
**THE INSTITUTIONALIZATION OF
HUMAN RIGHTS IMPACT ASSESSMENTS
THE CASE OF THE EUROPEAN UNION**

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Vorwort

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PART I: INTRODUCTION

1 CHAPTER 1: THE INSTITUTIONALIZATION OF HUMAN RIGHTS IMPACT ASSESSMENTS: INTRODUCTION AND OVERVIEW

1.1 The Human Rights Risks of Economic Policy-Making

Globalization, poverty and human rights are in an uneasy relationship. While millions of people have profited from economic liberalization and economic growth, many have not. It is their stories that should be of major concern - not only for economists and politicians but also for lawyers. Poverty deprives people of their human right to life, physical integrity, health, housing and food - in short, to an adequate standard of living as enshrined in Article 11 of the International Covenant on Economic, Social and Cultural Rights ("ICESCR").¹ In an increasingly interconnected world, acts of public authorities - such as states or International Organizations - can have environmental, social or human rights impacts in neighboring and far-away countries.² This does not only concern direct physical impacts - such as transboundary pollution - but also the impacts of general economic policies ranging from trade via development policies to sovereign debt restructuring.³ In legal terms, these global social impacts of economic policies can be situated at the intersection between human rights and economic law, including areas such as international trade, investment, and development cooperation law.⁴ Two scenarios shall illustrate this.

The EU's trade agreements intend to liberalize global food trade and can thus significantly change food prices. These changes severely affect many people's human rights, in particular the right to food and an adequate standard of living.⁵ In addition, the EU grants certain agricultural

¹ UN Committee on Economic, Social and Cultural Rights, *General Comment no 4 - The right to adequate housing*; UN Committee on Economic, Social and Cultural Rights, *Statement of the UN Committee on Economic, Social and Cultural Rights to the Third Ministerial Conference of the World Trade Organization* (1999), E/C.12/1999/9; UN Committee on Economic, Social and Cultural Rights, E/C.12/1/Add.100, *Concluding Observations regarding Ecuador* (2004).

² Eyal Benvenisti, 'Sovereigns as Trustees of Humanity: On the Accountability of States to Foreign Stakeholders', *American journal of international law*, 107 (2013), pp. 295–333, p. 296; Brun-Otto Bryde, 'International Democratic Constitutionalism', in: Macdonald, Ronald St. John and Douglas M. Johnston (eds.), *Towards World Constitutionalism*, pp. 103–125, p. 103; more generally on risks in a world risk society already: Brun-Otto Bryde, 'Recht der Risikogesellschaft', in: Herbert Grabes (ed.), *Wissenschaft und neues Weltbild*, pp. 71–90, 83 et seq.

³ For example, conditionalities in budget support agreements resulting in public spending cuts affecting the education or health sector: Matthias Goldmann, 'Human Rights and Sovereign Debt Workouts', in: Juan Pablo Bohoslavsky and Jernej Letnar Čerňič (eds.), *Making sovereign financing and human rights work*, pp. 79–100, p. 84; Andreas Fischer-Lescano, *Human rights in times of austerity policy* (Baden-Baden: Nomos, 2014), 1. ed. Similarly, patents on life-saving drugs can make them prohibitively expensive to many uninsured people in the Global South: ECORYS, 'Trade Sustainability Impact Assessment in support of negotiations of a DCFTA between the EU and Jordan: Final Report', 30 September 2014, p. 146. See also, by way of example, the instructive analysis in Sarah Joseph, *Blame it on the WTO?* (Oxford, New York: Oxford University Press, 2013).

⁴ Philipp Dann, *The Law of Development Cooperation* (Cambridge: Cambridge University Press, 2013), pp. 258 et seq.; Andreas Fischer-Lescano and Gunther Teubner, 'Regime-Collisions: The Vain Search for Legal Unity in the Fragmentation of Global Law', *Michigan Journal of International Law*, pp. 999–1046; Bruno Simma, 'Foreign Investment Arbitration: A Place for Human Rights?', *International and Comparative Law Quarterly*, 60 (2011), pp. 573–596; Holger Hestermeyer, *Human rights and the WTO* (Oxford: Oxford University Press, 2007); Bruno Simma, Jo Aschenbrenner, and Constanze Schulte, 'Human rights considerations in development cooperation activities of the European Community', in: Philip Alston (ed.), *The EU and human rights*, pp. 571–626.

⁵ UN Human Rights Council, A/HRC/10/5/Add.2, *Report of the Special Rapporteur on the right to food, Addendum: Mission to the World Trade Organization*, 4 February 2009.

subsidies to its own farmers which can exacerbate this effect:⁶ the combination of trade liberalization and the export of subsidized food from industrialized countries can put enormous pressure on local small-scale farmers in developing countries as it will reduce their profit margin to the extent that they might be unable to even buy the additional food they need to survive.⁷ Is the European Union obliged to take the rights and interests of affected farmers in developing countries, including their right to food, into consideration when concluding food-related trade agreements, and/or when granting agricultural subsidies? And if so, how can such an obligation be implemented in concrete decision-making processes?

A second constellation concerns farmers in developing countries producing and exporting food to the EU. The EU regularly adopts new food standards regulating food imports. These standards serve, *inter alia*, to protect food safety. In addition, marketing standards also deal with non-safety related marketability requirements such as the size of fruits.⁸ Farmers exporting to the EU must therefore make the necessary (often burdensome) adjustments.⁹ If they lack the capabilities to do so, they may not place their products on the EU market. In particular in export-oriented developing economies, this can be an existential threat, considering that adjustments may be too expensive and at least in the short run not possible.¹⁰ Is the EU obligated to consider these effects on the rights and interests of food-exporting farmers in third countries, in particular in developing and transition countries?

These cases raise the question whether decision-makers (in this thesis mainly: EU institutions) have an obligation to assess and consider the human rights impacts of their economic policies even if they occur extraterritorially. Many scholars have made high efforts to clarify how (international) economic law is or must be interpreted in the light of human rights, or under what conditions it can even advance the realization of human rights. Many authors focused on the role

⁶ While the EU has recently abolished its *explicit* export subsidies for agricultural products, the „general“ subsidies arguably also have a dumping effect on third countries: Jacques Berthelot, 'The truth about the European Union's food deficit and the dumping of its food exports linked to its domestic subsidies', 26 June 2018.

⁷ It might seem surprising at first that the right to food of *farmers* would be particularly affected. However, *inter alia* for the abovementioned reasons, half of the world's underfed people are smallholder farmers, see: Joseph, *Blame it on the WTO?* (above, n. 3), p. 204.

⁸ For example: *Regulation (EU) No 1308/2013 of the European Parliament and of the Council of 17 December 2013 establishing a common organisation of the markets in agricultural products*, Art. 76 (1) states: "[...] products of the fruit and vegetables sector which are intended to be sold fresh to the consumer may only be marketed if they are sound, fair and of marketable quality and if the country of origin is indicated."

These provisions are implemented by: European Union, *Commission Implementing Regulation (EU) No 543/2011 of 7 June 2011 laying down detailed rules for the application of Council Regulation (EC) No 1234/2007 in respect of the fruit and vegetables and processed fruit and vegetables sectors*.

⁹ Anne-Célia Disdier, Belay Fekadu, Carlos Murillo et al., 'Trade Effects of SPS and TBT Measures on Tropical and Diversification Products', ICTSD Programme on Agricultural Trade and Sustainable Development, May 2008.

¹⁰ In 2010, the Kenya Human Rights Commission analyzed the "threat" European food safety standards have for smallholder producers in Kenya: Kenya Human Rights Commission, 'Trading Our Lives With Europe: Possible Impact on Human Rights by the Framework for the Economic Partnership Agreements (EPAs) between the East African Community (Kenya) and the European Union', 2010, p. 33. While the particular case study referred to a private food safety standard, the negative impacts could equally be caused by binding EU norms.

of human rights in international economic law adjudication.¹¹ In addition, different theoretical and doctrinal concepts were developed to explain and justify that international organizations like the World Bank or the IMF have an obligation to respect and/or protect human rights, and that states have extraterritorial human rights obligations.¹² However, even if one accepts that such an obligation generally exists, many follow-up questions can be raised. A central challenge in this regard is the high level of factual and normative uncertainty. The human rights impacts of economic policies – granting agricultural subsidies, or enacting new food standards – are often *factually* difficult to predict and *normatively* difficult to evaluate.¹³

Reference to the aforementioned example of trade liberalization, subsidies and the right to food can illustrate the levels of factual and normative uncertainty, often due to the related complexities of cause-effect relationships. As briefly illustrated, trade liberalization for agricultural products may significantly affect global food prices and thus have significant impacts, in particular, on the lives of many poor people and small farmers in developing countries.¹⁴ However, such an impact is not only negative or positive. As illustrated above, a sharp drop in food prices negatively affects many poor households, namely small-scale farmers in developing countries who would become unable to compete at an international level. These effects are arguably caused by a certain design of trade rules. For example, under international trade law, WTO Member States are allowed to provide support to their farmers. For several reasons, mainly industrialized countries can fully profit from this privilege while only a few developing countries do.¹⁵ For example, the Agreement on Agriculture (“AoA”)¹⁶ permits developed and developing states to provide subsidies for a certain percentage of the total value of agricultural goods per year: while on its face a fair and neutral provision, few developing countries can afford to meet their threshold, while all

¹¹ Hestermeyer, *Human rights and the WTO* (above, n. 4); Anashri Pillay, ‘Toward effective social and economic rights adjudication: The role of meaningful engagement’, *International Journal of Constitutional Law*, 10 (2012), pp. 732–755.

¹² Siobhán McNerney-Lankford, ‘International Financial Institutions and Human Rights: Select Perspectives on Legal Obligations’, in: Daniel Bradlow and David Hunter (eds.), *International Financial Institutions & International Law*, pp. 239–285; Mac Darrow, *Between Light and Shadow* (Oxford, Portland, Or: Hart Pub., 2003); Dann, *The Law of Development Cooperation* (above, n. 4), 258 ff.; Lorand Bartels, ‘The EU’s Human Rights Obligations in Relation to Policies with Extraterritorial Effects’, *EJIL*, 25 (2014), pp. 1071–1091; Fons Coomans, ‘The Extraterritorial Scope of the International Covenant on Economic, Social and Cultural Rights in the Work of the United Nations Committee on Economic, Social and Cultural Rights’, *Human Rights Law Review*, 11 (2011), pp. 1–35; Marko Milanovic, ‘Extraterritorial Application of Human Rights Treaties’ (2011); Sigrun Skogly and Mark Gibney, ‘Economic Rights and Extraterritorial Obligations’, in: Lanse Minkler and Shareen Hertel (eds.), *Economic Rights*, pp. 267–283.

¹³ One employee at the World Bank, when asked about the Bank’s social agenda, stated that “the objectives of the institution are a little unclear, the norms are a little unclear, the roles are a little unclear [...]”, quoted in: Galit A. Sarfaty, *Values in Translation* (Stanford, Calif: Stanford University Press, 2012), p. 78. And indeed, due to problems of normative content and application (Martti Koskeniemi, *From Apology to Utopia* (Cambridge u.a: Cambridge Univ. Press, 2006), p. 25) it is often a little unclear what exactly it means for policy- and decision-making to respect and protect human rights.

¹⁴ On the relationship between the Agreement on Agriculture (AoA) and the livelihood of the world’s poor already: Kerstin Mechlem, ‘Harmonizing Trade in Agriculture and Human Rights: Options for the Integration of the Right to Food into the Agreement on Agriculture’, *Max Planck UNYB*, 10 (2006), pp. 127–190.

¹⁵ Joseph, *Blame it on the WTO?* (above, n. 3), p. 185; UN Human Rights Council, A/HRC/10/5/Add.2, *Report of the Special Rapporteur on the right to food, Addendum: Mission to the World Trade Organization* (2009), para 11.

¹⁶ *Agreement on Agriculture (AoA)*, Apr. 15, 1994, Marrakesh Agreement Establishing the World Trade Organization, Annex 1A, 1867 U.N.T.S. 410.

developed countries can.¹⁷ Many small farmers in the Global South are therefore unable to export their products to the developed world at competitive prices, even though developing countries should have a competitive advantage for the production of primary products.¹⁸

At the same time, lower global food prices can have positive impacts on *other* poor households, in particular: consumer households, which are not active in the agricultural sector. High food prices would hit poor households disproportionately hard if they have to buy all or most food:¹⁹ The lower a household's income, the higher the percentage it will spend on food.²⁰ Consumer households might therefore benefit from trade liberalization and subsidized agricultural food imported from the EU. Consequently, liberalization of food trade and agricultural subsidies granted by developed countries can have, factually, positive and negative impacts. It is a complex task to make empirically based predictions about who will actually profit and who will lose – and to what extent – from a trade policy reform. This relates to factual uncertainty.

Also normative uncertainty exists. It is difficult to clearly determine at what point a trade and development agreement that liberalizes market access for food products from industrialized countries would not only negatively affect the interests of small-scale farmers but also infringe their human rights. One could establish – *de lege ferenda* – clear normative benchmarks. For example, one can measure the realization of the right to food by using nutrition indicators or measuring the percentage of a population with expenditures below US\$1 (PPP) per day – the latter could measure the economic accessibility to food.²¹ However, even if such a normative standard existed, and if one could establish a causal link between a new trade policy and an increase of the percentage of the population with expenditures below that threshold, numerous other factors of normative uncertainty would continue to exist: for example, if and under what conditions infringements could nevertheless be justified, to what extent the EU as opposed to the affected person's state is responsible for these negative human rights effects, or whether remedial action – compensation or the establishment of a social safety net to prevent the most severely affected from economic shocks – is required.

It is against this background that *Human Rights Impact Assessments* (“HRIA”) can become an important tool to give effect to human rights in economic policy making: HRIAs require analysis to predict likely significant human rights impacts, and they require deliberative processes such as consultation. They thus contain organizational and procedural elements that can guide decision-making of public authorities in the context of normative and factual uncertainties. How law guides the conduct of institutionalized HRIAs – illustrated in the case of the EU institutions' decision-making – is the central topic of this book.

¹⁷ Joseph, *Blame it on the WTO?* (above, n. 3), p. 186.

¹⁸ For example, only four transnational corporations control around 40 % of the global coffee trade: Tristan Feunteun, ‘Cartels and the Right to Food: An Analysis of States' Duties and Options’, *Journal of International Economic Law*, 18 (2015), pp. 341–382, p. 347.

¹⁹ ECORYS, ‘Trade Sustainability Impact Assessment in support of negotiations of a DCFTA between the EU and Egypt: Final Report’, 3 November 2014, pp. 72 et seq.; on short and long-run impacts of rising food prices: Will Martin and Maros Ivanic, ‘Food Price Changes, Price Insulation, and Their Impacts on Global and Domestic Poverty’, in: Matthias Kalkuhl, Joachim von Braun, and Máximo Torero (eds.), *Food Price Volatility and its Implications for Food Security and Policy*, pp. 101–113.

²⁰ Feunteun, ‘Cartels and the Right to Food: An Analysis of States' Duties and Options’ (above, n. 18), p. 342.

²¹ For further information: FAO, ‘Guide to Conducting a Right to Food Assessment’, 2009, p. 84.

1.2 Impact Assessments as a Response to Human Rights Risks

Human rights committees and institutions, scholars, and civil society groups have been urging states and international organizations to conduct HRIAs in areas as different as project finance, trade agreements or purely domestic regulation with transnational impacts.²² Over the past years, rules, principles, and guidelines on how to conduct Human Rights Impact Assessments emerged, covering sectors such as development cooperation²³, trade and investment agreements,²⁴ economic policy reforms, e.g. in the context of debt restructuring,²⁵ or general domestic policies with expected internal and external human rights effects²⁶.

²² Calls for Human-Rights Impact Assessments are numerous. By way of example: UN Committee on Economic, Social and Cultural Rights, *Concluding Observations regarding Ecuador* (above, n. 1), para 56; UN Committee on the Rights of the Child, CRC/C/15/Add.232 (2004), para 48; UN Committee on the Elimination of Discrimination against Women, CEDAW/C/COL/CO/6 (2007), para 29; UN Committee on the Elimination of Discrimination against Women, CEDAW/C/PHI/CO/6 (2006), para 26; UN Human Rights Council, *Report of the Special Rapporteur on the right to food, Addendum: Mission to the World Trade Organization* (above, n. 15), para 37–38. As representatives of civil society organizations: FIDH, ‘Human Rights Impact Assessment of Trade and Investment Agreements concluded by the European Union (Position Paper)’, February 2008. The UN Human Rights institutions and Special Rapporteurs also call for more human rights impact assessments in different areas of international economic law, such as for trade and investment agreements: UN Committee on Economic, Social and Cultural Rights, *Concluding Observations regarding Ecuador* (above, n. 1), para 55; Human Rights Council, *Guiding Principles on Human Rights Impact Assessments of Trade and Investment Agreements, Report of the Special Rapporteur on the right to food, Olivier de Schutter* [2011]; UN Committee on Economic, Social and Cultural Rights, U.N. Doc. E/1990/23, *General Comment No. 2*, para 8; Canadian Council for International Co-operation & Misereor Berne Declaration, ‘Human Rights Impact Assessments for Trade and Investment Agreements: Report of the Expert Seminar, June 23–24, 2010, Geneva, Switzerland’; European Economic and Social Committee, *Opinion of the European Economic and Social Committee on ‘Trade and Food Security’*, 2010/C 255/01, 1.2.1.9; Fabiane Baxewanos and Werner Raza, ‘Human Rights Impact Assessments as a New Tool for Development Policy?’, in: Working Paper, 37, Januar 2013; FIDH, ‘Human Rights Impact Assessment of Trade and Investment Agreements concluded by the European Union (Position Paper)’ (above, n. 22); James Harrison, *Measuring Human Rights: Reflections on the Practice of Human Rights Impact Assessment and Lessons for the Future*; Gillian MacNaughton and Paul Hunt, ‘A human rights-based approach to social impact assessment’, in: Frank Vanclay and Ana Maria Esteves (eds.), *New Directions in Social Impact Assessment*, pp. 355–367; World Bank /Nordic Trust Fund, ‘Human Rights Impact Assessments: A Review of the Literature, Differences with other forms of Assessments and Relevance for Development’, February 2013.

²³ For an overview: Baxewanos and Raza, ‘Human Rights Impact Assessments as a New Tool for Development Policy?’ (above, n. 22).

²⁴ For example: Human Rights Council, *Guiding Principles on Human Rights Impact Assessments of Trade and Investment Agreements, Report of the Special Rapporteur on the right to food, Olivier de Schutter* [2011], A/HRC/19/59/Add.5, 19 December 2011.

²⁵ UN Human Rights Council, *Guiding principles on human rights impact assessments of economic reforms, Report of the Independent Expert on the effects of foreign debt and other related international financial obligations of States on the full enjoyment of human rights, particularly economic, social and cultural rights*, A/HRC/40/57, 19 December 2018. The Human Rights Council later encouraged public authorities to take these guiding principles into account: UN Human Rights Council, Resolution 40/8 adopted on 21 March 2019, A/HRC/RES/40/8.

²⁶ The EU’s general impact assessment regime – which assesses also internal and external human rights impacts of legislative and non-legislative initiatives – will be analyzed in the following. However, different human rights impact assessment instruments have already been used at national or sub-national levels. One example is the Equality and Human Rights Impact Assessment („EQHRIA“) that has been used across Scotland and endorsed by the Scottish Human Rights Commission: see

<http://eqhria.scottishhumanrights.com/eqhriapolicyprocess.html> (last visited: June 2020).

Impact Assessments are, in a nutshell, instruments and procedures to generate information about the potential positive and negative, intended and unintended effects of a project, program, policy, or any other initiative.²⁷ They are aids to decision-making under factual and normative uncertainty. They were first mainly applied in environmental law as Environmental Impact Assessments (“EIA”)²⁸ in order to assess the environmental consequences of specific projects that might harm the human environment. Increasingly they were used to also assess non-environmental impacts in a whole range of policy areas, both domestically and internationally. Similarly, legislators and regulators at the domestic and EU level use (often so-called) Regulatory Impact Assessments (“RIA”) to assess the consequences of their general-abstract policies, be they legislative proposals, non-legislative initiatives, implementing measures or delegated acts. The development of both projects and policy IAs will be described in more detail below.

While no globally accepted definition exists, a *human rights* impact assessment is generally defined as “the process of predicting the potential consequences of a proposed policy, programme or project on the enjoyment of human rights.”²⁹ The aim is to identify and analyze the impacts of different initiatives on the enjoyment of human rights: They inform decision-makers about ways to “mitigate negative” and “enhance positive” human rights impacts.³⁰

Drawing on the experience with these different IA instruments, the first guidelines on how to conduct HRIAs were drafted by NGOs and state development agencies.³¹ These HRIA tools first focused on specific projects, mainly business operations and investment lending. Increasingly, public development institutions became interested in the instrument: The Norwegian Agency for Development Cooperation prepared guidelines for its development initiatives,³² the Special Rapporteur on Business and Human Rights presented a report on “key methodological questions” concerning HRIAs³³, and the IFC recently cooperated with transnational corporations to develop a Human Rights Impact Assessment and Management (HRIAM) tool to inform corpora-

²⁷ Jane Holder, *Environmental Assessment* (Oxford Univ. Press, 2006), p. 1; European Commission, *Impact Assessment Guidelines* [2009], p. 4; Frank Vanclay, ‘International Principles for Social Impact Assessment’, *Impact Assessment and Project Appraisal*, 21 (2003), pp. 5–11, p. 6; James Harrison, ‘Human Rights Impact Assessments of Free Trade Agreements: What is the State of the Art?: Outline Paper’, 5 November 2013; Gauthier de Beco, *Non-judicial Mechanisms for the Implementation of Human Rights in European States* (Bruxelles: Bruylant, 2010), p. 257.

²⁸ Simon Walker, *The Future of Human Rights Impact Assessments of Trade Agreements* (Antwerp, Portland: Intersentia, 2009), p. 3.

²⁹ UN General Assembly, *Report of the Special Rapporteur on the right of everyone to the enjoyment of the highest attainable standard of physical and mental health*, A/62/214, para 37. For Gauthier de Beco, HRIAs mean the “assessment of both the potential impact of human rights using a participatory approach with a view to helping states to achieve human rights compliance”, see: de Beco, *Non-judicial Mechanisms for the Implementation of Human Rights in European States* (above, n. 27), 257 f.

³⁰ Jennifer Zerk, ‘Human Rights Impact Assessment of Trade Agreements’, Chatham House, in: *International Law Programme*, Feb 2019, p. 3.

³¹ For example: the Rights and Democracy initiative on human rights impact assessment; and the Health Rights of Women Assessment Instrument (HeRWAI) developed by the Netherlands’ Humanist Committee on Human Rights in order to support NGOs world-wide in analyzing especially women’s health rights. Similarly, the FAO has developed a Right to Food Impact Assessment checklist. For an overview see Simon Walker, ‘Human Rights Impact Assessments: Emerging Practices and Challenges’, in: Eibe Riedel, Gilles Giacca, and Christophe Golay (eds.), *Economic, Social, and Cultural Rights in International Law*, pp. 391–414, p. 393.

³² NORAD, ‘Handbook in human rights assessment: state obligations awareness & empowerment’, 2001.

³³ UN Human Rights Council, *Report of the Special Representative of the Secretary-General on the issue of human rights and transnational corporations and other business enterprises* (2007), A/HRC/4/74.

tions on how to assess and manage human rights risks and impacts.³⁴ Now, impact assessments, including human rights analysis, are the cornerstone for the IFC Performance Standards (PS 1): it is through these impact assessments that all significant relevant social, environmental and human rights impacts should be identified which would then “trigger” the applicability of other Performance Standards.

Besides investment lending and project finance in development cooperation, trade and investment agreements increasingly became an object for HRIAs.³⁵ What is widely considered as the first HRIA of a trade agreement was a report prepared by the Thai Human Rights Commission in 2006.³⁶ Similarly, the Ecumenical Advocacy Alliance (EAA), a network of churches, commissioned studies of the impacts of trade agreements on the right to food.³⁷ Walker has developed a general methodology for a right to health impact assessment for free trade agreements and illustrated its application in a case study on the impacts of CAFTA on the right to health in Costa Rica.³⁸ An institutionalized ex-post HRIA – i.e. after the respective trade agreement entered into force – has been implemented in the Canada-Colombia FTA: The Canadian Parliament must present annual reports on the agreement’s impacts on human rights in Canada and Colombia.³⁹ The most comprehensive institutionalized IA regime with an increasingly strong focus on human rights impacts has been established by the European Union.⁴⁰ As the EU’s HRIA regime is normatively and institutionally most advanced, it will be at the center of this thesis.

1.3 The Institutionalization of Human Rights Impact Assessments: Towards an emerging “HRIA law”

A central assumption of this book is that HRIAs not only describe a set of methodological tools. Rather, HRIAs are increasingly institutionalized and governed by international and domestic public law. Institutionalization in this sense means that HRIAs are officially required as part of the decision-making process, and that binding and non-binding rules and principles determine how to conduct HRIAs. As will be illustrated in the case of EU law,⁴¹ public law increasingly determines the conduct of HRIAs and thus determines *if, how* and *with what effect* HRIAs must be conducted. While still at the very beginning, these are the contours of what I describe as an emerging “HRIA law”.

However, it should be made clear that such an “HRIA law” is far less advanced than, for example, EIA law. There is no international HRIA treaty, and domestic HRIA guidelines are often situated at a sub-legislative level. Still, the conduct of HRIA is increasingly governed by administrative

³⁴ Walker, ‘Human Rights Impact Assessments: Emerging Practices and Challenges’ (above, n. 31), p. 393.

³⁵ Ibid.

³⁶ James Harrison and Alessa Goller, ‘Trade and Human Rights: What Does ‘Impact Assessment’ Have to Offer?’, *Human Rights Law Review*, 8 (2008), pp. 587–615, p. 604.

³⁷ Walker, ‘Human Rights Impact Assessments: Emerging Practices and Challenges’ (above, n. 31), p. 394.

