

**BLUEPRINT FOR A  
HUMAN RIGHTS IMPACT ASSESSMENT OF THE PLANNED  
COMPREHENSIVE FREE TRADE AGREEMENT BETWEEN EFTA AND  
MERCOSUR**

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A study commissioned by Alliance Sud

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## ABBREVIATIONS

|          |  |
|----------|--|
| ADRIP    | American Declaration on the Rights of Indigenous Peoples                   |
| CEDAW    | Convention on the Elimination of all Forms of Discrimination Against Women |
| CERD     | Convention on the Elimination of all Forms of Racial Discrimination        |
| CESCR    | Committee on Economic, Social and Cultural Rights                          |
| CRC      | Convention on the Rights of the Child                                      |
| EIGE     | European Institute for Gender Equality                                     |
| EFTA     | European Free Trade Association  |
| FTA      | Free Trade Agreement   |
| FPIC     | Free, prior and informed consent   |
| FUNAI    | Fundação Nacional do Índio (National Indian Foundation), Brazil            |
| CGE      | Computable General Equilibrium   |
| GBA+     | Gender-Based Analysis, Canada  |
| HRIA     | Human Rights Impact Assessment   |
| ICCPR    | International Covenant on Civil and Political Rights                       |
| ICESCR   | International Covenant on Economic, Social and Cultural Rights             |
| IIP      | International Intellectual Property Institute                              |
| IP       | Intellectual Property  |
| IWGIA    | International Work Group for International Affairs                         |
| KILM     | Key Indicators of the Labour Market Database, ILO                          |
| Mercosur | Southern Common Market   |
| OECD     | Organisation for Economic Co-operation and Development                     |
| R&D      | Research and Development   |
| SDGs     | Sustainable Development Goals  |
| SECO     | State Secretariat for Economic Affairs, Switzerland                        |
| TSD      | Trade and sustainable development  |
| TRIPs    | Trade-Related Aspects of Intellectual Property Rights                      |
| UN       | United Nations   |
| UNCTAD   | UN Conference on Trade and Development                                     |
| UNDRIP   | UN Declaration on the Rights of Indigenous Peoples                         |
| US       | United States of America   |
| WECF     | Women in Europe for a Common Future  |
| WTO      | World Trade Organisation   |

## EXECUTIVE SUMMARY

This study sets out the rationale and the methodology for carrying out human rights impact assessments of Switzerland's trade agreements. Recalling the objectives of Switzerland's trade policy as well as the country's human rights obligations, it shows that human rights-based impact assessments of trade agreements are feasible and constitute valuable tools for policy-making, in addition to being a legal obligation.

To demonstrate why and how a human rights impact assessment (HRIA) should be carried out, this study takes as a case study the Comprehensive free trade agreement between the Member States of the European Free Trade Association (EFTA, namely Iceland, Liechtenstein, Norway and Switzerland) and the Member States of Mercosur (Argentina, Brazil, Paraguay and Uruguay).

Following HRIA best practice, Alliance Sud undertook stakeholder consultations in Switzerland and in Mercosur countries, on the basis of which it identified areas of concern for further study. Part 2 of this study presents the agreement's likely content relating to (1) intellectual property provisions affecting the right to health, (2) women's rights, and (3) agriculture trade provisions affecting Indigenous rights.

Based on prior experience, it describes human rights-related concerns in each of these areas for the Mercosur countries, and how these should be assessed from a human rights perspective. It presents the relevant methodology for *ex ante* human rights impact assessment of the EFTA-Mercosur trade agreement and suggests how indicators should be selected for more detailed *ex ante* assessment as well as ongoing assessment after the agreement is in force.

The present study also offers context and discussion of what a human rights impact assessment can – and cannot – do, so as to clarify the role and the value of the methodological approach proposed. It demonstrates that, notwithstanding the complexity of the issues at hand, methodologies exist for meaningful assessment of human rights impacts of trade agreements.

It recommends that the Swiss government:

- should carry out systematic *ex ante* and *ex post* HRIAs of its trade agreements.
- 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.
- should include a broad range of views and experience when formulating positions and options in trade policy negotiations. An independent body should be entrusted 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.

- 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.
- should make negotiating positions and the basis for these publically available
- should encourage other EFTA States, as well as the EFTA Secretariat to make negotiating positions and the basis for these publically available
- should endeavor to ensure that consultations are held with the local population of the partner countries in the course of the FTA negotiations, with both the government of the partner country and the Swiss government participating in these consultations.
- should encourage other EFTA States, as well as the EFTA Secretariat to make negotiating positions and the basis for these publically available
- should 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.
- should spearhead initiatives, at the national and international level, to ensure that economic modelling integrate considerations relating to economic losses involved in not harnessing women in the workforce or depleting natural resources.

It recommends that 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.

## **PART 1 – BACKGROUND AND CONTEXT**

### **I Background**

The purpose of this study is to demonstrate that robust, applicable methodologies exist for assessing potential human rights impacts of planned free trade agreements. It takes the EFTA-Mercosur comprehensive free trade agreement as a case study for demonstrating how human rights impact assessment (HRIA) methodology should and can be applied, to this or to other trade agreements. It presents how the first steps of HRIA methodology – stakeholder consultations, screening and scoping – were applied to identify risk areas from a human rights perspective for further study. It summarizes an in-depth literature review for each of these risk areas. The study then presents the applicable methodology and indicators for ongoing monitoring.

### **II The comprehensive free trade agreement between EFTA and Mercosur**

In August 2019, the Member States of the European Free Trade Association (EFTA) (Iceland, Liechtenstein, Norway and Switzerland) completed their negotiations towards a

“comprehensive free trade agreement” with Members of Mercosur (the South American Common Market, comprised of Argentina, Brazil, Paraguay and Uruguay).

The scope of the planned EFTA-Mercosur trade agreement (“planned agreement”) is apparently broad, covering *inter alia* trade in goods, trade in services, intellectual property, competition, investment, and government procurement.<sup>2</sup> These are all areas that can significantly impact on the realisation of the Sustainable Development Goals (SDGs) and the enjoyment of human rights.

The Swiss government has stressed the economic importance of the agreement for Switzerland. Given the country’s relatively small domestic market, access to other markets is vital for Swiss businesses and, according to the government, for growth, prosperity and jobs in Switzerland. In addition, it will prevent Swiss exporters from being disadvantaged compared to their competitors in the EU, which concluded a trade agreement with Mercosur in July 2019.<sup>3</sup> The agreement facilitates access to an attractive market for the Swiss export industry. Switzerland exports goods worth over CHF 3.6 billion a year to the Mercosur countries. Around 95% of these exports will enjoy duty-free access after the planned agreement enters into force. Given that Mercosur States impose high customs duties, the Swiss government says that the planned agreement will facilitate trade and result in substantial savings, potentially reaching CHF 180 million per year.<sup>4</sup>

The agreement is also significant in that it is the first time that Mercosur has included facilitation of investment rules under an extra-regional agreement, thus offering the potential to boost foreign direct investment (FDI) in the region by EFTA countries.<sup>5</sup> As the world's tenth largest exporter of capital, foreign investment is a “key factor for economic growth and prosperity in Switzerland.”<sup>6</sup>

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<sup>2</sup> The texts of the agreement have not been made public, but EFTA has issued a presentation of its scope. EFTA Secretariat (no date) EFTA- Conclusion in Substance of the EFTA-Mercosur Free Trade Negotiations, <https://www.efta.int/sites/default/files/documents/legal-texts/free-trade-relations/mercosur/2019-08-24-EFTA-Mercosur-Chapter-Description-of-FTA.pdf> (accessed 12 December 2019). See also Inter-American Development Bank (2019) *MERCOSUR-European Free Trade Association Agreement*.

<sup>3</sup> Confédération Suisse, Secrétariat d’Etat à l’économie (no date) *MERCOSUR - Accord de libre-échange en négociations*, [https://www.seco.admin.ch/seco/fr/home/Aussenwirtschaftspolitik\\_Wirtschaftliche\\_Zusammenarbeit/Wirtschaftsbeziehungen/Freihandelsabkommen/Partner\\_weltweit/mercosur.html](https://www.seco.admin.ch/seco/fr/home/Aussenwirtschaftspolitik_Wirtschaftliche_Zusammenarbeit/Wirtschaftsbeziehungen/Freihandelsabkommen/Partner_weltweit/mercosur.html) (accessed 12 December 2019).

<sup>4</sup> This figure is an estimate of the value of customs duties that would no longer have to be paid on exports of goods from Switzerland to Mercosur. In its public materials, SECO does not specify who will be making these savings; applying trade theory, one can assume that it would be for Mercosur consumers.

<sup>5</sup> Inter-American Development Bank (2019) *supra note 2*, page 2.

<sup>6</sup> Confédération suisse, SECO, *International Investments*, [https://www.seco.admin.ch/seco/en/home/Aussenwirtschaftspolitik\\_Wirtschaftliche\\_Zusammenarbeit/Wirtschaftsbeziehungen/Internationale\\_Investitionen.html](https://www.seco.admin.ch/seco/en/home/Aussenwirtschaftspolitik_Wirtschaftliche_Zusammenarbeit/Wirtschaftsbeziehungen/Internationale_Investitionen.html) (accessed 20 January 2020). With regard to Mercosur countries, the volume of Swiss investments in Brazil stood at CHF 10.6 billion at the end of 2017, with Swiss companies employing more than 65,000 people there.

### III Trade policy and human rights obligations

#### (a) Objectives of Switzerland's trade policy

The stated aim of Switzerland's trade policy is to promote and secure open markets while contributing to sustainable development. Switzerland regularly reiterates its support, in the trade context, for the UN 2030 Agenda for Sustainable Development, as well as for measures that contribute to socially and environmentally viable economic growth.<sup>7</sup>

#### (b) Switzerland's human rights obligations

Switzerland has ratified the main international human rights treaties such as the International Covenant on Civil and Political Rights (ICCPR), the International Covenant on Economic, Social and Cultural Rights (ICESCR), the Convention on the Elimination of all Forms of Discrimination Against Women (CEDAW) and the Convention on the Rights of the Child (CRC). Many of these rights are also safeguarded in the Swiss constitution. Switzerland is therefore bound to uphold specific human rights such as the right to life, to a fair trial, to food or to health; and to stand by its general and procedural human rights obligations. These entail, inter alia, the obligation to monitor likely or actual human rights impacts of its laws, policies and measures, in Switzerland and abroad. The full legal rationale underlying this obligation is set out in Annex 1 of this study.

#### (c) Assessment of impacts of Switzerland's trade agreements

The Swiss Constitution sets out promotion of human rights as a foreign policy objective, based on the belief that the realisation of human rights is an indispensable condition for genuinely sustainable economic and social progress. Thus, human rights are supposed to be systematically addressed at governmental level and in multilateral forums.<sup>8</sup>

This strong human rights commitment is however inadequately translated into Switzerland's trade policy. The government appears not to take the steps required to ascertain that its trade agreements are consistent with what human rights require, either in terms of process or in terms of result.<sup>9</sup>

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<sup>7</sup> See for instance WTO, Trade Policy Review (2017) *Reports by Switzerland and Liechtenstein*, WTO Doc. WT/TPR/G/355, [https://www.wto.org/english/tratop\\_e/tpr\\_e/g355\\_e.pdf](https://www.wto.org/english/tratop_e/tpr_e/g355_e.pdf) (accessed 1 December 2019).

<sup>8</sup> Federal Department of Foreign Affairs, *Human rights policy*, <https://www.dfae.admin.ch/eda/en/fdfa/foreign-policy/human-rights/human-rights-policy.html> (accessed 20 January 2020). According to its human rights strategy, the government asserts that Switzerland works at all times to promote and defend the universal, interdependent and indivisible nature of human rights, and sees the 2030 Agenda for Sustainable Development as an important instrument for according greater consideration to human rights in the global governance system. Federal Department of Foreign Affairs, *Human Rights Strategy, 2016 – 2019*, page 16.

<sup>9</sup> The Federal Audit Office has reported that only one third of all Federal Council messages (whether relating to trade or other topics) meet the minimum requirements regarding the assessment of impact on society and the environment. Swiss Federal Audit Office (2017) *Prévisions dans les messages du Conseil fédéral, Evaluation des analyses prospectives de l'impact des projets législatifs*, <https://biblio.parlament.ch/e-docs/389085.pdf> (accessed 12 December 2019).

Many voices, within Switzerland and elsewhere, have called for assessments of the likely and actual impacts of trade agreements.<sup>10</sup> The UN Committee on Economic, Social and Cultural Rights (CESCR, or Committee), which oversees implementation of the ICESCR, has recommended that Switzerland take into account its partners' obligations when negotiating and concluding trade and investment agreements. It has encouraged Switzerland to systematically carry out impact assessments to determine the possible impact of trade agreements on human rights, including economic, social and cultural rights in Switzerland and in partner countries.<sup>11</sup> The Committee on the Elimination of Discrimination against Women (CEDAW) has done likewise.<sup>12</sup>

The Swiss government has never undertaken a human rights-based impact assessment. It has mandated an environmental impact assessment to gauge the possible environmental consequences of the planned trade agreement between EFTA and Mercosur in Switzerland and in the Mercosur countries.<sup>13</sup> However, the invitation to tender was issued late in the negotiations and the report had not been finalised by the time the negotiations concluded.

On the whole, the government has been reluctant to carry out *ex ante* impact assessments, citing amongst other reasons that the methodology for doing so is inadequate, that the data for *ex ante* assessments is lacking or that findings of such assessments lack practical application. In March 2019, the Management Commission of the Swiss National Parliament asked the Federal Council to develop a method for assessing likely sustainable development impacts of planned trade agreements<sup>14</sup> and this is pending.

The legal requirement to undertake HRIAs is set out in Annex 1 of this study, as is discussion of the economic, social and political benefits of doing so.<sup>15</sup>

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<sup>10</sup> See for instance *Accords de libre-échange. Renoncer à exiger des lois plus strictes sur la protection des obtentions végétales*, Interpellation du 18 mars 2015, <https://www.parlament.ch/fr/ratsbetrieb/suche-curia-vista/geschaefte?AffairId=20153186>; Rapport du Contrôle parlementaire de l'administration à l'intention de la Commission de gestion du Conseil national, 2016, Évaluation concernant les effets des accords de libre-échange du 26 octobre 2016 ; Platform of Swiss NGOs for Human Rights (2019) *Civil society parallel report on the Swiss Government's obligations to respect and protect ESC Rights*, page 6 ; A. Eberhard et al. (2015) *Human Rights Impact Assessments*, <https://fian-ch.org/content/uploads/HRC-HRIA-Report.pdf> (accessed 12 December 2019).

<sup>11</sup> UN CESCR (2019) *Concluding observations on the fourth periodic report of Switzerland*, UN Doc. E/C.12/CHE/CO/4; UN CESCR (2010) *Concluding observations on the third periodic report of Switzerland*, UN Doc. E/C.12/CHE/CO/2-3.

<sup>12</sup> UN CEDAW (2016) *Concluding observations on the combined fourth and fifth periodic reports of Switzerland*, UN Doc. CEDAW/C/CHE/CO/4-5.

<sup>13</sup> Federal Department of Economic Affairs, Education and Research, State Secretariat for Economic Affairs SECO (2019) *Terms of Reference/Invitation to tender: Assessment of the potential environmental impact in Switzerland and the MERCOSUR States resulting from a Free Trade Agreement between the EFTA States and MERCOSUR*.

<sup>14</sup> Confédération suisse, *Effets des accords de libre-échange – Avis du Conseil fédéral du 22 septembre 2017 et du 16 mai 2018*, Rapport succinct de la Commission de gestion du Conseil national du 1er mars 2019, page 7.

<sup>15</sup> In putting forth this Blueprint for a HRIA, this study responds to the government's objection that "The complexity of the problems, the difficulty of identifying and tracking causal links and the lack of disaggregated statistics are issues that render the assumptions and conclusions of [wide-ranging impact assessments in the context of negotiations on free-trade agreements] fragile." UN CESCR, *Fourth periodic report submitted by Switzerland*, UN. Doc E/C.12/CHE/4, 26 July 2018, para. 27.



## PART 2 – ASSESSING IMPACTS

### IV Methodology

According to generally-agreed methodology, HRIA of trade-related agreements includes the following steps: preparation, consultations, screening and scoping, evidence-gathering, analysis, recommendations and presentation of results. Some of these steps are undertaken in parallel, or repeated during the assessment. Further evaluation and monitoring is generally recommended.<sup>16</sup>

#### (a) Stakeholder consultations

The present HRIA study undertook stakeholder consultations as a primary step. These served to inform stakeholders about possible contents of the agreement, and to identify priority areas for more detailed analysis. To prepare the consultations, three main strands of work were undertaken, constituting the initial stages of the screening and scoping steps:

- (1) Identification of likely contents of the planned trade agreement. As neither the negotiations nor the draft texts are public, assumptions about the likely contents were based on other recent EFTA trade agreements, as well as on the existing trade flows between EFTA and Mercosur countries.<sup>17</sup>
- (2) Identification of which sectors of the Swiss and Mercosur countries' economies might benefit and which might lose out as a result of the planned agreement.
- (3) Identification of the most vulnerable groups in Mercosur countries who might be affected by new trade-related measures or new trading patterns.

