliance with the principles of participation, transparency, and accountability (see commentary following principle 4): certain indicators should be adopted that allow the human rights impact assessment to take into account this dimension.

V. Balancing priorities and human rights impact assessments of trade or investment agreements

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.

Commentary

6.1 Each State retains the prerogative in setting its priorities, which often requires balancing different competing priorities. Trade and investment agreements may benefit certain groups, making them better off, while hurting others, whose situation will worsen as a result. Delicate choices will have to be made about the priorities that the State seeks to pursue, for instance, where trade and investment agreements contribute to economic growth and thus may facilitate the ability of the State to realize certain rights by mobilizing budgetary resources to finance certain public goods and services in various areas, including education, food, health and housing, while at the same time negatively affecting the State's capacity to protect the rights of certain groups, such as workers in the least efficient sectors of the economy. States should prioritize those economic and social benefits that will be sustainable in the long term in terms of their contribution to the realization of all human rights, including the right to development, over short-term economic and/or political gains expected from any trade and investment agreement. Furthermore, complementary policy

¹⁸ On the use of human rights indicators, see the report of the Special Rapporteur on the right of everyone to the enjoyment of the highest attainable standard of physical and mental health, (E/CN.4/2006/48 and Corr.1), annex; report of the Office of the United Nations High Commissioner for Human Rights (OHCHR) on indicators for monitoring compliance with international human rights instruments: a conceptual and methodological framework (HRI/MC/2006/7); report of OHCHR on indicators for promoting and monitoring implementation of human rights (HRI/MC/2008/3).

¹⁹ See, for instance, Committee on the Rights of the Child, general comment No. 5 (2003) on general measures of implementation of the Convention on the Rights of the Child, paras. 48-50 ("Collection of sufficient and reliable data on children, disaggregated to enable identification of discrimination and/or disparities in the realization of rights, is an essential part of implementation [of the Convention on the Rights of the Child]").

measures are indispensable for ensuring that those directly affected by the trade/investment agreement and vulnerable groups are protected and, concurrently, that society as a whole can benefit equitably from any positive impacts on economic output, competitiveness and growth.

6.2 Human rights impact assessments seek to clarify the nature of such choices, and to ensure that they are made on the basis of the best information available. The question of which trade-offs are acceptable is to be decided at the level of each country, through open and democratic processes, which the human rights impact assessment seeks to inform. However, the process of setting priorities and of managing trade-offs, as well as the substance of the outcome, must comply with certain conditions.

6.3 First, the process of setting priorities must involve effective, free, active and meaningful²⁰ participation of all stakeholders, including the poorest and most vulnerable segments of the population and women. As already noted under principle 5, the institutional mechanisms through which impact assessments are prepared and feed into political decision-making must therefore allow for the views of these stakeholders to be fully taken into account, directly or through their legitimate representatives.

6.4 Second, the principle of equality and non-discrimination rules out any trade-offs which would result in or exacerbate unequal and discriminatory outcomes, for example, giving priority to providing health and education services to the more affluent parts of society, rather than to the most disadvantaged and marginalized groups, particularly women.

6.5 Third, trade-offs must never result in a deprivation of the ability of people to enjoy the essential content of their human rights. It follows that no provision is acceptable that might deprive people of their current income sources unless a credible, realistic and sustainable alternative is offered that would allow for the continued enjoyment of human rights in full dignity.

6.6 Fourth, even where the previous condition is fulfilled, any trade-off that results in a retrogressive level of protection of a human right should be treated as highly suspect: trade-offs whereby one right suffers a marked decline in its level of realization would need to be subject to the most careful consideration and to be fully justified by reference to the totality of human rights.

6.7 Fifth, to the fullest extent possible, solutions should be found under which losses and gains are shared across groups, rather than concentrated on one group. This suggests the need to identify mechanisms, such as mitigating measures or redistributive measures included in taxation schemes, ensuring that those benefiting from the agreement will at least in part compensate those who are negatively affected, and that the latter will be protected.²¹

²⁰ Declaration on the Right to Development, art. 2, para. 3.

²¹ *Ibid.*, “States have the right and the duty to formulate appropriate national development policies that aim at the constant improvement of the well-being of the entire population and of all individuals, on the basis of their active, free and meaningful participation in development and in the fair distribution of the benefits resulting therefrom.”

VI. Key steps in preparing a human rights impact assessment

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.

Commentary

7.1 First, the human rights impact assessment should include a preliminary analysis of which human rights are most likely to be affected, with respect to which population groups, as a result of the trade or investment agreement (*screening*): this should allow the determination of which elements of the trade or investment agreement shall be subject to a full assessment, and with regard to their impacts on which human rights.

7.2 Second, those in charge of the human rights impact assessment should determine the set of questions that will have to be addressed and the methodology to be applied, including the use of indicators, for the full assessment in the areas identified at the screening stage (*scoping*). The scoping stage becomes more complex in an ex ante assessment, which might not have a negotiating text available before it and, thus, might have to examine several possible outcomes of a negotiation. Accordingly, the human rights impact assessment might have to consider at least two scenarios, and the scoping stage could identify these.

7.3 Third, *evidence gathering* shall include the use of both quantitative (including economic modelling and regression analysis) and qualitative research (including consultations with rights holders or their representatives, and where feasible using participatory research methodologies), in order to determine the impacts as precisely as possible. The contribution of human rights impact assessments to improving participation and accountability in the process of the negotiation of trade and investment agreements should be kept in mind in defining how evidence shall be gathered: the involvement of the groups affected, directly or through their legitimate representatives, is both a means to inform the process and an end in itself (see commentary following principle 4).

7.4 Fourth, the impacts of the trade or investment agreement on the ability of the State to respect, protect and fulfil human rights should be assessed, taking into account what has been said above about trade-offs (*analysis*). Such an analysis may include recommendations as to how any tension between the trade or investment agreement on the one hand, and human rights obligations on the other hand, may be addressed, although the identification of the measures that might be adopted in order to address such tensions could be left to the parliamentary committee receiving the human rights impact assessment to guide its deliberations. The outcome of the human rights impact assessment, in any case, should be made public, since it should feed into the public debate about the preparation or implementation of the trade or investment agreement considered.

7.5 Fifth, the impact assessment should lead to the presentation of *conclusions and recommendations*, on the basis of which the bodies in charge of negotiating and concluding the impact assessment shall be held accountable.

7.6 Sixth, appropriate follow-up should be given to the conclusions and recommendations adopted at the final stage of the impact assessment, by organizing a *monitoring and evaluation mechanism* assessing the extent to which these conclusions and recommendations were in fact taken into account.