³⁸ Ibid.; Walker *The Future of Human Rights Impact Assessments of Trade Agreements* (above, n. 28).

³⁹ Ibid.

⁴⁰ See with further reference: Zerk, ‘Human Rights Impact Assessment of Trade Agreements’ (above, n. 30), p. 5.

⁴¹ With regard to HRIAs of trade agreements: Ibid. However, Zerk’s analysis is only focused on IAs accompanying trade agreements. The EU has established a much broader IA regime that is relevant to the assessment of trade agreements as well as almost all other policy areas, be they trade related or not.

guidelines, institutional law, case law, and legal principles. Some of these norms explicitly address HRIAs. For example, the European Commission has enacted the “Guidelines on the analysis of human rights impacts in impact assessments for trade-related policy initiatives”.⁴² In other cases, norms of a general nature also determine how HRIAs are to be conducted, and to what extent HRIAs are able to influence decision-making. As will be seen, participation is one of the main principles guiding the HRIA process. Under EU law, access to European Parliament, Commission, and Council documents is regulated in Regulation (EC) No. 1049/2001 (“Access to Information Regulation”).⁴³ This is not an HRIA specific norm, but of major relevance for participatory IA procedures. In a recent case, the Court of Justice of the European Union had to determine to what extent citizens have a right to get access to the European Commission’s draft Impact Assessments Reports.⁴⁴ Consequently, the interpretation of the Access to Information Regulation clearly influences the extent to which EU law enforces the principle of participation as part of the HRIA process.

Against this background, and with the aforementioned caveat, I will use the term “HRIA law” as comprising rules and principles of public law, ranging from traditional sources of international law to domestic constitutional, administrative and regulatory law, which determine – directly or indirectly – the conduct of HRIAs. As stated above, such an HRIA law has only started to emerge, and I am not using this term to “invent” a new area of law, but mainly for the sake of simplification and clarification: It is a *simplification* because it is a collective term comprising a set of different norms, and a *clarification* because it focuses on the legal aspects surrounding HRIA, not on scientific methodologies used to predict real-life impacts.

One important question is, consequently, to what extent rules and principles guiding HRIAs are binding and judicially enforceable, and thus “law” in a narrow sense. However, this is not the only issue to be addressed. This thesis analyzes and evaluates, from a legal perspective, the already existing binding and non-binding rules and principles governing HRIAs. At the same time, it also asks to what extent law *could*, in the future, govern the conduct of institutionalized HRIAs, or to what extent structural challenges, mainly due to actual and legal uncertainty, limit the ability to enact HRIA norms that would actually bring about positive effects for human rights. In particular, the comparison with EIA law, a well-established area of law, illustrates the “potential” of law in IA regimes and thus allows to analyze to what extent HRIA *could* be regulated by binding rules and principles, and where the legal and actual limits are.

The book is based on the assumption that clear legal rules – binding and non-binding – and effective mechanisms to ensure compliance with these rules governing HRIAs are generally welcomed from a human rights perspective. This is because, as I will argue, the legal institutionalization of HRIA can provide for human rights protection through organization and procedure, which essentially recognizes the contribution of an ex-ante procedure to the realization of human rights as opposed to pure ex-post (judicial) control.⁴⁵ In particular where HRIAs aid deci-

⁴² European Commission, *Guidelines on the analysis of human rights impacts in impact assessments for trade-related policy initiatives*, http://trade.ec.europa.eu/doclib/docs/2015/july/tradoc_153591.pdf

⁴³ European Union, *Regulation (EC) No 1049/2001 of the European Parliament and of the Council* (2001). This right is now constitutionally anchored in Art. 15 (3) TFEU.

⁴⁴ See section 7.2.4.2.

⁴⁵ On the concept of Human Rights Protection through Organization and Procedure: Peter Häberle, ‘Grundrechte im Leistungsstaat: Mitbericht’, in: Wolfgang Martens and Peter Häberle (eds.), *Grundrechte*

sion-makers to take uncertain human rights impacts into consideration, human rights protection through organization and procedure compensates for the fact that substantive human rights obligations do not allow to precisely determine the limit between legality and illegality.

This book is divided into several parts with several chapters each. After this introductory part, part II will set the theoretical background for the analysis: It will illustrate different approaches to HRIAs and will explain what is meant by a public law approach to HRIA. Part III will analyze why there is an obligation to take human rights impacts into account irrespective of where they occur. This obligation will be reconstructed as a principle of affectedness. This is a broad constitutional perspective and the legal basis for HRIAs. Part IV will analyze how such a broad principle could be “operationalized” and implemented into rules and principles specifically guiding an institution’s every-day decision making. This is an administrative perspective. Part IV will then address to what extent these rules and principles guiding HRIAs can influence decision-making and increase compliance with human rights. This is a somewhat regulatory perspective focusing on compliance and effectiveness. The following sections will provide a brief overview of these parts.

1.3.1 “Why?” – The Obligation to Assess Human Rights Impacts (Part III)

In a blog entry, Giovanni Gruni criticized the “Missing Human Rights Impact Assessment of European Union Free Trade Agreements”.⁴⁶ One commentator asked: “We don’t impose human rights assessment on the unwritten free trade which applies between Hertfordshire and Buckinghamshire or between England and Scotland. Why should international frontiers make any difference?” This raises indeed two essential questions: First, why is it justified to oblige public authorities to formally assess the human rights consequences of their decisions, and second, what role do international borders play? In other words, would an obligation to assess human rights impacts include the duty to assess impacts occurring in third states?

These questions will be addressed in chapter 4. The obligation to assess human rights impacts irrespective of their occurrence will be reconstructed in the light of an emerging legal principle of affectedness (“PoA”).⁴⁷ This principle is rooted in cosmopolitan and deliberative political theory and, in essence, states that all those who are affected by an act of (public) authority shall also be involved or at least be enabled to be involved in its creation.⁴⁸ While the principle is widely

im Leistungsstaat, pp. 43–131, pp. 86–90; Uwe Kischel, *Die Begründung* (Tübingen: Mohr Siebeck, 2003), 123 ff.; Erhard Denninger, ‘Staatliche Hilfe zur Grundrechtsausübung durch Verfahren, Organisation und Finanzierung’, in: Josef Isensee and Paul Kirchhof (eds.), *Handbuch des Staatsrechts der Bundesrepublik Deutschland*, pp. 621–663.

⁴⁶ Giovanni Gruni, The Missing Human Rights Impact Assessment of European Union Free Trade Agreements, 21 August 2014, available at: <http://ohrh.law.ox.ac.uk/the-missing-human-rights-impact-assessment-of-european-union-free-trade-agreements/> (last visited: June 2020).

⁴⁷ The criterion of affectedness as such is not new, see: Brun-Otto Bryde, ‘Das Demokratieprinzip des Grundgesetzes als Optimierungsaufgabe’, in: Redaktion Kritische Justiz (ed.), *Demokratie und Grundgesetz*, pp. 59–70, p. 64. However, it has lost recognition in the context of territorial sovereignty and a widespread understanding of democracy as based on a national *demos*. It might therefore be more precise to talk about the re-emergence of the principle of affectedness and its recent recognition in international and constitutional law.

⁴⁸ See section 4.2.

recognized in domestic administrative law where people whose rights and/or interests are affected by an act of public authority are entitled to participation and can under certain conditions challenge such an act in court, I will argue that such a *legal* principle of affectedness is internationalized, i.e. implies that public authorities must take the rights and interests of all potentially affected people into consideration, including the interests of potentially affected “distant strangers”⁴⁹. It does not require that everyone affected has standing to challenge a decision in court, but it rather constitutes an obligation to at least consider these impacts diligently. This principle is reflected in specific rules and principles of environmental, human rights, and economic law, but also in domestic constitutional and administrative law, as will be illustrated in the case of EU law. These rules are not, as one might assume at first sight, in conflict with or an exception to sovereignty, but rather modify the concept of sovereignty. Only in a narrow traditional reading can sovereignty be understood as a principle that per se justifies that states exclude the rights and interests of non-citizens or people living outside their territory. As the historical evolution of the sovereignty principle demonstrates, sovereignty is justified in the name of humanity, and the narrow interpretation just described can only be justified as long as there is a nearly perfect fit between collective autonomy (sovereignty) and individual autonomy (rights and interests of individuals).⁵⁰ As the introductory examples have illustrated and as will further be discussed in the following parts, such a perfect fit does not exist anymore. Insofar, sovereignty as such cannot justify excluding the consideration of impacts on people in third countries; instead, the opposite is true: the exclusion of these people’s rights and interests must be justified. This might answer the question raised at the beginning of this section: First, the fact that there *is no* HRIA of the trade between Scotland and England does not mean that there *should not be one*. Second, frontiers make a difference where those affected by transnational impacts of trade policies are not involved in the making of these policies. As long as there is no Global Parliament, frontiers will make a difference: insofar, in particular participatory HRIAs can help to ensure that the rights and interests of foreigners in third countries, who are affected but not entitled to vote, are considered during decision-making. However, the observation that there is a general obligation for states and international organizations to take human rights impacts into account, irrespective of where these impacts occur, raises several follow-up questions on how to operationalize this principle in everyday decision-making. Put differently: How should authorities transpose a constitutional principle of affectedness into specific administrative rules and principles guiding every-day decision-making? These issues will be addressed in the next part.

1.3.2 “How?” – How Law Regulates the Process and Methods of Impact Assessments (Part IV)

Some of the follow-up questions a legal principle of affectedness provokes are how the rights and interests of affected people should be meaningfully taken into consideration. What does “to be affected” mean, how shall uncertain impacts be addressed in order to reduce factual uncertainty, and how should they normatively be evaluated, and by whom? Does the principle of affectedness constitute a consideration-duty or imply substantive obligations, and should

⁴⁹ The term „distant strangers“ refers to non-citizens and non-residents, i.e. people living in third countries. Similar: Aravind Ganesh, ‘The European Union’s Human Rights Obligations Towards Distant Strangers’, *Mich. J. Int’l L.*, 37 (2016).

⁵⁰ On the drifting-apart of collective and individual autonomy see section 3.2.1.2.

compliance with such a legal principle be subject to judicial review? Many of these follow-up questions are raised because the factual and normative effects of projects and policies are unclear: The actual effects of a certain initiative can be uncertain (*factual* uncertainty), and even where specific effects can be identified, it is often unclear what that means for human rights (*normative* uncertainty). While uncertainty is a challenge for IAs, it is at the same time the very reason for their existence: impact assessments are legally regulated instruments to make better decisions under uncertainty where command-and-control regulation would not be an option. From a doctrinal human rights perspective, they can contribute to protecting human rights through organization and procedure where substantive human rights standards do not exist.⁵¹

So Impact Assessments are an administrative instrument to generate information and knowledge⁵² and they function (also) as a „legal response to risk management needs“. ⁵³ This is not only true for “traditional” risk law concerning the regulation of the risks caused by technological innovations, such as the installation of a nuclear power plant or the distribution of genetically modified food. General and abstract policies can also pose risks. As indicated in the introduction, trade regulation as such can be a risk: not because it regulates per se dangerous activities, but because the consequences of trade regulation can cause harm. In other words: IAs of trade or development policies do not respond to the regulation *of* risk but address regulation *as* a risk. It is this type of risk that is generally referred to in debates about “trade and human rights” and about the human rights “risks” of trade policy.⁵⁴

It is before this background that the institutionalization of HRIAs can be analyzed through a risk law perspective, which is an important field of research within the ambit of public law. Such a perspective offers several advantages: it is possible to draw on descriptive risk and decision theory in order to better understand potential obstacles to an effective institutionalization of impact assessments. Risk research, decision theory and epistemology are descriptive insofar as they describe how people gather information and make decisions under uncertainty; some of the results pose significant challenges to IA law. Risk theory can also be normative in the sense that it may indicate how people and institutions should take decisions under risk, e.g. whether and how to apply the precautionary principle.

Based on insights from EIA law, risk law and theory, I argue that rules and principles governing the conduct of HRIAs can be interpreted in the light of three risk paradigms. Each paradigm reflects ideal-type opinions on how risks should be dealt with. Depending on each of these understandings, there are three corresponding ideal-type models explaining how IAs can and should function. The three paradigms are, roughly speaking, defined by how far science and expertise are valued as objective and neutral on the one hand or subjective and politicized on the other hand. The first paradigm is what can be called the objective-managerial paradigm. It believes in the strength of science and expertise and states that decisions under uncertainty should mainly

⁵¹ See section 3.2.1.5 and chapter 5.

⁵² Andreas Voßkuhle, ‘§ 1 Neue Verwaltungsrechtswissenschaft’, in: Wolfgang Hoffmann-Riem, Eberhard Schmidt-Aßmann, and Andreas Voßkuhle (eds.), *Grundlagen des Verwaltungsrechts Band I*, pp. 1–63, para 11.

⁵³ With regard to Environmental Impact Assessment: Valentina Vadi, ‘Environmental Impact Assessments in Investment Disputes: Methods, Governance and Jurisprudence’, *Polish Yearbook of International Law* (2010), p. 170.

⁵⁴ By way of example: European Economic and Social Committee, *Sustainability impact assessments (SIA) and EU trade policy* (2011), 2011/C 218/03.

be based on analytical, scientific evidence. Ideally, an impact assessment should, therefore, provide facts and inform decision-makers (“information model”). At the other end of the spectrum is a subjective-pluralistic paradigm. It is based on deep skepticism against science and expertise, not only because scientists and experts can also make serious mistakes, but in particular because of the perceived undemocratic epistemic power and disrespect for laypersons’ individual preferences. The main purpose of impact assessments based on this paradigm would be to increase the transparency of decision-making processes and enable people to participate in the IA-process. It should not wrongly claim to provide objective information but identify individual preferences (“preference accumulation model”). The third is an analytic-deliberative paradigm which can be placed somewhere in the middle as it combines these two approaches. It is analytical insofar as it recognizes that scientific analysis provides important information, but also recognizes its limits and therefore suggests to supplement analytical with deliberative elements. This means that impact assessments should combine analytical and deliberative elements in a mutually reinforcing way: neither to simply inform decision-makers nor to aggregate individual preferences in a pseudo-democratic manner. Rather, the goal is to enable different experts and laypersons to participate in informed discourse: technical analysis can inform laypersons, but laypersons can also contribute their knowledge, experience or anecdotal evidence to broaden the experts’ and decision-makers’ perspective. In consequence, impact assessments could have a transformative function, namely to transform preferences or opinions through an analytic-deliberative process (“transformation model”). Throughout this thesis, these paradigms and models will be used to analyze and evaluate existing rules, principles, and institutions which I include under the term HRIA law.

It is against this background that part IV analyzes the role of law in determining how to conduct HRIAs. The first chapter in part IV will address the role law and impact assessments play for decision-making under uncertainty (see chapter 5). The following chapter will analyze how institutions decide which initiatives require the conduct of an in-depth HRIA, given that it would be technically impossible to conduct HRIAs for every single decision. Here, IAs are generally necessary where *significant* impacts on certain rights and interests are *likely* to occur. While mainly a scientific exercise, in particular (domestic) EIA law has developed rules and principles to determine how to assess the likelihood and significance of impacts (see chapter 6). Irrespective of what IA model applies – the information, the pluralistic or the transformation model – participation always is an essential element of IAs: Either as a source of information, as a democratic requirement to identify individual preferences, or as a process to shape and transform the assessment procedure. Legal rules and principles guide and influence participation and its relevance for IAs and will be analyzed in the light of these paradigms and ideal-type models (see chapter 7). And while the analysis of impacts is generally dominated by scientific and empirical methods, there are still certain rules and principles determining how to conduct such an analysis and what decision-rules to apply where uncertainty prevails (see chapter 8).

1.3.3 “What for?” – Giving Effect to Human Rights Obligations (Part V)

This part focuses on the role IA law plays in order to increase compliance with and to give effect to human rights in public decision-making. This part will look at how law and legal institutions can make IAs a more relevant instrument to increase the positive and reduce the negative hu-

man rights impacts of public acts. In this context, I will use “relevance” as an umbrella term comprising compliance and effectiveness.

Drawing on compliance theory and a comparison with domestic EIA law, five factors that determine the relevance of IAs will be carved out: First, the availability of formal accountability mechanisms such as judicial review. The scope of (quasi-)judicial review is often limited due to the broad discretion vague terms like “significance” leave. In particular where authorities take decisions under uncertainty, they generally enjoy broad discretion. However, as a comparison with domestic EIA law demonstrates, this does not mean that judicial review should be excluded right away or necessarily limited to simple reasonability tests.

Second, the availability of informal or political accountability mechanisms can increase the relevance of impact assessments. This regards political review by democratic organs as well as the involvement of external participants. In particular, IA law provides two valuable resources: time and information. Both of these resources are important for external actors to participate in the decision-making procedure meaningfully. Still, the effectiveness of political accountability mechanisms largely depends on different other factors, including the potential to mobilize people. As a rule of thumb, it may generally be more difficult to mobilize people to hold decision-makers accountable for policies producing adverse human rights impacts in third countries. However, as will be seen, in particular NGOs actually play at least a certain role in this regard.

Third, a comparison with domestic EIA law and compliance theories reveals that the relevance of IAs will increase if legal rules are specific and therefore clearly determine the procedure and object of the assessment. IAs can reveal that an initiative would be not in compliance with a substantive rule and can, therefore, induce decision-makers to stop or modify a proposal. Actors are also generally less inclined to infringe specific rules, either because this is more likely to result in sanctions (including reputational loss), or because it appears inappropriate.⁵⁵ However, this is the weakest point for IAs in general and HRIAs in particular. Normative uncertainty is often very high, and this is – as mentioned above – one of the reasons why HRIAs emerged in the first place. Still, like in domestic law, it would be possible to specify normative standards in IA law further: not necessarily as absolute boundary markers⁵⁶, but rather as eye-openers which would force decision-makers to take a “hard look”.

Fourth, the internalization of rules and principles guiding HRIAs is an important factor increasing their relevance. This includes but is not limited to the implementation of institutional learning mechanisms within the institution in charge of the decision-making process. Also, it matters to what extent the conduct of “good” HRIAs is rewarded, e.g., because there is a particular quality review for IA reports providing immediate feedback, or because it is rewarded in a more subtle way such as through promotional schemes.

Finally, there is a broad consensus in the IA community that ex-post IAs are important. As it is difficult to predict future impacts, ex-post IAs will be conducted after an initiative has been approved or implemented. Thus, the actual human rights impacts of an initiative can be determined more precisely. However, the main obstacle here would be that it is often difficult to

⁵⁵ On different approaches in compliance theories see section 9.1.1.

⁵⁶ Roger Brownsword and Morag Goodwin, *Law and the Technologies of the Twenty-First Century* (Cambridge: Cambridge Univ. Press, 2012), 225 et seq.

amend an initiative once it has been implemented. Whether or not this is possible depends on the flexibility of the legal act in question: if the HRIA accompanies a financing agreement, the contract should contain clauses that require the adoption of mitigation measures should human rights impact occur at a later stage. Legislative acts or international agreement may be difficult to amend ex-post. Therefore, the relevance of ex-post HRIAs will largely depend on formal and informal flexibility mechanisms to adapt to later identified human rights impacts. In the final part, I will analyze the institutionalization of HRIAs in EU law through the lenses of these factors.

1.4 Methods: Doctrinal, Comparative and Contextual Approaches

The central thesis is that an emerging set of legal rules and principles – which I cover under the term “HRIA law” - increasingly determines if, how, and with what effect public authorities in general and EU institutions in particular must or should assess the human rights impacts of their initiatives. The focus is therefore on the institutionalization of HRIA in the decision-making of public authorities. In order to answer the research questions, it is necessary to take a macro-perspective on IA law as opposed to a micro-perspective. The methods used are mainly doctrinal and comparative. However, as impact assessments are also tools to generate information and knowledge and to deal with uncertainty and risk - inherently interdisciplinary concepts - it will be necessary to embed this thesis in an interdisciplinary context, drawing in particular on insights from risk and decision theory.

1.4.1 The Institutionalization of HRIA: A Macro-Perspective on Impact Assessment Law

There are two major perspectives from which one could analyze the role of law in HRIAs. First, it is possible to analyze the role human rights play in different types of IAs from a *micro*-perspective. The objective would be to evaluate (and potentially contribute to improve) methodologies used to predict, measure and assess the impacts of a specific type of initiative on a specific human right. Considerable differences exist between different policy-areas: The methodologies to assess the potential impacts of a trade agreement on the right to health can hardly be transferred to assess the consequences an infrastructure project has on indigenous land rights. A micro-analysis must, therefore, distinguish between the respective policy fields, such as development finance, trade, business regulation or investment law, and focus on a limited set of human rights and interests, which can range from privacy and freedom of speech via the right to food or health to adequate housing and indigenous land rights. The micro-perspective, therefore, focuses on the use and application of specific methodological elements, such as human rights indicators, benchmarking or evidence gathering techniques. Such an approach would be inherently interdisciplinary.⁵⁷ Most publications on HRIA so far focus on this micro-perspective.

The present thesis will adopt a *macro*-perspective, which describes how impact assessments are *institutionally* embedded and governed by law. The primary goal is to better understand the “key

⁵⁷ Examples can be found in Walker, *The Future of Human Rights Impact Assessments of Trade Agreements* (above, n. 28); Walker also analyzed the human rights methodology used for the HRIA of the Tunisia EU Trade Agreement, see: Simon Walker, ‘Human Rights in the Trade and Sustainability Impact Assessment of the EU-Tunisia Free Trade Agreement’, *Journal of Human Rights Practice*, 10 (2018), pp. 103–124.

systemic issues to institutionalize meaningful and robust HRIA processes”.⁵⁸ It is necessary to look at central elements of HRIA such as competences, the involvement of experts, transparency, participation, and monitoring, or different enforcement and compliance mechanisms. By institutionalization, I mean the fact that an issue of social, political or legal concern is inserted into a set of substantive and procedural norms guiding the decision-making processes of public authorities. While Human Rights Impact Assessments had at first mainly been used as a human rights advocacy tool, last but not least due to civil society pressure, institutions like the European Commission integrated them into their internal decision-making procedure. This is not a surprising development: Similarly, the EIA obligations under the US National Environmental Policy Act (NEPA 1969),⁵⁹ were mostly the result of a strong environmental movement which led to the institutionalization of environmental law.⁶⁰ In a similar vein, human rights impact assessments tools are increasingly incorporated into rules and principles guiding public decision-making.

1.4.2 Terminology

Not only those impact assessments that make explicit reference to human rights will be considered, but also those that deal with functional equivalents to human rights, be they framed as rights, interests or values. An example is the right to adequate housing and the World Bank’s Operational Policies on involuntary resettlement, which serves (at least partially) the same purpose as the right to adequate housing, namely to respect and protect individuals’ rights to adequate shelter. In other words: World Bank law also contains a *right* to adequate housing without calling this a *human* right.⁶¹ Therefore, it makes sense to not only look at norms that require assessing impacts on *human rights* but also more generally on *humans’ rights and interests*. For the sake of clarity, I will use the generic term “impact assessment” or “IA” when distinctions between different types are not necessary.⁶² I will use the term “HRIA” whenever the focus is on impacts on human rights and human interests, in other words, on the assessment of a decision’s

⁵⁸ James Harrison, ‘Human Rights Impact Assessment: Potential and Challenges in the Development Context’, 4 November 2013. Some guidelines and principles on how to conduct HRIA of trade and investment agreements have already been developed by the Special Representative for Food Olivier de Schutter: Human Rights Council, *Guiding Principles on Human Rights Impact Assessments of Trade and Investment Agreements, Report of the Special Rapporteur on the right to food, Olivier de Schutter* [2011].

⁵⁹ Neil Craik, *The International Law of Environmental Impact Assessment* (Cambridge: Cambridge University Press, 2010), p. 23; The National Environmental Policy Act of 1969, as amended, 42 USC Chapter 55 Sections 4321-4370 (h).

⁶⁰ Cary Coglianese, ‘Social movements, law, and society: The Institutionalization of the Environmental Movement’, *University of Pennsylvania Law Review*, 150 (2001), pp. 85–118, 95 et seq.

⁶¹ Such a functional understanding is also in line with recent developments in international law. Especially the emergence of international administrative law flattens the importance to distinguish between “human rights” and “other individual rights”. Like in domestic administrative law, the status of the individual and his/her right to participate in decision-making or to challenge an administrative act does not depend on whether a constitutional human right but whether *any* individual right has been affected. See, on this development: Anne Peters, *Beyond human rights* (Cambridge: Cambridge University Press, 2016).

⁶² This is a rather common approach, see: Markus W. Gehring, ‘Tools for More Sustainable Trade Treaties with Developing Countries’, *Fostering Development through Opportunity, Inclusion and Equity*, 63-, p. 67; OECD, ‘Sustainability in Impact Assessments - A Review of Impact Assessment Systems in Selected OECD countries and the European Commission’, SG/SD(2011)6/FINAL, 2012.

consequences for human lives,⁶³ and the term “explicit HRIA” if it is decisive that the IA is based on an explicit human rights framework.

1.4.3 Doctrinal Analysis

Institutionalized impact assessments of public authorities can, from a legal perspective, best be analyzed through the lenses of public law. The rules and principles determining “if” and “how” IAs are to be conducted and how compliance with these rules is reviewed are largely constitutional and administrative in nature. This is also true in a transnational setting where rules and principles regulate what has for long been recognized as part of domestic public law.⁶⁴ The fact that IA-law mainly regulates internal decision-making is not a valid counterargument even though a frequently made objection – similarly, the legal world of internal administrative law was too often ignored by a focus on external judicial control and accountability.⁶⁵

Many parts of this analysis are doctrinal insofar as they aim to identify, structure and evaluate the existing rules and principles guiding the assessment of human rights impacts.⁶⁶ It is the task of doctrinal analysis to develop and apply (doctrinal) concepts, bring structure into an often confusing load of norms, and to identify underlying patterns and principles. Unlike in domestic EIA law, the legal nature of norms guiding impact assessments – such as operational policies, interinstitutional agreements, guidelines or communications – is often not self-explanatory and therefore requires closer analysis. Another objective of the doctrinal method is to analyze, systematize and conceptualize the rules and principles governing the process of impact assessments. Moreover, an overarching issue of central importance for public law is the role of discretion and judicial review,⁶⁷ be it by a court or a quasi-judicial review body. Important questions in the case of impact assessment law concern, for example, the scope of the authority’s discretion to classify impacts as significant or insignificant, to determine the range of potentially affected people, or to decide which documents are to be published when and where in order to enable meaningful participation.