A table indicating the main areas where possible human rights impacts in Mercosur countries were identified<sup>18</sup> was shared with stakeholders for their comment, by email, through online questionnaires, as well as in person. A workshop, to which a broad range of stakeholders were invited, was held in Buenos Aires in May 2019.<sup>19</sup>

The conclusion drawn from these consultations was that a HRIA of the EFTA-Mercosur trade agreement should pay priority attention to the following areas:

In Mercosur countries:

- Intellectual property provisions and access to medicines
- Intellectual property provisions and access to seeds
- Government procurement provisions and social policy

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<sup>16</sup> For a more detailed presentation of each of these steps, see S. Walker (2009) *The Future of Human Rights Impact Assessments of Trade Agreements*; UN Human Rights Council (2011) *Special Rapporteur on the Right to Food - Guiding Principles on Human Rights Impact Assessments of Trade and Investment Agreements*, UN Doc. A/HRC/19/59/Add.5, 19 [hereinafter *Guiding Principles on HRIA*]; C. Dommen (2013) *Research Methodology for conducting a Human Rights Impact Assessment (HRIA) of UPOV*.

<sup>17</sup> EFTA, *Global trade relations*, <https://www.efta.int/free-trade> (accessed 12 December 2019)

<sup>18</sup> The table is included as Annex 2.

<sup>19</sup> For an account of some stakeholders' views, see I. Agazzi (2019) *L'accord de libre-échange avec le Mercosur va dans le mur*, <https://blogs.letemps.ch/isolda-agazzi/2019/10/08/laccord-de-libre-echange-avec-le-mercotur-va-dans-le-mur> (accessed 12 December 2019)

- Reduced tariff revenues, fiscal policy and social investment
- Increased export of agricultural commodities and the right to an adequate standard of living and cultural rights of small-scale farmers and others whose livelihoods depend on the land
- Exports of raw materials and import of processed materials facilitated by the agreement and implications for Mercosur countries' right to development
- Differential impacts of the trade agreement on women's rights, with a particular concern for wages and labour rights
- Differential impacts of the trade agreement on the rights of Indigenous peoples, particularly their rights to land, to culture and to health.

In Switzerland:

- Increased pharmaceutical, machine and luxury watch exports and the right to work of youth and low-skilled persons
- Increased food imports from Mercosur countries with lower production standards and the right to health
- Competition from lower-priced food imports and the right to work and to an adequate standard of living of Swiss producers.

In Mercosur and in Switzerland:

- Increased trade and the rights to health and to a healthy environment.

#### (b) Evidence-gathering and analysis

Given the nature of this study – a Blueprint designed to demonstrate how Switzerland should assess possible impacts of trade agreements on human rights in partner countries in the global South – three priority areas were chosen for analysis. These are the issues about which stakeholders expressed particular concern.

- Issue 1: Intellectual property provisions and access to medicines
- Issue 2: Impacts of the planned trade agreement on women's rights
- Issue 3: Impacts of the planned trade agreement on the rights of Indigenous peoples

The section on each of these issues is structured as follows:

- (a) Brief background
- (b) Legal basis for the human rights obligation concerned.
- (c) Likely content of the EFTA-Mercosur trade agreement.

Existing EFTA trade agreements were scrutinized to gauge what provisions of the planned trade agreement with Mercosur might affect the issue area at hand.

- (d) Human rights concerns.

For each issue area, an in-depth review of research and literature was undertaken to ascertain how comparable provisions of the type likely to be included in the EFTA-Mercosur trade agreement have impacted human rights in Mercosur countries or elsewhere. The research and literature review sought to focus primarily on *ex post* analyses, so as to identify risk areas that warrant attention from the human rights

perspective, even in the absence of hard data or knowledge of the actual content of the EFTA-Mercosur trade agreement.

(e) Applicable methodology.

Based on the conclusions drawn from the literature review, each section presents the relevant methodology or methodologies that should be applied for assessing possible human right impacts of the agreement with Mercosur.

(f) Indicators

The study describes how to define indicators for *ex ante* and subsequent ongoing monitoring of the human rights under discussion and includes an illustrative list for each issue area.

## V Issue 1: Intellectual property provisions and access to medicines

### (a) Background

The stakeholder consultations revealed widespread concern that intellectual property (IP) standards in the planned agreement would restrict access to medicines. Pharmaceutical products constitute by far the largest category of goods traded between EFTA and Mercosur countries (by value), flowing mainly from Switzerland to Mercosur. Valued at €1 728 million in 2018,<sup>20</sup> pharmaceuticals from Switzerland accounted for almost 47% of total EFTA exports to Mercosur. It is thus unsurprising that IP is a priority issue for Switzerland in these negotiations, as it is in other trade negotiations.

### (b) Legal basis

Access to medicines is a right under international human rights law, protected *inter alia* as part of the rights to life and to health. The ICESCR, which all EFTA and all Mercosur countries have ratified, imposes a duty to provide universal access to essential medicines as a core and therefore prioritized duty under the right to health,<sup>21</sup> Moreover, the duty to assure that all health care services are available, accessible, acceptable and of good quality implies an obligation on the State to ensure access to affordable and safe drugs.<sup>22</sup> The UN General Assembly has confirmed that access to medicines is a fundamental element in achieving realisation of the right to health, and the agreed targets for achieving SDG3 of healthy lives and wellbeing includes access to medicines.<sup>23</sup> In short, the norm that access

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<sup>20</sup> EFTA, *Trade between EFTA and Mercosur 2018*, <http://trade.efta.int/#/country-graph/EFTA/MERCOSUR/2018/HS2> (accessed 20 January 2020)

<sup>21</sup> L. Forman & G. MacNaughton (2016) "Lessons learned: a framework methodology for human rights impact assessment of intellectual property protections in trade agreements," 34(1) *Impact Assessment and Project Appraisal*.

<sup>22</sup> UN, CESCR (2000) General Comment No. 14: The Right to the Highest Attainable Standard of Health, UN Doc. E/C.12/2000/4 [hereinafter CESCR General Comment Right to Health].

<sup>23</sup> Sustainable Development Goals Knowledge Platform, *Sustainable Development Goal 3, Targets & Indicators*, <https://sustainabledevelopment.un.org/sdg3> (accessed 20 January 2020).

to medicines forms an integral part of the right to health is now widely accepted, including—at least in part—by the multinational pharmaceutical industry.<sup>24</sup>

States have human rights duties towards their own citizens. They also have international obligations pursuant to their ratification of human rights instruments, and by application of general international law. In relation to the right to health, States must respect the enjoyment of the right to health in other countries, prevent third parties from violating the right to health in other countries, and ensure that State party actions as parties to international agreements take due account of the right to health. A State's failure to take into account its legal obligations regarding the right to health when entering into bilateral or multilateral agreements with other States is a violation of the obligation to respect the right to health.<sup>25</sup> In 2015, the UN High-Level Panel on Access to Medicines recommended that governments undertake public health impact assessments of their trade and investment treaties in order to ensure that these agreements do not include provisions that interfere with their obligations to fulfil the right to health.<sup>26</sup>

Under its duty to ensure that trade agreements it enters into take account of the right to health of those under its trading partners' jurisdiction, Switzerland is required to ensure that the IP standards included in this agreement will not jeopardize enjoyment of the right to health in Mercosur countries. The CESCR has recognized the right to health risks posed by Switzerland's trade agreements, noting in particular that TRIPS-plus intellectual property standards can adversely affect access to medicines and thereby compromise the right to health.<sup>27</sup> As noted in the presentation of the obligation to carry out a human rights impact assessment (see Annex 1) the Committee has, on more than one occasion, called on Switzerland to carry out human rights impact assessments of its planned trade agreements, asking Switzerland to pay specific attention to the IP chapter of these.<sup>28</sup>

### (c) What is likely to be in the EFTA-Mercosur agreement<sup>29</sup>

Switzerland generally pushes for high intellectual property standards in its trade agreements and is expected to have done so in its negotiations with Mercosur. It is

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<sup>24</sup> S. Moon (2013) "Respecting the right to access to medicines: Implications of the UN Guiding Principles on Business and Human Rights for the pharmaceutical industry," 15(1) *Health and Human Rights*.

<sup>25</sup> ICESCR Article 12, as interpreted by CESCR General Comment Right to Health; Committee on the Rights of the Child (2003) *General Comment No. 5: General Measures of Implementation for the Convention on the Rights of the Child*, UN Doc. CRC/GC/2003/5, at para. 5.

<sup>26</sup> UN (2016) *The United Nations Secretary-General's High-Level Panel on Access to Medicines Report: Promoting Innovation and Access to Health Technologies*.

<sup>27</sup> UN CESCR (2010); UN CESCR (2019), *supra* note 14.

<sup>28</sup> *Ibid.*

<sup>29</sup> Other elements of EFTA trade agreements can have significant and direct consequences for the right to health. Although important, these are not considered here as they did not emerge from the stakeholder consultations as priority issues. For instance, government procurement provisions have given rise to concern that they shrink policy space for health care as in most countries, governments are involved in the procurement of medicines and devices. IP rules have enabled traditional medicines to be appropriated, adapted and patented without the prior informed consent of the original knowledge-holders or with little or no compensation to them. See D. Gleeson et al. (2019) "Analyzing the impact of trade and investment agreements on pharmaceutical policy: provisions,

anticipated that the agreement will include a range of IP provisions that go beyond what is required by the World Trade Organisation (WTO) Agreement on Trade-Related Aspects of Intellectual Property Rights (TRIPs), which all eight EFTA and Mercosur States have already agreed to. These so-called ‘TRIPs-plus’ provisions might include patent extensions (for instance if the administrative process of approving a medicine delays the granting of a patent or the patented product’s market entry), extended provisions on exhaustion, guarantees of patentability for new uses of the same medicine, protection of data exclusivity, imposing linkage (coordination) between health and patent authorities, conditions on compulsory licensing of medicines, bans on parallel imports, stronger patent enforcement mechanisms, or restrictions of the grounds on which patents can be revoked. Other EFTA trade agreements have specified that their IP provisions shall be without prejudice to the Doha Declaration on the TRIPs Agreement and Public Health as well as the 2005 Amendment of the TRIPs Agreement that facilitates access to medicines.<sup>30</sup> It is expected that the agreement with Mercosur will include similar wording. A WTO panel has recognized that the decision adopting the Doha Declaration expresses “an agreement between WTO Members on the approach to be followed in interpreting the provisions of the TRIPs Agreement.”<sup>31</sup> Nonetheless, concern remains that the approach favouring stricter IP standards may cause regulatory and negotiating chill and, in practice if not in law, prevail over agreements that call for IP standards that facilitate access to medicines.

#### (d) Human rights concerns

Past experience from trade agreements with high IP standards shows that TRIPs-plus standards on pharmaceuticals can influence the availability and price of medicines as well as States’ policy space in areas such as definition of patenting processes and criteria or setting the appropriate balance between encouraging innovation and safeguarding public health.<sup>32</sup> TRIPs-plus standards can also affect developing countries’ capacity to sustain domestic production of medicines and other technologies, thus impacting on industrial and development policy as well as health policies.

#### *Medicine prices*

Patents are the main form of IP protection for pharmaceuticals. They seek to encourage and reward inventors by guaranteeing a period of exclusivity in a market to enable the patent owner to recoup the costs invested in developing the product. However, by

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pathways and potential impacts,” 15(1) *Globalization and Health* and S. Reid Smith (2015) *Potential human rights impacts of the TPP*, Third World Network.

<sup>30</sup> See for instance Free Trade Agreement Between the EFTA States and the Central American States, 2013, Annex XIX, Intellectual Property Rights, <https://www.efta.int/media/documents/legal-texts/free-trade-relations/central-america/annexes-en/annex-xix-ipr.pdf> (accessed 20 January 2020).

<sup>31</sup> WTO, Dispute Settlement Body, *DS467: Australia — Certain Measures Concerning Trademarks, Geographical Indications and Other Plain Packaging Requirements Applicable to Tobacco Products and Packaging*, Report of the Panels, WTO Doc. WT/DS435/R, 18 June 2018.

<sup>32</sup> S. Barazza (2014) “The Draft Trans–Pacific Partnership Agreement and its Implications for Public Health and Access to Medicines: The UNITAID Report,” 5(3) *European Journal of Risk Regulation*, pages 366-373.

excluding third parties the incumbent can set prices that are higher than in a scenario with competition.<sup>33</sup> Both economic theory (the fact that patent protection usually leads to a monopoly position) and empirical studies suggest that increasing patent protection for medicines goes hand in hand with higher medicine prices,<sup>34</sup> although there are challenges in establishing overall conclusions as these will differ depending on the drug in question and the time span of the study, not to mention the specifics of IP protection and other factors in the country being studied.<sup>35</sup>

A number of *ex post* studies find higher prices following increased IP protection. After patents were introduced in Malaysia, drug prices rose by 28% on average per year between 1996 and 2005.<sup>36</sup> Introduction of patents on pharmaceutical products in Brazil in 1996 has caused medicines to weigh increasingly heavily upon the Brazilian public health budget.<sup>37</sup> Delayed market entry of generics due to enhanced IP protection is estimated to have cost Jordanian private consumers approximately 18 million US dollars in 2004<sup>38</sup>, as well as having harmful effects on public health in the country.<sup>39</sup> A 2018 study of prices in OECD countries finds that stronger IP standards correlate with higher national pharmaceutical expenditure.<sup>40</sup> Other studies have shown that IP can significantly increase the likelihood of non-access to prescribed medicines even after controlling for individual socioeconomic status and national characteristics associated with access to medicines.<sup>41</sup>

Although price is only one of a number of determinants of access to medicines, health care and the right to health, this study proceeds on the basis that increased pharmaceutical prices negatively affect human rights. Increased governmental spending on pharmaceuticals stretches public health budgets and reduces funds available for other social spending.<sup>42</sup> Foregoing other necessities to pay for medical treatment or declining medical treatment altogether can affect health and other human rights. These constitute a

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<sup>33</sup> G. C. Chaves et al. (2017) *Mercosur-EU Free Trade Agreement: Impact analysis of TRIPS-plus measures proposed by the EU on public purchases and domestic production of HIV and Hepatitis C medicines in Brazil*.

<sup>34</sup> See for instance K. Maskus (2009) "A review of the economic literature," in R. Meléndez-Ortiz and P. Roffe P (eds) *Intellectual property and sustainable development. Development agendas in a changing world*. Edward Elgar Publishing, Cheltenham, pages 71–95.

<sup>35</sup> K. Shadlen et al. (2019) "Patents, trade and medicines: past, present and future," *Review of International Political Economy*.

<sup>36</sup> R. D. Smith et al. (2009) "Trade, TRIPS, and Pharmaceuticals," 373 *The Lancet*.

<sup>37</sup> M. S. Guise Rosina & A. de Oliveira Novaes (2014) "Brazil and the Case of Patents and Access to Medicines: A Medical Condition?" in *Balancing Wealth and Health: The Battle over Intellectual Property and Access to Medicines in Latin America*.

<sup>38</sup> R. Abbott et al. (2012) "The price of medicines in Jordan: The cost of trade-based intellectual property," 9 (2) *Journal of Generic Medicines*, pages 75-85

<sup>39</sup> Oxfam International (2007) *All costs, no benefits: How TRIPS-plus intellectual property rules in the US-Jordan FTA affect access to medicines*.

<sup>40</sup> Y. Jung & S. Kwon (2018) "How Does Stronger Protection of Intellectual Property Rights Affect National Pharmaceutical Expenditure? An Analysis of OECD Countries," 48(4) *International Journal of Health Services*.

<sup>41</sup> Y. Jung & S. Kwon (2015) "The Effects of Intellectual Property Rights on Access to Medicines and Catastrophic Expenditure," 45(3) *International Journal of Health Services*.

<sup>42</sup> S. Walker (2009) *The Future of Human Rights Impact Assessments of Trade Agreements*, page 173.

step away from progressive realisation of the right to health in and of themselves, even if other factors necessary for realisation of the right to health are also absent.

#### *IP's role in stimulating innovation*

Advocates of stronger IP protection refer to its role in encouraging investment in innovation, research and development (R&D) of new medicines, through giving patent owners certainty over their inventions.<sup>43</sup> They note that IP can sustain continuing investment and provide the framework for funding research into new treatments and cures. The pharmaceutical industry notes that countries with IP systems that do not provide adequate protections discourage medical innovation and ultimately diminish patients' access to new treatments and cures.<sup>44</sup> In other words, possible price increases are offset by other benefits that stronger IP regimes can bring. Indeed, a new, more expensive, medicine may contribute to realisation of the right to health by curing a patient or improving her quality of life, for instance by allowing for less frequent doctor and hospital visits.<sup>45</sup>

Although R&D is indispensable for the right to health, and innovation is valuable for a country's development, it is not certain that strict IP provisions are the best way to finance this. The pharmaceutical sector is known for its high rate of profit,<sup>46</sup> and many believe that research and development costs may be recouped after only months of sales of a product in a monopoly regime.<sup>47</sup> But the secrecy that surrounds R&D financing means that we do not know to what extent the monopoly privileges offered through extended IP protection are really necessary to fund R&D into new medicines and to what extent they just fuel profit.<sup>48</sup> The International Intellectual Property Institute reports that, even within the IP policy community, the perception is that stronger patent protection in the pharmaceutical context primarily benefits large rights holders from industrialised countries.<sup>49</sup> Access to medicines advocates contend that there are other medical research and innovation stimulation mechanisms besides IP that are less costly for public purses and patients.<sup>50</sup>

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<sup>43</sup> Global Program for Intellectual Property Rights (GPIPR) (2019) *Factsheet*.