⁶³ Robert Rattle and Roy Kwiatkowski, ‘Integrating Health and Social Impact Assessment’, in: H. A. Becker and Frank Vanclay (eds.), *The International Handbook of Social Impact Assessment*, pp. 92–107, p. 99; this includes SIAs, PSIAs, HIAs, the social aspects of EIAs and obviously HRIAs.

⁶⁴ The question whether or not these norms are law in the stricter sense should, probably, not be overrated. A denial of the legal nature and relevance of internal preparatory procedures has also prevailed vis-à-vis domestic administrative decision-making, where “domestic administrative practice have [sic] acknowledged a number of forms of preparation, of internal rule-making, procedures which have a strong impact on the legal processes, without being (unanimously) regarded as being legal acts or legal norms in the stricter sense”: Karl-Heinz Ladeur, ‘The Evolution of General Administrative Law and the Emergence of Postmodern Administrative Law’, in: *Comparative Research in Law & Political Economy*, Research Paper No. 16/2001, 2011, p. 10. What matters is that practices and rules, irrespective of their “bindingness”, have a steering effect that determines the process of decision-making and, eventually, the final decision.

⁶⁵ Jerry Mashaw, ‘Reluctant Nationalists: Federal Administration and Administrative Law in the Republican Era, 1801-1829’, *Yale Law Journal* (2007), pp. 1636–1740, p. 1740.

⁶⁶ On the systematizing function: Dann, *The Law of Development Cooperation* (above, n. 4), p. 22; Eberhard Schmidt-Aßmann, *Das allgemeine Verwaltungsrecht als Ordnungsidee* (Berlin: Springer, 2004), 2nd ed., p. 2.

⁶⁷ Michael Ioannidis, ‘A Procedural Approach to the Legitimacy of International Adjudication: Developing Standards of Participation in WTO Law’, *German Law Journal*, 12 (2011), pp. 1175–1202, p. 1183.

1.4.4 Comparative Analysis

A doctrinal analysis of IA-norms facilitates legal comparison, in particular between (what I defined above as an) emerging HRIA law and Environmental Impact Assessment (“EIA”) law. Such a comparison appears promising, at least as long as procedural aspects are concerned, given that EIAs and HRIAs respond to similar challenges, namely to assess potential non-financial impacts of initiatives under uncertainty and to make sure that the findings enter the decision-making process and are adequately considered.⁶⁸ While a comparison can draw the attention to how certain rules, principles, and institutions function and can be an impulse for critical reflection, one should be careful to overhastily draw normative conclusions based on a formal and purely functional comparison.⁶⁹ The context and dynamics at the international and EU level are so different that analogies with domestic administrative law may only be carefully drawn. This, however, is a caveat that applies to “traditional” inter-state-comparisons as well, namely that it is important to understand the various legal orders within their institutional, political, cultural and social context.⁷⁰

Moreover, the objective of such a comparison can be more modest: not to arrive at definite normative evaluations; rather, the comparison shall serve as a source of “inspiration”⁷¹ in order to better identify potential unforeseen challenges and tradeoffs which enables a more critical evaluation of institutionalized HRIAs. Such a comparison serves to identify, in particular, to what extent law *can* actually govern the conduct of IAs, considering the fact that EIA law is a well-established practice and defined by detailed statutory and case law in many jurisdictions. This comparison consequently serves to evaluate existing rules on HRIAs and to demonstrate what role law *could* potentially play for the legal regulation of HRIAs in the future. At the same time, research on EIA law has also identified challenges and deficits that persist even though domestic EIA law in the United States or the European Union is already well-established. This is largely the case due to high levels of actual and normative uncertainty. Identifying the limits of law is also a valuable inside, in particular to point out where the limits of a – in the future possibly more robustly anchored – HRIA law would be: It would be detrimental to the implementation of HRIAs if one were to place too much hope in the legal institutionalization thereof – if the hope would, in any case, be disappointed because it is based on unrealistic assumptions.

In this context, a comparison allows considering empirical and theoretical insights regarding the potentials and pitfalls of EIA-law, as will be seen during the course of this thesis. Considering this objective of the comparison, it appears not necessary to restrict the comparison to only one other legal order. Instead, the lessons identified above can be learned from EIA law and research in several countries. Nevertheless, the comparison will – for practical reasons – mainly focus on EIA law in the United States and the European Union. In the case of EU law, this makes only sense when also considering the law of Member States transposing the respective directives into national law.

⁶⁸ For a similar approach on risk regulation in general Elizabeth Charlotte Fisher, *Risk Regulation and Administrative Constitutionalism* (Oxford, Portland, Or: Hart, 2007), p. 3.

⁶⁹ Similar: Benedict Kingsbury, ‘The Concept of ‘Law’ in Global Administrative Law’, *EJIL*, 20 (2009), pp. 23–57, p. 27.

⁷⁰ Esin Örüçü, *The Enigma of Comparative Law* (Leiden, Boston: Martinus Nijhoff Publishers, 2004), p. 167.

⁷¹ Aharon Barak, ‘Response to The Judge as Comparatist: Comparison in Public Law’, *Tulane Law Review*, 80 (2005), pp. 195–202, p. 196; Örüçü, *The Enigma of Comparative Law* (above, n. 70).

This thesis will look at IA law in the context of both projects and policies. This raises the question of whether project and policy IAs are “comparable”. This issue also plays a role in domestic law, namely to what extent it makes sense to compare the law governing (project) EIAs and (policy) Regulatory Impact Assessments (“RIA”). Evidently, the object of the assessment (“impact of what”) is different: EIAs mainly concern impacts of relatively specific and individual projects and RIAs rather general-abstract legislative or regulatory initiatives. The second distinction regards the type of impacts assessed (“impact on what”), and it is here where not only differences but also potential conflicts might arise. EIA-law appears primarily concerned with environmental or social costs of projects, while RIA, at least in its early forms, seems mainly concerned with economic costs of environmental and social regulation. EIAs might, therefore, delay (economically) needed projects, whereas RIAs might delay (environmentally or socially) needed regulation.⁷² It thus appears, at first sight, important to regard these two types of IAs as different tools with different objectives.

However, the relationship between project IAs and policy IAs has over the last years developed from *conflicting* to *complimentary*. Increasingly, RIAs become more “integrated” and take social and human rights impacts into consideration. While critics still point out that economic impacts often gain more weight and relevance in these integrated IAs, they are not simply tools to delay environmental or social regulation, as is demonstrated by the fact that the EU now conducts comprehensive Social Impact Assessments (“SIA”) for all major trade agreements. Similarly, EIAs are not necessarily protecting the environment, but especially the IA-report can be used by project-developers to advertise their planned development, for example by over-emphasizing the expected positive and downplaying the potential negative impacts, or by underpinning the analysis in the report with colorful and promising pictures.⁷³ The distinction between environment-friendly EIAs and business-friendly RIAs is therefore too simplistic. In spite of the aforementioned differences between these two assessment categories, it is not only the increasingly common type of impacts on human rights and interests, but also the overall objective that EIAs and RIAs have in common, namely to modify the decision-making process and respond to the growing demand for policy foresight to improve decisions with respect to their consequences in the future⁷⁴. In impact assessment practice and theory, much energy has been invested in creating “distinctions between approaches and tools that overemphasize uniqueness and neglect commonalities”,⁷⁵ even though it seems that “the field of impact assessment is much more homogeneous than this situation would suggest.”⁷⁶ Therefore, as regards the institutionalization of HRIAs, it is justified to consider project-IAs and policy-IAs,⁷⁷ and – bearing the differences between these IA-types in mind – also compare EIA-law with the emerging rules and principles on policy-HRIAs.⁷⁸

⁷² Jonathan Wiener and Daniel Ribeiro, ‘Impact Assessment: Diffusion and Integration’, in: Francesca Big-nami and David Zaring (eds.), *Comparative Law and Regulation*, pp. 159–189, p. 163.

⁷³ Holder, *Environmental Assessment* (above, n. 27), p. 182.

⁷⁴ Wiener and Ribeiro, ‘Impact Assessment: Diffusion and Integration’ (above, n. 72), p. 162.

⁷⁵ Jenny Pope, Alan Bond, Angus Morrison-Saunders et al., ‘Advancing the theory and practice of impact assessment: Setting the research agenda’, *Environmental Impact Assessment Review*, 41 (2013), pp. 1–9, p. 7.

⁷⁶ Ibid.

⁷⁷ Walker, ‘Human Rights Impact Assessments: Emerging Practices and Challenges’ (above, n. 31), p. 397.

⁷⁸ Clive George, ‘Proportionate Impact Assessment: Discretion, Formalism, and the Undefined Responsibilities of European Decision-Makers’, in: Kilian Bizer, Sebastian Lechner, and Martin Führ (eds.), *The Euro-*

1.4.5 Contextualized Approach

As impact assessments deal with real-life consequences, overlaps between law and (other) social sciences exist. This is what has been observed on a more general level in many new forms of public administration in both the domestic and international arena:⁷⁹ public authorities regulate by using or basing their regulatory instruments on insights from cost-benefit-analysis, behavioral economics, including the use of incentives and governance by information, as well as other economic and non-economic social sciences. As this is a book about impact assessment *law*, these different perspectives will be discussed where necessary to better understand the context, background and potential deficits of HRIA law. This includes in particular consideration of literature on risk and decision-making. HRIAs are instruments to deal with human rights risks, and they thus apply in situations where decisions are taken under uncertainty. Different ideal-types or paradigms on how people and institutions do (descriptive) and should (normative) take decisions under risks exist, and many disputed issues surrounding the institutionalization of HRIAs can be better understood in this context, for example concerning the relevance of expert as opposed to lay knowledge. Similarly, research on risk decisions has identified structural cognitive biases, and rules on HRIAs can be designed in a way to mitigate these biases. The goal of the contextualized approach is not to conduct an interdisciplinary study but to look at the institutionalization of HRIAs from a different perspective and indicate where discourse with other disciplines might be fruitful.

1.5 Interim Conclusion and Outlook

HRIAs are increasingly institutionalized, and public law regulates *if* and *how* HRIAs must be conducted. Public law can also increase the ability of HRIAs to influence decision-making and to increase human rights compliance. Accordingly, this thesis analyzes the institutionalization of HRIA in three steps: Part III will address the obligation to assess human rights impacts irrespective of where they occur from a general perspective and reconstruct such an obligation as an (emerging) legal principle of affectedness. This is the legal or constitutional basis for HRIAs. However, such a broad principle of affectedness raises many follow-up questions. It seems in particular questionable how to implement and operationalize such an obligation in decision-making processes, among other things because factual impacts are often uncertain and clear normative standards to evaluate global effects on human interests are rare. Part IV will, therefore, analyze how law regulates the conduct of HRIAs in every-day decision-making. The institutionalization of HRIAs is one approach to implement and concretize the principle of affectedness, and like all IAs, they are (also) tools that respond to the challenge of factual and normative uncertainty. Part V finally looks at the ability of HRIAs to influence decision-making and asks if and under what circumstances institutionalized HRIAs can increase compliance with human rights. Admittedly, this is an extremely broad question that would require primarily empirical research. This thesis is limited to a more general analysis of how law can control the conduct of HRIAs. For that purpose, I will draw on compliance theory and a comparison with domestic EIA law. The

pean Impact Assessment and the Environment, pp. 103–117, pp. 103–104; Holder, *Environmental Assessment* (above, n. 27), p. 181.

⁷⁹ Voßkuhle, '§ 1 Neue Verwaltungsrechtswissenschaft' (above, n. 52), para 11.

effectiveness of domestic EIA regimes has already been studied extensively so that it is useful to draw on these insights. Before this background, I will carve out five factors that determine the relevance - or effectiveness - of IAs and evaluate the institutionalization of HRIAs in EU decision making through the lenses of these five factors.

Before starting this three-step analysis, it is necessary to expound the concept of “Human Rights Impact Assessments” and the understanding of public law upon which this thesis is built. This is now addressed in part II.

PART II: HUMAN RIGHTS IMPACT ASSESSMENTS AND PUBLIC LAW

2 Chapter 2: Human Rights Impact Assessments: Types and Background Norms

2.1 Introduction

This thesis argues that there is an emerging set of rules and principles that guide public authorities when conducting HRIAs. This is – institutionally and normatively – most advanced for EU policy making. So what are HRIAs, and what is the concept of law as understood here? The concept of law upon which this thesis is built will be outlined in the next chapter. This chapter examines the concepts, types, and categories of Human Rights Impact Assessments. It starts by defining the terms *impact*, *assessment*, and the difference between an *assessment of impacts* and an *impact assessment*. Afterwards, I will categorize impact assessments, using classifications that are relevant throughout this book. It is useful to distinguish, in particular, between ex-ante and ex-post assessments (timing), between the type of initiative accompanied by an IA (impact of what), between the different environmental, social or human rights effects to be assessed (impact on what or whom), and the actors conducting or involved in the conduct of IAs. The ensuing section will look at the role of human rights in impact assessments, both as the object of the assessment and as principles guiding the IA procedure. Before this background, I will define the IA-categories that are at the focus of this thesis. This chapter concludes with a critical overview of potential benefits and trade-offs of institutionalized HRIAs.

2.2 Impact Assessments: Concepts and Definitions

Both the terms “impact” and “assessment” require some clarification. “Impact” is used here in a broad sense⁸⁰ that comprises what is, in a technical sense, often classified as “output”, “outcome” and “impact”. Outputs are the immediate results of an intervention, for example, in the case of an educational development project the recruitment of qualified teachers or the construction of education facilities.⁸¹ Outcomes relate to the “likely or achieved short-term and medium-term effects of an intervention's outputs”,⁸² such as better quality or affordability of education. Impacts in the narrow and technical sense, finally, are the long-term or indirect effects of an initiative: The overall increase of literacy rates (specific impacts) or better income opportunities of graduates (general impact) would count as impact indicators.⁸³ However, impact assessments can comprise, depending on the respective legal regime, all of the aforementioned effects.

The term *assessment* also requires clarification, especially with regard to compliance. Generally, an assessment refers to the identification and evaluation of potential impacts of an initiative. The consideration of alternatives is at the heart of most impact assessments, as it allows to compare the (hypothetical) impacts of different options with each other and with the no-policy-change baseline scenario.⁸⁴ Especially where clear normative standards are missing, these *relative* com-

⁸⁰ World Bank Group: Independent Evaluation Group, ‘Impact Evaluations: Relevance and Effectiveness’, 2012, p. 4.

⁸¹ EC External Services Evaluation Unit, ‘Outcome and Impact Level - Indicators’, in: Working Paper, September 2009, p. 2.

⁸² Ibid., p. 4.

⁸³ Ibid., p. 5.

⁸⁴ See section 6.2.2.2.

parisons allow for a meaningful evaluation.⁸⁵ Overlaps between human rights assessment and compliance review exist. Some IA guidelines require to also assess compliance with human rights and to rule out options that would be illegal. This is, however, not at the core of IAs, and in particular where ex-ante impact assessments are conducted at an early stage before a specific legal document exists – a contract for project finance, a legislative proposal, etc. –, a compliance review in the strict sense would often be impossible. Impact Assessments are not less valuable than compliance assessments though, they rather pursue a different goal. In some regards, impact assessments can go beyond compliance. In particular, they also allow considering impacts that do not surpass the threshold of human rights infringements. In other words, impacts that would not infringe human rights and would, therefore, pass a compliance test could nevertheless have to be considered during an impact assessment. It is this supplementary function of impact assessments that allows considering human rights impacts that would be below the radar screen of compliance, at least as usually understood in the positivist legal tradition.⁸⁶

It is also important whether there is a difference between an impact assessment and the assessment of impacts. Even before IAs were formalized and institutionalized, policy- and decision-makers more or less explicitly had to assess the (potential) impacts of their decisions. Indeed, the very goal of legislative or administrative decision-making is to foster intended and avoid unintended consequences. A central factor that turns the *assessment of impacts* into an *impact assessment* is the “systematic analysis of the lasting or significant changes in people’s life brought about by a given action or series of actions”.⁸⁷ An impact assessment is, in other words, the systematic and structured assessment of impacts, based on varying degrees of analytical and participatory mechanisms. Whether such a structured assessment process is explicitly called impact assessment or not is not decisive.⁸⁸

The term “Human Rights Impact Assessment” can also be used, at times, in a broad or narrow sense. In a narrow sense, it would have to be distinguished from other concepts. Most prominently, human rights due diligence has recently become part of the international human rights discourse, mainly in the context of corporate human rights responsibilities. The concept of “due diligence” of companies can be traced back to the U.S. Securities Act of 1933, which required brokers under certain circumstances to start an investigative process to prevent harm. If they comply with certain standards, due diligence can be used as a defense against damage claims.⁸⁹ Over time, the concept of due diligence was broadened. First, its content was extended to pre-

⁸⁵ This is one element of the IA-process where supporters of explicit reference to human rights argue that Human Rights Impact Assessments have a clear advantage over other forms, such as social or health impact assessments. They allegedly allow for a normative standard to evaluate the impact in absolute (normative) terms. While the outcome of a food impact assessment might evaluate a mechanism that *reduces* the number of people starving, a right to food impact assessment would come to the conclusion that other, more efficient measures must be developed in order to not violate the *core content* of the right to food.

⁸⁶ For more on the relationship between impact assessments and human rights compliance see chapter 9.

⁸⁷ Chris Roche, ‘Impact assessment: seeing the wood and the trees’, *Development in Practice*, 10 (2000), pp. 543–555, p. 546.

⁸⁸ This view has also been endorsed in the pleadings by the Government of New Zealand before the ICJ in the *Nuclear Tests Case*: “The fact that the means whereby a party ensures that there is no such risk to the environment is nowadays called an EIA is purely coincidental. The EIA is simply a convenient term to describe a process whereby a party carries out a clear, legal duty”, ICJ, *Nuclear Test Cases - Oral Pleadings* (1995), para 22. The present thesis shares this view of “function over form”

⁸⁹ Mark Taylor, Luc Zandvliet, and Mitra Forouhar, ‘Due Diligence for Human Rights: A Risk-Based Approach’, Working Paper, Harvard University, in: Corporate Social Responsibility Initiative, No. 53, p. 2.

vent harm to the natural environment or to people: “A company’s human rights due diligence approach can be defined as the way a company becomes aware of, prevents and addresses any potential and/or actual human rights risks arising from its business activities that may infringe the human rights of its stakeholders.”⁹⁰ Second, the scope of the concept has slowly transcended from private to public law. The ILC Commission Commentary on Transboundary Harm, for example, states that “due diligence is manifested in reasonable efforts by a State to inform itself of factual and legal components that relates foreseeably to a contemplated procedure and to take appropriate measures in timely fashion to address them”.⁹¹ A few years later, the Ruggie Principles on Business and Human Rights emphasized that due diligence covers the “responsibility” of business actors and, at the same time, the obligation of states to protect human rights, in particular by adopting adequate regulation;⁹² the terminology of “due diligence” is thus familiar from human rights law and business management.⁹³ What human rights due diligence and HRIA, however, share is the common objective to make an informed decision and thus prevent potential harm.⁹⁴

So due diligence is a comprehensive concept, whereas an Impact Assessment requires a more specific and usually a more detailed analysis of likely and significant consequences. The duty to conduct an IA is usually only triggered if a certain threshold has been met. This also means that an HRIA is one instrument to discharge an actor’s human rights due diligence obligations. This view is shared by the World Bank Group’s International Finance Corporation (IFC) and the International Business Leaders Forum (IBLF): “Determining a company’s human rights due diligence approach is an important first step towards scoping an appropriate and relevant human rights impact assessment that will complement, and add to, the existing company policies, procedures and practices”⁹⁵.

What is, finally, the difference between a human rights *impact assessment* and a human rights *audit*? While both are due diligence instruments, views on what the main differences are diverge. Some authors regard the time at which the assessment takes place and the scope of review as the decisive factors. In the case of environmental governance, an environmental impact assessment “assesses the potential environmental effects of a proposed facility” whereas the “purpose of an environmental audit is the systematic scrutiny of environmental performance throughout a company’s existing operations”.⁹⁶ An important consequence is that impact assessments include the consideration of hypothetical or counterfactual alternatives: Unlike an audit, an ex-ante impact assessment requires that decision-makers consider alternative options,

⁹⁰ International Business Leaders Forum (IBLF) and the International Finance Corporation (IFC), ‘Human Rights Impact Assessment and Management’, 2010, p. 15.

⁹¹ International Law Commission, *Commentaries to Draft Articles on Prevention of Transboundary Harm from Hazardous Activities* (2001) Article 3 Commentary 10.

⁹² ‘Guiding Principles on Business and Human Rights: Implementing the United Nations “Protect, Respect and Remedy” Framework: Report of the Special Representative of the Secretary-General on the issue of human rights and transnational corporations and other business enterprises, John Ruggie’, A/HRC/17/31, Principles 4, 15 et seq.; Anne Peters, ‘Global Constitutionalism: The Social Dimension’, MPIL Research Paper Series, 2017-25, p. 29.

⁹³ Ibid., with further reference to a recent report of the ILA.

⁹⁴ Mark Taylor, ‘Human Rights Due Diligence: The Role of States: 2013 Progress Report’, 2013, p. 15.

⁹⁵ International Business Leaders Forum (IBLF) and the International Finance Corporation (IFC), ‘Human Rights Impact Assessment and Management’ (above, n. 90), p. 15.

⁹⁶ Robert Coyle, ‘Environmental Auditing - Definition and Methodology’, in: Jeanne Mager Stellman (ed.), *Encyclopaedia of Occupational Health and Safety*, 54.24.

including the no-policy-option.⁹⁷ Another distinction between impact assessments and audits has been suggested by Balakrishnan and Elson and applied by Simma to the context of investment law and human rights. Here, the focus is on the depth of the human rights assessment: An impact assessment aims to identify a causal link between projects or policies and the degree of enjoyment of human rights. The methodology can consist of complex mathematical models and econometric techniques, and an IA can be very detailed and fact-intensive.⁹⁸ Human Rights audits, on the other hand, are suggested as a more cost-effective and less ambitious instrument that could be applied more broadly.⁹⁹ For Balakrishnan and Elson, human rights audits of economic policies examine whether economic policy “has consisted of action ‘reasonably calculated to realize the enjoyment of a particular right’, selecting rights which might reasonably be thought to have a strong relation to the policy instrument”¹⁰⁰. The objective is thus not to establish a causal link between an initiative and the impact, but to require consideration of potential impacts based on a reasonability test.¹⁰¹ In spite of these attempts to draw lines between audits and impact assessments, they are in fact closely related.

2.3 Types of Impact Assessments and the Scope of this Book

HRIAs can be classified according to different features, and it would be impossible to consider all categories of impact assessments at the same time. It is helpful to unfold the different categories in order to specify the focus of the present thesis. First, IAs can be distinguished according to impact types - direct or indirect - and timing - ex-ante and ex-post (see section 2.3.1). They can be classified according to the initiative they accompany, for example whether the impacts of a specific project (“**project IA**”) or a general policy (“**policy IA**”) is assessed (see section 2.3.2). A further classification concerns what impacts are to be assessed (see section 2.3.3); this can be broadly categorized as environmental, social, economic or human rights impacts, or even more specific, for example as impacts on climate change, labor, small enterprises or the right to food. Finally, it is possible to distinguish IAs according to the actors in charge (see section 2.3.4), for example whether private companies or public authorities are required to conduct them. The present thesis is limited to indirect ex-ante and ex-post IAs of projects and policies under the

⁹⁷ E.g. “[T]he counterfactual is what differentiates impact assessment from other forms of project evaluation.” USAID, MarketLinks, 3.5.1, available at:

<https://www.marketlinks.org/good-practice-center/value-chain-wiki/impact-assessment> (last visited: June 2020).

⁹⁸ Simma, ‘Foreign Investment Arbitration: A Place for Human Rights?’ (above, n. 4), p. 594; Radhika Balakrishnan and Diane Elson, ‘Auditing Economic Policy in the Light of Obligations on Economic and Social Rights’, *Essex Human Rights Review Vol. 5 No. 1 July 2008*, 5 (2008), p. 9.

⁹⁹ Simma, ‘Foreign Investment Arbitration: A Place for Human Rights?’ (above, n. 4), p. 594; Balakrishnan, ‘Auditing Economic Policy in the Light of Obligations on Economic and Social Rights’ (above, n. 98), pp. 8–9.

¹⁰⁰ *Ibid.*, 9 f.

¹⁰¹ Based on this general assumption, but translated into the context of international investment law, Simma suggests that, as part of the human rights audit, the investor and the (potential) host State shall “survey the host State’s human rights treaty commitments [...] and methods for implementing such commitments” as part of the “due diligence to be conducted by the investor and the host state”: Simma, ‘Foreign Investment Arbitration: A Place for Human Rights?’ (above, n. 4), p. 594. A practical legal consequence of such a human rights audit would be a “better definition of the landscape of the foreign investor’s ‘legitimate expectations’ in a way that would not leave excessive ex post discretion to arbitrators, should investor–host State disputes arise in the future”: *Ibid.*, p. 595.

responsibility of public authorities. It is not limited to particular human rights, and will also consider the human rights relevance an environmental or social impact assessment may have irrespective of whether the respective norms make explicit reference to human rights.

2.3.1 The Types and Timing of IAs

Todd Landman suggests to classify Human Rights Impact Assessments in four categories, namely according to the type of initiative they relate to and their timing,¹⁰² which would result in the following taxonomy:

	<i>Direct</i>	<i>Indirect</i>
<i>Ex-ante</i>	I Intentional planning to change the human rights situation	II Awareness of human impact of other and/or unrelated activities
<i>Ex-post</i>	III Evaluation and assessment of policies, strategies, and programs for changing the human rights situation	IV Evaluation and assessment of outcomes of policies, strategies, and programs that were not intended for changing the human rights situation
Source: Todd Landman, <i>Studying Human Rights</i> (2006), Figure 8.1. Categories of human rights impact assessments.		

Cell I refers to impact assessments carried out before an intervention takes place that is intended to improve the human rights situation. Here, the IA is an instrument of the planning process that needs to ideally provide for a baseline assessment of the human rights situation, establish indicators and use analytical and participatory tools to anticipate the likely effects of the intervention.¹⁰³ Ex-post impact assessments (cell III), on the other hand, involve the evaluation of these projects, programs, or policies once they have been implemented. The focus of this thesis will be on what Landman calls indirect impacts as illustrated in cells II and IV. This involves initiatives that are not primarily designed to improve the human rights situation, but that may have indirect, i.e. often unintentional, impacts on human rights. This category includes large-scale infrastructure projects like those funded by development banks (e.g. airports, roads, and dams), the activities of multinational companies or any other initiative where human rights impacts are initially seen as unintentional.¹⁰⁴ Human rights impacts can be both positive and negative: A new trade agreement or a trade policy reform, such as the lowering of tariffs or the broadening of a GSP-scheme, can affect the situation of small-scale farmers positively or negatively, and thus

¹⁰² Todd Landman, *Studying human rights* (London, New York: Routledge, 2006), 127 ff.

¹⁰³ Ibid., p. 127.

¹⁰⁴ Ibid., p. 128.

either advance or impair the enjoyment of the right to food and to an adequate standard of living.¹⁰⁵

2.3.2 The Impact of What: The Initiative to be accompanied by HRIAs

All human activities can have environmental or human consequences. Therefore, it is necessary to determine what types of initiatives are in general regarded as potentially subject to impact assessments. Investment projects and trade policies,¹⁰⁶ but increasingly also structural adjustment programs¹⁰⁷ or debt restructuring¹⁰⁸ might require HRIAs. In addition, as will be seen in the case of the EU, legislative and non-legislative acts in potentially all policy areas can have impacts that may be felt internally, i.e. within the EU territory, and externally.

2.3.2.1 Projects

Environmental impact assessments were first officially endorsed under US Federal law and legally embedded in the National Environmental Policy Act (NEPA 1969),¹⁰⁹ according to which all agencies of the Federal Government shall “utilize a systematic, interdisciplinary approach which will insure the integrated use of the natural and social sciences and the environmental design arts in planning and in decision-making which may have an impact on man's environment”¹¹⁰. Based on substantive objectives (e.g.: sustainable development), EIA is a mechanism through which relevant information can enter into the decision-making process.¹¹¹

Today, it is estimated that more than 100 countries have implemented EIAs in some forms into their national legislation.¹¹² This is also the result of a diffusion of norms: US NEPA might have served simply as a role model that was copied elsewhere, and probably pressure from donors and international organizations such as the World Bank has added to this type of diffusion. The OECD encouraged its member states to “actively support the formal adoption of an environmental assessment policy for their development assistance activities”.¹¹³ Another dimension of internationalization is important, namely the increasing regulation of impact assessments in international law. Rules and principles on EIAs can be found in international treaties and declara-

¹⁰⁵ Article 11 ICESCR; UN Committee on Economic, Social and Cultural Rights, E/C.12/1999/5, *General Comment No. 12 - The Right to Adequate Food (Art. 11)*. For more examples on ex-ante impact assessment with human rights reference: Landman, *Studying human rights* (above, n. 102), 128 ff.

¹⁰⁶ Baxewanos and Raza, ‘Human Rights Impact Assessments as a New Tool for Development Policy?’ (above, n. 22), p. 20.

¹⁰⁷ A first step towards such as policy-related HRIA can be seen in the the World Bank’s guidelines on “Poverty and Social Impact Analysis” (PSIA).

¹⁰⁸ Goldmann, ‘Human Rights and Sovereign Debt Workouts’ (above, n. 3), p. 100.

¹⁰⁹ The National Environmental Policy Act (“NEPA”) of 1969, as amended, 42 USC Chapter 55 Sections 4321-4370 (h); Craik, *The International Law of Environmental Impact Assessment* (above, n. 59), p. 23.

¹¹⁰ 42 USC 4331 § 102 (A).

¹¹¹ Craik, *The International Law of Environmental Impact Assessment* (above, n. 59), p. 26.

¹¹² *Ibid.*, p. 4.

¹¹³ OECD, *Recommendation of the Council on Measures Required to Facilitate the Environmental Assessment of Development Assistance Projects and Programmes* (1986), C(86)26/FINAL, I. a.

tions¹¹⁴, international case law¹¹⁵ and the law of international organizations¹¹⁶. This mainly contains the obligation of states to also assess transboundary impacts when conducting an EIA.¹¹⁷ This does not mean that the national and international spheres are easily separable: on the one hand, domestic EIA norms were often used as templates for international agreements, and on the other hand, international norms had to be incorporated into domestic law.¹¹⁸

The environmental and social impacts of mainly large-scale international development projects are oft-reported, and often a severe social backlash against these initiatives emerged: Especially infrastructure projects such as dams or oil pipelines are in a certain way the prototype of human rights struggles in international development finance.¹¹⁹ Apart from social resistance, the concept of development as pursued until the 1990s was also fundamentally questioned¹²⁰, ranging from pragmatic to structural and post-colonial criticism. In response, states and international organizations felt the need to pay more attention to environmental and social aspects of economic development. The first safeguard policies at the World Bank required environmental and, to a limited extend, social impact assessments for investment lending. The World Bank Group¹²¹ increasingly requires the assessment of social impacts and risks before, during and after project approvals. Especially at a time when the World Bank Group is encouraged to “expand its risk

¹¹⁴ UNECE, *Convention on Environmental Impact Assessment in a Transboundary Context* (1991); United Nations, *Convention on the Law of the Sea* (1982), 21 ILM 1261 (1982); United Nations, *Convention on Biological Diversity* (Rio de Janeiro, 1992); *Convention for the Protection of the Natural Resources and Environment of the South Pacific Region* (1987), 26 ILM 38.

¹¹⁵ ICJ, *Costa Rica v. Nicaragua, Certain Activities carried out by Nicaragua in the Border Area* (2015); ICJ, *Case concerning the Gabčíkovo-Nagymaros Project* (1997); ICJ, *Nuclear Tests Case (New Zealand v. France)* (1974); Arbitral Trib., 3 U.N. Rep. Int'l Arb. Awards 1905 (1941), *Trail Smelter Arbitral Decision*.

¹¹⁶ World Bank, *The World Bank Operations Manual* OP/BP 4.01 (previous), now: ESS1. On the recent reform of the World Bank's Environmental and Social Safeguards: Philipp Dann and Michael Riegner, 'The World Bank's Environmental and Social Safeguards and the evolution of global order', *Leiden Journal of International Law* (2019), 32, 32 (2019), pp. 537–559.

¹¹⁷ Craik, *The International Law of Environmental Impact Assessment* (above, n. 59); Angela Cassar and Carl Bruch, 'Transboundary Environmental Impact Assessment in International Watercourse Management', *N.Y.U. Environmental Law Journal*, 12 (2003), 169–244; Charles Kersten, 'Rethinking Transboundary Environmental Impact Assessment', *The Yale Journal of International Law*, 34 (2009), pp. 173–206.

¹¹⁸ Craik, *The International Law of Environmental Impact Assessment* (above, n. 59), p. 24.

¹¹⁹ Michael Likosky, *Law, infrastructure, and human rights* (Cambridge, New York: Cambridge University Press, 2006); Dann, *The Law of Development Cooperation* (above, n. 4), p. 101.

¹²⁰ By way of example: Graham Hancock, *Lords of poverty* (London: Arrow Books, 1997); William Russell Easterly, *The White Man's Burden* (Oxford: Oxford Univ. Press, 2006).

¹²¹ IFC, *Performance Standards*, January 1, 2012, para 4; IFC, *Policy on Environmental and Social Sustainability* (2012), para 12; The International Business Leaders Forum (IBLF) and the International Finance Corporation (IFC), in association with the UN Global Compact, *Guide to Human Rights Impact Assessment and Management*. The IBRD/IDA is still hesitant to use human rights terminology, even though reference to human rights has recently been made in the Bank's new Vision Statement: Dann and Riegner, 'The World Bank's Environmental and Social Safeguards and the evolution of global order' (above, n. 116), p. 551. Under its new Environmental and Social Framework, rules on EIA were now explicitly extended to also cover social impacts for certain types of investment lending (see ESS1), *Ibid.* Even before the EFS entered into force, internal World Bank law contained several norms requiring social impact assessments: BP 10.00 at para 23; World Bank, 'Good Practice Note: Using Poverty and Social Impact Analysis to Support Development Policy Operations', 2008; Gender Assessment: OP 4.20 para 2.

appetite”, it is essential to also “invest in structures that provide management with assurance that [environmental and social] risk is being rationally identified and managed.”¹²²

Soon, other international financial organizations followed and enacted similar safeguard policies, increasingly incorporating also human rights frameworks.¹²³ This trend is not limited to traditional Western donors or investors; while still refraining from human rights terminology, the Asian Development Bank (ADB) also stresses the “the importance of safeguard policies on environmental and social impacts of projects.”¹²⁴

2.3.2.2 Policies

While environmental impact assessments were first intended to accompany specific projects, in the 1970s another type of impact assessment evolved. Increasingly, Regulatory Impact Assessments (RIA) were used as tools to evaluate the costs and benefits – or “impacts” – of regulatory initiatives. Like EIAs, they were increasingly institutionalized and spread among different legal systems around the world.¹²⁵ While the idea to oversee the costs and benefits of regulation is not new,¹²⁶ what was new is the density of regulation and the spread of IAs to oversee regulation, a trend also promoted by the OECD.¹²⁷ Countries all over the world have started to implement IA systems (e.g. Regulatory Impact Assessments) to assess the consequences of regulatory and non-regulatory policy initiatives,¹²⁸ even though scope and detail of these IAs vary tremendously between different countries. While project-IAs first focused mainly on environmental impacts and later included social and human rights assessments, RIAs first focused on financial and economic impacts and later started to include the environmental, social and human rights consequences.

¹²² CAO Vice President Request, Honduras / Dinant-01/CAO, available at <http://www.cao-ombudsman.org/cases/case_detail.aspx?id=188>.

¹²³ For example, the OECD governments developed the OECD Guidelines on Responsible Business Conduct which, in its 2011 update, incorporated the UN Guiding Principles on Business and Human Rights and the “Protect, Respect and Remedy” framework which requires human rights due diligence, including where necessary human rights impact assessments: OECD, *Guidelines for Multinational Enterprises* (2011). In the 2000s, the Equator Principles established a framework for private Financial Institutions to assess and manage the environmental and social risks in project finance. For an overview see: Joshua Lance, ‘Equator Principles: A Hard Look at Soft Law’, *N.C. Banking Institute*, 17 (2013). In line with the environmental and social categorization process of the International Finance Corporation (IFC), all projects must be screened and categorized (Principle 1), and all category A and B projects are subject to an Environmental and Social Assessment (Principle 2), which is either a fully-fledged impact assessments or, for appropriate category B projects, can also be a limited or focused social assessment such as an audit. Similarly, the OECD “Common Approaches” regarding official export credits require an environmental and social review and, where appropriate, an Environmental and Social Impact Assessment (ESIA): OECD, *Recommendation of the Council on Common Approaches for Officially Supported Export Credits and Environmental and Social Due Diligence (The “Common Approaches”)* (2012), C(2012)101, 13 et seq.

¹²⁴ ADB, News Releases, 1 May 2015: <http://www.adb.org/news/adb-and-aiib-agree-collaborate-asia> <last visited: 29 May 2020>.

¹²⁵ Organisation for Economic Co-operation and Development (OECD), ‘Regulatory Impact Analysis—Tool for Policy Coherence’, 2009, p. 15.

¹²⁶ Benjamin Franklin, ‘Letter to Joseph Priestley, September 19’ advised on how to take informed decisions in difficult cases and make sure that decision-makers consider “all the Reasons pro and con”.

¹²⁷ Jonathan Wiener, ‘Better Regulation in Europe’, *Current Legal Problems*, 59 (2006), pp. 447–518, 453 ff.

¹²⁸ For an overview: OECD, ‘Sustainability in Impact Assessments - A Review of Impact Assessment Systems in Selected OECD countries and the European Commission’ (above, n. 62). For Germany: Sec. 44 GGO.

Internationally, the human rights impacts of World Bank and IMF policies were prominently discussed in the context of conditionalities attached to budget support or debt restructuring.¹²⁹ In these cases, the governments of the states where the potential human rights impacts materialize are in charge of conducting the policy reform, even though economic dependencies and financial necessities often de facto limit their actual choice. Therefore, the legitimacy of these policies is increasingly questioned. However, concerning the impacts of policy reforms in the context of budget support or debt restructuring, social and human rights impact assessments are less institutionalized compared with project-based investment lending. While other multi-lateral development banks apply a comprehensive safeguard regime – including the necessity to conduct IAs – to all lending activities, be it project or policy lending,¹³⁰ the World Bank’s previous safeguard policies as well as the new Environmental and Social Framework (“ESF”) mainly relate to World Bank funded investment projects.¹³¹ Admittedly, even in the context of Development Policy Lending, the World Bank must determine “whether specific country policies supported by the operation are likely to have significant poverty and social consequences, especially on poor people and vulnerable groups”.¹³² An instrument to better assess especially distributional impacts of policy reforms is the World Bank’s Poverty and Social Impact Analysis (PSIA) tool: it is mainly a “knowledge product” that may be used to assess the impact of policy change,¹³³ and the Operational Policies do not require, but only allow to use the PSIA to assess the consequences of DPL.¹³⁴ The regulation of environmental, social and human rights impact and risk assessment of World Bank policy lending is thus relatively thin,¹³⁵ at least compared with the emerging norms and practices at regional development banks where environmental and social impact assessments are also mandatory for general policies such as budget support.¹³⁶

Other development-related policies, such as trade and investment agreements, can have positive and negative impacts on human rights, and here, Human Rights Impact Assessments have increasingly gained attention in the last years. Since the 1990s, different international institutions have urged states to conduct IAs to inform their trade negotiations about the different environmental, social and human rights impacts and have suggested methodologies and principles to

¹²⁹ Fischer-Lescano, *Human rights in times of austerity policy* (above, n. 3); Goldmann, ‘Human Rights and Sovereign Debt Workouts’ (above, n. 3).

¹³⁰ Philipp Dann and Michael Riegner, ‘Managing Social and Environmental Risks in World Bank Development Policy Operations’, *giz*, April 2015, p. 2.

¹³¹ OP 4.01 on Environmental Assessment/ Environmental and Social Standard (“ESS”) 1.

¹³² OP 8.60 para 10. But unlike in the case of investment lending, clear standards on procedure and substance are missing; instead, the impact assessment is only sporadically mentioned in a few paragraphs: OP 8.60 para 9.

¹³³ The World Bank, ‘A User’s Guide to Poverty and Social Impact Analysis’, 2003, p. 3.

¹³⁴ OP 8.60 para 10 Fn. 9.

¹³⁵ Following the recent reform of the Bank’s Safeguard Policies, the document “A Vision for Sustainable Development”, which is not limited to investment lending, at least contains an explicit reference to human rights: “In this regard, the World Bank’s activities support the realization of human rights expressed in the Universal Declaration of Human Rights”: World Bank, *A Vision for Sustainable Development*, para 3; Dann and Riegner, ‘The World Bank’s Environmental and Social Safeguards and the evolution of global order’ (above, n. 116), p. 551.

¹³⁶ “[T]he ISS makes it mandatory to apply Strategic Environmental and Social Assessment (SESA) to address the environmental and social issues arising from “upstream” operations, such as budget support”, AfDB, *Safeguards and Sustainability Series*, Vol. 1 Issue 1 Dec. 2013, p. 8, see: http://www.afdb.org/fileadmin/uploads/afdb/Documents/Policy-Documents/December_2013_-_AfDB'S_Integrated_Safeguards_System_-_Policy_Statement_and_Operational_Safeguards.pdf.

guide the assessment process.¹³⁷ The United States agencies must consider, once a certain threshold has been met, also international environmental impacts of planned trade agreements.¹³⁸ In addition, NGOs and scholars joined the debate about how to best assess these impacts.¹³⁹ As will be explained later, major actors in global trade, such as Canada¹⁴⁰ and the USA, conducted since the 1990 EIAs of their trade agreements.¹⁴¹ In the late 1990s, the EU has started to conduct impact assessment which also include social and more recently human rights consequences of, for example, legislative and non-legislative acts, delegated acts, implementing measures or international trade and investment agreements; the guidelines were regularly updated, and IAs became a more and more integrated part of EU rule-making.¹⁴² As the EU impact assessment regime is comparatively advanced, in particular as far as human rights impacts are concerned, this thesis will focus on the institutionalization of HRIAs in EU rule and policy-making.

2.3.3 The Impact on What and Whom: From Environmental to Human Rights Impacts

It would be misleading to assume that environmental, social and human rights impacts are clearly separable. To the contrary: Environmental law has usually been based on an anthropocentric understanding of the environment.¹⁴³ Environmental impact assessments, from the very beginning, were designed to also protect the *human* environment, i.e. human health, or prevent the environment for human needs and preferences, e.g. as “national heritage”. This has been clearly spelled out by NEPA, defining the purpose of, inter alia, EIAs as to “prevent or eliminate damage to the environment and biosphere and stimulate the health and welfare of man”¹⁴⁴. During the starting period, EIAs mainly considered only those social impacts that were directly caused by

¹³⁷ Human Rights Council, *Guiding Principles on Human Rights Impact Assessments of Trade and Investment Agreements, Report of the Special Rapporteur on the right to food, Olivier de Schutter* [2011]; The International Business Leaders Forum (IBLF) and the International Finance Corporation (IFC), in association with the UN Global Compact, *Guide to Human Rights Impact Assessment and Management* (above, n. 121); World Bank /Nordic Trust Fund, ‘Human Rights Impact Assessments: A Review of the Literature, Differences with other forms of Assessments and Relevance for Development’ (above, n. 22); James Harrison and Mary-Ann Stephenson, ‘Human Rights Impact Assessment: Review of Practice and Guidance for Future Assessments’, Scottish Human Rights Commission, June 2010.

¹³⁸ Markus W. Gehring, ‘Tools for More Sustainable Trade Treaties with Developing Countries’ (above, n. 62), p. 69.

¹³⁹ D, ‘Insights on Human Rights Impact Assessments of Trade Policies and Agreements’; Berne Declaration, ‘Human Rights Impact Assessments for Trade and Investment Agreements: Report of the Expert Seminar, June 23-24, 2010, Geneva, Switzerland’ (above, n. 22); MacNaughton and Hunt, ‘A human rights-based approach to social impact assessment’ (above, n. 22); Walker, ‘Human Rights Impact Assessments: Emerging Practices and Challenges’ (above, n. 31).

¹⁴⁰ EIAs are guided by the Cabinet Directive on the Environmental Assessment of Policy, Plan, and Program Proposals and the 2001 Framework for Conducting Environmental Assessments of Trade Negotiations.

¹⁴¹ Markus Gehring, ‘Sustainability Impact Assessments of Trade Agreements in the Americas : A Tool for Sustainable Development’, Centre for International Sustainable Development Law, in: *Eco-Health in the Americas Legal Working Paper Series*, 2010, 8 ff.; James Salzmann, ‘Seattle’s Legal Legacy and Environmental Reviews of Trade Agreements’, *Environmental Law*, 31 (2001), pp. 501–548.

¹⁴² See section 6.1.

¹⁴³ On the developments of this paradigm: Alexander Gillespie, *International environmental law, policy, and ethics* (Oxford: Oxford Univ. Press, 2014), 2nd ed.

¹⁴⁴ 42 USC 4321 [NEPA] Sec. 2.

environmental change – mainly impacts on physical health. In the context of the construction of an Alaskan pipeline, an Inuit tribal chief critically remarked, “Now that we have dealt with the problem of the permafrost and the caribou and what to do with hot oil, what about changes in the customs and ways of my people?”¹⁴⁵ Increasingly, not only environment-related health impacts were considered, but also other “social effects of environmental alterations by development projects”.¹⁴⁶ Still, the starting point that was necessary to trigger an (integrated) social impact assessment was an “environmental alteration”. The second emancipation occurred when SIAs accompanied interventions beyond the environmental ambit. For that purpose, social scientists were either directly hired by administrative agencies or increasingly gathered in networks to develop and improve methodologies, rules, and principles on the conduct of SIAs which include both the assessment of projects and policies.¹⁴⁷ On the international level, the International Association for Impact Assessment (IAIA) has developed guidelines on Social Impact Assessments and laid down several principles.¹⁴⁸ While Social Impact Assessments still cover a very broad range of consequences for human lives, NGOs, national and international organizations have also developed more and more specific impact assessment tools, focusing on health¹⁴⁹, equality and gender-related topics¹⁵⁰, on food security¹⁵¹ or poverty¹⁵². Increasingly, tools to explicitly assess consequences for human rights – political, civil, economic, social and cultural – emerged. Human rights impact assessments equally focus on many of these economic, environmental and social consequences, which is why clearly overlaps exist.¹⁵³

2.3.4 The Actors Involved in Impact Assessments

Many different types of actors can be responsible for HRIAs. In some cases, private companies conduct HRIAs to assess the consequences of their business activities. This regards the business and human rights nexus as analyzed by John Ruggie, the then United Nations Special Rapporteur, who was asked to also “focus on human rights impact assessments”.¹⁵⁴ Here, HRIAs are part of a

¹⁴⁵ Cited in: Rabel Burdge and Frank Vanclay, ‘Social Impact Assessment: A contribution to the state of the art series’, in: Frank. Vanclay and Daniel A. Bronstein (eds.), *Environmental and social impact assessment*, p. 62.

¹⁴⁶ Ibid.

¹⁴⁷ For example: The Interorganizational Committee on Principles and Guidelines for Social Impact Assessment, ‘Principles and guidelines for social impact assessment in the USA’, *Impact Assessment and Project Appraisal*, 21 (2003), pp. 231–250; Walker, *The Future of Human Rights Impact Assessments of Trade Agreements* (above, n. 28), p. 39.

¹⁴⁸ Frank Vanclay, ‘International Principles for Social Impact Assessment’ (above, n. 27); Walker, *The Future of Human Rights Impact Assessments of Trade Agreements* (above, n. 28).

¹⁴⁹ For example: WHO, Health Impact Assessment <<http://www.who.int/hia/en/>>

¹⁵⁰ For example: The University of Edinburgh Equality Impact Assessment <http://www.docs.csg.ed.ac.uk/EqualityDiversity/EqIA_Guidance.pdf>.

¹⁵¹ For example: FAO, Guide to Conducting a Right to Food Impact Assessment, available at: <http://www.fao.org/3/a-i0550e.pdf> (last visited: June 2020).

¹⁵² For example: OECD, A Practical Guide to Ex Ante Poverty Impact Assessment (2007).

¹⁵³ The potential added value of an explicit human rights frameworks is discussed in section 2.4.3.

¹⁵⁴ Radu Mares, ‘Business and Human Rights After Ruggie: Foundations, the Art of Simplification and the Imperative of Cumulative Progress’, in: Radu Mares (ed.), *The UN Guiding Principles on Business and Human Rights*, pp. 1–49, p. 5; UN Commission on Human Rights, *Human rights and transnational corporations and other business enterprises* (2005), E/CN.4/2005/L.87, (1) (d).

corporation's human rights due diligence responsibility in order to "become aware of, prevent and address adverse human rights impacts".¹⁵⁵

Non-governmental organizations and scholars are also involved in HRIAs on different levels: First, they contribute significantly to developing methodologies for HRIAs and push for the implementation and institutionalization thereof, for example in the context of the reform of the World Bank's Safeguard regimes, but also for trade and investment agreements concluded by the European Union. This is part of the norm-creating function. A second function concerns the enforcement and implementation of HRIA requirements. Here, NGOs participate during the consultation, at times prepare their own "shadow" HRIA report¹⁵⁶, or use formal and informal accountability mechanisms to ensure compliance with HRIA commitments.¹⁵⁷

Public authorities are still the primary human rights duty-bearers, and the focus of this thesis will be on the role of *public* authorities. These public authorities are human rights duty-bearers under human rights law, and it is here where public law rules and principles clearly apply. Public authorities, for the purpose of this thesis, are mainly international organizations, governments, and administrative agencies at the national, regional and local level as well as legislative bodies. A public law approach will require to open the "black box" a bit further and have a more nuanced look at the role different departments play within an institution. The determination of competences – who is in charge of conducting the HRIA – and of the procedure – which departments will be involved – can make a decisive difference. Some departments have a strong interest in pushing a certain initiative through while others regard their role as guardians of the public interest. Sociological studies have shown that an organization's staff relatively quickly identifies with an organization's mandate:¹⁵⁸ the involvement of departments which have a social or human rights mandate, and which are thus likely to be willing to influence the decision-making process, could give more effect to human rights compliance.

The scope of this analysis focuses on, but is not limited to, impact assessments in EU decision-making. With regard to policy IAs, the EU has one of the most elaborated IA-regimes worldwide and puts a particular emphasis on the assessment of human rights impacts occurring both within and outside the EU. It is, therefore, inspiring to illustrate how policy HRIAs can be institutionalized.

2.4 What are *Human Rights* Impact Assessments?

HRIAs generally follow a certain logic common to most (if not all) IAs. These steps shall briefly be illustrated by reference to EIAs as regulated under NEPA and EU law. The following chapters will regularly refer to these "basic structure" norms of IA-law. HRIAs share many aspects with

¹⁵⁵ UN Human Rights Council, *Business and human rights: Towards operationalizing the "protect, respect and remedy" framework: Report of the Special Representative of the Secretary-General on the issue of human rights and transnational corporations and other business enterprises* (2009), A/HRC/11/13, para 59.