<sup>44</sup> Phrma, *Advocacy – Intellectual Property*, <https://www.phrma.org/en/Advocacy/Intellectual-Property> (accessed 20 January 2020).

<sup>45</sup> European Public Health Alliance 2018 quoted in BKP Development Research & Consulting (2018) *Sustainability Impact Assessment in Support of the Negotiations for the Modernisation of the Trade Part of the Association Agreement with Chile*, at page 109.

<sup>46</sup> WHO, WIPO & WTO (2013) *Promoting Access to Medical Technologies and Innovation: Intersections between Public Health, Intellectual Property and Trade*.

<sup>47</sup> C. Correa (2006) "Implications of bilateral free trade agreements on access to medicines," 84(5) *Bull. World Health Organ.* pages 400-402.

<sup>48</sup> E. t'Hoen, quoted in J. Zarocostas (2017) "Perspectives on access to medicines and IP rights," *WIPO Magazine*, [https://www.wipo.int/wipo\\_magazine/en/2017/06/article\\_0002.html](https://www.wipo.int/wipo_magazine/en/2017/06/article_0002.html) (accessed 20 January 2020).

<sup>49</sup> A. Koff et al. (2011) *Study on the Economic Impact of "TRIPS-Plus" Free Trade Agreements*, International Intellectual Property Institute [hereinafter Economic Impact TRIPS-Plus FTA Study].

<sup>50</sup> See for instance Ellen t'Hoen, *supra note 48*.

From the perspective of this study, those arguing in favour of the role of IP in stimulating innovation would have to make their case specifically in relation to the countries involved in negotiations for a given trade agreement, based on the conditions prevailing in the countries involved. Given the price increases that IP brings, it would be incumbent on those calling for higher IP standards to demonstrate that medicines would not be produced or would not be available in the absence of such standards.

#### *Trade benefits in exchange for pricier medicines?*

The key point to remember in this discussion is that the State bears the duty of ensuring that medicine prices do not contribute to retrogression from realisation of the right to health. States retain the primary obligation to protect the right to health when business activities may be undermining it and must therefore ensure *inter alia* that the IP framework does not permit excessive pricing for medicines. In the context of a HRIA of an agreement that contains TRIPs-plus standards, the onus is therefore on the State to demonstrate how benefits that can derive from more extensive IP rights – or other benefits under the trade agreement<sup>51</sup> – can directly compensate those whose right to health will be adversely affected. Overall aggregate numbers (of increased trade volumes, or of other benefits put forward by IP proponents as discussed in the following sub-section) will not suffice; consideration of impacts on those most vulnerable to price increases must be considered.

#### *Other benefits of IP for developing countries*

A substantial amount of research has been published on whether the other promises of TRIPs-plus standards have been borne out in practice. The main focus of this section is price, but it is still worth briefly noting some of the findings with regard to arguments that stronger IP in developing countries can attract investment, or result in increased pharmaceutical production and exports from countries who have accepted TRIPs-plus standards through trade agreements.

Today, developed countries produce and export high-value patented pharmaceuticals, with developing countries tending to import these products and produce low-value generic or alternative medicines. This leads to many developing countries having a trade deficit in modern medicines, often resulting in an overall health-sector deficit. There is little evidence that this pattern has reversed through adoption of stronger IP standards; on the contrary.

A 2009 *ex ante* study of Costa Rica using the IPRIA (Intellectual Property Rights Impact Aggregate) model found that IP protection of foreign medicines would reduce domestic

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<sup>51</sup> According to the Swiss government “the treaties on free trade and the protection of investment entered into by Switzerland promote the opening-up of the economies of its partner countries and thereby contribute to economic development and the growth of these economies, which has a positive impact on access to medicines. Protecting intellectual property rights in the health-care sector and improving the health of disadvantaged populations are important. The efforts made in these two areas can complement each other. Intellectual property protection not only can contribute to prosperity and the development of society but also serves as a driver for the development of more effective medicines and better technologies and services.” UN CESCR (2018) *Fourth periodic report submitted by Switzerland*, UN Doc. E/C.12/CHE/4.



competitiveness and local market share,<sup>52</sup> giving rise to concerns that IP could increase reliance of developing countries on rich-country pharmaceutical companies, further increasing the latter's market power and disincentivizing investment in domestic production capacity. No follow-up studies appear to have been undertaken so it is not possible to say whether the concerns were borne out in practice, although data from elsewhere suggest that they might be. In the decade to 2009, for instance, Thailand increased dependency on pharmaceutical imports although it had strengthened its IP regime.<sup>53</sup> Likewise, despite having a TRIPs-consistent IP system, Uruguay doubled its pharmaceutical imports over the past decade.<sup>54</sup> In the country patents are predominantly used by non-residents from the pharmaceutical industry; Uruguayan residents filed little more than 4% of all pharmaceutical patent applications in the period 1995-2012.<sup>55</sup>

Studies of whether strong IP rights help attract FDI have reached different conclusions depending on factors like the levels of the country's IP protection, and the channel of investment in question. There does nevertheless appear to be little overall connection between extended IP protection in developing countries and pharmaceutical companies' decisions to increase expenditure on R&D, to conduct research in the treatment of endemic diseases;<sup>56</sup> or flows of investment by the pharmaceutical industry into a given country.<sup>57</sup> Research finds that patent protection in wealthy countries is associated with increases in R&D, but that the introduction of patents in developing countries has not been followed by greater R&D investment in the diseases that are most prevalent there.<sup>58</sup>

A study by the International Intellectual Property Institute (IIPI) of TRIPs-plus provisions of 14 US free trade agreements assesses these provisions' effects on the US trading partner through econometric analysis and on-site interviews. The study showed that Jordan, the first country to adopt TRIPs-plus standards through a bilateral trade agreement with the US, saw virtually no FDI by foreign drug companies between 2001 and 2007 to synthesize or manufacture medicines in partnership with local generics companies. On investment, cables leaked more recently revealed that the government was unable to persuade Bristol Myers Squibbs to change its 2008 decision to close down its operations in Jordan, despite the country's high levels of IP protection.<sup>59</sup> Examination of the Singapore-US free

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<sup>52</sup> G. Hernández-González et al. (2009), *Evaluación del impacto de las disposiciones de ADPIC + en el mercado institucional de medicamentos de Costa Rica*, ICTSD: Geneva, Switzerland.

<sup>53</sup> R. D. Smith et al. (2009) *supra note 36*.

<sup>54</sup> Trading Economics, *Uruguay imports of pharmaceutical products*, <https://tradingeconomics.com/uruguay/imports/pharmaceutical-products> (accessed 20 January 2020).

<sup>55</sup> WIPO, Committee on Development and Intellectual Property (2014) *Study on the impact of intellectual property on the pharmaceutical industry of Uruguay*, WIPO Doc. CDIP/13/INF/5.

<sup>56</sup> W. Park (2007) "Intellectual property rights and international innovation," in K. Maskus (ed.) *Frontiers of economics and globalization*. Elsevier: New York, pages 289-327.

<sup>57</sup> M. Palmedo (2013) "Do pharmaceutical firms invest more heavily in countries with data exclusivity?" 21(2) *Curr Int Trade Law J.* pages 38-47.

<sup>58</sup> M. Kyle & A. McGahan (2012) "Investments in Pharmaceuticals Before and After TRIPs," 94(4) *The Review of Economics and Statistics*.

<sup>59</sup> M. El Said (2012) *The Morning After: TRIPs-Plus, FTAs and Wikileaks - Fresh Insights on the Implementation and Enforcement of IP Protection in Developing Countries*. PIJIP Research Paper no. 2012-03. American University Washington College of Law: Washington, D.C.

trade agreement in the same IPI study echoed the findings from Jordan, that strong IP standards are not in themselves a condition for attracting or retaining foreign investment.<sup>60</sup> Similarly, although foreign corporations reportedly considered Malaysia's patent system to be robust, they did not transfer technology or investment there.<sup>61</sup> This confirms the conclusion that IP is but one of many factors that attract FDI and stimulate innovation.<sup>62</sup>

The IPI study did find trade increases: US imports of pharmaceuticals and medicines from Jordan increased by over 8000 percent in the ten years after the free trade agreement (FTA) was signed (compared to a 200 percent increase during the same period in US pharmaceutical and medicines imports from the world). The results of the IPI study also suggest that stronger IP protection abroad is generally associated with a higher level of US goods imports from those countries.<sup>63</sup> Overall, though, another study concluded that whilst TRIPs generated clear gains for the pharmaceutical industry and the developed world it did not generate substantial gains for developing countries in the form of increased exports.<sup>64</sup>

Notwithstanding any increased trade, from a human rights perspective, the primary issue remains the impact of IP protection on availability and cost of medicines for those who need them. Even if there is increased domestic production and export of drugs, it would have to be demonstrated that the benefits of these flow, in the form of increased salaries or reduced expenditure on other essential goods and services for instance, directly to those who are most vulnerable.

#### *Mercosur's IP environment*

Mercosur countries introduced pharmaceutical patents through the TRIPs agreement, and still retain considerable TRIPs flexibility. Uruguay first allowed patent applications based on chemical substances and products in 1999.<sup>65</sup> Pharmaceutical patents were introduced in Brazil in 1996 and in Argentina in 2000. In Paraguay, the first pharmaceutical patent was granted in 2013.<sup>66</sup>

Argentina and Brazil are particularly noteworthy for their efforts to balance the patent regime and the protection of the right to health. Brazil is the only country to have made effective use of compulsory licensing provisions. Argentina marginalizes the role of

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<sup>60</sup> Economic Impact TRIPs-Plus Study, *supra* note 49.

<sup>61</sup> R. Smith et al. (2009) *supra* note 36.

<sup>62</sup> Economic Impact TRIPs-Plus Study, *supra* note 49. See also Yi Qian (2007) "Do National Patent Laws Stimulate Domestic Innovation in a Global Patenting Environment? A Cross-Country Analysis of Pharmaceutical Patent Protection 1978–2002," 89(3) *The Review of Economics and Statistics*, which finds that national patent protection alone does not stimulate domestic innovation; W. Park (2007) *supra* note 57.

<sup>63</sup> Economic Impact TRIPs-Plus Study *supra* note 49.

<sup>64</sup> R. Smith et al. (2009) *supra* note 36.

<sup>65</sup> WIPO, Committee on Development and Intellectual Property (2014) *supra* note 55.

<sup>66</sup> Lexology, *The first patent for pharmaceutical products in Paraguay*, <https://www.lexology.com/library/detail.aspx?g=f50b1f10-2146-4ce4-8612-daf6ef688c7c> (accessed 20 January 2020).

patents in determining the cost of medicines and reduces the impact of patenting decisions on fair and efficient access to healthcare.<sup>67</sup> From 2002 Argentina's patent office's examination guidelines have barred patents on most forms of secondary pharmaceutical patents.<sup>68</sup> Argentina also allows parallel imports, compulsory licensing and other TRIPS flexibilities. In 2017, 70% of the country's domestic market is supplied from locally produced medicines.<sup>69</sup> Paraguay has a significant pharmaceutical industry with strong national laboratories and provides for participation of the Ministry of Health in the examination of pharmaceutical patents.<sup>70</sup>

Mercosur governments undertake public procurement processes and strategies to reduce the price of medicines. They do so individually and collectively: since 2015 Latin American countries from the Mercosur trade bloc have successfully joined forces to negotiate lower prices for several medicines including drugs for treating HIV, hepatitis C antivirals and oncology medicines.<sup>71</sup>

*Ex ante* health impact assessments have been carried out to model possible public health impacts of the EU-Mercosur trade agreement on medicines used to treat HIV/Aids and hepatitis C. One, for Brazil, estimated the impact of TRIPs-plus measures on public expenditures on these medicines, and sales of domestic production in Brazil. It found that TRIPs-plus provisions on data exclusivity and patent extensions that the EU had proposed (and were finally not included in the agreement) would have increased prices of these medicines and decreased sales of these medicines produced locally.<sup>72</sup> A study concerning Argentina came to similar conclusions.<sup>73</sup>

If the trade agreement between EFTA and Mercosur contains any TRIPs-plus provisions,<sup>74</sup> it would be likely to affect availability and prices of medicines in Mercosur countries, and thus impact on the right to health. This pleads in favour of *ex ante* impact assessment to ascertain the extent of the risks based on different negotiating scenarios, and to facilitate adoption of a text which promotes and does not undermine the right to health.

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<sup>67</sup> P. Bergallo & A. Ramón Michel (2014) "The Recursivity of Global Lawmaking in the Struggle for an Argentine Policy on Pharmaceutical Patents," in R. Dreyfuss & César Rodríguez-Garavito *Balancing Wealth and Health: The Battle over Intellectual Property and Access to Medicines in Latin America*.

<sup>68</sup> B. N. Sampat & K. C. Shadlen (2017) "Secondary pharmaceutical patenting: a global perspective," 46(3) *Research Policy*, pages 693-707.

<sup>69</sup> Embassy of India in Argentina (2018) *Pharmaceutical Industry in Argentina*, <https://www.indembarg.gov.in> (accessed 12 December 2019).

<sup>70</sup> Lexology, *supra* note 66.

<sup>71</sup> F. Bruce (no date), *Lessons From Mercosur Multi-Country Pricing Negotiations*, <https://pharmaintelligence.informa.com/resources/product-content/lessons-from-mercotur-multi-country-pricing-negotiations> (accessed 20 January 2020); C. Mota Soares, B. Nascimento et al. (2019) Public procurement of medicines: scoping review of the scientific literature in South America, 12 *J of Pharm Policy and Pract.*

<sup>72</sup> Chaves et al. (2017) *supra* note 33, at pages 7-9.

<sup>73</sup> Fundación Grupo Efecto Positivo (FGEP) (no date) *EU-Mercosur Bi-Regional Association Agreement: impact of the intellectual property chapter on public procurement of medicines in Argentina*.

<sup>74</sup> Provisions relating to public procurement can also impact medicine prices and would therefore warrant separate human rights-based analysis.

### (e) Applicable methodology

The most detailed methodology for HRIA of trade agreements has been set out by Simon Walker in an *ex ante* right to health assessment of planned IP provisions that Costa Rica was to introduce through ratifying the Central American Free Trade Agreement (CAFTA).<sup>75</sup> Walker cautions that his work is but an illustration of the methodology, yet subsequent experience confirms the continued validity of his approach. In particular, the methodology's application of both quantitative and qualitative analytical tools, and its focus on a narrow set of expected IP provisions and one human right, enable the level of detailed focus necessary to yield findings that have practical application.

The present study has already carried out the "consultation" and "screening" HRIA steps (described in Section IV). These resulted in identification of possible inclusion of TRIPs-plus provisions in the planned agreement as a concern. Walker's methodology from the "scoping" step onwards will be briefly presented here. That scoping exercise described Costa Rica's IP legal landscape prior to CAFTA, the country's human rights normative framework relating to access to medicines, and discussed the changes CAFTA's provisions on IP affecting access to medicines would introduce. It also presented the choice of assessment techniques and the criteria for selecting indicators.

Walker's methodology uses three techniques in the analysis. First is the economic modelling based on the IPRIA (Intellectual Property Rights Impact Aggregate) Model.<sup>76</sup> This provides a simulation model for assessing the impact of changes to IP rules on access to medicines, based on a "scenario methodology." A base scenario reflects the market behaviour based on the selected parameters as well as the effects of legislation and regulation already approved at the initial year of the period analysed. The base scenario is then compared with a number of alternative scenarios incorporating the impact of the potential changes on IP. A scenarios approach such as this is valuable for identifying the optimal trade negotiation position, as well as providing the information base necessary for addressing possible adverse impacts.

Causal-chain analysis and expert judgment are the other techniques that Walker uses. Based on the analysis these tools yields, he formulates conclusions as to the impacts of stronger IP standards on the right to health, and puts forward recommendations for addressing the adverse impacts identified.

Many observers have noted how complex it is to quantify all of the implications of new IP protection; so, as noted earlier, one of the advantages of the Walker methodology is to narrow down the field of enquiry and to combine quantitative with qualitative methods to establish what the human rights risks are. Also, rigorous selection of indicators enables the same approach to be applied at a later stage, to assess the *ex post* impacts of the new IP

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<sup>75</sup> S. Walker (2009) *The Future of Human Rights Impact Assessments of Trade Agreements*, pages 123-186 [hereinafter Walker HRIA methodology].

<sup>76</sup> J. Rovira et al. (2009) *Guide to the IPRIA (Intellectual Property Rights Impact Aggregate) Model*, <https://www.ictsd.org/sites/default/files/event/2010/03/guide-to-the-ipria-model.pdf> (accessed 12 December 2019).

provisions. New research methods and tools can easily be integrated into Walker's methodology. For instance, a team of researchers are currently developing a best practice research guide which will include a list of empirical indicators for access to medicine research,<sup>77</sup> some of which will be relevant for a HRIA of IP provisions in trade agreements.