¹⁵⁶ An example is: Armin Paasch and others, *Right to Food Impact Assessment of the EU-India Trade Agreement* (2011).

¹⁵⁷ For example in the case of the missing HRIA of the EU-Vietnam Free Trade Agreement: European Ombudsman, *Draft recommendation of the European Ombudsman in the inquiry into complaint 1409/2014/JN against the European Commission*, 26 March 2015.

¹⁵⁸ William Connolly, *James Madison rules America* (Lanham, Md: Rowman & Littlefield, 2010), p. 147.

other types of impact assessments.¹⁵⁹ Afterwards, this section will analyze how human rights modify this basic structure norms to turn an IA into an HRIA. Human rights can be relevant in at least two ways: On the one hand, the goal of an HRIA is to assess impacts on human rights. Consequently, human rights are the object of the assessment. On the other hand, human rights standards can determine the assessment procedure as such, which must arguably be participatory, transparent and non-discriminatory. Therefore, human rights also guide the IA procedure itself. However, the function of law is not limited to these two dimensions. As will be discussed in the following chapters, the role of law is more complex insofar as the institutionalization of HRIAs is concerned. Institutionalized HRIAs are embedded in a set of general rules, principles and institutional practices that are not IA specific. For that purpose, HRIA must be interpreted in their institutional context. For example: An IA may generate knowledge about a particular initiative and inform policy-making, however, those in charge of conducting the assessment will necessarily rely on existing knowledge sources within or outside the institution in question, such as the European Commission. Law therefore also regulates what knowledge sources may or must be taken into consideration in order to assess the consequences of an initiative. Also, HRIA Guidelines require consultation on the planned initiative; at the same time, participation and transparency rights may entitle civil society organization to get access to Commission documents relevant to the impact assessment. Conducting an impact assessment in order to gather scientific evidence might be required by the precautionary principle. At the same time, impact assessments must make predictions about uncertain events and rule out illegal options. In order to evaluate different options, it can also be necessary to consider the precautionary principle as part of the assessment: when analyzing whether a certain option is legal, the precautionary principle is part of the legal framework against which the legality of such an initiative must be measured. These different interactions between IA-specific norms and general public law will be discussed in the following chapters. The next sub-sections will concentrate on the basic structure norms for IAs.

2.4.1 EIA Law as “Background Norms”

The role and scope of human rights impact assessments can be better understood if one considers the evolution of these instruments, which can be traced back to the Environmental Assessment of projects. Above, it has been explained how the scope of impact assessments has expanded: From projects to policies, from environmental to social and human rights impacts, from the assessment of domestic to international impacts.

For heuristic purposes, it is useful to refer to the different steps and methods prescribed by domestic EIA law, which have been widely adopted also for other types of IAs, including HRIAs.¹⁶⁰ To a certain extent, this is a matter of practical necessity: It is at first necessary to decide which initiatives require an impact assessment (screening) before the content and depth of the assessment can be determined (scoping). Other issues are based on normative or political decisions, for example, whether participation shall already take place at the screening and scoping stage. As impact assessments started first as a distinct form of public decision-making in domes-

¹⁵⁹ Walker, ‘Human Rights in the Trade and Sustainability Impact Assessment of the EU-Tunisia Free Trade Agreement’ (above, n. 57), p. 106.

¹⁶⁰ Zerk, ‘Human Rights Impact Assessment of Trade Agreements’ (above, n. 30), p. 9.

tic EIA-law in the United States,¹⁶¹ the characteristics and central elements of EIA-law shall briefly be outlined below and serve as “background norms”¹⁶² for the following analysis of HRIA norms.

Screening and Pre-Assessment

Screening is the first step to identify whether a particular initiative requires an impact assessment.¹⁶³ It is a decisive step and consequently gives often rise to disputes because parties disagree about which projects, programs, policies or other initiatives should be accompanied by an in-depth or “full” EIA. Practical constraints – time, money and other resources – would make it impossible to conduct EIAs for every single action taken by the respective actors. While EIA statutes often define certain categories of initiatives that always require impact assessments (“mandatory EIA”), at most times, a case-by-case prediction is necessary to determine whether the *likely* effects are going to be *significant*. The criteria “likelihood” and “significance” are, for example, reflected in Art. 2 (1) of the EU EIA-Directive (see Sec. 6.2 for a closer analysis). Another good example is NEPA which states that “all agencies of the federal government” have to prepare environmental impact statements (EIS) “for legislation and other major Federal actions significantly affecting the quality of the human environment”.¹⁶⁴ At the end of this pre-assessment stage, the agency must prepare a so-called Environmental Assessment (EA), a public document to briefly provide evidence and analysis for determining whether to prepare a full EIS or a finding of no significant impact (“FONSI”)¹⁶⁵.

The circularity of such an approach to narrow down the applicability becomes evident: A full EIA to assess the environmental impacts is only triggered if significant environmental impacts are likely to occur. Domestic legislators came up with proposals to – if not overcome – at least manage the problem of circularity. One approach is to conduct preliminary assessments to determine whether significant impacts are likely to occur and a full-fledged IA is therefore necessary.¹⁶⁶ Other legal orders require the classification of projects into high-, medium- and low-risk categories.¹⁶⁷ A similar approach is taken by the EU legislator: The EIA Directive on Environmental Impact Assessments contains a list of projects that are regarded *prima facie* as having “significant impact”¹⁶⁸; in all other cases, the EU Directive provides for certain criteria to be considered for the screening exercise.

¹⁶¹ Craik, *The International Law of Environmental Impact Assessment* (above, n. 59), p. 23.

¹⁶² Term borrowed from: *Ibid.*, 23 et seq.

¹⁶³ For screening in HRIAs: European Commission, *Guidelines on the analysis of human rights impacts in impact assessments for trade-related policy initiatives* (above, n. 42), p. 5.

¹⁶⁴ United States, NEPA, 42 USC 4332 Sec. 102 (2) (c).

¹⁶⁵ 40 C.F.R. §§ 1501.4, 1508.9; see also: US Supreme Court, *Dep't of Transp. v. Pub. Citizen*, 541 U.S. 752, 757 (2004).

¹⁶⁶ Craik, *The International Law of Environmental Impact Assessment* (above, n. 59), p. 29.

¹⁶⁷ For example, the International Finance Corporation classifies projects into category A, B and C projects: IFC Sustainability Framework, *IFC*, para 40.

¹⁶⁸ Art. 4 (1) in conjunction with Annex I in European Union, *EIA Directive 2011/92/EU* [2011] as amended by Directive 2014/52/EU.

Scoping

Whereas the goal of the screening process is to determine which initiatives need an EIA at all, the scoping phase aims at setting the focus on the most significant impacts: The objective is to find an adequate balance between comprehensiveness and efficiency.¹⁶⁹ This is important as the EIA process can be extremely time and money-consuming, and Environmental Impact Statements (EIS) have consistently been criticized for being too long and unapproachable. So scoping requires policy- and decision-makers to narrow down the scope of a specific EIA and focus on those aspects that can have genuinely significant impacts, i.e. on the most likely and/or most serious potential harm. Two major challenges are apparent. First, the circularity-argument mentioned above is also a concern here: How can the significance of impacts determine the scope of an IA if the very purpose of IAs is to identify likely significant impacts? This problem might be handled if one understands scoping not as a static element at the beginning of the IA procedure, but rather as a reflexive and on-going process.¹⁷⁰ The scope of the IA is not fixed once and for all but may change throughout the IA procedure. For example, an agency might learn new vital facts during a later consultation phase that justify the extension or restriction of the scope of the IA. A second challenge is that what counts as “significant” impact is a highly subjective question, and NGOs are often unwilling to “eliminate” issues from the list of impacts they once spotted as being significant.¹⁷¹ However, the determination of significance is, as a closer analysis of EIA law demonstrates, not completely discretionary but rather based on legal principles subject to at least restricted judicial review.

Impact analysis and consideration of alternative options

After screening and scoping, and – depending on the IA regime – before or after broad consultation, technical or scientific analysis of expected impacts is required.¹⁷² The goal is to provide the necessary information to prepare the IA report. The choice of analytical methods is generally discretionary: it depends mainly on the particular case in question, and there is generally no single-best methodology a statute could prescribe to use. At the same time, what counts as an adequate method often requires technical expertise and can therefore only be subject to limited judicial review. Nevertheless, there are legal rules and principles guiding the analysis of impacts and the violation of which could be reviewed by courts or quasi-judicial bodies. This will be analyzed in chapter 8.

NEPA and other EIA norms define minimum standards the IA report must meet, and accordingly, in order to meet this requirement, certain analytical steps are necessary. The EIA report must generally describe the objective of the initiative, the affected environment (“baseline scenario”) the environmental consequences of the planned activities as well as of potential alternative options. Based on this information, the EIS must present the environmental impacts of the “proposal and the alternatives in comparative form, thus sharply defining the issues and providing a

¹⁶⁹ Craik, *The International Law of Environmental Impact Assessment* (above, n. 59), p. 30; scoping in HRIAs: European Commission, *Guidelines on the analysis of human rights impacts in impact assessments for trade-related policy initiatives* (above, n. 42), p. 8.

¹⁷⁰ Craik, *The International Law of Environmental Impact Assessment* (above, n. 59), p. 30.

¹⁷¹ Alan Gilpin, *Environmental impact assessment (EIA)* (Cambridge, New York: Cambridge University Press, 1995), p. 19.

¹⁷² Analysis in HRIAs: European Commission, *Guidelines on the analysis of human rights impacts in impact assessments for trade-related policy initiatives* (above, n. 42), p. 9.

clear basis for choice among options by the decision-maker and the public”.¹⁷³ It is essential to explore all reasonable alternatives, including the “no-action” option, and include, where necessary, “appropriate mitigation measures”. This step is “the heart of the environmental impact statement”.¹⁷⁴ Such an approach requiring the evaluation of different *relative* alternatives can be especially useful where *absolute* standards are inexistent.¹⁷⁵ At the same time, in particular relevant for HRIAs, the consideration of alternatives is a concretization of the principle of proportionality: it is necessary to identify the least restrictive means to achieve a legitimate objective. On the other hand, the consideration of alternatives in IAs is also susceptible to abuse by EIS drafters: Agencies can frame the purpose in ways that either broaden or narrow the alternative analysis, and thus agencies can avoid presenting less intrusive alternatives, which will make the preferred option appear more favorable.¹⁷⁶

Public Participation and consultation

EIA regimes generally include some form of participation. Participation refers both to public consultations, by involving potentially affected individuals or communities, civil society organizations, the general public or other states and international organizations (external participation), as well as internal consultation of other government agencies or departments (internal participation). The added value of participation can be instrumental or inherent.¹⁷⁷ The first emphasizes the role of consultation as an instrument to gather valuable information and to coordinate policies (information model). The second perspective emphasizes the inherent value of participation, either from a skeptical (preference accumulation model) or analytic-deliberative perspective (transformation models).

Even though domestic and international EIA norms usually contain some form of consultation requirement, differences exist as to when, where, and how consultation takes place. Critics have pointed out that, in spite of the importance of the screening and scoping process, participation is rarely explicitly mandated at the early screening-stage.¹⁷⁸ Under US law, consultation is only required after a first draft has been finished.¹⁷⁹ It is then published and distributed for comments by other agencies and the public. This is a relatively late stage of the process as modifying an existing draft is often much more difficult compared to influencing an emerging one. In any case, the timing, form, and scope of consultation is an important element for human rights impact assessments and will be analyzed more closely in chapter 7.

¹⁷³ United States, 40 CFR § 1502.14.

¹⁷⁴ Ibid.

¹⁷⁵ Craik, *The International Law of Environmental Impact Assessment* (above, n. 59), p. 31.

¹⁷⁶ Daniel Mandelker, ‘The National Environmental Policy Act: A Review of Its Experience and Problems’, *Wash. U. J. L. & Pol’y* 293 (2010, 32, pp. 293–312, p. 305; Craik, *The International Law of Environmental Impact Assessment* (above, n. 59), p. 31.

¹⁷⁷ Neil Craik, ‘Deliberation and Legitimacy in Transnational Governance: The Case of Environmental Impact Assessments’, *Victoria University of Wellington Law Review*, 38 (2007), pp. 381–401.

¹⁷⁸ Craik, *The International Law of Environmental Impact Assessment* (above, n. 59), p. 31.

¹⁷⁹ United States, 40 CFR § 1503.1.

IA-report and its relevance for the final decision

At the end of the process, those in charge of conducting the IA must draft the IA report which is the essential device to ensure that the respective environmental policies and goals are “infused into the ongoing programs and actions” of the competent agencies.¹⁸⁰ According to US law, the EIS shall specify the underlying purpose and the need for action defined during the IA procedure. In order to ensure that agencies take the input of consultations into account, they are often obliged to refer to these comments and mention the different arguments and preferences (duty to give reason). For example, US law mandates that agencies respond to all comments made.¹⁸¹

How does the EIA relate to the final (political) decision? The relationship can be discussed time- and content-wise. In both cases it is useful to remember the fundamental objective of Impact Assessments is to influence the final decision, irrespective of the type of IA-model in question, i.e. irrespective of whether the model is primarily targeted at information, participation or transformation. Nevertheless, it is still controversial at what time, for example, external and internal participation should place; the only logically consistent principle is that no final decision should be made before the EIA process has come to an end.¹⁸² Regarding the content and specific recommendations enshrined in the EIS, the objective to inform the decision-maker implies that this recommendation is not binding – at least not in the sense that decision-makers have to choose the option the EIS prefers. Nevertheless, the findings in the IA-report can have indirectly binding effects and can shift the burden of proof, as will be discussed in section 10.2.2.

Monitoring and ex-post impact assessments

EIAs have, for a long time, been designed as an ex-ante planning tool. This has been subject to fundamental critique, pointing out that EIAs are unable to predict future impacts precisely.¹⁸³ Recently, the importance of monitoring and other follow-up mechanisms has been emphasized, including the conduct of ex-post impact assessments. This is important for at least two reasons: First, monitoring, evaluation and other forms of ex-post impact assessments can enable institutional learning in order to improve the quality of future ex-ante impact assessments. Second, they identify deficits in the specific project or policy at hand and thus allow regulators, legislators or other decision-makers to avoid or at least mitigate adverse impacts. In this sense, ex-post EIAs can be seen as a flexible regulatory tool,¹⁸⁴ however one that can only be effective if the legal act it accompanies contains flexibility mechanisms to adapt to the new findings. In order to become a useful tool, a legal framework must be in place to allow that these ex-post corrections can be implemented into the project or policy design. This will be addressed below (see section 9.1.2.1.5).

¹⁸⁰ Ibid., § 1502.1; for HRIAs: European Commission, *Guidelines on the analysis of human rights impacts in impact assessments for trade-related policy initiatives* (above, n. 42), p. 12.

¹⁸¹ United States, 40 CFR § 1503.4; Craik, *The International Law of Environmental Impact Assessment* (above, n. 59), p. 32.

¹⁸² Ibid.

¹⁸³ Ibid., p. 33.

¹⁸⁴ Ibid.

2.4.2 The Role of Human Rights in Impact Assessments: Human Rights as Entitlements and Human Rights as Constitutional Policy Objectives

HRIAs were developed before these background norms. Human rights are relevant in two ways: First, they are the object of the assessment in the sense that impacts on the realization of human rights must be determined. Second, they guide the IA process as such, for example insofar as IAs must be conducted in a transparent, participatory and non-discriminatory way.

The term “human rights” will be used here broadly unless specifically defined otherwise. In the international sphere, it will refer to human rights as laid down in the Universal Declaration of Human Rights¹⁸⁵ and the core international human rights treaties.¹⁸⁶ At the same time, the term human rights may also encompass human or fundamental rights as recognized under the regional conventions¹⁸⁷, and in the constitutional law of the EU and its Member States. This broad definition is justified as both international and EU constitutional law will be relevant insofar as the institutionalization of HRIAs in EU law is concerned. Human rights contain – as commonly understood – both positive and negative duties, as expressed, for example, in Art. 2 (1) ICCPR (“to respect and to ensure”). It is now widely accepted that three levels of obligations can be distinguished, namely a duty to respect, protect and fulfill human rights¹⁸⁸ (the latter two argua-

¹⁸⁵ *Universal Declaration of Human Rights* [adopted 1948].

¹⁸⁶ (1) International Convention on the Elimination of All Forms of Racial Discrimination (adopted 21 December 1965, entered into force 4 January 1969) 666 UNTS 195 (ICERD); (2) International Covenant on Civil and Political Rights (adopted 16 December 1966, entered into force 23 March 1976) 999 UNTS 171 (ICCPR); (3) International Covenant on Economic, Social and Cultural Rights (adopted 16 December 1966, entered into force 3 January 1976) 993 UNTS 3 (ICESCR); (4) Convention on the Elimination of All Forms of Discrimination against Women (adopted 18 December 1979, entered into force 3 September 1981) 1249 UNTS 13 (CEDAW); (5) Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment (adopted 10 December 1984, entered into force 26 June 1987) 1465 UNTS 85 (CAT); (6) Convention on the Rights of the Child (adopted 20 November 1989, entered into force 2 September 1990) 1577 UNTS 3 (CRC); (7) International Convention on the Protection of the Rights of All Migrant Workers and Members of Their Families (adopted 18 December 1990, entered into force 1 July 2003) 2220 UNTS 3 (ICMW); (8) International Convention for the Protection of All Persons from Enforced Disappearance (adopted 20 December 2006, entered into force 23 December 2010) 2716 UNTS 3; (9) Convention on the Rights of Persons with Disabilities (adopted 13 December 2006, entered into force 3 May 2008) 2515 UNTS 3 (CRPD).

¹⁸⁷ In particular: Convention for the Protection of Human Rights and Fundamental Freedoms (adopted 4 November 1950, entered into force 3 September 1953) 213 UNTS 221 (European Convention on Human Rights, ECHR); American Convention on Human Rights (adopted 22 November 1969, entered into force 18 July 1978) 1144 U.N.T.S. 123; African Charter on Human and Peoples’ Rights (adopted 27 June 1981, entered into force 21 October 1986) (1982) 21 ILM 58 (African Charter).

¹⁸⁸ The Respect – Protect – Fulfill trias can be traced back to a final report by Asbjorn Eide to the United Nations: Report on the right to adequate food as a human right, submitted by Mr Asbjorn Eide, Special Rapporteur, to the Commission on Human Rights, Sub-Commission on the Prevention of Discrimination and Protection of Minorities, 7 July 1987, E/CN.4/Sub.2/1987/23, para 66 et seq., available at: <https://undocs.org/en/E/CN.4/Sub.2/1987/23>. On recent developments and the content of the respect – protect – fulfill trias see: Han Somsen, ‘Environmental Law at the Dawn of the Anthropocene’, in: Roger Brownsword, Eloise Scotford, and Karen Yeung (eds.), *The Oxford Handbook of Law, Regulation, and Technology*, pp. 383–403, p. 393. For the European Convention on Human Rights: Martin Borowski, ‘Charta Artikel 51’, in: Jürgen Meyer (ed.), *Charta der Grundrechte der Europäischen Union*, Norbert Bernsdorff, para 32. See for German constitutional law: Christian Callies, ‘Dimensions of Fundamental Rights’, in: Hermann Pünder, Christian Callies, and Pünder-Waldhoff (eds.), *Debates in German Public Law*, pp. 27–42.

bly specifying the requirement “ensure”). As will be seen later, an obligation to assess human rights impacts can be based on both positive and negative obligations.

In the context of HRIAs, it is helpful to distinguish two (even though closely interrelated) functions of human rights. First and foremost, human rights function as individual and (often) judicially enforceable *rights* or *entitlements*.¹⁸⁹ Individuals have human rights claims against a duty-bearer. This includes, inter alia, the obligation to respect fundamental rights as prescribed in Article 51 of the Charter of Fundamental Rights of the European Union (“CFR”). Human Rights in this function serve as “boundary markers”.¹⁹⁰ EU institutions must thus ensure compliance with human rights – including, insofar as human rights apply extraterritorially, the human rights of distant strangers.¹⁹¹

Second, human rights can also serve as general principles even absent judicially enforceable individual entitlements; in this regard, they function as legally binding (in the case of the EU: constitutional) *policy objectives* guiding public decision-making. Here, human rights operate in their “non-individualised function as a background grid for practices and procedures which seek to prevent cross-border social harm”.¹⁹² This is particularly relevant where acts of public authorities have some consequences on the enjoyment of human rights even though it is impossible to identify an infringement. In particular EU constitutional law explicitly establishes the promotion of human rights as a *constitutional policy objective* in external relations (Art. 3 (5), 21 TEU).¹⁹³ This commitment, as I will argue below, at least contains the obligation of the EU to not obstruct the realization of human rights elsewhere and to thus, as a minimum obligation, assess and adequately take into consideration potential negative human rights impacts of EU policy decisions. As such, this constitutional policy objective contains already a legal basis for the conduct of HRIAs under EU law.

Constitutional policy objectives supplement the individualized function of human rights as entitlements.¹⁹⁴ The non-individualized policy-objective function is particularly relevant where an initiative somehow *affects* the enjoyment of human rights but does not clearly *infringe* human

¹⁸⁹ Anne Peters, ‘Global Constitutionalism: The Social Dimension’, in: Takao Suami, Anne Peters, Dimitri Vanoverbeke et al. (eds.), *Global constitutionalism from European and East Asian perspectives*, pp. 277–350, p. 328.

¹⁹⁰ Brownsword and Goodwin, *Law and the Technologies of the Twenty-First Century* (above, n. 56), 225 et seq.

¹⁹¹ Under EU law, it is controversial though to what extent this includes the negative duty to respect or also a positive duty to protect human rights extraterritorially. Bartels assumes that the EU is only obliged to respect human rights extraterritorially: Bartels, ‘The EU’s Human Rights Obligations in Relation to Policies with Extraterritorial Effects’ (above, n. 12). Similar, with regard to international treaty law: Milanovic, ‘Extraterritorial Application of Human Rights Treaties’ (above, n. 12), p. 228, arguing that absent effective control, human rights only apply in the negative dimension. For a different approach covering also a positive obligation to protect insofar as an EU act produces legal effects abroad: Ganesh, ‘The European Union’s Human Rights Obligations Towards Distant Strangers’ (above, n. 49).

¹⁹² Peters, ‘Global Constitutionalism: The Social Dimension’ (above, n. 189), p. 319 who also uses a similar distinction.

¹⁹³ Constitutional Policy Objectives are also established in several domestic legal orders, such as *Staatszielbestimmungen* under German or Directive Principles under Indian Constitutional Law. For an overview see: Joris Larik, *Foreign Policy Objectives in European Constitutional Law* (Oxford, New York, NY: Oxford University Press, 2016), First edition.

¹⁹⁴ On human rights and optimization principles see section 3.2.2.3; see also: Hartmut Henninger, *Menschenrechte und Frieden als Rechtsprinzipien des Völkerrechts* (Tübingen: Mohr Siebeck, 2013), 293 et seq.; Peters, ‘Global Constitutionalism: The Social Dimension’ (above, n. 189), p. 319.

rights, for example because the harm cannot be clearly attributed to the acting authority (factual uncertainty), or because there are no normative standards clearly identifying the threshold for a human rights infringement (normative uncertainty). Still, under Articles 3 (5), 21 TEU, the EU would arguably be obligated to assess potential impacts on the enjoyment of human rights and take the finding into account to mitigate negative and increase positive effects; in such cases, as with all policy objectives, optimization would be unavoidable.¹⁹⁵ This closes the gap that exists in consequence of the binary code between “infringement” and “no infringement”. To take up the introductory example of agricultural subsidies affecting small farmers in the Global South: if that policy is likely to adversely affect the livelihood of small scale farmers by resulting in a sharp drop of food prices, this has clearly a negative effect on the enjoyment of these farmers’ human right to an adequate standard of living, even though it is generally unlikely (as will be seen below) that this effect would already constitute a violation of their human rights as *entitlements*. Nevertheless, the obligation to advance human rights as constitutional policy objectives implies a duty to assess and take into account these human rights effects,¹⁹⁶ and failure to do so could constitute an abuse of discretion.¹⁹⁷

Nevertheless, human rights as entitlements also remain relevant for HRIAs. First, insofar as individuals – including distant strangers - hold (potentially, i.e. subject to court procedure law) judicially enforceable human rights vis-à-vis the EU, the duty to respect and (potentially) protect these human rights also implies an obligation to assess, in advance, whether a planned project or policy is likely to infringe these human rights. The duty to assess human rights impacts ex-ante thus also stems from a substantive human rights obligation.¹⁹⁸ This concerns mainly the first issue addressed here – namely *why* the EU should be obligated to conduct HRIAs (see chapter 4): Insofar as human rights apply extraterritorially as rights, the EU’s obligation to conduct HRIAs would not only be based on Art. 3 (5), 21 TEU, but *also* on, for example, a fundamental right enshrined in the CFR. Human rights as entitlements are also important for the question *how* to conduct HRIAs (see chapter 8): if those conducting an impact assessment identify policy options that would infringe human rights as entitlements, this would have to be clearly spelled out. Should it become clear during the screening stage of an impact assessment that a policy option would violate individual human rights, such an option would – at least under the EU Impact Assessment regime - have to be discarded early-on as it would be “not legally viable”.¹⁹⁹

2.4.2.1 Human Rights Impact Assessments and the Assessment of Human Rights Impacts

The difference between the broader term assessment of impacts and a formalized and structured impact assessment has been discussed above. This is also a relevant distinction with re-

¹⁹⁵ Chris Hilson, ‘Rights and Principles in EU Law: A Distinction Without Foundation?’, *Maastricht Journal of European and Comparative Law*, 5 (2008), pp. 193–215, p. 210; on optimization and constitutional principles in regulatory law: Wolfgang Hoffmann-Riem and Saskia Fritzsche, ‘Innovationsverantwortung - zur Einleitung’, in: Martin Eifert and Wolfgang Hoffmann-Riem (eds.), *Innovationsverantwortung*, pp. 11–41, 17 f.

¹⁹⁶ Consequently, as long as the concept of human rights as policy objectives only has a supplementary function, balancing understood as a duty to optimize is both unavoidable and unproblematic. It does not downgrade the deontological basis of human rights: See section 3.2.2.3 on the Alexy-Habermas debate.

¹⁹⁷ On the scope of judicial review in such a case see section 9.2.

¹⁹⁸ See section 4.7.1.

¹⁹⁹ European Commission, *Better Regulation Guidelines* (2017), SWD(2017) 350 final, p. 22.

gard to HRIAs. Many legal sources requesting to assess human rights impacts distinguish between a “duty to assess impacts” and a “duty to conduct impact assessments”. And indeed, there is a slight but significant difference: While the former can take many forms and mainly requires to understand potential impacts when making decisions, the latter often refers to assessments that are at least to a certain extent formally structured. In this regard, civil society organizations²⁰⁰ and legal scholars are often more straightforward. Most prominently the “Maastricht Principles on Extraterritorial Obligations of States in the Area of Economic, Social and Cultural Rights” assume a duty to conduct HRIAs. In 2011, a group of experts in international law and human rights met at the University of Maastricht and adopted a set of principles. Principle 14 claims that a duty to conduct participatory human rights impact assessments exists:

“States must conduct prior assessment, with public participation, of the risks and potential extraterritorial impacts of their laws, policies and practices on the enjoyment of economic, social and cultural rights. The results of the assessment must be made public. The assessment must also be undertaken to inform the measures that States must adopt to prevent violations or ensure their cessation as well as to ensure effective remedies.”²⁰¹

However, while the Maastricht Principles might be considered as “subsidiary means for the determination of rules of law” (Article 38 para. 1 lit. d ICJ Statute), they are not legally binding. So if there is a requirement to assess human rights impacts, does this also imply that it must be done in an institutionalized and formalized EIA-like manner? From an international perspective, states have a margin of appreciation when determining how to best comply with their international human rights obligations, and arguably also have discretion to determine how exactly to comply with the procedural obligation to assess human rights impacts of their projects and policies. Conducting formalized HRIAs can be time-consuming and require to build-up institutions and establish adequate procedures. This may be a significant burden in particular for economically weak states. In addition, it is not yet clear to what extent HRIAs actually increase human rights compliance, and some scholars have argued that a human rights “mainstreaming” in institutional decision-making can even have counter-productive effects.²⁰² However, I would argue that the margin of appreciation decreases if a state already has implemented impact assessment institutions, for example established EIA or RIA mechanisms to assess the environmental or economic impacts of its projects and policies. In that case, a certain minimum obligation to also allow for a consideration of human rights impacts would not be an excessive and intrusive limitation of the state’s margin of appreciation and would not necessarily produce unbearable costs. In the following, I will, therefore, argue that there is a duty to assess impacts on human rights, and that public authorities must provide for institutions, rules, and principles that allow taking the potential human rights impacts into account.

²⁰⁰ FIDH, ‘Human Rights Impact Assessment of Trade and Investment Agreements concluded by the European Union (Position Paper)’ (above, n. 22).

²⁰¹ Available at Olivier de Schutter and et. al, ‘Commentary to the Maastricht Principles on Extraterritorial Obligations of States in the Area of Economic, Social and Cultural Rights’, *Human rights quarterly*, 34 (2012), pp. 1084–1196.

²⁰² Critical of the added value of human rights mainstreaming in general: Martti Koskeniemi, ‘Human Rights Mainstreaming as a Strategy for Institutional Power’, *Humanity. An International Journal of Human Rights, Humanitarianism and Development* (2010), 47 - 58.

2.4.2.2 Human Rights as the Object of the Assessment

Human rights are the object of the assessment: the goal of HRIAs is to determine the consequences an initiative (potentially) has on human rights. In this sense, human rights can be “trumps”²⁰³ so that courts can declare acts that violate human rights to be invalid. Some HRIA guidelines therefore explicitly require policy-makers to discard a policy option early-on if it is clear that it violates human rights.²⁰⁴ At the same time, human rights are also used as moral and political arguments,²⁰⁵ for example in cases where judicial enforcement bodies are lacking. In this sense, human rights can be described as an “alternative means of moral reasoning”.²⁰⁶ From a legal positivism perspective, it might, therefore, be tempting to categorize human rights in a legal vs. moral claims dichotomy. In this sense, human rights as legal rights are generally understood as certain minimal guarantees people in all countries and cultures have because they are humans.²⁰⁷ The fact that guarantees are rights implies that they are norms of high relevance.²⁰⁸ The inclusion of human rights in impact assessments, however, does not always require a clear distinction between legal and non-legal claims. Therefore, to understand the evolution of human rights and the role human rights can play in decision-making, drawing a line between moral and legal categories is only of limited use. Human rights can gain shape at the moment they are applied,²⁰⁹ and the application is not necessarily limited to judicial organs creating a set of case law. The discursive function of human rights and the interaction between judicial and quasi-judicial interpretation, scholarly writings, human rights movements, UN declarations, and common practice contributes to the evolution of legal human rights.²¹⁰ One example is the emergence of indigenous people’s rights: the indigenous movement helped to set indigenous interests on the international agenda, resulting in a non-binding UN Declaration as well as two ILO Conventions. In addition, international financial institutions such as the World Bank adopted operational policies with respect to indigenous rights, and the World Bank’s Inspection Panel explicit-

²⁰³ Ronald Dworkin, *Taking rights seriously* (Cambridge, Mass.: Harvard University Press, 1978), xv; Brownsword and Goodwin, *Law and the Technologies of the Twenty-First Century* (above, n. 56), p. 229. In international law, at least core human rights are widely regarded as jus cogens and thus as forming a higher hierarchy of norms from which states cannot deviate: Brun-Otto Bryde, ‘Konstitutionalisierung des Völkerrechts und Internationalisierung des Verfassungsrechts’, *Der Staat <Berlin>*, 42 (2003), pp. 61–75, p. 66.

²⁰⁴ European Commission, *Better Regulation Toolbox* (2017), p. 211.

²⁰⁵ Brownsword and Goodwin, *Law and the Technologies of the Twenty-First Century* (above, n. 56), p. 232.

²⁰⁶ *Ibid.*

²⁰⁷ James Nickel, *Making Sense of Human Rights* (Malden, Mass.: Blackwell, 2007), 2. ed., 37 f.

²⁰⁸ *Ibid.*, p. 24.

²⁰⁹ Brownsword and Goodwin, *Law and the Technologies of the Twenty-First Century* (above, n. 56), p. 231.

²¹⁰ In this sense already: Peter Häberle, ‘Die offene Gesellschaft der Verfassungsinterpreten: Ein Beitrag zur pluralistischen und „prozessualen“ Verfassungsinterpretation’, *Juristenzeitung*, 30 (1975), pp. 297–305. Michaela Hailbronner recently tested the theory of the open society for German and US American law, stating that the group of constitutional interpreters in Germany is much more closed due to the quasi-scientific doctrinal analysis which requires a certain degree of expertise for efficient participation: Michaela Hailbronner, ‘We the experts: Die geschlossene Gesellschaft der Verfassungsinterpreten’, *Der Staat <Berlin>*, 53 (2014), pp. 425–443. It remains subject to further analysis to what extent Häberle’s approach could be applied to international human rights discourse, given that the technical obstacles Hailbronner identified in Germany, namely a highly doctrinal expert-based constitutional rights discourse, appear less relevant internationally. Brought to the international sphere where doctrinal analysis of human rights is not extremely technical, Häberle’s theory might be more realistic.

ly referred to the ILO Conventions in some of the disputes it had to resolve.²¹¹ Another illustrative case concerns the right to water and EU trade policies. The recently updated EU Handbook on trade Sustainability Impact Assessments (“SIA”) explicitly requires to assess impacts on the “right to water”.²¹² While the legal nature of the right to water might be still unclear, it is likely that this “right” was considered in response to the first successful European Citizens Initiatives on the right to water.²¹³ HRIA procedures can, therefore, be a place where public authorities and citizens discuss the role and scope of human rights obligations. Similarly, the EU guidelines on the HRIA of trade policy make explicit reference to the potential human rights impacts of intellectual property rights on the traditional knowledge of indigenous peoples.²¹⁴ Activists and academics had set this topic on the global agenda for many years. Pahuja therefore rightly observes that, “at any given moment, there is both a set of positive legal rules laid down in treaties or found in customary international law, and a whole range of people making claims in the name of human rights – either in terms of rights which are yet to be ‘recognized’ as law, or with respect to the identities which are excluded from the terms of a particular existing right”.²¹⁵

Before this background, many scholars and UN human rights bodies state that human rights impact assessments shall be based on an explicit human rights framework.²¹⁶ The adequate human rights framework depends on the initiative to be assessed and the actor who conducts the IA.²¹⁷ For example, Ruggie refers to the International Bill of Rights²¹⁸ as well as the ILO Declaration on Fundamental Principles and Rights at Work,²¹⁹ whereas for a government right to health impact assessment the ECOSOC General Comment No. 14 might provide an appropriate and more specific normative framework.²²⁰ The added value and potential trade-offs of explicit human rights framework in institutionalized impact assessments will be discussed below.

²¹¹ For an overview: Steven Herz and Anne Perrault, ‘Bringing Human Rights Claims to the World Bank Inspection Panel’, Oct 2009; regarding child labor, the Inspection Panel considered a report by the ILO Committee of Experts on ILO Convention 182 World Bank Inspection Panel, Report No. 83254-UZ, *Republic of Uzbekistan: Second Rural Enterprise Support Project (P109126) and Additional Financing for Second Rural Enterprise Support Project (P126962)* (2013), 59 ff.

²¹² European Commission, ‘Handbook for Trade Sustainability Impact Assessment’, 2016, p. 31.

²¹³ See European Commission, DG Environment at https://ec.europa.eu/environment/water/water-drink/information_en.html (last visited: June 2020).

²¹⁴ European Commission, *Guidelines on the analysis of human rights impacts in impact assessments for trade-related policy initiatives* (above, n. 42), p. 8.

²¹⁵ Sundhya Pahuja, ‘Rights as Regulation: The Integration of Development and Human Rights’, in: Bronwen Morgan (ed.), *The Intersection of Rights and Regulation*, 167-191, p. 168.

²¹⁶ MacNauthon and Hunt, ‘A human rights-based approach to social impact assessment’ (above, n. 22), p. 363; Baxewanos and Raza, ‘Human Rights Impact Assessments as a New Tool for Development Policy?’ (above, n. 22), p. 15.

²¹⁷ MacNauthon and Hunt, ‘A human rights-based approach to social impact assessment’ (above, n. 22), p. 364.

²¹⁸ UN Human Rights Council, *Report of the Special Representative of the Secretary-General on the issue of human rights and transnational corporations and other business enterprises* (above, n. 33), para 22.

²¹⁹ UN Human Rights Council, *Business and human rights: Towards operationalizing the “protect, respect and remedy” framework: Report of the Special Representative of the Secretary-General on the issue of human rights and transnational corporations and other business enterprises* (above, n. 155), para 53.

²²⁰ MacNauthon and Hunt, ‘A human rights-based approach to social impact assessment’ (above, n. 22), p. 364.

2.4.2.3 Human Rights Guiding the Assessment Procedure

Human rights also guide the impact assessment procedure, which should be transparent, participatory, and non-discriminatory.²²¹ So far, a great variety of HRIA methodologies has been developed, and no single and official definition exists²²² beyond the rather general definition that a “human rights impact assessment is the process of predicting the potential consequences of a proposed policy, programme or project on the enjoyment of human rights.”²²³ While a certain degree of methodological flexibility might be necessary to achieve the best results, a minimum consensus about cross-cutting human rights standards has emerged, as a synopsis of the different human rights impact assessment instruments and principles developed so far demonstrates. Many of these principles are reflected as “core values” of Social Impact Assessments.²²⁴ These “core values” were developed and formulated after several workshops, conferences and after “[s]everal hundred people were consulted and some 50 made substantial contributions.”²²⁵ The project was conducted in the context of the International Association for Impact Assessment, a “global network on best practice in the use of impact assessment” founded in 1980 to “bring together researchers, practitioners, and users of various types of impact assessment from all parts of the world”.²²⁶

First, participation and transparency are regarded as essential, and all HRIA guidelines and concepts emphasize the importance thereof.²²⁷ This is not surprising, given that participation and transparency have for a long time been regarded as important elements in environmental and regulatory impact assessments, and that both principles are among the “core” principles of international administrative law. For HRIAs, the human right to participation, to have access to information and freely express ideas is at the forefront, even though also instrumental reasons are brought forward for participation, be it as a source for knowledge-generation or as an informal accountability mechanism allowing to review the activities of public institutions and exert public pressure to increase compliance.²²⁸

HRIAs further require that public institutions establish accessible, effective and transparent accountability mechanisms “during both the impact assessment and the implementation and evaluation of the proposal adopted”.²²⁹ The establishment of accountability mechanisms cannot only be justified from an individual human rights perspective but also from an efficacy-perspective:

²²¹ Walker, ‘Human Rights in the Trade and Sustainability Impact Assessment of the EU-Tunisia Free Trade Agreement’ (above, n. 57), p. 104.

²²² Walker, ‘Human Rights Impact Assessments: Emerging Practices and Challenges’ (above, n. 31), p. 395.

²²³ UN General Assembly, *Report of the Special Rapporteur on the right of everyone to the enjoyment of the highest attainable standard of physical and mental health* (above, n. 29), para 37; For Gauthier de Beco, HRIAs mean the “assessment of both the potential impact of human rights using a participatory approach with a view to helping states to achieve human rights compliance”, Beco, *Non-judicial Mechanisms for the Implementation of Human Rights in European States* (above, n. 27), 257 f.

²²⁴ Frank Vanclay, ‘International Principles for Social Impact Assessment’ (above, n. 27), p. 9.

²²⁵ *Ibid.*, p. 5.

²²⁶ IAIA homepage, available at <https://www.iaia.org/> <last visited June 2020>.

²²⁷ For further reference: MacNauthon and Hunt, ‘A human rights-based approach to social impact assessment’ (above, n. 22), p. 363 who require the “meaningful participation by all stakeholders”.

²²⁸ The different dimension of participation will be presented in chapter 7, but due to its different functions, the issue of participation and transparency will pop up in different parts of this thesis.

²²⁹ *Ibid.*, p. 364.

As will be discussed later, formal and informal accountability mechanisms can increase the relevance of IAs as an instrument to influence decision-making.

Public institutions must promote equality and non-discrimination.²³⁰ This is also a cross-cutting standard affecting the analysis, the IA-procedure, and the substantive decision. First, the principle of non-discrimination can result in a positive obligation to devote resources, particularly to vulnerable groups most severely affected. It could require efforts to also involve those disenfranchised individuals and groups in decision-making,²³¹ for example by providing for alternative means of communication in order to allow also the illiterate to receive information about a planned initiative. Second, in order to be able to implement such measures against discrimination, the use of disaggregated data might be necessary, namely to ensure that impacts – often unintended factual discrimination as opposed to open discrimination – on the most vulnerable parts of society are identified.²³² However, at the same time, a human rights-based approach must also be aware of the human rights concerns that can be raised against the disaggregation of sensitive data. The collection of data on racial or ethnic origin can be seen as an intrusion of individual privacy rights or of indigenous data sovereignty.²³³ Such data may be misused, namely not to improve the situation of disadvantaged groups but, for example, to further exclude them. Against this background, especially many European jurisdictions restrict the collection of such sensitive data.²³⁴ A human rights-based impact assessment must, therefore, strike a balance between these conflicting rights claims.

Finally, human rights impact assessment guidelines emphasize the interdependence, inter-relatedness, and indivisibility of human rights.²³⁵ These principles were prominently adopted by the representatives of 171 States in 1993 during the World Conference on Human Rights in Vienna.²³⁶ For impact assessments, this mainly implies that not one or few rights should be analyzed in isolation, but that all categories – political, civil, social, economic and cultural rights – must, in general, be considered, even though this does not exclude that the focus in international economic law will generally be on certain mainly economic, social and cultural rights.²³⁷

²³⁰ Ibid., p. 363.

²³¹ Ibid., p. 364.

²³² Ibid.

²³³ Victor Rubin, Danielle Ngo, Ángel Ross et al., 'Counting a Diverse Nation: Disaggregating Data on Race and Ethnicity to Advance a Culture of Health', PolicyLink, 2018, p. 25.

²³⁴ This is in contrast with approaches used in the United States of America. For example, in France, the collection of racial data which is commonly collected in the US is prohibited by constitutional law and, explicitly, under a data protection statute (see Art. 8 of Law No. 78-17, available at: <https://www.cnil.fr/fr/loi-78-17-du-6-janvier-1978-modifiee> (1978 Data Protection Act)); for a closer analysis and comparison: Lia Epperson, 'Beware the Unintended Consequences: Government Transparency, Racial Data Collection, and Minority Rights in the United States and Abroad', *Revue Internationale des Gouvernements Ouverts*, 2 (2016), pp. 297–310.

²³⁵ MacNaughton and Hunt, 'A human rights-based approach to social impact assessment' (above, n. 22), p. 363.

²³⁶ World Conference on Human Rights in Vienna, *Vienna Declaration and Programme of Action* (1993), para 5.

²³⁷ Walker, 'Human Rights Impact Assessments: Emerging Practices and Challenges' (above, n. 31), p. 391.

2.4.3 The Importance of a Human Rights Framework

It is now to ask what the added value of human rights for impact assessments is. In particular, what, if any, is the added value of a human rights impact assessment compared with SIAs or EIAs? And are there potential tradeoffs for using an explicit human rights framework?

2.4.3.1 Potential Benefits of Explicit Human Rights Frameworks

First, human rights terminology emphasizes that the assessment takes place within a normative framework of binding obligations and not just social aspirations (*normativity argument*). An HRIA can, therefore, be based on a solid and legally binding framework.²³⁸ Such a legal framework can translate IA-practice – as identified by the SIA core values – into legal obligations.²³⁹ People have a legitimate expectation that public authorities will comply with human rights and thus human rights can provide for a legitimate basis of impact assessments.²⁴⁰ This, in turn, could ideally cause a “legitimacy pull”, and as human rights assign even judicially enforceable duties, HRIAs could help to incentivize or encourage duty-bearers to protect the rights of right-holders.²⁴¹

Second, a human rights framework is universal and comprehensive.²⁴² Considering the indivisibility of human rights, it would include not only civil and political but also economic, cultural, political social dimensions which are largely accepted worldwide. HRIA could “locate conclusions and recommendations within the context of legal obligations that states have voluntarily undertaken”²⁴³ (*universality argument*).

Third, an explicit human rights framework enables those who conduct Impact Assessments to rely on objective human rights standards instead of using the status-quo as the baseline scenario²⁴⁴ (*objective standards argument*). HRIAs allow identifying *existing* deficits. Such a normative framework limits the option to “trade” certain negative impacts against other positive impacts, in other words, to apply a utilitarian approach to impact assessments. Human rights, it has been argued, leave little room for these trade-offs.²⁴⁵ Rather, a human rights impact assessment recognizes a special legal status of individuals and would place the individual and his/her rights at the center of the analysis. For example, instead of only gathering data and information about people’s state of health and the public health system, a right to health impact assessment would also look at how their right to health is protected. This can make an actual difference: an initiative that does not lead to a rise in prices of *existing* but only *new* life-saving drugs might not have a negative impact on the status quo of access to health services, but it would count as a negative impact considering that the right to health implies the state’s commitment to progressive reali-

²³⁸ Walker, *The Future of Human Rights Impact Assessments of Trade Agreements* (above, n. 28), p. 43.

²³⁹ MacNaughton and Hunt, ‘A human rights-based approach to social impact assessment’ (above, n. 22), p. 365.

²⁴⁰ Ibid., p. 366.

²⁴¹ Paul Hunt and Gillian MacNaughton, ‘Impact Assessments, Poverty and Human Rights: A Case Study Using the Right to the Highest Attainable Standard of Health’, World Health Organization, in: Health and Human Rights Working Paper Series, No 6, p. 15.

²⁴² Walker, *The Future of Human Rights Impact Assessments of Trade Agreements* (above, n. 28), p. 43.

²⁴³ Ibid., p. 48.

²⁴⁴ Ibid., p. 191.

²⁴⁵ Sarfaty, *Values in Translation* (above, n. 13), p. 127.

zation. While sustainability impact assessments may be more comprehensive insofar as environmental impacts are concerned irrespective of the human rights relevance, HRIA can be more comprehensive in other ways. For example, a trade SIA would often leave out political and cultural impacts:²⁴⁶ In the EU-Mercosur Trade-SIA, impacts were assessed on the basis of “equity”; however, equity was only analyzed in terms of income and gender. Human rights impact assessments would require the consideration of other aspects, including non-discrimination in relation to indigenous peoples, persons with disabilities, or migrant workers.²⁴⁷

Another difference – even though this might not be welcomed by everybody – is what one could call the discursive function of an explicit human rights framework for impact assessments (*discourse argument*). Especially in international law, human rights can serve as the contemporary “lingua franca”,²⁴⁸ a normative language which allows communicating across borders and is as such necessary (and unlikely to diminish soon).²⁴⁹ Such a discursive element is particularly important for hard cases, namely those situations where it is difficult to evaluate certain impacts from a human rights perspective. In these cases, a diligent analysis would require to consider not only human rights treaties and case law, but also other sources eminent in international human rights law, such as the General Comments or Concluding Observations of the UN Human Rights Committees or the “teachings of the most highly qualified publicists of the various nations” (Article 38 ICJ Statute). It thus enables a discourse between different parts of the “human rights community”.

Another function concerns the generation of information and knowledge (the *knowledge argument*). As such, an explicit human rights framework would open the impact assessment to a broader range of knowledge sources. It might require considering data and information provided by human rights organizations or to involve human rights experts. It might also imply that recommendations, concluding observations or other soft-law norms issued by UN human rights bodies must be taken into account. At the same time, many human rights principles – such as participation, transparency, and accountability – are also regarded as having an efficiency-enhancing effect: they will enable institutions to take better (informed) decisions and can thus enhance the effectiveness of projects and policies alike.²⁵⁰ This might also reassure those skeptics in international financial institutions who emphasize that they are not human rights experts and have no human rights mandate. It is exactly for that reason that information and knowledge provided by external actors – UN human rights organizations or human rights “experts” – should also be considered.

²⁴⁶ Walker, *The Future of Human Rights Impact Assessments of Trade Agreements* (above, n. 28), p. 188.

²⁴⁷ MacNauthon and Hunt, ‘A human rights-based approach to social impact assessment’ (above, n. 22), p. 367; Walker, *The Future of Human Rights Impact Assessments of Trade Agreements* (above, n. 28), 188 et seq.

²⁴⁸ Cited in: Joseph Raz, ‘Human Rights Without Foundations’, in: Samantha Besson and John Tasioulas (eds.), *The Philosophy of International Law*, p. 321.

²⁴⁹ Brownsword and Goodwin, *Law and the Technologies of the Twenty-First Century* (above, n. 56), p. 226.

²⁵⁰ MacNauthon and Hunt, ‘A human rights-based approach to social impact assessment’ (above, n. 22), p. 367.

2.4.3.2 Potential Trade-Offs of an Explicit Human Rights Framework

The critics of human rights analysis can be divided into those who regard it as *inefficient* and those who regard it as *counterproductive*. Here, only the latter will be addressed. The added value of human rights and the idea that more “human rights”-based approaches are better to protect humans’ interests have been challenged.²⁵¹ Koskenniemi points out that there is the risk of human rights as ideology: Empowering human rights preferences in policy design can mean to set the wrong focus, especially as human rights experts are often not experts in technology or economics and might therefore not adequately understand the consequences of different options. Therefore, “reliance on rights translates into dogmatic recourse to past institutional experience, ignoring the particularities of the situation where one is acting”.²⁵²

Mainstreaming human rights through the institutionalization of human rights impact assessments can also lead to *institutional* as opposed to *individual* empowerment. One concern is that economic institutions such as the World Bank could capture and shape the human rights agenda. A similar effect has been observed in international environmental law: external environmentalists criticized that the World Bank, in implementing its environmental policies, “captured” and reframed the environmental agenda of social movements.²⁵³ Institutions may not only influence the human rights agenda but may also shape human rights discourse concerning individual initiatives. In particular if IAs are based on complex economic modelling, it is difficult for affected or interested individuals to understand and challenge the assumptions and conclusions. This makes it easy to end debates about the expected effect by referring to the expert-based in-depth impact analysis conducted in advance. Precisely for this reason, HRIAs can not only legitimize acts of public authority but also in themselves be an exercise of authority that requires legitimization.

In addition, the supporters of an explicit human rights framework tend to over-emphasize the alleged objectivity and specificity of standards. For example, the use of disaggregated data under the non-discrimination standard is not uncontroversial as it might conflict with constitutional privacy rights insofar as sensitive data are concerned.²⁵⁴ It can also create new identities or strengthen perceived differences between different groups. Other critics fear that human rights language will dominate other valuable normative approaches such as ethics.²⁵⁵

²⁵¹ David Kennedy, *The Dark Sides of Virtue* (Princeton, NJ: Princeton Univ. Press, 2005); Koskenniemi, ‘Human Rights Mainstreaming as a Strategy for Institutional Power’ (above, n. 202).

²⁵² Ibid., p. 55.

²⁵³ In this sense: Sarfaty, *Values in Translation* (above, n. 13), p. 34; Balakrishnan Rajagopal, *International Law from Below* (Cambridge, U.K, New York: Cambridge University Press, 2003), p. 126.

²⁵⁴ Morgane Donse and et. al., ‘Disaggregated Data and Human Rights: Law, Policy and Practice’, University of Essex Human Rights Centre Clinic, p. 10; see already footnote 234.