#### (f) Indicators

Indicators are necessary to evaluate the extent to which IP provisions in the EFTA-Mercosur trade agreement affect the right to health. There exist a large number of indicators to measure health and right to health outcomes. The SDGs set out a few of these, but more useful will be those developed by the UN Special Rapporteur on the Right to Health and the Office of the High Commissioner for Human Rights, which has also proffered detailed guidance on how to select indicators in such a way as to monitor realisation of a particular human right.<sup>78</sup>

A human rights indicator is specific information on the state or condition of an object, event, activity or outcome that can be related to human rights norms and standards, that addresses and reflects human rights principles and concerns, and that can be used to assess and monitor the promotion and implementation of human rights.<sup>79</sup> Human rights indicators' roots in the human rights treaties assure a precise and objective basis for their identification and measurement, drawing on internationally recognized definitions of the issues at stake.<sup>80</sup> Human rights indicators are generally divided into three categories:

1. *Structural indicators*, which reflect the human rights institutional framework that is necessary to facilitate the realisation of the human right concerned and provide a measure of 'duty-bearers' commitment to human rights. Structural indicators include ratification of international instruments; recognition of rights in national laws; and the identification of institutional mechanisms for the promotion and protection of rights.
2. *Process indicators*, which measure the effort undertaken to respect, protect and fulfil human rights through programmes, policies and other interventions. The respect for human rights in government processes has a significant bearing on the extent to which individuals do actually enjoy human rights.
3. *Outcome indicators*, which capture attainments, individual and collective, that reflect the actual level of enjoyment of human rights – the *results* of the commitment and effort of the duty-bearers with regard to human rights. Thus, a process indicator might assess the existence and coverage of an immunisation programme, while outcome indicators would capture life expectancy or mortality rates.<sup>81</sup>

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<sup>77</sup> R. Thrasher et al. (2019) *Rethinking Trade Treaties and Access to Medicines: Toward a Policy-Oriented Research Agenda*, Global Development Policy Centre: Boston.

<sup>78</sup> OHCHR (2012) *Human Rights Indicators – A Guide to Measurement and Implementation*, [http://www.ohchr.org/Documents/Publications/Human\\_rights\\_indicators\\_en.pdf](http://www.ohchr.org/Documents/Publications/Human_rights_indicators_en.pdf)

<sup>79</sup> *Ibid.*

<sup>80</sup> In particular in contrast to the different understandings of more general indicators under headings such as poverty or health.

<sup>81</sup> Walker HRIA methodology, *supra* note 75, page 108.

The choice of indicators is an important one. A sufficient number of indicators should be included to enable the assessor to discern a complete picture of the situation at hand, but not so many that the measurement exercise becomes unmanageable. Indicators should be reliable, valid, relevant and suitable to measurement over time. Wherever possible they should be disaggregated or amenable to disaggregation, and data for their measurement should be available. In some cases however, data, disaggregated or not, will not be available. Absence of relevant data will in itself be an indicator of the importance attributed to the factor that is the subject of the assessment. In some cases, the HRIA will be able to generate data or commission data collection, which will be useful to future research or policy-making in the area at hand. Objectivity is also a criterion for selection of an indicator, bearing in mind that subjective indicators will sometimes be relevant.<sup>82</sup> The key point in such a case is to make clear whether or not the indicator is objective.

The indicators chosen for the *ex ante* HRIA can and should be revisited after a certain number of years, as part of an *ex post* assessment of the agreement's human rights impacts. Indeed, the use of the same indicators over time permit a clearer and more consistent picture to emerge.

Some indicators for assessing the possible impact of TRIPs-plus IP provisions in the EFTA-Mercosur trade agreement are listed below. Others could be added depending on the specific focus of the HRIA, to ensure that what is being measured yields as complete a picture as possible.

- International human rights treaties, relevant to the right to enjoyment of the right to health ratified by the State
- Date of entry into force and coverage of the right to health in the Constitution or other forms of superior law
- Date of entry into force and coverage of domestic laws for implementing the right to health
- Time frame and coverage of national policy on access to medicines
- Legal protections against discrimination
- Level of autonomy, independence and capacity of the country's national human rights institution
- Is the right to health and/or access to medicines justiciable under the domestic legal system? (including identification any legal cases brought to ensure access to medicines)
- Existence of structures for the use of parallel importing of or compulsory licensing of medicines
- Capacity to produce medicines in each of the Mercosur countries (measuring the proportion, by value and by number of medicines, of medicines consumed nationally are imported, and what proportion are produced locally; proportion of the patents worked in Mercosur countries are owned by nationals of those countries)

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<sup>82</sup> The OECD Better Life Index includes several subjective indicators, such as "self-reported health." OECD, *Better Life Index*, <http://www.oecdbetterlifeindex.org/topics/health> (accessed 19 December 2019).

- Percentage of the domestic market supplied from locally produced medicines
- Level of autonomy, independence and capacity of the regulatory and health agencies with responsibility for approving drugs in the domestic market independent from the trade or IP regimes (measuring, for instance, how many drugs marketing authorisations use right to health criteria and how many use IP-related criteria)
- Engagement of civil society and of academia in access to medicines-related policy processes (what could be measured would be the regularity of involvement of civil society groups in discussions about market authorisation, government procurement and related topics, and the number of times civil society proposals make it into policy)
- Extent of the government's involvement in the procurement of medicines and devices, either through direct procurement, setting or regulating prices, or negotiating with companies? (could be measured in terms of value of such procurement in relation to overall expenditure on medicines and devices within the country, or in terms of the number of medicines/devices governmental procurement programmes cover)
- Existence within the country covered of a public health insurance system, and its reach (percentage of people within the country with public coverage, proportion of health expenditure covered by the public system)
- Proportion of persons within the country covered by health insurance (public or private schemes)
- Incidence of persons foregoing prescribed medicines (including data disaggregated by income / wealth level, gender, geographical region and other relevant factors)
- Incidence of persons foregoing other human rights-related expenditure in order to purchase prescribed medicines.

## VI Issue 2: Impact of the trade agreement on women's rights

### (a) Background

The four Mercosur countries score poorly on gender equality: women are more vulnerable than men to poverty and food insecurity and spend over twice the amount of time as men on unpaid domestic and care work. Despite similar mean years of schooling, the gender wage gap remains significant. Women's labour market participation is lower than men's, and they are more likely to be unemployed.<sup>83</sup>

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<sup>83</sup> M. I. Terra et al. (2008) *Trade Openness and Gender in Uruguay: A CGE Analysis*; OECD (2019) OECD Economic Surveys: Argentina, <http://www.oecd.org/economy/surveys/Argentina-2019-OECD-economic-survey-overview.pdf> (accessed 20 January 2020); UNDP, *Human Development Reports, Gender Inequality Index (GII)*, <http://hdr.undp.org/en/content/table-5-gender-inequality-index-gii> (accessed 12 December 2019); World Bank, *Women, Business and the Law Database, 2018*; UNCTAD (2018) *Trade and Gender Linkages: An Analysis of Mercosur*, at page 9; Equal Measures, 2030 Data Hub, *Latin America and the Caribbean*, <https://data.em2030.org/regions/latin-america-and-the-caribbean> (accessed 12 December 2019); LSE Consult (2019) *Sustainability Impact Assessment in Support of the Association Agreement Negotiations between the European Union and Mercosur, Draft Interim Report*, pages 99-102.

It is widely acknowledged that trade and trade rules affect women and men differently. From a human rights point of view, temporary special measures may be required so as to not further entrench the inequality which women face. This points to the need to anticipate what specific impacts of trade-related economic changes on women might be.

## (b) Legal basis

Switzerland, like all EFTA and Mercosur countries, is bound by law to respect women's rights. All eight countries have ratified the CEDAW Convention as well as other instruments protecting women from discrimination, such as the ICESCR and the ICCPR. In addition, Policy Guidelines for Gender Equality are in place in Mercosur. These mandate the inclusion of a gender perspective in the design of objectives, policies, regulations and actions.<sup>84</sup> Trade agreements that Chile has since concluded with Uruguay (in 2016)<sup>85</sup> and Argentina (2017)<sup>86</sup> include provisions on gender. Gender is a key element in the SDGs, which set out a range of gender objectives and targets. Goal 5 specifically focuses on achievement of gender equality and empowerment of all women and girls.

Although Switzerland regularly reaffirms its commitment to gender equality in its activities promoting human rights worldwide,<sup>87</sup> CEDAW has expressed concern over the country's lack of impact assessment on women's human rights prior to the negotiation of international trade and investment agreements. CEDAW has recently recommended that the country ensure that its trade and investment agreements recognize the primacy of its obligations under the Convention and explicitly consider their impact on women's rights.<sup>88</sup>

## (c) What is likely to be in the EFTA-Mercosur agreement

Based on EFTA's previous trade agreements, there is likely to be no specific mention of women or of gender in the agreement with Mercosur. At most we might expect an article in the trade and sustainable development chapter underlining the need to protect the welfare and improve the livelihoods of vulnerable groups such as women, children or subsistence farmers.<sup>89</sup> The text is likely to be peppered with references to sustainable development, social development and the need to uphold labour standards and eliminate discrimination in respect of employment and occupation, which we can read to include gender equality issues.

Even if the agreement does not specifically mention women, they will be affected by it. Indeed, new patterns of production and trade in goods, liberalisation of services trade,

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<sup>84</sup> Mercosur (2014) *Directrices de la Política de Igualdad de Género del Mercosur*, Mercosur/CMC/DEC. N° 13/14.

<sup>85</sup> *Acuerdo de libre comercio entre la República de Chile y la República oriental del Uruguay* (2016).

<sup>86</sup> *Acuerdo comercial entre la República Argentina y la República de Chile* (2017).

<sup>87</sup> See for instance FDFA, *Human Rights Strategy, 2016 – 2019*, supra note 8, at page 13.

<sup>88</sup> UN CEDAW (2016) *Concluding observations on the reports of Switzerland*, UN Doc. CEDAW/C/CHE/CO/4-5, para 41b.

<sup>89</sup> As is the case in the 2018 EFTA-Indonesia Comprehensive Economic Partnership Agreement, *Article 8.5 Social Development*.



rules governing investment, government procurement, or intellectual property rights can all affect women differently from men, sometimes offering new opportunities, sometimes presenting challenges.

#### (d) Human Rights Concerns

Any assessment of the impact of new trade rules and trading patterns must therefore take into account their possible impact on women in their different roles – whether as workers, producers, traders, consumers, home managers, taxpayers or users of public services. Increased employment opportunities and wages for women are often put forward as positive effects of trade liberalisation, but stakeholders consulted expressed doubt as to whether “rhetoric about women’s economic empowerment” is really borne out in practice. Several felt that the EFTA-Mercosur trade agreement was not likely to improve women’s enjoyment of the right to an adequate standard of living, nor result in creating quality jobs. Rather, they expressed concern that lower tariff revenues could result in cuts to social spending and that increased international competition would push women’s wages down, thus jeopardizing the rights to work and to an adequate standard of living as well as contravening obligations to ensure non-discrimination between women and men.<sup>90</sup>

This section therefore considers possible impacts of the EFTA-Mercosur trade agreement on women’s wages and on their access to public services,<sup>91</sup> bearing in mind the positive knock-on effects of respecting, protecting and fulfilling women’s economic rights. As women tend to invest in their children’s education, health and family welfare to a larger degree than men, increasing the resources at their disposal significantly contributes to realisation throughout society of the rights to an adequate standard of living, to education, and to health.

##### *Women’s wages*

Most of the research on the impact of trade liberalisation on women focuses on women in wage employment and assesses how their employment and income are affected through an increase (or decrease) in exports and imports. This considerable body of research offers models to explain the pathways and conditions whereby increased trade leads to more (or fewer) jobs or better (or lower) wages for women. It also includes country-based studies of how trade liberalisation has affected women’s work opportunities and conditions in many specific countries and sectors. The one conclusion one can draw from these empirical country-based studies is that there is no clear global pattern in the trade–gender relationship. Rather, whether liberalisation will bring positive opportunities for women will depend on the sector, the country and a range of other factors including child-care opportunities or prevailing societal views about gender roles.

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<sup>90</sup> See also a publication by participants in the stakeholder consultations: F. Partenio et al. (no date) *Tratado de Libre Comercio entre Argentina y Chile - Análisis del Capítulo de Género y Comercio*.

<sup>91</sup> There are many additional ways that trade and trade rules can impact women; as they emerged less forcefully from the stakeholder consultations, they will not be discussed here.

Some research indicates, for instance, that trade liberalisation can improve gender equality in wages and employment through pro-competitive effects of liberalisation that stimulate firms' investment in new technologies. Studies in Mexico have shown that technology upgrading can expand opportunities for women relative to men, as the new jobs are considered more suitable for women.<sup>92</sup> Yet in other countries, technological upgrading has often been followed by a contraction in the relative demand for women in export sectors.<sup>93</sup> Most studies find no support for the argument that trade competition reduces gender wage discrimination.<sup>94</sup> Trade openness tends to create price pressure in less competitive sectors and consequent labour market restructuring with job losses in the short-term. The economic volatility often associated with production in export sectors can affect the quality and security of employment, and small-scale producers and lower-skilled workers – often women – tend to be more adversely affected.<sup>95</sup>

Unsurprisingly, studies undertaken in Mercosur countries present similarly mixed results. In Brazil in the 1990s, trade liberalisation did not lead to a reallocation of workers toward comparative advantage sectors or exporting firms. Unilateral reduction of import tariffs reduced male and female labour force participation and employment rates in the tradable sector, with workers moving into unemployment, inactivity, and the non-tradable sector. As the tradable sector as a whole is relatively male-intensive in Brazil the effects on men were significantly larger. In other words, liberalisation contributed to gender convergence in labor force participation and employment rates, but with downward pressure on both men and women.<sup>96</sup>

A study of Uruguay in 2008 found that greater trade openness improved both employment and wages for women, but its impact on gender gaps depended on the specific trade flows. Net exports from Uruguay to Argentina, for instance, tended to be intensive in skilled female labour. Thus if net exports to Argentina increased, demand for female labour rose and the gender gap declined, whereas a rise in net exports to other countries caused demand for male labour to increase, thus widening the gender gap.<sup>97</sup>

More recently, UNCTAD used both macroeconomic and microeconomic analysis to evaluate the impact of trade integration on women's employment and gender inequalities in employment in Mercosur. Macroeconomic analysis found that trade openness had a slight positive impact on women's employment shares in industry and services, and no impact in agriculture. Microeconomic analysis showed the effect of import tariff liberalisation on female-to-male employment ratios to be negative, but with variations

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<sup>92</sup> J. Pieters, (2018) *Trade liberalization and gender inequality*. IZA World of Labor 2018.

<sup>93</sup> UNCTAD (2019) *Making Trade Policies Gender-Responsive: Data requirements, methodological developments and challenges*, at page 7.

<sup>94</sup> UNCTAD (2014) *Virtual Institute Teaching Material on Trade and Gender, Volume 1: Unfolding the Links*, at page 44.

<sup>95</sup> M. von Hagen (2014) *Trade and Gender – exploring a reciprocal relationship: Approaches to mitigate and measure gender-related trade impacts*, Deutsche Gesellschaft für Internationale Zusammenarbeit (GIZ).

<sup>96</sup> J. Pieters, *supra note 92*; I. Gaddis & J. Pieters (2017) "The Gendered Labor Market Impacts of Trade Liberalization: Evidence from Brazil," *The Journal of Human Resources*.

<sup>97</sup> M. I. Terra et al. (2008) *Trade Openness and Gender in Uruguay: A CGE Analysis*.

depending on the country and the type of task. In Paraguay, for instance, the impact was positive in terms of production tasks but negative for non-production tasks.<sup>98</sup>

Consistent with an emerging body of inquiry on the impacts of trade liberalisation on various national labour market outcomes,<sup>99</sup> the above overview demonstrates the importance of specific contextual studies for discerning the possible employment outcomes for women of different liberalisation scenarios.