²⁵⁵ Brownsword and Goodwin, *Law and the Technologies of the Twenty-First Century* (above, n. 56), p. 227; concerned but still optimistic on the interaction between human rights and medical ethics: Thomas Faunce, ‘Will international human rights subsume medical ethics?: Intersections in the UNESCO Universal Bioethics Declaration’, *Journal of Medical Ethics*, 31 (2005), pp. 173–178; However, ethic or moral argument and human rights do not necessarily compete, but can generally mutually reinforce each other: Thomas W. Pogge, *World Poverty and Human Rights* (Cambridge: Polity Press, 2008), 2nd ed demonstrates that it is possible to combine moral argument and human rights.

Human rights “mainstreaming” in public institutions can end up in a “repackaging of existing practice”, as some World Bank employees expressed their concerns.²⁵⁶ Critics like Koskenniemi, therefore, emphasize the value of human rights advocacy and expertise as watchdogs outside administrative procedures as opposed to institutional mainstreaming.²⁵⁷ However, I will argue that the institutionalization of HRIAs through public law can respond to many of these potential downsides, in particular if legal rules and principles governing these HRIAs contain sufficient safeguards against regulatory capture or institutional empowerment, such as transparency and participation rules or review mechanisms that enable affected individuals and NGOs to hold decision-makers accountable.

2.5 Interim Conclusion and Outlook

This chapter has defined the term “impact assessment”, examined different IA categories and briefly outlined the main structure of IAs as indicated by EIA “background norms”. It has also analyzed the role of human rights in impact assessments. Before this background, it was pointed out that this thesis focuses on HRIAs dealing with indirect ex-ante and ex-post effects of initiatives conducted by public authorities, in particular the European Commission. This means that the focus is on HRIAs that assess the human rights impacts of economic or other policies that are not or not primarily intended to improve the human rights situation. Rather, it mainly concerns economic projects and policies with unintended human rights consequences. The next chapter sets forth the understanding and concept of public law which forms the basis of this thesis.

²⁵⁶ Interviews found in Sarfaty, *Values in Translation* (above, n. 13), p. 127.

²⁵⁷ Koskenniemi, ‘Human Rights Mainstreaming as a Strategy for Institutional Power’ (above, n. 202), p. 55.

3 CHAPTER 3: HUMAN RIGHTS IMPACT ASSESSMENTS AND PUBLIC LAW

3.1 Introduction: A Public Law Approach to the Institutionalization of Human Rights Impact Assessments

The previous chapter has outlined the basic structure of EIA laws as background norms and identified the emerging contours of HRIAs. This chapter will focus on the institutionalization of HRIA, understood as the structured application of HRIA as part of the decision-making process of public authorities. As stated in the introduction, I will analyze the institutionalization through the lenses of public law. This chapter will clarify the understanding of law upon which this thesis is based. It shall also explain how HRIAs and norms governing them – the theme of this thesis – relate to broader discourses about human rights, law, and legitimacy in an increasingly complex and interconnected world.

One important function of public law is to translate legitimacy claims into legality claims. This is relevant for mainly two reasons: First, public authorities are increasingly faced with factual uncertainty, and consequently command-and-control regulation or in Luhmann's terms "conditional programs" often do not work anymore, and the exercise of public authority is confronted with legitimacy deficits. Consequently, the concept and instruments of public law have changed over the past decades, and public law is increasingly understood in its guiding function ("*Steuerungsfunktion*"). For example, law determines how to generate knowledge, and contains principles that guide decision-making under uncertainty. It is before this background that the use of impact assessments makes sense, namely as a tool to gather the information that allows decision-makers to make informed decisions under uncertainty.

Legitimacy deficits are exacerbated due to the growing interconnectedness of international relations. Acts and decisions of a – domestic or international - authority can have far-reaching impacts on people who were not involved in the making of that decision. This chapter will briefly illustrate the causes a bit further, and ask how public law can respond to these legitimacy deficits. I will argue that the institutionalization of HRIAs can increase the legitimacy of acts of public authority as this realizes human rights protection through organization and procedure (see section 3.2.1.5). It is before this background that the following chapters will analyze if and to what extent the legal institutionalization of HRIAs can legitimize the exercise of public authority and translate calls for legitimacy into concepts of legality.

While the first part of this chapter focuses on the "publicness" of public law, the second part will shift the focus on the "lawness" of public law. Unlike in EIA-law, the obligation to assess human rights impacts irrespective of where they occur is (generally) not explicitly established under an international treaty or domestic law. Rather, what I describe as HRIA law consists of different rules and principles: Some are found in "traditional" sources of constitutional, administrative and international law, but others are norms where the legal nature is less clear, such as provisions in interinstitutional agreements, internal guidelines or handbooks. Therefore, the second part of this chapter will set the doctrinal framework to later address the question of why the institutionalization of HRIAs is not merely a scientific but increasingly also a legal issue.

3.2 The Role of *Public Law* in Impact Assessments

The relationship between public law and impact assessments is multifaceted. First, law can be the *object* of an IA. HRIAs are instruments to assess impacts on human rights. Consequently, human rights law defines the normative framework against which the impacts of an initiative must be assessed. The second perspective is more relevant to the present thesis about the institutionalization of HRIAs, namely how law regulates the obligation to assess human rights impacts. I argue that these questions – *if* there is an obligation to assess human rights impacts, *how* to conduct such impact assessments, and how to make sure that the findings are *adequately considered* in the decision-making process – are increasingly structured by public law.

At first sight, it seems that the role of (substantive) law in IAs basically consists in the fact that IA-guidelines cite long lists of relevant laws and statutes to be considered during the assessment; however, this would be an over-simplistic description of IA-law.²⁵⁸ Law can regulate if and how to conduct impact assessments. At the same time, the fact that many legislative and non-legislative decisions, implementing acts, project approvals, etc. increasingly require impact assessments is part of a procedural legalization: Legal norms increasingly operate in a “broader normative landscape to shape policy outcomes in both political and scientific processes”.²⁵⁹

This is largely a response to the challenges of decision-making under uncertainty. As the consequences of technological or regulatory innovation are usually not (yet) clear, it is often impossible to enact specific substantive laws. Rather, the factual uncertainties force regulators to shift from conditional to final programs, and from specific rules to general principles. While (also) a legal tool, impact assessments are interdisciplinary in nature and combine law, science, and policy-making.²⁶⁰ In particular ex-ante impact assessments are mainly used or legally required for decision-making under uncertainty. They shall make a prediction about expected consequences. From a legal perspective, decision-making under uncertainty requires a reflexive legal program in response to factual and normative uncertainty.²⁶¹ The necessity to make decisions under uncertainty and to respond to unanticipated risks reduces the normative quality of law in the sense that judgments of legality are increasingly based on the (empirical) consequences. However, this normative decline is compensated by an increasing guiding function of law (“*Steuerungswirkung*”)²⁶² beyond command-and-control regulation: law aims at increasing normatively desirable and reducing normatively undesirable results²⁶³ without necessarily prescribing or prohibiting certain types of action. Law grants leeway to decision-makers to rely on additional factors, such as knowledge-generation²⁶⁴, which ideally enables efficient problem-solving within a normative framework. This may include the increasing reference to legal principles and objectives that guide decision-makers in the sense that they must optimize the realization thereof. It im-

²⁵⁸ Holder, *Environmental Assessment* (above, n. 27), p. 86.

²⁵⁹ Craik, *The International Law of Environmental Impact Assessment* (above, n. 59), p. 273.

²⁶⁰ Holder, *Environmental Assessment* (above, n. 27), 80 ff.

²⁶¹ Similar: Christoph Lau and Stefan Bösch, ‘Möglichkeiten und Grenzen der Wissenschaftsfolgenabschätzung’, in: Ulrich Beck and Wolfgang Bonß (eds.), *Die Modernisierung der Moderne*, p. 124.

²⁶² Petra Hiller, ‘Probleme prozeduraler Risikoregulierung’, in: Alfons Bora (ed.), *Rechtliches Risikomanagement*, pp. 29–40, p. 33; Wolfgang Hoffmann-Riem, ‘Regulierungswissen in der Regulierung’, in: Alfons Bora, Anna Henkel, and Carsten Reinhardt (eds.), *Wissensregulierung und Regulierungswissen*, pp. 135–156.

²⁶³ Ibid.

²⁶⁴ Ibid.

plies a shift from substantive rules and specific standards to other more flexible forms of regulation, including IA-based decision-making.²⁶⁵ In particular policy IAs address not only the regulation of risk, but also the risk of regulation,²⁶⁶ such as the potential social harm that trade regulation can cause. The institutionalization of IAs as a part of the decision-making of public authorities, therefore, requires decision-makers not to implement command-and-control rules, but to gather information and knowledge, analyze impacts and evaluate these in the light of human rights or other principles. In doing so, the institutionalization of IAs, and the emerging set of rules and principles determining how public authorities in general and the European Commission in particular adopt decisions can be conceptualized as “meta-regulation”. This refers to a type of regulation that has no direct external effect but rather “stands behind” rulemaking and regulates how public decisions are made. In this sense, meta-regulation has been defined as “any set of institutions and processes that embed regulatory review mechanisms on a systematic basis into the every-day routines of governmental policymaking”.²⁶⁷

3.2.1 A Public Law Approach to the Institutionalization of HRIAs

I use public law as the generic term comprising elements of constitutional and administrative law in its procedural and substantive dimensions.²⁶⁸ The rules and principles determining “if” and “how” public authorities must conduct IAs, and what legal mechanisms ensure that the results of an IA are adequately taken into account, are public in nature: they regulate at a national and international sphere what has for long been recognized as part of domestic public law.²⁶⁹

Public law *constitutes* the right of authorities to make binding decisions (e.g., conclude a trade agreement) and at the same time *restricts* the exercise of (public) authority, for example through

²⁶⁵ Craik, *The International Law of Environmental Impact Assessment* (above, n. 59), p. 232.

²⁶⁶ Corinna Sicko, ‘Gesetzesfolgenabschätzung und -evaluation: Ein Beitrag zum besseren Umgang mit dem Risikofaktor Recht’, in: Jörg Scharrer, Marcel Dalibor, Katja Fröhlich et al. (eds.), *Risiko im Recht - Recht im Risiko*, Alfred G. Debus, 199 ff, 200 f.

²⁶⁷ Bronwen Morgan, *Social citizenship in the shadow of competition* (Aldershot: Ashgate, 2003), p. 2; Anne C. M. Meuwese, *Impact Assessment in EU Lawmaking* (Alphen aan den Rijn [etc.]: Wolters Kluwer Law & Business, 2008), 13 ff. Morgan’s critical analysis in 2003 focused on meta-regulation in Australia which basically required the “application of a public benefit test to justify the maintenance of any public policy that prima facie restricts competition”. It is against this background that Morgan analysis the relationship – or tension – between social citizenship and meta-regulation. Morgan, *Social citizenship in the shadow of competition* (above, n. 267), pp. 2–3. This tension clearly exists where the only goal of an RIA regime is deregulation. Meta-regulation in the EU, as established under the IA regime, however, is much broader and based on the sustainability trias. While deregulation (“regulatory fitness”) is one objective, IAs explicitly and extensively also pursue environmental, social and human rights objectives.

²⁶⁸ The link between legitimacy and law, as well as between public law and other concepts will be described in more detail below.

²⁶⁹ The question whether or not these norms are law in the stricter sense should not be overrated. A denial of the legal nature and relevance of internal preparatory procedures has also prevailed vis-à-vis domestic administrative decision-making, where “domestic administrative practice have [sic] acknowledged a number of forms of preparation, of internal rule-making, procedures which have a strong impact on the legal processes, without being (unanimously) regarded as being legal acts or legal norms in the stricter sense”: Karl-Heinz Ladeur, ‘The Evolution of General Administrative Law and the Emergence of Postmodern Administrative Law’ (above, n. 64), p. 10. What matters is that practices and rules, irrespective of their “bindingness”, have a steering effect that determines the process of decision-making and, eventually, the final decision.

human rights obligations, in order to protect individual freedom and self-determination.²⁷⁰ A public law approach is oriented towards the best possible realization of the fundamental principles of the (national or international) legal order.²⁷¹ Reconstructing a legal framework for public authority means to channel discourses on legitimacy into meaningful discourses on legality.²⁷² In this sense, rules and principles guiding impact assessments introduce arguments about the potential impacts of an initiative into decision-making procedures, and the findings thereof have to be taken into consideration. While some obligations are extremely vague – such as the obligation to take the findings of an IA into consideration – they constitute legal principles. The violation of such principles could be subject to judicial review: this is now broadly accepted under domestic EIA regimes,²⁷³ and, as will be discussed below, can also be the case for HRIAs.

One explanation for why many acts of public authorities beyond the nation-state raise legitimacy concerns in spite of being legal is that there are no appropriate legal standards to constrain the exercise of public authority.²⁷⁴ Even a clear commitment to respect human rights would therefore not necessarily be efficient if no clear human rights standards exist to draw boundaries. Impact assessment law, as will be explained, contains procedural rules and substantive principles guiding decision-making. HRIAs can thus *operationalize* the implementation of general human rights obligations, in particular in cases where differentiated legal norms that allow adequate judgments of legality are not available, but where nevertheless legitimacy concerns exist. Mandatory HRIAs would, in particular, force decision-makers to analyze and consider the human rights impacts of their decisions. HRIA law could enable the public to participate in the assessment and decision-making procedure, and it would sanction non-compliance with HRIA requirements. From a public law perspective, such an institutionalization of HRIAs could be considered a form of human rights protection through organization and procedure (see section 3.2.1.5): Failure to comply with essential HRIA requirements could result in a judgment of illegality – as is often the case for failure to comply with domestic EIA law.

Before these arguments can be further developed, it is useful to briefly clarify how the term “legitimacy” is used here (see section 3.2.1.1), what relevant causes for legitimacy in post-national settings exist (see section 3.2.1.2), and how this relates to general theoretical discourses about public law and legitimacy deficits in a globalized world (see section 3.2.1.4).

3.2.1.1 Legitimacy, Legality and the Added Value of HRIAs

For some authors, legality is a constituent element of legitimacy, so that the legitimacy of international law should be exclusively assessed through the perspective of legality.²⁷⁵ Others use legitimacy as a corrective to justify acts that are formally illegal but regarded as morally neces-

²⁷⁰ Armin von Bogdandy, Philipp Dann, and Matthias Goldmann, ‘Developing the Publicness of Public International Law: Towards a Legal Framework for Global Governance Activities’, *German Law Journal*, 9 (2008), pp. 1375–1400, p. 1380.

²⁷¹ Bryde, ‘Konstitutionalisierung des Völkerrechts und Internationalisierung des Verfassungsrechts’ (above, n. 203), p. 67

²⁷² Bogdandy, Dann and Goldmann, ‘Developing the Publicness of Public International Law: Towards a Legal Framework for Global Governance Activities’ (above, n. 270), p. 1380.

²⁷³ See section 9.2.

²⁷⁴ *Ibid.*, p. 1389.

²⁷⁵ For further reference: *Ibid.*

sary, as recently advocated by defenders of the NATO intervention in Serbia and Kosovo.²⁷⁶ The concept of legitimacy here shall not be used in a way to correct *judgments of illegality* like in the Kosovo case, but rather to correct (or complement) *judgments of legality*, namely acts that appear to be legal from a traditional public law perspective but that raise legitimacy concerns, as described in the following section. This second constellation is relevant to HRIA law.

Further, a common distinction is drawn between social and normative approaches to legitimacy. The sociological concept focuses on actual recognition and acceptance of authority.²⁷⁷ Normative approaches, on the other hand, focus not on the (factual) *acceptance* but on the (normative) *acceptability*²⁷⁸ of authority, depending on whether a claim of authority is “well-founded”.²⁷⁹ Normative legitimacy is understood broadly as the justification of authority. While the legality²⁸⁰ of an act is often regarded as a prerequisite for legitimacy, this is not the only standard against which legitimacy is measured.

Often due to a lack of clear and determinate legal norms, recourse is made to the concept of legitimacy to assess acts of public authority, resulting in the evaluation that an act may be *legal but illegitimate*, for example because no appropriate standards exist for new phenomena or because the deformed and fragmented world order impedes to find a consensus on applicable legal norms.²⁸¹ While, for example, human rights are fundamental constitutional principles of EU external relations law²⁸², what these principles actually mean in the extraterritorial context is still largely unclear. It is therefore important to fill this normative gap and identify procedural or substantive norms that allow responding to new challenges in a global world order. One of these normative responses could be the use of legally embedded human rights impact assessments,

²⁷⁶ Bruno Simma, ‘NATO, the UN, and the Use of Force: Legal Aspects’, 10 (1999), pp. 1–22, p. 22.

²⁷⁷ Daniel Bodandsky, ‘The Legitimacy of International Governance: A Coming Challenge for International Environmental Law?’, 93 (1999), pp. 596–624, p. 601; Luhmann defines legitimacy as “*den faktische[n] Glauben an die Richtigkeit und Werthhaftigkeit bestimmten Sollens*”: Niklas Luhmann, *Legitimation durch Verfahren* (Frankfurt am Main: suhrkamp, 1993), 3. Aufl., p. 239.

²⁷⁸ Matthias Goldmann, *Internationale öffentliche Gewalt* (Berlin, Heidelberg: Springer Berlin Heidelberg, 2015), p. 129.

²⁷⁹ Bodandsky, ‘The Legitimacy of International Governance: A Coming Challenge for International Environmental Law?’ (above, n. 277), p. 601; Niels Petersen, *Demokratie als teleologisches Prinzip* (Heidelberg: Springer, 2009), p. 7. The sociological definition of legitimacy has the great advantage of providing a relatively clear-cut definition of a complex concept. However, there are practical and normative objections: First, it is difficult to measure the acceptance of systems: elections – unless those for a constitutional assembly – generally do not express opinions about a system, but about the representatives within a pre-defined political order, and the lack of opposition especially in autocratic regimes can rather be a result of fear than of a free will. From a normative perspective, factual acceptance without consideration of the reason for acceptance is normatively void: The popular acceptance of national-socialism in Germany did not make the regime normatively legitimate. *Ibid.*, p. 8; Bodandsky, ‘The Legitimacy of International Governance: A Coming Challenge for International Environmental Law?’ (above, n. 277), p. 602.

²⁸⁰ Some authors would still distinguish between normative and legal legitimacy, equating the latter with legality. With reference to Kelsen: Yves Bonzon, *Public Participation and Legitimacy in the WTO* (Cambridge: Cambridge University Press, 2014), p. 43.

²⁸¹ Similar: Bogdandy, Dann and Goldmann, ‘Developing the Publicness of Public International Law: Towards a Legal Framework for Global Governance Activities’ (above, n. 270), p. 1389; Martti Koskeniemi, ‘Global Governance and Public International Law’, *Kritische Justiz*, 37 (2004), pp. 241–254, p. 243; Eyal Benvenisti and George Downs, ‘The Empire’s New Clothes: Political Economy and the Fragmentation of International Law’, *Stanford Law Review*, 60 (2007), pp. 595–631.

²⁸² Explicitly, for example, in Articles 2, 3 (5) and 21 TEU. More on the role of fundamental and human rights in EU law see section 4.7.4.

which I suggest can protect human rights based on the concept of human rights protection through organization and procedure.²⁸³

What, then, does “justification of authority” in the sense of normative legitimacy theories mean? This is subject to complex scholarly debates, not least because it not only touches on issues of *law* but of *justice* in general. However, for the purpose of this thesis, simply two broad distinctions between input-oriented vs. output-oriented approaches should be made.²⁸⁴ Even though often presented as juxtapositions, they are not necessarily incompatible but are sometimes even mutually reinforcing.²⁸⁵ Institutionalized HRIA can, theoretically, increase both input and output legitimacy.

Input-oriented approaches²⁸⁶ emphasize the importance of institutions, such as democratic involvement in decision-making, which determine how a decision is made. Governing processes must be responsive to the preferences of those who are governed.²⁸⁷ Elections, participation, and principles such as transparency are some of the factors that can increase input legitimacy. Impact assessments can contribute to input-legitimacy, especially if one regards them as a mainly procedural instrument to further broad objectives in situations where precise substantive standards are missing. The dialogue between decision-makers, other interested institutions, and stakeholders as well as those affected by a decision can turn impact assessments into an instrument to increase input-legitimacy.²⁸⁸

The starting points for output-oriented approaches are the consequences of decisions or the effects produced by an institutional design. These approaches have gained increasing importance in debates about the democratic deficit of the European Union.²⁸⁹ Output-oriented approaches can be used for the evaluation of legal and policy instruments if one compares their output with their self-proclaimed objectives.²⁹⁰ Consequently, impact assessments can contribute to increasing output-legitimacy if they actually promote better decisions. What “better” means depends on the self-proclaimed objectives of the respective IA-regimes: It can mean that decisions are more efficient (regulatory IAs), more environmental-friendly (environmental IAs) or more compliant with human rights (human rights IAs). In this sense, IAs can be seen as an analytical problem-solving tool. Generally, policy-makers are committed to increase the positive and avoid, minimize, or mitigate the negative impacts of their decisions. Whether or not IAs contribute to achieving that goal determines whether they can increase the output-legitimacy of the final act. How IAs can, at least on a conceptual level, increase compliance and efficiently influence decision-making will be discussed below.

²⁸³ See section 3.2.1.5.

²⁸⁴ Fritz Scharpf, ‘Problem-Solving Effectiveness and Democratic Accountability in the EU’, in: Political Science Series 107, 2006.

²⁸⁵ Goldmann, *Internationale öffentliche Gewalt* (above, n. 278), p. 129.

²⁸⁶ Input legitimacy is sometimes referred to as procedural legitimacy: Annica Kronsell and Karin Bäckstrand, ‘Rationalities and form of governance’, in: Karin Bäckstrand (ed.), *Environmental politics and deliberative democracy*, pp. 28–46, p. 39; Brownsword and Goodwin, *Law and the Technologies of the Twenty-First Century* (above, n. 56), p. 179.

²⁸⁷ Fritz Scharpf, ‘Problem-Solving Effectiveness and Democratic Accountability in the EU’ (above, n. 284), p. 2.

²⁸⁸ Craik, ‘Deliberation and Legitimacy in Transnational Governance: The Case of Environmental Impact Assessments’ (above, n. 177).

²⁸⁹ Fritz Scharpf, ‘Problem-Solving Effectiveness and Democratic Accountability in the EU’ (above, n. 284).

²⁹⁰ Goldmann, *Internationale öffentliche Gewalt* (above, n. 278), p. 131.

3.2.1.2 Causes for Legitimacy Deficits: Can HRIAs legitimize the exercise of authority?

In a globalized world, decisions taken in one state can have far-reaching transnational or global impacts and thus affect the lives of “distant strangers”. This section addresses the question of whether and why there are legitimacy deficits in particular in the context of international rule-making, and why there is a need for such a public law approach beyond traditional public international law. A central reason is that state consent alone is, in an interconnected world, often insufficient to render acts of public authority legitimate: activities as those described in the introduction with trans- and international effects limit individual and collective autonomy and challenge existing concepts of legitimacy under international law based on state consent.²⁹¹ If a state gave its consent to an agreement, for example through ratification, the effects produced by that treaty are generally to be accepted. However, the potential of state consent as the ultimate source of legitimacy increasingly lost its persuasiveness. I am not only referring to the democratic dilemma that international law generally accepts state consent irrespective of a state’s internal democratic structure, and that consent given by an authoritarian regime may also bind future democratic regimes.²⁹² Even in the case of perfectly democratic states, consent is often only a weak source of legitimacy. Three causes for these deficits shall be briefly discussed²⁹³ in order to show the need for a legal institutionalization of HRIAs.

Policies can have an impact on non-consenting states and their people. This can be illustrated by reference to the former negotiations about the Transatlantic Trade and Investment Partnership Agreement (“TTIP”) between the European Union and the United States. A study conducted for the Bertelsmann Foundation found that “[t]he main losers from eliminating tariffs are the developing countries. They experience dramatic losses in market share from intensified competition on the EU or US markets. [...] It is exactly the poorer countries that suffer, some of them to a remarkable extent.”²⁹⁴ The study found that the change in global per capita income in the tariff scenario on African countries is up to minus 7.4 %.²⁹⁵ There is consequently a “lack of the fit between the group that has a right to vote and the group that is affected by the decisions made by, or on behalf of, the first group”.²⁹⁶ This effect would probably not render TTIP illegal –

²⁹¹ Ibid., p. 172.

²⁹² Even though the concept increasingly comes under attack; see for example the debate about odious debt and odious finance: Christiana Ochoa, ‘From Odious Debt to Odious Finance: Avoiding the Externalities of a Functional Odious Debt Doctrine’, *Harvard International Law Journal*, 49 (2008).

²⁹³ For a comprehensive assessment: Goldmann, *Internationale öffentliche Gewalt* (above, n. 278), 129 ff.; see also Benvenisti, ‘Sovereigns as Trustees of Humanity: On the Accountability of States to Foreign Stakeholders’ (above, n. 2), 303 ff.

²⁹⁴ Gabriel Felbermayr, Benedikt Heid, and Sybille Lehwald, ‘Transatlantic Trade and Investment Partnership (TTIP): Who benefits from a free trade deal?’, Bertelsmann Stiftung, p. 28.

²⁹⁵ Ibid.

²⁹⁶ Benvenisti, ‘Sovereigns as Trustees of Humanity: On the Accountability of States to Foreign Stakeholders’ (above, n. 2), p. 304. Other examples include the externalization of the costs of climate change which means that the profits are largely gained in industrialized countries and the effects, such as natural disasters, are most severely felt in other parts of the world, such as small islands in the Pacific: Intergovernmental Panel on Climate Change, ‘Climate Change 2007: Synthesis Report’, p. 12. Therefore, Urbinati and Warren point out that a geography-based constituency definition introduces, right from the start, an arbitrary inclusion/exclusion criterion: Nadia Urbinati and Mark Warren, ‘The Concept of Representation in Contemporary Democratic Theory’, *The Annual Review of Political Science* (2008), pp. 387–412, p. 397. In consequence, proposals to re-define the scope of stakeholders to whom decision-makers are accountable emerged: Seyla Benhabib, ‘Twilight of Sovereignty or the Emergence of Cosmopolitan Norms? Rethinking Citizenship in Volatile Times’, *Citizenship Studies*, 11 (2007), pp. 19–36.

it would, however, raise legitimacy concerns. Similarly, unilateral trade policies (e.g. the EU's Generalized Scheme of Preferences) and domestic²⁹⁷ regulation can have *external* impacts on third countries and people living therein,²⁹⁸ even though those affected by these policies were not involved in the decision-making process. These policies can affect the enjoyment of social and economic rights, even where it would be impossible to identify a clear and attributable infringement of these rights. Against this background, HRIAs can be a tool to consider these impacts on third parties and inform decision-makers accordingly.