#### *Lower tariff revenues*

National tax revenues can be affected by trade liberalisation as tariffs on imported goods drop with the tariff reductions agreed to through the trade agreement.<sup>100</sup> Tariffs on imports to Mercosur countries are higher than many other countries' (see figure 1) and these countries rely on such revenue for a relatively high proportion of governmental revenue (see figure 2). As already noted, Switzerland expects 95% of Switzerland's yearly CHF 3.6 billion exports to Mercosur to benefit from tariff exemptions after the entry into force of the agreement.<sup>101</sup> Tariff concessions through the agreement could therefore amount to lowering Mercosur countries' tariff revenue by hundreds of million francs per year. For Argentina, the OECD has estimated that the impact on fiscal balance of reducing tariffs and non-tariff barriers would represent a reduction of 0.6% of GDP.<sup>102</sup>

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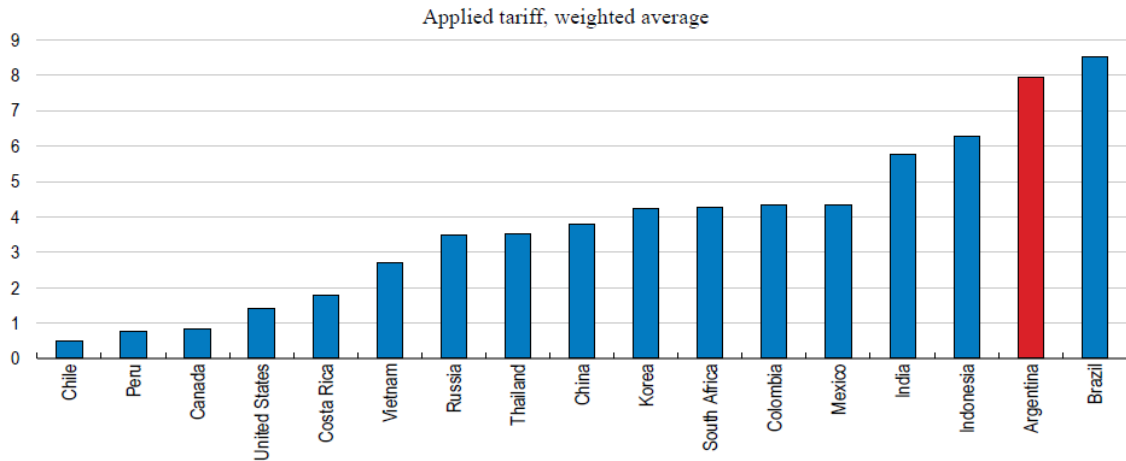
<sup>98</sup> UNCTAD (2018) *Trade and Gender Linkages: An Analysis of Mercosur*, pages 27-33.

<sup>99</sup> See I. Gaddis & J. Peters (2017). See also B. K. Kovak (2013) *Regional Effects of Trade Reform: What is the Correct Measure of Liberalization?* American Economic Review 2013, 103(5).

<sup>100</sup> In theory, the greater volume of imports as a result of liberalisation will generate a compensatory amount of tariff revenue, but in practice this rarely happens; CGE simulations predict that only in the case of very high import demand and substitution elasticities would the generated increase in imports be sufficient to compensate for the tariff cuts. X. Cirera et al. (2011) *What is the evidence of the impact of tariff reductions on employment and fiscal revenue in developing countries?* Technical report. London: EPPI-Centre, Social Science Research Unit, Institute of Education, University of London. IMF (2011) *Revenue Mobilization in Developing Countries*, <https://www.imf.org/external/np/pp/eng/2011/030811.pdf> (accessed 12 December 2019).

<sup>101</sup> Confédération Suisse (2019) Accord de libre-échange AELE-Mercosur : aboutissement des négociations quant au fond, <https://www.admin.ch/gov/fr/accueil/documentation/communiqués.msg-id-76159.html> (accessed 20 January 2020).

<sup>102</sup> OECD (2019) OECD Economic Surveys: Argentina, *supra note* 83, at page 38.



Source: World Integrated Trade Solution database (WITS).

Figure 1: From OECD, Economic Survey: Argentina 2019, page 50.

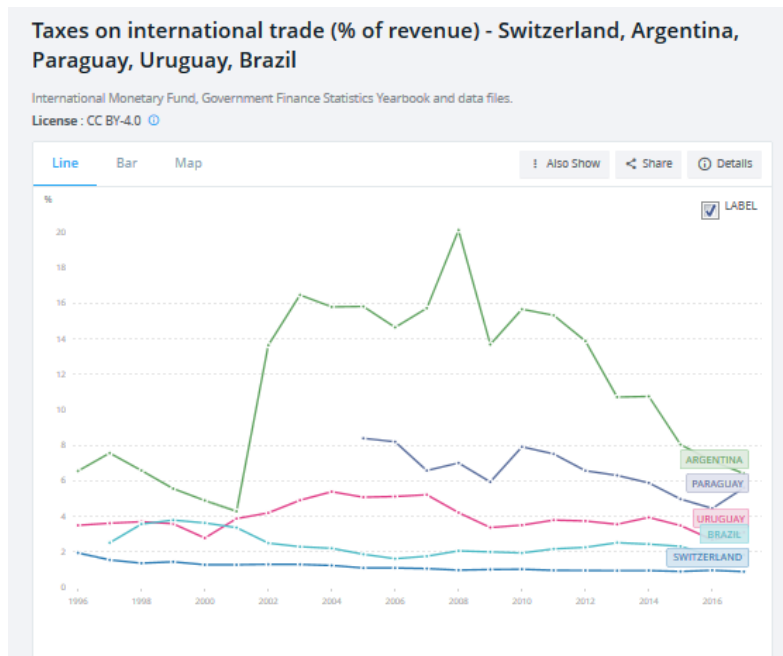


Figure 2: <https://data.worldbank.org/share/widget?end=2017&indicators=GC.TAX.INTT.RV.ZS&locations=CH-AR-PY-UY-BR&start=1996&view=chart>

Based on experience in other countries, we can expect reduced State spending to follow tariff reductions, including on public services, such as infrastructure, health services or daycare facilities, on which women tend to rely more than men.<sup>103</sup> Such a drop in governmental revenue, if it results in lower allocation of resources for social spending, is contrary to governments’ duty to mobilise resources for progressive realisation of human

<sup>103</sup> J. Cagé & L. Gadenne (2018) “Tax revenues and the fiscal cost of trade liberalization 1792–2006,” 70 *Explorations in Economic History*, pages 1-24.

rights.<sup>104</sup> In countries like Argentina, reduction of funding for public services can doubly affect women, not only as consumers of public services, but also as those are the sectors that employ high proportions of women.<sup>105</sup>

The standard policy prescription to recover revenue is to combine tariff reduction with increased consumption taxes (such as value-added or sales taxes). However these can entail administrative costs, as tariffs are an easy-to-apply source of revenue, particularly in countries like Paraguay or Argentina which have a sizeable level of informality in the economy.<sup>106</sup> Studies suggest that developing countries have found it difficult to replace tariffs with revenue from domestic sources, and it can take decades for those who have recovered pre-liberalisation tax revenue levels.<sup>107</sup>

Moreover, consumption taxes are problematic from a human rights perspective as such taxes are generally regressive, i.e. they constitute a larger proportion of income for poorer people.<sup>108</sup> For example, in 2013, in Latin America, sales tax accounted for 13.7 percent of the income of the poorest 20 percent of the population, but only 5.8 percent of the income of the richest 20 percent.<sup>109</sup> Again, women, who tend to use larger portions of their income on basic goods, bear the regressive brunt of consumption taxes.<sup>110</sup> Resorting to income taxes to compensate for loss of trade revenues can also work against women's rights if such taxes are applied to joint household incomes rather than individual incomes, deterring women's participation in the labour market as is the case in Switzerland.<sup>111</sup>

The changes in government revenues through tariff cuts therefore need to be analysed for their impacts on expenditure as well as on other means of raising public revenue. Analysis should bear in mind the gendered impacts of these changes, bearing in mind that trade policies impact women in the market as well as non-market spheres. Gender-based analysis will be necessary for policy-makers to explicitly consider new patterns of revenue

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<sup>104</sup> C. Dommen & M. Sepulveda (2017) *The Obligation to Mobilise Resources: Bridging Human Rights, Sustainable Development Goals, and Economic and Fiscal Policies*. London: International Bar Association.

<sup>105</sup> B. Paz & G. Carracedo (2018) *El mercado de trabajo argentino desde una perspectiva de género*, in *Aportes de la Economía Feminista desde Argentina*, Friedrich-Ebert-Stiftung: Argentina.

<sup>106</sup> M. Vargas (2015) *Informality in Paraguay; Macro-Micro Evidence and Policy Implications*, IMF Working Paper.

<sup>107</sup> As was the case for Turkey, see Y. Bayar & N. Ece Çelik (2019) *Tax Revenue Effect of Trade Liberalization: Evidence from Turkey*. See also [J. Cagé](#) & [L. Gadenne](#), *supra* note 103; P. I. Nwosa et al. (2012) "The Effect of Trade Liberalization On Trade Tax Revenue in Nigeria," 10 (2) *African Economic and Business Review* (finding that trade liberalisation increased imports and resulted in increased trade tariff revenues for Nigeria.)

<sup>108</sup> I. Ortiz & M. Cummins (2012) *A Recovery for All*, UNICEF, at page 210.

<sup>109</sup> Inter-American Development Bank (2013) *Recaudar No Basta: Los impuestos como instrumento de desarrollo*, at page 247.

<sup>110</sup> UNDP (2010) *Gender Equality and Poverty Reduction: Taxation*, Issues Brief, No. 1; UN Human Rights Council (2014) *Report of the Special Rapporteur on extreme poverty and human rights, fiscal policy and taxation*, UN Doc. A/HRC/26/28.

<sup>111</sup> UNCTAD (2016) *Implementing gender-aware ex ante evaluations to maximize the benefits of trade reforms for women*, Policy Brief 51. See also U. Kuhn & L. Ravazzini (2017) *The Impact of Female Labour Force Participation on Household Income Inequality in Switzerland*; OECD (2017) *OECD Economic Surveys - Switzerland*.

and spending that follow from the trade agreement. And to design these in ways that do not undermine women's rights.

#### (e) Applicable methodology

Several methodologies can be used to assess possible impacts on women's rights of the planned trade agreement. These include the general methodology for human rights impact assessment of trade and investment (HRIA) agreements presented in Sections IV and V (pages 9 and 11), UNCTAD's trade and gender toolbox, Canada's Gender-Based Analysis (GBA+), WECF's Gender impact assessment and monitoring tool and the European Institute for Gender Equality (EIGE) Gender Mainstreaming Toolkit.<sup>112</sup> All of these offer valuable insights. The EIGE toolkit reminds us that integration of a gender analysis should take place from the 'define' stage of the policy cycle. Canada's GBA+ prompts assessors to take into account the range of factors of differentiation or discrimination that we all face (e.g. ethnicity, age, education level, social class or sexual orientation) as well as cultural barriers (such as attitudes, customs and practices). Notwithstanding the qualities inherent in all these approaches, this study finds that application of general HRIA methodology combined with elements of UNCTAD's trade and gender toolbox are best suited for human rights-based assessment of possible effects on women of the planned agreement. The reason is that the former combines quantitative and qualitative analysis, includes a specific human rights focus and emphasizes the importance of involving women and women's groups in the assessment processes. The latter integrates different levels of economic analysis, primarily using macro-economic and micro-economic analytical tools, and also being capable of taking household-level factors into account.<sup>113</sup>

Ideally, examination of all the potential consequences on women of the planned trade agreement should be undertaken. Bearing in mind that the agreement will affect women differently according to their geographical location, educational level or sector of work, and that detailed assessment is time-consuming, this HRIA recommends narrowing in on a defined number of economic sectors or geographical areas for focused study. A narrow focus safeguards the robustness of the approach and the results. Drawing conclusions from aggregate numbers can obscure the realities for women in different sectors, and, since there may be several reasons for pre-existing gender inequality, there are also multiple channels through which trade liberalisation can affect such inequality. Experience has shown that the most convincing empirical evidence on the causal effects of trade liberalisation is provided by studies that focus on one or more of these channels.<sup>114</sup>

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<sup>112</sup> Status of Women Canada, *Gender-based Analysis Plus*, <https://cfc-swc.gc.ca/gba-acg/approach-approche-en.html> (accessed 12 December 2019); Women in Europe for a Common Future (WECF) (2019) *Gender impact assessment and monitoring tool*; European Institute for Gender Equality (2016) *Gender Impact Assessment Gender Mainstreaming Toolkit*; UNCTAD (2017) *Trade and Gender Toolbox*.

<sup>113</sup> M. I. Terra et al. (2008) *supra note 83*; UNCTAD (2018) *Trade and Gender Linkages: An Analysis of Mercosur*, pages 48-49.

<sup>114</sup> Pieters (2018) *supra note 92*.

HRIA methodology starts from consultations to guide the choice of main sectors or geographical regions to focus on. The next step is described in UNCTAD's trade and gender toolbox, similar to the "scoping" stage of HRIA as described in the section on IP and health above (Section V (e) page 20).<sup>115</sup> This consists of a descriptive analysis of gender inequalities and economic contexts of the countries in question and involves a general mapping of women's roles in the four countries' economy to identify sectors or regions where women are particularly vulnerable. For instance, where is women's labour force participation the lowest (or the highest)? In which sectors are the gender wage gap highest? Which sectors are most likely to expand or to contract due to new patterns of trade or trade-related regulations? Which public services are of particular importance for the most vulnerable women within the country studied?

The mapping exercise should result in a broad as possible list of expected effects of a trade policy using a comprehensive assessment matrix, similar to the screening and scoping stages in the general HRIA methodology. Based on this, the issues that will be subject to more detailed analysis should be chosen. The choice should be guided by human rights considerations, giving priority to those in which women appear the most vulnerable, either presently or due to potential trade-related changes, and involving women in the choice of focus areas.

The second step involves quantitative analysis of the expected consequences of the trade reform on the economy, with a focus on the chosen sector or sectors. Various approaches are possible. One involves estimation with a microeconomic model, using individual, household or firm-level data restricted to a certain segment of the economy. Another involves estimations based on computable general equilibrium (GCE) models, relying on data on a range of sectors of the economy.<sup>116</sup> In this step, quantitative data can be complemented by qualitative data in order to assess women's choices at household or firm level that are relevant to enjoyment of human rights, such as intra-household spending, division of labour, power relations and agency.<sup>117</sup>

Unlike many other countries,<sup>118</sup> much relevant data is available for the four Mercosur countries. Sources include the countries' economy ministries<sup>119</sup> and statistical offices.<sup>120</sup> The World Bank's World Development Indicators or Enterprise Surveys, ILO's Key Indicators of the Labour Market Database (KILM), and UNCTAD's population and labour

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<sup>115</sup> See also Walker HRIA methodology *supra note* 75.

<sup>116</sup> UNCTAD (2014) page 22. For details of the methodology, see UNCTAD (2018) *Trade and Gender Linkages: An Analysis of Mercosur, Annex 1. Empirical analysis: Methodology*.

<sup>117</sup> WECF *supra note* 112.

<sup>118</sup> Measuring gender impacts of trade has proved a challenge with regard to some countries and sectors due to insufficient sex-disaggregated data about employment, income and other economic indicators. A. Frohmann (2017) *Gender Equality and Trade Policy*, World Trade Institute: Bern.

<sup>119</sup> For instance Brasil, *Relação Anual de Informações Sociais*, <http://www.rais.gov.br/sitio/index.jsf> (accessed 20 January 2020).

<sup>120</sup> Although it is worth checking with outside sources as to the reliability of a country's national statistics offices, as not all are always considered reliable. See B. Mander (2016) "Argentina counts on credible statistics," *Financial Times*, 16 June 2016.

force statistics also offer relevant information. Lack of data for gender-based analysis does not represent a dead end for researchers. Rather it is in and of itself an indicator of whether sufficient attention is paid to women within a country, and lends itself to a clearly applicable recommendation: to gather data in that area.

#### (f) Indicators

A third step in the proposed methodology involves analysis of data by reference to measurable human rights indicators. Such indicators can also be used for monitor the situation before, and at regular intervals after, the implementation of the planned trade agreement.<sup>121</sup> Section V (page 11) presented the main features of human rights indicators, as well as guiding criteria for selecting indicators to assess human rights impacts of the planned agreement. Those factors will also be relevant here. Some indicators to assess whether different negotiating options enhance, or undermine, women's rights are set below. These should be fine-tuned, and others added depending on the specific focus of the HRIA, to ensure that what is being measured yields as complete a picture as possible. It should be borne in mind that whenever possible, data should be disaggregated according to geographical region, economic sector, income/wealth bracket and other relevant factors.

- International human rights treaties protecting women's rights that the country has ratified
- Coverage of women's rights and provisions against discrimination in the Constitution or other forms of superior law
- Date of entry into force and coverage of domestic laws and policies relevant for women's rights
- Legal protections against discrimination
- Level of autonomy, independence and capacity of the country's national human rights institution
- Existence of mechanisms or measures for redress available to women or women's groups in case of discrimination
- Number of cases brought under the redress measure, and proportion of such cases resolved within a determined time
- Proportion of government revenue that is raised from trade tariffs
- Overall gender wage gap
- Overall female labour force participation and ratio of women/men of labour force participation
- Number of public or affordable child care facilities available per 1000 children
- Proportion of requests for child care that are responded to favourably
- Availability of paid parental leave: duration, for women and for men and at what conditions

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<sup>121</sup> UNCTAD (2016) *supra note* 111.



- Female intensity and percentages of female labour in key export sectors, gender wage gap in each of these sectors, average hourly and monthly pay for women in these sectors as compared to national or regional averages
- Female intensity and percentages of female labour in key sectors expected to contract as a result of the EFTA-Mercosur trade agreement, gender wage gap in each of these sectors, average hourly and monthly pay for women in these sectors as compared to national or regional averages
- Participation of the governmental agency responsible for gender equality in the trade negotiations
- Proportion of women trade negotiators involved in the negotiations towards the EFTA-Mercosur trade agreement
- Existence within the trade agreement of flexibilities to adjust countries' commitments if it appears that women are disproportionately affected by the agreement's implementation
- If tariff accounts for a lower share of government revenue at the time of assessment relative to a previous time-period, which other taxes have increased proportionately?
- Most of the indicators chosen for the *ex ante* HRIA can and should be revisited after a certain number of years, as part of an *ex post* assessment of the agreement's human rights impacts. Indeed, the use of the same indicators over time permit a clearer and more consistent picture to emerge.

## VII Issue 3: Impact of trade liberalisation on Indigenous rights

### (a) Background

Indigenous peoples make up only five percent of the world's population but represent fifteen percent of the world's poor. They face higher levels of infant mortality and fare worse on most social indicators than non-Indigenous groups. In Paraguay, for instance, rates of poverty and extreme poverty among Indigenous peoples stand at 75 and 60 percent respectively, far exceeding the national average. These numbers are all the more vexing that Indigenous traditional territories commonly coincide with biologically-diverse and resource-rich areas. Indigenous people often act as stewards of natural resources and guardians of biodiversity, but tend to be ignored in policies and discriminated against in practice.<sup>122</sup> This is the case also in Mercosur countries, where Indigenous communities face structural discrimination, are threatened by natural resource exploitation such as mining, logging and cattle ranching, and are regularly victimized for seeking to defend their resources.<sup>123</sup>

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<sup>122</sup> UN Human Rights Council (2015) *Report of the Special Rapporteur on the rights of indigenous peoples - The situation of indigenous peoples in Paraguay*, UN Doc. A/HRC/30/41/Add.1; P. Hanna & F. Vanclay (2013) "Human rights, Indigenous peoples and the concept of Free, Prior and Informed Consent," 31(2) *Impact Assessment and Project Appraisal*, page 146-157; FAO (2016) *Free Prior and Informed Consent An indigenous peoples' right and a good practice for communities – Manual for project practitioners*.

<sup>123</sup> UN CERD (2017) *Concluding observations on the combined twenty-first to twenty-third periodic reports of Argentina*, UN Doc. CERD/C/ARG/CO/21-23, para 6; UN Human Rights Council (2015) - *The situation of indigenous peoples*

## (b) Legal basis

### *Obligation to respect Indigenous rights*

The international community adopted the UN Declaration on the Rights of Indigenous Peoples (UNDRIP) in 2007. All the EFTA and Mercosur member countries supported adoption of this instrument. Argentina, Brazil, Norway and Paraguay have ratified the 1989 Indigenous and Tribal Peoples Convention, known as “ILO Convention 169.” The rights of Indigenous people are also protected under the legally-binding human rights treaties that Switzerland and Mercosur countries are party to, including the ICESCR, the ICCPR and the Convention on the Elimination of all Forms of Racial Discrimination (CERD).<sup>124</sup> Under these instruments as well as under general international law, Switzerland has a duty to ensure that trade agreements it enters into take account of, and do not undermine, the rights of Indigenous peoples within its trading partners’ jurisdiction.

Confirmation that States’ human rights duties extend to Indigenous people outside their borders can be found in a range of sources. In 2007, for instance, CERD expressed concern about reports of adverse effects on Indigenous peoples of economic activities connected with the exploitation of natural resources in countries outside Canada by transnational corporations registered in Canada. The Committee recommended that Canada take measures to prevent this and to hold transnational corporations registered in Canada accountable.<sup>125</sup> It is also relevant here to mention Article 104a of Switzerland’s Constitution that requires that the country’s trade relations contribute to the sustainable development of agriculture in Switzerland and abroad.

### *Issues specific to Indigenous peoples*

Specific legal principles apply to Indigenous peoples. Two that are worth mentioning in this context are (1) collective rights (2) “free prior informed consent” (FPIC). Several instruments recognize collective rights of importance for Indigenous peoples. UNDRIP does so as does the American Declaration on the Rights of Indigenous Peoples (ADRIP) agreed to by all Mercosur States in 2015. Collective rights include Indigenous peoples’ right to self-determination and to not be deprived of their own means of subsistence, both

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*in Paraguay, supra note 122, at page 12 ; Minority Rights Group, World Directory of Minorities and Indigenous Peoples – Paraguay, <https://minorityrights.org/directory> (accessed 20 January 2020); S. Cowie (2019) “Brazilian ‘forest guardian’ killed by illegal loggers in ambush,” *The Guardian*, 2 November 2019; International Work Group for Indigenous Affairs, *Indigenous Peoples in Argentina*, <https://www.iwgia.org/en/argentina> (accessed 20 January 2020).*

<sup>124</sup> C. Dommen (2020) “Assessing Impacts of Trade Agreements - Human Rights and Indigenous Rights,” in Borrows & Schwartz (eds), *Indigenous Peoples and International Trade - Building Equitable and Inclusive International Trade and Investment Agreements*; International Labour Organization (ILO) Convention 169, on Indigenous and Tribal Peoples has been ratified by Argentina, Brazil and Paraguay but not Uruguay.

<sup>125</sup> UN CERD (2007) *Concluding Observations of the Committee on the Elimination of Racial Discrimination - Canada*, UN Doc. CERD/C/CAN/CO/18.

of which are also enshrined in the ICESCR and the ICCPR.<sup>126</sup> Government statements to the Working Group on IP and other bodies over the past two decades demonstrate that States agree that indigenous peoples have the collective right to control their economic, political, and social destinies.

UNDRIP and ADRIP also entrench the principle of free, prior and informed consent (FPIC). This builds on the right to participate which is an established principle of human rights law, and is a key mechanism for realisation of Indigenous peoples' rights. Indigenous peoples have a particularly strong claim to participate in international trade negotiations, given the potential of trade and trade agreements to impact their rights. In Canada, Indigenous representatives have argued that by not including them in the negotiations, Canada's signing of the Trans-pacific partnership Agreement was unconstitutional, given the legal requirement that Indigenous peoples be informed, consulted, accommodated and that they consent to the TPP negotiations.<sup>127</sup>

In addition to general human rights law requirements relating to participation, this right is set out in ILO Convention 169; indeed the principles of consultation and participation represent the cornerstone of the Convention.<sup>128</sup> Inadequate (or non-existent) consultations with Indigenous peoples relating to trade or investment provisions affecting their resources has led the ILO Committee of Experts on the Application of Convention 169 to express concern over the failure to consult with indigenous peoples on legislation that may affect them, and on decisions regarding the use of natural resources on their traditional territories.<sup>129</sup>

### (c) What is likely to be in the EFTA-Mercosur agreement

A number of the elements that will be included in the planned trade agreement can affect Indigenous rights, directly or indirectly:<sup>130</sup> the chapter on intellectual property rights could affect traditional knowledge, rules on investment could draw new investors in the mining, logging or agriculture sectors on lands traditionally occupied by Indigenous groups, thus jeopardizing their rights. Regarding trade in goods, new agricultural exports from

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<sup>126</sup> ICCPR and ICESCR, Article 1. UNDRIP provides for "internal self-determination," understood as a 'collective human rights demand rather than a claim for statehood.' C. Dessanti (2015) *Indigenous Peoples' Right to Self-Determination in International Law*.

<sup>127</sup> N. Gombay (2017) "A Role for Indigenous Peoples in Canada's Trade Talks," *Policy Options*, <https://policyoptions.irpp.org/magazines/december-2017/a-role-for-indigenous-peoples-in-canadas-trade-talks> (accessed 20 January 2020).

<sup>128</sup> ILO (no date) *Contribution to the Study by the Expert Mechanism on the Rights of Indigenous Peoples on Indigenous peoples and the rights to participate in decision-making*.

<sup>129</sup> See for instance International Labour Conference 98th Session (2009), *Report of the Committee of Experts on the Application of Conventions and Recommendations, Peru*, [https://www.ilo.org/wcmsp5/groups/public/@ed\\_norm/@relconf/documents/meetingdocument/wcms\\_103484.pdf](https://www.ilo.org/wcmsp5/groups/public/@ed_norm/@relconf/documents/meetingdocument/wcms_103484.pdf) (accessed 20 January 2020).

<sup>130</sup> EFTA Secretariat (2019) *EFTA-Mercosur Free Trade Agreement – Conclusion in Substance of the EFTA-Mercosur Free Trade Negotiations*, <https://www.efta.int/sites/default/files/documents/legal-texts/free-trade-relations/mercosur/2019-08-24-EFTA-Mercosur-Chapter-Description-of-FTA.pdf>

Mercosur countries could imperil Indigenous rights. Switzerland is expected to grant annual concessions for agricultural products from Mercosur, notably meat (3000t of beef, 1000t of chicken and 200t of pork), edible oils (2000t of soya and groundnut oils), wheat (1500 tonnes) and red wine (35 000 hl).<sup>131</sup>

#### (d) Human Rights Concerns

Research for this study yielded no indication of Indigenous groups having been consulted on the content of the planned trade agreement or participated in the process towards its adoption. Besides the lack of respect of Indigenous rights to be consulted, to participate, or to give their free, prior, informed consent to the agreement, a range of potential negative impacts on Indigenous rights have been linked to expansion in agricultural production attributable to increased exports of farm products from Mercosur.<sup>132</sup> The EFTA-Mercosur trade agreement can contribute to this, even if EFTA accounts for only a tiny fraction of the agricultural products exported from the South American region.<sup>133</sup>

Based on the priority concerns that emerged from consultations with stakeholders undertaken for this study, this section considers the impacts on Indigenous rights of expansion of beef, soy and other intensively-produced agricultural exports from Argentina, Brazil and Paraguay.<sup>134</sup>

Commercial agriculture has accounted for most of the deforestation in Latin America over recent decades. 71% of deforestation in Argentina, Colombia, Bolivia, Brazil, Paraguay, Peru and Venezuela was due to increased demand for pasture and 14% due to cash crops like soy and palm oil.<sup>135</sup> Over time, land concentration, appropriation and expropriation have become general features in almost all Mercosur countries. Paraguay is the eighth largest exporter of beef and leather globally and the sixth-largest soybean producer in the world; in the Gran Chaco region that is partly within its borders, cattle grazing as well as charcoal exports have significantly contributed to loss of forest cover. Elsewhere, intensive production has led to loss of biodiversity.<sup>136</sup> In Brazil, the world's largest beef exporter, cattle and soy are largely to blame for the need to clear land. Deforestation levels there

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<sup>131</sup> DEFR (no date) *Fiche d'information : Accord de libre-échange (ALE) AELE-Mercosur*.

<sup>132</sup> FERN (2018) *Civil society letter calling for the EU to put human rights and sustainability front and centre of the Free Trade Agreement negotiations*, [https://www.fern.org/fileadmin/uploads/fern/Documents/EU-Mercosur%20FTA%20NGO%20letter\\_2.pdf](https://www.fern.org/fileadmin/uploads/fern/Documents/EU-Mercosur%20FTA%20NGO%20letter_2.pdf)

<sup>133</sup> The value of imports of beef from Mercosur to EFTA amounted to some €41 million in 2018; Brazil's revenue from beef exports to China alone exceeded €1.3 billion that year. See <http://trade.efta.int/#/country-graph/CH/MERCOSUR/2018/SVHS4>; Global Meat News.com (2019) *Brazil closes 2018 with largest-ever beef volume exports*, <https://www.globalmeatnews.com/Article/2019/01/22/Largest-ever-beef-exports-by-volume-for-Brazil> (accessed 20 January 2020).s

<sup>134</sup> In many areas, small-scale farmers are just as vulnerable as Indigenous peoples to infringements of their rights due to increased agricultural or natural resource exports.

<sup>135</sup> FAO, *Commercial agriculture accounted for almost 70 percent of deforestation in Latin America*, <http://www.fao.org/americas/noticias/ver/en/c/425600> (accessed 20 January 2020).

<sup>136</sup> C. Ávila & A. Monroy Sarta (2019) *Mapeando el agronegocio en Paraguay*.

between July 1 and 22 of 2019 alone were 111% higher than they were in 2018.<sup>137</sup> The scale of the threat – not only to Indigenous groups but also to environmental health around the globe – is so stark that even the staunchly pro-free trade publication *The Economist* has called for Brazil’s trading partners to make agreements contingent on the country’s good stewardship of the Amazon basin forests.<sup>138</sup>

Forest clearing and further expansion of the agricultural frontier into the Brazilian Amazon or the Gran Chaco region has been reckoned to reduce the natural resources – land and biodiversity – on which Indigenous people depend. This is particularly sensitive in the Amazon region, due to the additional costs of biodiversity loss, which in turn threatens the livelihoods of indigenous people, some of whom have no contact with the outside world and are not counted in official statistics. Beyond deforestation, should trade liberalisation contribute to growth in the agriculture sector, it would imply a continuation of the process of land concentration – and, perhaps, Indigenous land dispossession – to allow economies of scale.<sup>139</sup>

Let us briefly consider two related impacts of increased export-oriented production on Indigenous rights. First, significant amounts of pesticides are used in the export-oriented agricultural sector, including in Indigenous-inhabited areas, with adverse effects on the right to health.<sup>140</sup> Second, all three countries have witnessed intimidation or killings of Indigenous people opposing commercial exploitation of their resources. In Argentina, for instance, Indigenous groups report that due to the government’s political decision to generate income from the sale of the country’s raw materials, and the key importance of these to the economy, Indigenous territories are becoming increasingly valuable, so the “neutralisation” of indigenous demands now has to be achieved by force.<sup>141</sup> In Paraguay, powers associated with agro-business are reported to routinely engage in violence, including disappearances and threats in response to territorial claims.<sup>142</sup> The killing of an Indigenous forest guardian in Brazil in November 2019 is a recent incident in what is reported to be a pattern of impunity across the region.<sup>143</sup>

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<sup>137</sup> Gesellschaft für bedrohte Völker (2019) *Indigenenrechte in Brasilien – Schweiz muss handeln*, [https://www.gfbv.ch/wp-content/uploads/fact-sheet\\_amazonas.pdf](https://www.gfbv.ch/wp-content/uploads/fact-sheet_amazonas.pdf) (accessed 20 January 2020).

<sup>138</sup> *The Economist*, *Deathwatch for the Amazon*, <https://www.economist.com/leaders/2019/08/01/deathwatch-for-the-amazon> (accessed 20 January 2020).

<sup>139</sup> L. Hinojosa (2009) “EU-Mercosur Trade Agreement: Potential Impacts on Rural Livelihoods and Gender,” *Sustainability*, page 1120-1143.

<sup>140</sup> J.-F. Obregón et al. (2019) *Beef, banks and the global context behind Brazil’s deforestation*; <https://globalforestcoalition.org/paraguay-cas-photo-essay>; *Report of the Special Rapporteur on the rights of indigenous peoples – The situation of indigenous peoples in Paraguay*, *supra* note 122.

<sup>141</sup> IWGIA (2019) *The Indigenous World 2019*, [https://www.iwgia.org/images/documents/indigenous-world/IndigenousWorld2019\\_UK.pdf](https://www.iwgia.org/images/documents/indigenous-world/IndigenousWorld2019_UK.pdf) (accessed 20 January 2020), at page 122.

<sup>142</sup> *Ibid.* at page 193.

<sup>143</sup> C Muñoz Acebes (2019) “Brazil’s Amazon – and Its Defenders – Are Under Attack From Illegal Loggers,” *Foreign Policy*, <https://foreignpolicy.com/2019/11/14/brazil-amazon-indigenous-defenders-deforestation-illegal-loggers> (accessed 20 January 2020)

*Brazil is one of the world's largest consumers of pesticides. It continues to use dozens of pesticides that have been banned in other countries for health or environmental reasons. Most of the production of food and agriculture in Brazil is for export. Well-founded concerns exist that lower standards of protection from pesticides persist in Brazil to benefit a narrow set of private interests concerned with the export of agricultural commodities.*

*Statement by the UN Special Rapporteur on human rights and hazardous substances and wastes, Baskut Tuncak on his visit to Brazil, December 2019*

In some cases liberalisation or investment in resource industries have provided opportunities for employment or revenue generation for Indigenous peoples, with positive impacts for instance on Indigenous women's income or self-esteem.<sup>144</sup> Whilst new income-generating or employment opportunities may be a way of realizing the human rights of rural inhabitants in general, such opportunities may be insufficient to safeguard Indigenous rights for those who wish to maintain their links with their traditional lands, resources and culture. Whether it is due to this or due to more entrenched patterns of discrimination, the UN Special Rapporteur on the rights of Indigenous peoples noted that Paraguay had experienced a "phenomenal rate of economic growth" during in the years before 2014, but at the cost of environmental destruction and violations of Indigenous peoples' rights. Moreover, the Special Rapporteur's noted that the economic growth in Paraguay did not lead to significant reductions in the poverty levels of indigenous peoples.<sup>145</sup>

Before discussing the applicable methodology, it is important to recall that the primary responsibility for respecting, protecting and fulfilling the human rights of Indigenous peoples within their borders lies with the Mercosur countries, irrespective of any trade negotiations. The fact remains though, that Switzerland has legal responsibility to ensure that any agreements it enters into do not undermine the enjoyment of human rights in partner countries.

### (e) Applicable methodology

The general HRIA methodology described in section V above (page 11), can be applied to assess possible impacts on Indigenous rights of the planned trade agreement. Additional insights can be drawn from approaches specifically designed to include the experience and knowledge of Indigenous peoples such as the Akwé: Kon Guidelines on the conduct of impact assessment of developments likely to impact on, sites traditionally occupied or used by Indigenous and local communities. The Ake:Kwon guidelines are *inter alia* helpful

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<sup>144</sup> S. Manning et al. (2018) *Strengthening Impact Assessments for Indigenous Women*. See also, for discussion of possible employment-generating possibilities of agricultural trade liberalization in the Mercosur region, L. Hinojosa (2009) *supra* note 139.

<sup>145</sup> UN General Assembly (2015) *Special Rapporteur on the Rights of Indigenous Peoples - Rights of Indigenous Peoples*, UN Doc. A/70/301, para. 4.

in setting out ways to ensure effective Indigenous participation in all stages of impact assessment.<sup>146</sup>

Stakeholder consultations are the starting point for identifying what issues emerge as main concerns concerning the planned agreement. As already noted, the main concern arising from consultations for this study was the impact on Indigenous rights on forests and indigenous lands through liberalisation of trade in agricultural products so this section will focus on these aspects. A full assessment should take steps at an early stage to consult Indigenous groups in order that they inform the content and focus of the HRIA. Indeed, critiques of assessments that consider impacts on Indigenous peoples have regularly observed the failure to adequately understand and respect Indigenous knowledges.<sup>147</sup>

The next step – the scoping stage described in Section V above (page 11) – would be to identify Indigenous groups in the region who are particularly exposed or vulnerable to the particular trade-related concern in question, in this case, increased production of beef and soy for export. Ideally two or three (or more, if time and resources so permit) communities with different characteristics (either different geographical location, or different exposition to the country's dominant culture) should be identified for assessment. This should be done in collaboration with Indigenous groups and Indigenous agencies in the four countries, such as the National Indian Foundation (FUNAI) in Brazil. Relevant questions include: which regions are the critical regions (i.e. where the proportion of rural indigenous people is higher and/or where they are most exposed to risks to their livelihoods or culture)? Which of these are locations for production of the crops export of which the EFTA-Mercosur agreement facilitates?<sup>148</sup>

Through Indigenous consultative processes, one or two key rights should be defined (these might be the right to be free from discrimination, to food, to health, to participate, or to water), in order that the analysis be explicitly and clearly based on the specific normative content of those rights. It will also be necessary to consider intersectionalities:<sup>149</sup> Indigenous women's rights for instance, may be affected differently from those of Indigenous men and so it will be necessary to make sure that all sectors of Indigenous peoples are able to share their perspectives.<sup>150</sup> As already noted, the methodology calls for assessing the impacts of one, two or more negotiating options, in order to identify the

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<sup>146</sup> 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*. See also H. Ross (1990) "Community Social Impact Assessment: A framework for Indigenous peoples", *Environ. Impact Assess Rev*, page 185-193 for insights on impact assessment practice with Indigenous groups.

<sup>147</sup> T. Duong (2015) *Human Rights Impact Assessment of Trade Agreements*, 2015.

<sup>148</sup> It should be borne in mind that non-export production might move to indigenous lands to leave room in already exploited lands for export production. L. Hinojosa (2009) *supra note 139*.

<sup>149</sup> Intersectionality is the understanding that multiple interconnected factors of discrimination can affect individuals, based for instance on race, age, sex, gender, level of education, political allegiance, social class or religion. These factors make up individuals' experience of the world and cannot be looked at separately from another.

<sup>150</sup> S. Manning et al. (2018) *Strengthening Impact Assessments for Indigenous Women*.

option most consistent with Indigenous rights, and to permit the adoption of necessary flanking and compensatory measures in the case of risks of adverse impacts.

#### (f) Indicators

In order to evaluate whether the planned trade agreement can and actually does affect the realisation of Indigenous rights, specific indicators must be defined and monitored over time. Section V (page 11) presented the main features of human rights indicators, as well as criteria to assist in their selection. It is worth recalling that a human rights approach calls for both quantitative and qualitative indicators. Indicators of a qualitative nature may include Indigenous experience or surveys of their perceptions. In addition to being of interest in and of themselves, these provide baselines for future assessment where initial baselines are absent.<sup>151</sup>

The indicators chosen for this part of the HRIA must be contextually relevant, that is, designed to gather information on whether there has been progressive realisation of Indigenous peoples' rights most likely to be affected by production of beef and soy for export. Data should, wherever possible, be disaggregated according to potential grounds of discrimination, such as age, gender, Indigenous group or geographical location. Sources to help identify or develop relevant indicators include the Office of the High Commissioner for Human Rights Guide to human rights indicators,<sup>152</sup> the UN's SDG Indicators, the Indigenous navigator network<sup>153</sup> or work on strengthening impact assessments for Indigenous women.<sup>154</sup> Naturally, the indicators should be chosen and developed consistent with the views of indigenous and local communities.

Some relevant indicators could include those indicated below. These should be adjusted or added to depending on the specific sector, geographical region or other factors that the HRIA focuses on.

- International human rights treaties in force that are relevant to the right to enjoyment of Indigenous rights
- Date of entry into force and coverage of Indigenous rights in the Constitution or other forms of superior law; Date of entry into force and coverage of domestic laws and policies to protect Indigenous rights
- Existence of independent or autonomous Indigenous rights body
- Legal protections against discrimination
- Existence and coverage of policies such as special and temporary measures to ensure or accelerate equality in the enjoyment of human rights
- Whether the people or community in question have title deeds or other binding agreements recognising their rights over the lands or territories in question. If yes,

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<sup>151</sup> UN Economic Commission for Africa, Friedrich-Ebert-Stiftung (2017) *The Continental Free Trade Area (CFTA) in Africa – A Human Rights Perspective*, pages 143-144.

<sup>152</sup> OHCHR (2012) *Human Rights Indicators*, *supra* note 78.

<sup>153</sup> *Integration of global SDG Indicators in the Indigenous Navigator monitoring framework*, <http://nav.indigenousnavigator.com/index.php/en/resources-en/monitoring>

<sup>154</sup> S. Manning et al. (2018) *supra* note 144.



what is the extent of the land covered by such agreements, and what proportion of the community land is covered.

- Number of challenges brought by Indigenous people or communities to exploitation of their traditional land; proportion of such challenges to have been resolved within a given timeframe; proportion of the land at stake that is used for production of goods for export
- Number of consultations held with Indigenous groups about the proposed content of the EFTA-Mercosur trade agreement. If consultations were held, what language were they held in, and who defined the agenda?
- If consultations were held, what avenues were made available to Indigenous people to voice their concerns or additional questions after a meeting, and what time and resource availability there were for Indigenous people to formulate their responses to options under negotiation?
- Was any feedback from the consultations with Indigenous peoples fed into the trade negotiation process?
- Evolution of volumes and value of exports of products that tend to cause pressures on Indigenous lands (including beef and soy)
- Extent to which the trade agreement's implementing legislation provides for mechanisms to fairly and equitably share benefits from activities relating to Indigenous lands, knowledge or resources
- Extent to which Indigenous peoples or communities have standing to challenge activities facilitated by the trade agreement that affect their traditional lands, knowledge or practices.

## PART 3 – FINDINGS AND RECOMMENDATIONS

### VIII Findings

#### (a) Switzerland insufficiently assesses the impacts of its trade agreements

This study confirms that agreements such as the comprehensive free trade agreement between EFTA and Mercosur can bring economic and social benefits. They can also lead to adverse effects for some sections of the population. Despite its strong rhetoric supporting the SDGs and the central role of human rights in its foreign policy, this study found no evidence that the Swiss government assessed the potential differential impacts of different negotiating options for the substantive chapters of the EFTA-Mercosur trade agreement on different groups in the Southern cone countries.

This study highlights how little we know about the impacts of trade and trade agreements on economic patterns, let alone on human rights. Few trade agreements are monitored after their implementation to gauge whether the promises made during negotiations have been borne out in practice.<sup>155</sup> Where evidence is available, it is referred to in the relevant

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<sup>155</sup> A recent study found that the Swiss federal government has only limited information regarding the effects of free trade agreements. S. Giger (2017) *How free trade agreements benefit Switzerland* <https://www.s-ge.com/en/article/news/how-free-trade-agreements-benefit-switzerland> See also a recent report of the

sections of this study. The bulk of this evidence is generated by independent researchers, not by governmental bodies.

#### (b) HRIA – a tool for sustainable trade agreements

This study confirms that the legal obligation to undertake HRIA is strong, and that the economic and policy arguments in favour of doing so are compelling. HRIAs are not only a means for Switzerland to meet its human rights obligations, but can also be a central tool for ensuring coherence in Switzerland's foreign policy.

The study reveals that integrating the needs and concerns of vulnerable groups such as women or Indigenous peoples can result in trade agreements that are more consistent with sustainable development prerogatives. For example, applying an Indigenous rights lens to trade policy compels policy-makers to make responsible environmental stewardship of natural resources an integral part of trade agreements. Likewise, an Indigenous rights or gender equality lens brings to the fore the need to ensure fair distribution of the benefits of new trade and investment policies. As public opinion is increasingly turning against trade agreements based on perceived unfair distribution of benefits and negative environmental impacts, HRIA are a particularly pertinent and timely tool for more socially, environmentally and politically sustainable trade policies.

#### (c) Methodologies for HRIA exist

This study has presented the main methodologies that exist for assessing human rights impacts of trade agreements and illustrated how these can contribute to trade agreements that are consistent with sustainable development objectives. This study has demonstrated 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. It must be stressed that the choice for narrowing down areas to be focused on must be based on HRIA methodology, including a rigorous grounding in human rights law and involvement of a range of stakeholders, so as to avoid capture of focus areas by more powerful interest groups. Application of HRIA methodology can thus avoid the disappointment that has met some of the wide-ranging sustainability impact assessments carried out so far.

#### (d) HRIA can generate needed knowledge

Moreover, regular assessments of impacts of trade agreements will help policy-makers build up an accurate picture of how trade rules translate into impacts on the ground, including on non-trading communities. In building this body of knowledge, policy-makers will develop a tools for more accurate and convincing arguments in favour of trade agreements they are negotiating.

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Contrôle fédéral des finances (CDF) (2017) *Die Qualität der Botschaften des Bundesrates ist insgesamt zufriedenstellend* which studied some fifty messages of the Conseil federal and found that impact assessments are insufficiently used.

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. It is argued that this improved understanding and collaboration around economic and social policy can lead not only to increasingly robust HRIAs, but also, more importantly, more robust trade agreements.

#### (e) All parts of a trade agreement affect human rights and sustainable development

Human rights and sustainability issues have to be considered in every part of a trade agreement as many of its provisions will have impacts in these areas, as will the actual trade flows, new economic patterns and fiscal adjustments following the implementation of the agreement.

EFTA countries deserve credit for having introduced trade and sustainable development (TSD) chapters into their trade agreements. Although this study did not have as a purpose to consider the effectiveness of these chapters in safeguarding human rights, the finding that human rights and sustainability impacts flow from all parts of the agreement points to the fact that the TSD chapters as currently crafted are insufficient. Indeed, they seek to respond to potential adverse effects after the fact. But what is most needed is to ensure that trade agreements are designed and implemented in such a way as to avoid adverse effects on human rights, for instance by taking all possible steps to avoid favouring one sector of the population at the expense of another.

At the same time, effective TSD 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.

#### (f) Causality and data

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. Trade agreements are but one element in the broad and complex economic policy landscape. The dynamics the agreement might trigger are impossible to predict. They should nevertheless be explored in the context of the overall trade policy in which the agreement is embedded.<sup>156</sup> Even the economic modelling techniques often used to inform trade negotiating positions do not seek to predict outcomes but provide insights into

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<sup>156</sup> E. Bürgi & I. Musselli (2019) "HRIA of trade agreements involving agriculture: Enabling innovative trade options that protect human rights," in N. Götzman, *Handbook on Human Rights Impact Assessment*, at page 222.

possible consequences of defined scenarios, often based on incomplete information, and with the awareness that future events might alter their findings.

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, complete data lacking and causality hard to establish. This has been demonstrated by past practice in this area. The HRIA of the African Continental Free Trade Agreement,<sup>157</sup> 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, some of which are already being implemented.

## IX Recommendations

### (a) Recommendations for the Swiss government:

- 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 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 should include a broad range of views and experience when formulating positions and options in trade policy negotiations. An independent body should be entrusted with carrying out and implementing the findings of 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 endeavor to ensure that consultations are held with the local population of the partner countries in the course of the FTA negotiations, with both the government of the partner country and the Swiss government participating in these consultations.

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<sup>157</sup> UN Economic Commission for Africa & Friedrich-Ebert-Stiftung (2017) *The Continental Free Trade Area (CFTA) in Africa – A Human Rights Perspective*.

- The Swiss government should work through its development cooperation programmes to strengthen capacities (of governmental agencies, civil society and/or national human right institutions) in partner countries to gather the data needed for those countries to carry out HRIA of their planned trade agreements
- 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. These initiatives could involve partnerships with academia, think tanks or international organisations such as the UN Conference on Trade and Development (UNCTAD)

#### (b) Recommendation for Parliament:

- 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.

## ANNEX 1      IMPACT ASSESSMENT FROM A HUMAN RIGHTS PERSPECTIVE

### Impact assessments

Impact assessments are tools that provide a structured approach to gathering and analysing evidence for policy-making. Through bringing the potential impacts of proposed policy options to policy-makers' attention, impact assessments can provide a sound basis for, and serve as an aid to, elaboration of new policies. Primary objectives of impact assessment include providing information as the basis for policy, promoting transparency, encouraging participation of all sectors of the potentially-affected population in decision-making, avoiding unintended consequences of trade and investment agreements, and making it possible to identify measures to avoid, mitigate or compensate for possible negative consequences.

### Legal basis for the obligation to carry out HRIAs

International law gives States leeway to implement certain human rights progressively, yet it also imposes immediate obligations. These are to *take steps* and to ensure *non-discrimination* in the progressive realisation of human rights, to guarantee enjoyment of *minimum core elements* of human rights, and to *monitor* the situation with regard to the relevant rights. When necessary, States must mobilize resources, domestically or through international assistance and co-operation for the progressive realisation of human rights. These obligations are underpinned by the principles of participation, accountability, non-discrimination, transparency, and the rule of law.

Compliance with substantive and procedural rights involves obligations of conduct, and obligations of result. The former require action reasonably calculated to realise the enjoyment of a particular right. The latter require States to achieve specific targets to satisfy a detailed substantive standard.<sup>158</sup>

Impact assessment is thus a tool for States to fulfil their human rights obligations. There are four main reasons for this. First, all States are bound by their pre-existing treaty obligations when they negotiate trade agreements, so international law precludes them from concluding agreements inconsistent with those obligations. It follows that there is a duty to identify potential inconsistencies between pre-existing human rights treaties and planned trade agreements, and to refrain from entering into new agreements where inconsistencies are found.<sup>159</sup> In this sense, human rights impact assessments are also a tool for ensuring consistency and coherence between States' obligations under international law, and thus to overcome, or at least mitigate, problems that can result from the fragmentation of international law.<sup>160</sup> This fits with the objective of establishing a coherent international frame of reference and an adequate international normative framework, which is one of the primary goals of Switzerland's human rights foreign policy.

Second, compliance with Switzerland's general obligations to *take steps* and to *monitor* the situation with regard to the relevant rights will require assessing possible and actual human rights impacts of new laws and policies. The CESCR has aptly noted that "the essential first step towards promoting the realisation of economic, social and cultural rights is diagnosis and knowledge of the existing situation."<sup>161</sup> In human rights law, "taking steps" involves devising specific strategies and programmes and implementing legislative measures targeted deliberately towards the full realisation of the rights the country has committed itself to. The obligation to take steps entails a prohibition on retrogression, that is, on measures that directly or indirectly lead to backwards steps in the enjoyment of human rights. The only way to know whether strategies, programmes and legislative measures constitute progress towards – and not retrogression from – full enjoyment of human rights, is through monitoring and assessment.

Third, human rights require compliance with procedural obligations of participation and transparency. The ICCPR's recognition of the right of every citizen to take part in the conduct of public affairs is one of the many articulations of the right of those affected by key decisions to participate in the relevant decision-making processes.<sup>162</sup> This implies that no trade or investment agreement should be concluded in the absence of a public debate. Further, human rights legal instruments emphasize that particular effort is required to ensure participation of members of civil society, minorities, women, young people,

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<sup>158</sup> *Maastricht Guidelines on Violations of Economic, Social and Cultural Rights*, 1997.

<sup>159</sup> *Vienna Convention on the Law of Treaties*, 1969, arts. 26 and 30, para. 4 (b).

<sup>160</sup> UN, International Law Commission (2006) *Study Group of the International Law Commission on the fragmentation of international law: difficulties arising from the diversification and expansion of international law* UN Doc. A/CN.4/L.682.

<sup>161</sup> UN CESCR (1989) *General comment No. 1. Reporting by States parties*, para. 3.

<sup>162</sup> UN CESCR (2001) *Statement on Poverty and the International Covenant on Economic, Social and Cultural Rights*, UN ESCOR, UN Doc E/C.12/2001/10.

indigenous peoples, and other identified groups that in general are weakly represented in normal decision-making processes.<sup>163</sup> By making the often complex issues involved in trade negotiations more accessible, human rights impact assessments serve to inform debate and ensure broad participation in it.<sup>164</sup>

## Human rights obligations abroad

Added legitimacy for human rights-based impact assessments can be derived from the UN's 2030 Agenda for Sustainable Development, including the Sustainable Development Goals (SDGs) to promote a rules-based and equitable multilateral trading system, and to enhance policy coherence for sustainable development. The 2030 Agenda is an important guiding framework for Switzerland, a means of forming political opinion for both domestic and foreign policy. It underpins the country's "engagement for environmentally sound economic development within planetary boundaries, as well as for peace, respect for humanitarian law and human rights, with which sustainable development is inextricably linked."<sup>165</sup>

This also demonstrates Switzerland's extraterritorial concern for human rights. Consistent with human rights doctrine, States must comply with human rights not only in their domestic policies but also in their foreign policies. For Switzerland, the promotion of respect for human rights is a foreign policy objective, enshrined in the Constitution, and as such should be integrated into the negotiation of trade agreements.

On ratifying the UN Charter, Switzerland pledged to take joint and separate action to achieve universal respect for, and observance of, human rights and fundamental freedoms for all without distinction as to race, sex, language, or religion. The Universal Declaration of Human Rights (UDHR), widely recognized as expressing general principles of law, sets out a duty of international cooperation in Article 22.<sup>166</sup> Its Article 28 specifies that "Everyone is entitled to a social and international order in which the rights and freedoms in this Declaration can be fully realized."

According to human rights law, States have obligations to respect, protect and fulfil human rights within their territories and extraterritorially.<sup>167</sup> Under the ICESCR, Switzerland has committed to take steps "individually or through international assistance

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<sup>163</sup> O. De Schutter et al. (2012) "Commentary to the Maastricht Principles on Extraterritorial Obligations of States in the Area of Economic, Social and Cultural Rights," 34 Human Rights Quarterly 34, pages 1084–1169.

<sup>164</sup> Guiding Principles on HRIA, *supra* note 16.

<sup>165</sup> Swiss Confederation (2018) Switzerland implements the 2030 Agenda for Sustainable Development - Switzerland's Country Report 2018, [https://www.eda.admin.ch/dam/agenda2030/en/documents/laenderbericht-der-schweiz-2018\\_EN.pdf](https://www.eda.admin.ch/dam/agenda2030/en/documents/laenderbericht-der-schweiz-2018_EN.pdf) (accessed 20 January 2020).

<sup>166</sup> O. De Schutter et al. *supra* note 163.

<sup>167</sup> Even before the UDHR, international law prohibited a State from allowing its territory to be used to cause damage on the territory of another State. See Trail Smelter Case (United States v. Canada), 3 R.I.A.A. 1905 (1941).

and cooperation” towards achieving full realisation of Covenant rights.<sup>168</sup> Similarly, the CRC requires of its States parties to not only implement it within their jurisdiction, but also to contribute, through international cooperation, to global implementation.<sup>169</sup> This entails that Switzerland must respect the enjoyment of rights in other countries, to prevent third parties from violating human rights in other countries, and to ensure that its actions as a member of international organisations or parties to international agreements take due account of human rights.<sup>170</sup> There have been many reaffirmations of the importance of cooperating internationally to advance economic, social, and cultural rights, with the current most significant commitment set out in SDG17.

The corollary of States’ obligation to cooperate for the realisation of human rights around the world is that they must not, through individual or collective action, undermine the realisation of human rights in other countries. This is pertinent for this study’s analysis, which focuses on the impacts of Switzerland’s trade agreements on partner countries in the global South.

Linking this reasoning to impact assessment, the CESCR has recommended that Switzerland comply with its obligations under the ICESCR and take into account its partners’ obligations when negotiating and concluding trade and investment agreements. The CESCR has specifically noted the need for 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, and noted two particularly salient areas where Swiss trade agreements could adversely affect human rights: (1) TRIPS-plus intellectual property standards that can adversely affect access to medicines thereby compromising the right to health and (2) TRIPS-plus provisions concerning relating to plant variety protection that could undermine enjoyment of the right to food.<sup>171</sup> Similarly, CEDAW has expressed concern about Switzerland’s failure to undertake impact assessments to take into account women’s human rights before the negotiation of international trade and investment agreements, and recommended that Switzerland ensure that the trade and investment agreements it negotiates recognize the primacy of its obligations under the Convention and explicitly consider their impact on women’s rights.<sup>172</sup>

## Why carry out a HRIA of trade agreements

Beyond the legal imperative, human rights impact assessment (HRIA) is a valuable tool for crafting fair and robust trade agreements.

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<sup>168</sup> ICESCR Article 2(1), as interpreted by UN CESCR (1990) *General Comment No. 3*.

<sup>169</sup> UN Committee on the Rights of the Child (2003) *General Comment No. 5: General Measures of Implementation for the Convention on the Rights of the Child*, UN Doc. CRC/GC/2003/5, at para. 5.

<sup>170</sup> ICESCR Article 12, as interpreted by UN CESCR (2000) *General Comment No. 14*.

<sup>171</sup> UN CESCR (2019) *Concluding observations on the fourth periodic report of Switzerland*, UN Doc. E/C.12/CHE/CO/4; UN CESCR (2010) *Concluding observations on the third periodic report of Switzerland*, UN Doc. E/C.12/CHE/CO/2-3, para 24.

<sup>172</sup> UN CEDAW (2016) *Concluding observations on the reports of Switzerland*, UN Doc. CEDAW/C/CHE/CO/4-5, para 41.



*Ex ante* impact assessment is critical in the policy formulation phase for three reasons. It can be used to identify an optimal policy design to achieve specific targets (such as poverty alleviation or gender equality). Second, it can contribute to avoiding adoption or implementation of policies that would be ineffective. Third, it provides information on both expected and unintended effects of a given policy and therefore may be used when choosing corrective or accompanying measures.<sup>173</sup>

HRIA brings additional value in that it elicits consideration of differential impacts of new trade-related rules and trading patterns. Measuring or predicting overall growth – of an economy or of volumes of trade – does not always fully reflect the range of impacts of a trade agreement on the well-being of different sectors of trading partners' populations, or on their economic or social impacts over the longer-term. Even in the absence of detailed data, HRIA offers the tools that permit disaggregated analysis of the impacts of a planned trade measure.

It is increasingly recognised that for trade and investment agreements to be politically and socially, as well as economically, robust, they must take into account their broader impacts, as well as their impacts on different sectors of the population. As trade and trade rules affect people differently based on a wide range of factors such as sector of activity, geographical location or gender, HRIA helps make any trade-offs explicit.<sup>174</sup>

The political legitimacy of international agreements is increasingly correlated with public perceptions of the extent to which these meet their needs. A backlash against globalisation, with scepticism about economic integration and hostility towards elites, has increased in the past few years. This has partly been driven by people's apprehension that the benefits of trade and globalisation are not fairly distributed, which vindicates the need to explicitly consider perceived benefits and risks of new trade agreements from an early stage in the negotiations so as to integrate the required adjustment and compensatory mechanisms.<sup>175</sup> Thus a second way in which HRIA supports policy-making is through bringing public concerns to light and demonstrating that these are being responded to. Public discussion about expected risks and benefits of a planned trade agreement also contributes to increasing traders' use of the new concessions once the agreement is in force.<sup>176</sup>

Assessments of social, environmental or health impacts of policies or programmes are familiar tools and can to some extent fulfil the roles noted above. HRIA, which has emerged more recently, share other assessments' methodological approaches and objectives whilst offering additional advantages. It comes with a clear, precise and globally accepted legal basis, through being explicitly based on the normative human rights framework, which all EFTA and all Mercosur States have accepted, and which sets out clearly who has obligations and duties and who has not, and what those obligations and duties are. HRIA measures potential impacts of a proposed intervention against human

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<sup>173</sup> UNCTAD (2019) Policy Brief 51, *supra note* 111.

<sup>174</sup> WTO, Trade Policy Review (2019) *Canada*, WTO Doc. WT/TPR/G/389.

<sup>175</sup> IMF, World Bank, WTO (2017) *Making Trade an Engine of Growth for All - The Case for Trade and for Policies to Facilitate Adjustment*.

<sup>176</sup> P. Ziltener & G. Blind (2015) *Switzerland's new Free Trade Agreements (FTA): Opportunities in Asia, Middle East and America for Swiss Exporters*, <https://www.zora.uzh.ch/id/eprint/122868/1/75485.pdf>

rights standards, rather than against the status quo, and remind us that the process of the trade negotiation, as well as the impact assessment itself, be based on human rights.<sup>177</sup>

Through its requirement for engaging with a broad range of stakeholders, including the human rights community, it is inter-sectoral in approach and content and helps identify the most vulnerable groups within a country that other types of assessment may overlook. In taking account of the quantitative as well as qualitative. Experience has demonstrated that in addressing perceived risks as well as real risks it can calm misperceptions whilst also strengthening governmental trade negotiating positions.<sup>178</sup>

The human rights approach exposes the roots of vulnerability and marginalisation and can expand the range of responses.<sup>179</sup> Through contributing to developing the capacities of duty-bearers and rights-holders, HRIA not only strengthens the capacity of the most vulnerable to improve their conditions, but also contributes in the longer-term, to a more informed public debate about economic issues. HRIA can also be an important tool for accountability, contributing to ensure that trade policy makers have adequately considered risks and benefits for different sectors of society of different policy options.

HRIA of trade agreements can be carried out before the negotiation concludes (*ex ante*), or after the entry into force of an agreement (*ex post*). Ideally, HRIA should take place both before the conclusion of a new agreement and then again at defined points in time after its coming into effect. This would help generate knowledge about impacts of trade agreements over time, information which is currently sorely lacking.<sup>180</sup>

Arguably, information-generation is the most important function of a HRIA, providing the knowledge basis to inform future policy orientations and choices. Building on such knowledge, *ex ante* HRIAs can be seen as a form of risk assessment, permitting consideration of risks and benefits of different options and mitigating or avoiding measures needed.

### **What a HRIA does not do**

It is important to be clear about what human rights impact assessment does not do. It is not a technique to predict what outcomes might follow from a particular trade measure. It does not seek to establish causality; the complexities inherent in economic policy-making make it hard to isolate a possible causal factor from possible outcomes. Note that this is the case for modelling of economic impacts of trade agreements also. HRIA is

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<sup>177</sup> G. MacNaughton (2015) "Human Rights Impact Assessment: A Method for Healthy Policymaking," 17(1) *Health and Human Rights Journal*.

<sup>178</sup> C. Dommen (forthcoming) *Applying the human rights framework to economic policy: Insights from an impact assessment of services trade liberalization in Mauritius*.

<sup>179</sup> FAO (2009) *The right to adequate food and indigenous peoples*, page 31.

<sup>180</sup> A recent study found that the Swiss federal government has only limited information regarding the effects of free trade agreements, and this considered only the economic aspects. S. Giger, 2017, *How free trade agreements benefit Switzerland* <https://www.s-ge.com/en/article/news/how-free-trade-agreements-benefit-switzerland>

neither better than worse at this, but is more realistic in that it does not claim to foresee outcomes.

HRIA does not set out to establish human rights violations but rather to be a policy tool to assist in progressive realisation. HRIA methodology calls for selecting a number of specific areas for in-depth, focused and rigorous human rights-based examination, through the screening and scoping parts of the exercise. Thus it does not attempt to cover the entirety of possible human rights impacts of a trade agreement, nor address the entirety of a country's human rights record.

It is important to recall that international human right law takes a position neither for nor against any particular trade rule or policy, subject to two conditions: first, the rule or policy in question must, in practice, actually enhance enjoyment of human rights, including for the disadvantaged and marginalized; second, the process by which the rule or policy is formulated, implemented and monitored must be consistent with human rights principles.

## ANNEX 2 – EFTA-MERCOSUR TRADE AGREEMENT - TABLE OF POSSIBLE HUMAN RIGHTS IMPACTS IN MERCOSUR

### Comprehensive free trade agreement between the MERCOSUR States and the EFTA States - Possible human rights impacts in Mercosur

| Area under negotiation <sup>181</sup>                                      | Possible human rights impacts   | Positive or negative             |
|--|---|----------------------------------|
| Trade in goods (agricultural products)                                     | Increased pressure on land and water from intensive production (rights of the child, right to food, right to water, right to health, Indigenous peoples' rights, minority rights) <sup>182</sup><br>Increasingly intensive production with chemical inputs (right to health, right to a clean environment, labour rights)   | Negative<br>Negative             |
| Tariff reductions  | Lower tariffs could lower costs of certain goods in Mercosur countries, reducing the cost of living (right to health, right to an adequate standard of living) (for instance lower tariffs on imports of orthopaedic or fracture appliances could reduce medical costs for persons with disabilities (rights of persons with disabilities)<br>Reduced tariff revenue could limit a government's ability to finance measures and programmes necessary for the realisation of human rights (human rights obligation to mobilize resources and devote maximum available resources for the realisation of human rights) | Positive<br>Positive<br>Negative |
| Sanitary, phytosanitary and technical standards relating to trade in goods | Could be used by EFTA countries as a way to limit Mercosur exports of agricultural products (right to an adequate standard of living, right to work)  | Negative if limits economic      |

<sup>181</sup> These areas are assumed based on recent EFTA trade agreements.

<sup>182</sup> Mention of specific rights affected are indicative only.

|                             |   |  |
|-----------------------------|---|--|
|                             | Could favour high health and environmental standards (right to health, children's rights)   | development potential<br>Positive if limits negative health or environmental effects |
| Intellectual property (IP)  | Higher IP standards relating to pharmaceutical products could increase the cost and/or reduce the availability of medical treatment (right to health)<br>Higher IP standards on agricultural products (particularly seeds) could stimulate research for improved, locally-adapted crops (right to food, right to an adequate standard of living)<br>Higher IP standards on agricultural products (particularly seeds) could limit smallholder farmers' access to seeds and disrupt traditional knowledge systems (cultural rights, Indigenous rights, women's rights, right to food)<br>Allowing IP protection for remedies that have been used by Indigenous communities in traditional medicine can infringe the human rights of original knowledge holders (right to health, cultural rights, Indigenous rights) | Negative<br>Positive<br>Negative<br>Negative   |
| Government Procurement      | Provisions on governmental procurement could limit a government's ability to favour local providers or to promote public interest objectives in awarding governmental contracts (social rights, obligation to devote maximum available resources to realisation of human rights, women's rights, rights of persons with disabilities)   | Negative   |
| Investment                  | Could bring in foreign exchange and know-how (right to an adequate standard of living, right to work)<br>Could limit States' ability to introduce measures for environmental, public health or other public interest purposes (right to health, right to water, indigenous rights) (see Philip Morris case against Uruguay)<br>Could limit States' ability to take steps in favour of workers' rights such as raising the minimum wage (workers' rights)<br>Could grant investors the right to initiate disputes against a State (right to self-determination)  | Positive<br>Negative<br>Negative<br>Negative   |
| Telecommunications services | Liberalisation could increase competition and improve services, improve coverage and reduce prices<br>Liberalisation could limit the right of governments to ensure universal service (right to be free from discrimination, right to social security)<br>Liberalisation could jeopardize confidentiality (right to privacy)  | Positive<br>Negative<br>Negative   |
| Energy services             | Could affect distribution of energy and cost of energy (right to an adequate standard of living, right to be free from discrimination)<br>Liberalisation of energy services sector could affect governments' ability to regulate in a sector of key national strategic interest (right to self-determination, obligation to mobilise resources)   | Negative<br>Negative   |

|   |   |   |
|---|---|---|
| <p>Services liberalisation affecting data</p>   | <p>Provisions affecting digital data could lead to losing control of data originating in Mercosur countries (right to development, obligation to mobilize resources, right to privacy)</p>  | <p>Negative</p>                                     |
| <p>Financial services liberalisation</p>  | <p>Liberalisation of banking services could perpetuate gender inequality as women may have less access to collateral (such as land title) which could restrict their ability to access financial services (women’s rights, right to be free from discrimination)<br/>                     Liberalisation in the financial sector could limit government’s flexibility to regulate in favour of financial stability (right to self-determine, obligation to mobilize resources)<br/>                     Liberalisation in the insurance sector could leave vulnerable groups (those without income, or with chronic health problems for instance) uninsured (right to health, right to social security)</p> |   |
| <p>Changes in trading patterns and economic structures that might follow from the trade agreement between EFTA and Mercosur</p> | <p>New economic activity will contribute to economic growth, thus enhancing tax revenues that can be devoted to public expenditure on health, education and other public services<br/>                     New economic activity will contribute to economic growth and transformation of the economy towards new sectors, opening up new employment possibilities<br/>                     The benefits and disadvantages of the EFTA-Mercosur trade agreement will be unevenly spread amongst different groups of the country’s population (right to be free from discrimination, obligation to avoid retrogression in the enjoyment of economic, social and cultural rights, Indigenous rights)</p>      | <p>Positive<br/><br/>Positive<br/><br/>Negative</p> |