Another cause for legitimacy deficits concerns political and economic power imbalances between different states - or international organizations and states - even where states originally gave their consent.²⁹⁹ International agreements regarding trade, investment, or the transfer of official development assistance, are negotiated between formally equal sovereign subjects of international law in spite of major differences in economic, political and military power.³⁰⁰ Claims to consider these power imbalances in the law of treaties were largely ignored by industrial states. The concept of unequal treaties has not found entry into the VCLT, which limits the causes of invalidity to very few circumstances (Art. 46 – 52 VCLT)³⁰¹. Affected states can only claim a violation of the principle of non-intervention, which is universally recognized as custom-

²⁹⁷ The term „domestic“ is used here in a broad sense. It would also include legislative and non-legislative initiatives at the EU level that are not based on the EU's external regulation competences, such as the agricultural policy.

²⁹⁸ Benvenisti, 'Sovereigns as Trustees of Humanity: On the Accountability of States to Foreign Stakeholders' (above, n. 2).

²⁹⁹ The authority and scope of the activities of many international organizations have increased so tremendously that it becomes more difficult to argue that it is still fully covered by the original consent. Armin von Bogdandy and Ingo Venzke, 'In Whose Name?: An Investigation of International Courts' Public Authority and Its Democratic Justification', *The European Journal of International Law*, 23 (2012); Markus Krajewski, 'Democratic Governance as an emerging principle of international economic law', Society of International Economic Law, Working Paper No. 14/08, 2008, p. 3.

³⁰⁰ This refers both to industrialized states and international organizations. The economic power of many international organizations – such as the IMF's or WB's financial leverage – often leaves little options for economically weak states. Ibid., p. 5. This can even take more subtle forms than the oft-discussed conditionalities imposed on economically weak states. For example, Axel Dreher pointed out that international organizations such as the IMF and IBRD de facto support not only recipient states but also incumbent governments which helps them to win re-elections: Axel Dreher and Roland Vaubel, 'Do IMF and IBRD Cause Moral Hazard and Political Business Cycles?: Evidence from Panel Data', *Open Economies Review* (2004) 15: 5 (2004), pp. 5–22. Moreover, informal instruments, such as the use of indicators – for example the World Bank's "Doing-Business report" – can have a real impact on investment decisions and thus incentivize states to implement those reforms that lead to a higher ranking on the index: Michael Riegner, 'Legal Frameworks and General Principles for Indicators in Sovereign Debt Restructuring', *The Yale Journal of International Law Online* (2016), pp. 141–175, p. 154. As these recommendations often reward the lowering of social standards in order to increase international competitiveness, these powerful knowledge instruments can have a direct impact on individual and collective autonomy: Krajewski, 'Democratic Governance as an emerging principle of international economic law' (above, n. 299), p. 4. Moreover, the more power is shifted from local or national levels to international organizations, the more legitimacy chains are prolonged: Ibid., p. 2. As Lori Wallach noted: "Between someone who actually got elected and the DG of the WTO there are so many miles that, in fact, he and his staff are accountable to no one", quoted in: Nye, Joseph, et. al., 'The "Democratic Deficit" in the Global Economy: Enhancing Legitimacy', The Trilateral Commission, 2003, p. 1.

³⁰¹ Dann, *The Law of Development Cooperation* (above, n. 4), p. 249.

ary international law.³⁰² While arguably treaties based on coercion can be considered to be illegal due to a violation of the non-intervention principle,³⁰³ this would not cover economic pressure below the level of coercion. Consequently, an unequal treaty may be legal but still raise legitimacy concerns.

Third, legitimacy deficits even exist where economically strong and democratic states adopt policies, in particular if based on international agreements. The legitimating potential of Parliamentary consent to a statute or an international agreement is limited. This relates to the fact that many domestic democratic processes are “vulnerable to systemic failures that hamper individuals’ ability to have a voice and take an actual part in government”.³⁰⁴ This is particularly the case for international agreements, due to the logic of international treaties: their very idea is to limit state discretion.³⁰⁵ This may negatively affect the state’s ability to comply with its obligation to protect and fulfill human rights. This restriction can generally be justified by outcome-oriented arguments, emphasizing the positive objectives pursued by these treaties. However, from a legitimacy perspective, the risk that democratically accountable governments are limited in their ability to enact measures that might be necessary to protect and fulfill their human rights obligations persists. In addition, globalization also alters the bargaining powers some parts of societies have, and therefore alters the democratic decision-making process. This is also true for industrialized societies. For example, the lowering of barriers for the free movement of goods, services and capital, but not workers, “exacerbates” the “inherent failures” of the democratic process.³⁰⁶ Those who can use the “exit options” of globalization are winners and can gain “more voice in the democratic process of their countries of citizenship”³⁰⁷: Due to the ease of capital as opposed to workers’ migration, the latter do not have the same ability to use political pressure as leverage to gain preferences. In addition, the legitimating potential of Parliamentary consent is also criticized by the often weak position of parliaments. While parliaments can refuse to ratify a treaty negotiated by the government or, in the case of the EU, by the European Commission, this often comes down to a take-it-or-leave-it decision.³⁰⁸ The legal institutionalization of HRIAs can also respond to this cause of legitimacy deficits by forcing the negotiators of an

³⁰² While Article 2 (VII) UN Charter explicitly only refers to the United Nations, the principle is endorsed in non-binding Resolutions such as the Friendly Relations Declaration. While the principle as such is clearly recognized as customary law, the substantive scope and content is far from being clear: *Ibid.*, 250 et seq.

³⁰³ Brun-Otto Bryde, ‘Die Intervention mit wirtschaftlichen Mitteln’, in: Ingo von Münch (ed.), *Staatsrecht - Völkerrecht - Europarecht*, pp. 227–245 ; Dann, *The Law of Development Cooperation* (above, n. 4), 251 et seq.

³⁰⁴ Eyal Benvenisti, ‘Legislating for Humanity: May states compel foreigners to promote global welfare?’, in: Rain Liivoja and Jarna Petman (eds.), *International Law-Making*, pp. 3–16, p. 7. Several reasons exist why the “allocation of global resources among sovereign states strains the ability of individuals to exercise their own sovereignty”: Benvenisti, ‘Sovereigns as Trustees of Humanity: On the Accountability of States to Foreign Stakeholders’ (above, n. 2), p. 303.

³⁰⁵ Krajewski, ‘Democratic Governance as an emerging principle of international economic law’ (above, n. 299), p. 3.

³⁰⁶ Benvenisti, ‘Sovereigns as Trustees of Humanity: On the Accountability of States to Foreign Stakeholders’ (above, n. 2).

³⁰⁷ *Ibid.*, p. 303.

³⁰⁸ Often, Parliaments are only involved at a very late stage and not fully informed about ongoing negotiations. In a parliamentary democracy, where the majority of parliament elects the government, the majority might even be in full support of the government and support the ratification of a negotiation without adequate debate and deliberation. On “fast-track” legislation in general: Benhabib, ‘Twilight of Sovereignty or the Emergence of Cosmopolitan Norms? Rethinking Citizenship in Volatile Times’ (above, n. 296), p. 27.

international agreement to identify, early on, the potential impacts of the planned agreement, and to do so in an (ideally) transparent and participatory manner.

In response to these legitimacy deficits, two broad trends can be identified: there are tendencies towards a re-nationalization, hoping to thus increase collective autonomy. However, nationalization as a strategy to strengthen self-determination may “shield” against the limitation of collective autonomy through legal effects; for example the “sovereign right” to regulate tariffs can be restored by leaving the WTO. Nationalization, however, does not protect against many of the aforementioned *factual* effects and limitations of collective autonomy through acts and activities of influential international organizations, other states or private actors.³⁰⁹ The second trend therefore aims at changing trans- and international decision-making processes. The objective is to build more transparent and accountable structures of decision-making where global impacts are likely and significant.³¹⁰ Obviously, how to achieve these objectives is far from clear. Here again, two broad trends exist, which can be described as *reformist* vs. *revolutionary*.³¹¹ Revolutionists, in particular influenced by structuralist theories, regard the existing structure as fundamentally flawed. Revolutionist writers are extremely critical of attempts to reform existing institutions: as the problems are, for them, rooted in the existing structure of international law and relations, any attempts to make decision-making at the World Bank or in international committees more transparent or accountable would only increase their perceived legitimacy and thus stabilize or even increase their power and influence. Reformists, on the other hand, often recognize the existing flaws and congenital defects, but do not believe it is possible or advisable to turn over the existing legal and institutional structure. Reformist approaches emphasize the power of constructive change and the frequent inability of revolutionary events to permanently change a system for the better.

Supporters of the increasing use of human rights impact assessments are, broadly speaking, reformists. Human rights impact assessments may increase the transparency and accountability of decision-making, and raise awareness of human rights. They reform, but do not revolutionize international and transnational governance. At the same time, the concerns expressed by “revolutionists” must be taken seriously: Even though human rights impact assessments are broadly welcomed by human rights lawyers and activists around the world, the impact of impact assessments must be critically reflected, in particular if they actually increase individual autonomy

³⁰⁹ Already in 1995, Bryde has identified the limits of national democratic institutions to respond to the rising challenges caused by global economic and social processes, and has criticized attempts under German constitutional law to link democratic thinking with a national demos: Brun-Otto Bryde, ‘Kritik der Volks-Demokratie - Demokratie diesseits und jenseits des Nationalstaats’, in: Brun-Otto Bryde (ed.), *Triumph und Krise der Demokratie*, pp. 27–46.

³¹⁰ Similar: Benhabib, ‘Twilight of Sovereignty or the Emergence of Cosmopolitan Norms? Rethinking Citizenship in Volatile Times’ (above, n. 296), p. 29.

³¹¹ This regards in particular the difference between critical legal studies and third world approaches to law on the revolutionary side (e.g.: Sundhya Pahuja, *Decolonising International Law* (Cambridge: Cambridge Univ. Press, 2012), Reprint; Rajagopal, *International Law from Below* (above, n. 253); Koskeniemi, ‘Human Rights Mainstreaming as a Strategy for Institutional Power’ (above, n. 202)) and those scholars who suggest to reform decision-making at the global, EU or national level to better integrate principles such as human rights, rule of law or democracy (e.g. Sanae Fujita, *The World Bank, Asian Development Bank and Human Rights* (Cheltenham: Elgar, 2013); Dann, *The Law of Development Cooperation* (above, n. 4); David Kinley, *Civilising Globalisation* (Cambridge: Cambridge Univ. Press, 2010), Reprinted.; John G. Ruggie, ‘Business and human rights: The evolving international agenda’, *American journal of international law*, 101 (2007), pp. 819–840).

or rather institutional authority.³¹² It is for this reason that public law must *enable* and *limit* the use of institutionalized HRIAs. In other words: HRIAs can legitimize the exercise of public authorities, but can in themselves constitute an act of epistemic authority. In consequence, HRIAs can increase the legitimacy of decision-making if the HRIA-process is guided by public law principles that limit potential abuse of the assessment procedure.

3.2.1.3 Epistemic authority: Are HRIAs themselves in need of legitimization?

The legal institutionalization of HRIAs can increase the legitimacy of acts of public authorities, as illustrated above. However, one function of public law is, as described, to *restrict* the exercise of (public) authority.³¹³ This seems, at first sight, not relevant: HRIAs serve to legitimize the exercise public authority – so why should they be in need of legitimization?

I will argue that such a view would ignore the effects that knowledge-generating instruments like HRIAs have: if conducted by or under the supervision of a public authority, HRIAs can increase that organization's epistemic authority. While HRIA reports are not binding, they can nevertheless influence decision-making through persuasion,³¹⁴ and shift the "argumentative burden of proof" during administrative, legislative or judicial proceedings:³¹⁵ It is more difficult for affected individuals or civil society organization to challenge a decision if the HRIA reports issues a "finding of no significant impacts". IA reports can also shape the cognitive frame that influences which facts decision-makers or the public perceive as important.³¹⁶

Consequently, it is important *how* HRIAs are conducted and *how* the reports are used: They can increase human rights compliance and thus increase legitimacy, but can also be misused. For example, the HRIA-report can over-emphasize the positive and downplay the negative consequences of an initiative and thus shape public discourse. The use of quantitative data and economic modelling – methods encouraged to be used for the sake of objective and scientific analysis – can, as Tribe claims, anesthetize moral feeling.³¹⁷ It can also change human rights debates and be used by agencies to defend their preferred option: It is difficult or impossible for many laypersons to get involved in a discourse about the human rights impacts of a planned trade agreement if, for example, the representative of the European Commission can respond to human rights concerns by referring to the results of a quantitative assessment based on computa-

³¹² Koskeniemi, 'Human Rights Mainstreaming as a Strategy for Institutional Power' (above, n. 202).

³¹³ Bogdandy, Dann and Goldmann, 'Developing the Publicness of Public International Law: Towards a Legal Framework for Global Governance Activities' (above, n. 270), p. 1380.

³¹⁴ The term "Governance by Persuasion" is used by Kerstin Jacobsson, 'Employment Policy in Europe - A New System of European Governance?', in: SCORE Rapportserie, 1999:11.

³¹⁵ This is similar to what could be called "semantic authority": Armin von Bogdandy, Matthias Goldmann, and Ingo Venzke, 'From Public International to International Public Law: Translating World Public Opinion into International Public Authority', in: MPIL Research Paper Series, no. 2016-02, p. 34.

³¹⁶ Dennis Chong and James Druckman, 'Framing Theory', *Annual Review of Political Science*, 10 (2007); Daniel Kahnemann and Amos Tversky, 'The Framing of Decisions and the Psychology of Choice', *Science*, 211 (1981), 453-458.

³¹⁷ Laurence Tribe, 'Policy Science: Analysis or Ideology?', *Philosophy & Public Affairs*, 2 (1972), pp. 66–110, p. 97.

ble general equilibrium models.³¹⁸ In other words, the legal institutionalization of impact assessments has two consequences: it can legitimize the exercise of public authority but is also in need of legitimization. This is why one role of HRIA norms should be to avoid that HRIAs are being “captured” by particular interests.

It is against this background that a public law analysis can approach the relationship between HRIAs and legitimacy deficits: on the one hand, public law principles – such as participation, transparency and accountability of the HRIA process – can help to ensure that decision-makers comply with HRIA norms. At the same time, an analysis from a public law perspective also looks at rules and principles that reduce the risk that HRIAs are misused. For example, public law can prevent the misuse of HRIA by imposing transparency and participation requirements that enable broad-based participation and balanced representation in advisory committees representing business interests and civil society organizations alike.

Against this background, the following section will look at broader theoretical discourses about legal responses to legitimacy deficits, and how law could translate discourses about legitimacy into discourses about legality. I will outline what I mean by a public law approach, and how the analysis in this thesis relates to discourses about public law beyond the nation-state, including international constitutionalism and global administrative law.

3.2.1.4 Legitimacy, HRIAs and a Public Law Approach

In order to ensure in particular input-legitimacy, the HRIA procedure must respect certain principles such as participation, transparency and accountability. At the same time, institutionalized HRIAs are a tool of knowledge generation that can increase the epistemic authority of institutions. The use of institutionalized HRIAs is thus also in need of legitimization. This confirms that the institutionalization of HRIAs should be assessed from a public law perspective. As mentioned earlier, a central function of *public* law is to restrict the exercise of public authority at the national, regional and international level.³¹⁹ Public law rules and principles guiding the conduct of institutionalized HRIAs can fulfill this function. Some of these rules and principles already exist for HRIAs. For example, under EU constitutional law, there is – as I will examine below – an obligation to assess human rights impacts of legislative and non-legislative decisions, irrespective of where these impacts occur. Public law not only determines if, but also *how* to conduct an HRIA in an appropriate manner – i.e. in a manner to increase input-legitimacy and to avoid the misuse of HRIAs as a tool to increase an institution’s epistemic authority. Finally, public law can determine the consequences should decision-makers fail to respect the aforementioned requirements. While these rules and principles are, as far as HRIAs are concerned, only emerging, other types of impact assessments – in particular EIAs – are well-established and deeply regulated instruments of public law. Against this background, the comparison with EIA law makes sense to eval-

³¹⁸ On the use of economic modelling: European Commission, *Handbook for Trade Sustainability Impact Assessment* [2006], p. 18; Zerk, ‘Human Rights Impact Assessment of Trade Agreements’ (above, n. 30), p. 12.

³¹⁹ Bogdandy, Dann and Goldmann, ‘Developing the Publicness of Public International Law: Towards a Legal Framework for Global Governance Activities’ (above, n. 270), p. 1380; Bryde, ‘International Democratic Constitutionalism’ (above, n. 2), p. 106.

uate the role law plays for HRIAs at the moment, and possibilities for a more robust HRIA law de lege ferenda.

Such a “public law” approach, covering procedural, substantive and regulatory issues at the national and international level, has several advantages.

First and foremost, public law not only determines the legality or illegality of an action, but also has a guiding function³²⁰ that goes beyond the binary code legality-illegality. Public law can translate ideals – political, moral, etc. – into legal principles. Even absent specific rules, it allows to guide and evaluate decision-making along with these principles. These are not a form of ultimate authority, though, but can themselves be in turn contested.

Second, a public law perspective allows to structure and systematize rules and principles, and to take recourse to doctrinal concepts developed in domestic administrative and constitutional law where acts of public authorities are concerned. It is one task of public law to develop and apply (doctrinal) concepts and thus brings structure into an often confusing load of norms (heuristic function). This increases transparency as it allows to better understand the rules and principles according to which a public authority operates. It also allows to identify and evaluate underlying patterns and principles (evaluative function). In consequence, one can compare similarities and differences between different legal regimes, for example between well-established domestic and emerging international regimes. In the area of impact assessment law, a challenge all types of impact assessments across jurisdictions must respond to is factual and normative uncertainty. Carving out the requirements and techniques, the patterns and principles applied to identify the likelihood and significance of impacts which “trigger” the duty to conduct an in-depth impact assessment in a particular case demonstrates that this is a crucial point in the process where different regimes grant a different degree of discretion to decision-makers.

Third, public law contributes to the formalization of decision-making: it contains organizational rules and principles³²¹ and thus increases accountability. By formalizing rights and obligations and regulating procedures and competences, law can contribute to holding public authorities to account, for example by limiting their power and protecting the rights of those who are in need. At the same time, however, formalization can also have disadvantages and could even reduce accountability: Formal law can be used to legitimize raw power or otherwise disguise self-interests. In addition, formal rules and principles could also relieve decision-makers from being accountable to those affected by their decisions: States can use, for example, the principle of sovereignty as a defense against liabilities for extraterritorial effects, and individual decision-makers are often shielded from individual responsibility if they simply apply the rules of their organization. This will be addressed in the next chapter.

A broad definition of public law is permissible in this context. The institutionalization of HRIAs is not about the application of law to enact sanctions against individuals where a more precise definition of what counts as binding and enforceable law is necessary. For example, a judge can-

³²⁰ Dann, *The Law of Development Cooperation* (above, n. 4), p. 31; Jürgen Habermas, *Between Facts and Norms* (Cambridge, Mass: MIT Press, 1996), p. 144.

³²¹ Ibid.

not only apply soft law *as such* to decide a case,³²² or convict someone based on general principles of justice. But if law refers – as in the case of HRIA law – to publicly and officially endorsed norms that shall guide the exercise of public authority, then legal scholarship is not limited to the pure application of the law, but also to its consequences.³²³ Law and legal scholarship must also look at the influence law exercises on the decision-making process.³²⁴ As so-called soft law can equally influence decision-making processes, it would be unjustified to disregard it. Similar to other areas of public law, we can observe a shift from dispute settlement to policy-making.³²⁵ IAs are “one part of a larger whole”,³²⁶ namely a complex regime to prevent harm. Impact assessment commitments are based at the intersection between law, politics and scientific expertise,³²⁷ and in order to better understand the role of law it is necessary to also understand this triangular relationship. If public law is understood as the “rules dealing with the process, instruments and organization”³²⁸ of policy and decision-making, this means, for the present analysis, the rules and principles that determine the process, instruments and organization relevant for the assessment and consideration of human rights impacts. However, this does not mean that substantive norms become irrelevant. To the contrary: IA-commitments are included in a particular regime to promote substantive objectives.³²⁹ IAs are seeking public justification by seeking coherence between conflicting principles and interests, and some vagueness is reduced through the identification of principles and interests and the “integration of scientific understandings and experiences”.³³⁰

The focus of this thesis is on the institutionalization of HRIAs at the EU level, so that EU constitutional and administrative law becomes particularly relevant. However, HRIAs in EU law do not only focus on impacts occurring in the EU, but also (or, for IAs accompanying trade agreements mainly) on impacts occurring in third countries. This raises questions under international law as well, so that this thesis also has strong links to discussions on public law in transnational settings. Among the different theories and the vast amount of legal literature in this area, I will, in particular, draw on insights from international constitutionalism and global administrative law (“GAL”). In spite of the differences between GAL and constitutionalism,³³¹ there are large overlaps, and at least for the present thesis, these approaches do not conflict but complement each other. The public law approach adopted uses (domestic and international) constitutional law concepts – in particular for part III of this book – as well as (domestic and international) administrative law concepts – in particular for part IV of this book. Reference to constitutionalism and GAL primarily serves to outline the theoretical foundations on which this work is based, and to justify the use of the dogmatic concepts for this analysis. It is not the goal to process these theories and develop them further on a fundamental level.

³²² Critical insofar: Jan Klabbbers, ‘The Redundancy of Soft Law’, *Nordic Journal of International Law*, 65 (1996), pp. 167–182, 172 ff.

³²³ Hoffmann-Riem, ‘Regulierungswissen in der Regulierung’ (above, n. 262).

³²⁴ Ibid.; Hans-Heinrich Trute, ‘Methodik der Herstellung und Darstellung verwaltungsrechtlicher Entscheidungen’, in: Eberhard Schmidt-Aßmann (ed.), *Methoden der Verwaltungsrechtswissenschaft*, p. 293.

³²⁵ Craik, *The International Law of Environmental Impact Assessment* (above, n. 59), p. 272.

³²⁶ Ibid., p. 273.

³²⁷ Ibid., p. 225.

³²⁸ Dann, *The Law of Development Cooperation* (above, n. 4), p. 1.

³²⁹ Craik, *The International Law of Environmental Impact Assessment* (above, n. 59), p. 175.

³³⁰ Ibid., p. 227.

³³¹ Jeffrey L. Dunoff and Joel P. Trachtman, ‘A Functional Approach to International Constitutionalization’, in: Jeffrey L. Dunoff and Joel P. Trachtman (eds.), *Ruling the world?*, pp. 3–35, p. 33.

There are several approaches to global constitutionalism, often based on different schools of thought.³³² In essence, however, international constitutionalism is concerned with international public law in a globalized and interconnected world. Constitutionalism basically deals with limiting the power of the legislator or – at the international level – of states and international organizations, and this takes place through procedural and overriding substantive legal principles, in particular human rights.³³³ Against this background, traditional international law appears as “primitive and modest”,³³⁴ and as unable to respond to the legitimacy deficits identified above. Constitutionalist approaches also respond to another perceived problem of traditional public international law, namely the assumption of sovereign equality, which means that – irrespective of underlying power relations – state consent alone renders a decision legal and legitimate. Based on the assumption of equal sovereignty, international law largely relied on private law paradigms. In an international legal system that recognizes the protection of the interests of mankind as essential, this paradigm should be replaced by a public law perspective on international law.³³⁵ The more “comprehensive the regulatory reach”³³⁶ of national and international regulation and legislation, the more the question of legitimacy arises, and the more comprehensive public law (or constitutional) principles must be applied. Consequently, by way of example, the conclusion of modern international agreements raises legitimacy concerns and requires the application of public law principles. The EU and its partner countries recently began to negotiate “deep and comprehensive free trade agreements” or “DCFTAs”. These agreements go beyond traditional WTO based trade agreements and deeply touch upon sanitary measures, technical trade barriers, public procurement, investment provisions, and competition law.³³⁷ The consequence for legal analysis would be to shift the perspective from “public international law” to “international public law”.³³⁸

³³² By way of example: Bryde, ‘International Democratic Constitutionalism’ (above, n. 2); Jan Klabbers, Anne Peters, and Geir Ulfstein, *The Constitutionalization of International Law* (Oxford: OUP Oxford, 2009); Vicki C. Jackson, *Constitutional Engagement in a Transnational Era* (Oxford: Oxford Univ. Press, 2010). Some scholars have tried to „classify“ these approaches. For example: Christine Schwöbel, ‘Situating the Debate on Global Constitutionalism’, *I•CON*, 8 (2010), pp. 611–635 suggests four categories, namely social, institutional, normative, and analogical constitutionalism. For a different approach: Dunoff and Trachtman, ‘A Functional Approach to International Constitutionalization’ (above, n. 331).

³³³ Bryde, ‘Konstitutionalisierung des Völkerrechts und Internationalisierung des Verfassungsrechts’ (above, n. 203), p. 62; Bryde, ‘International Democratic Constitutionalism’ (above, n. 2), p. 106: “[...] The contrasting model of a constitutionalist system of international law, on the other hand, is not horizontal but verticalised. It recognizes a source of legitimacy that is higher than the individual states, a hierarchy of norms in which ordinary legal rules have to be reviewed against constitutional principles, and it employs constitutionalist methods of interpretation.”

³³⁴ *Ibid.*, p. 104. While critics might argue that international constitutionalism is a value-loaded term and overstates the influence of emerging global norms, Bryde points out that this critique is often based on a flawed comparison in the sense that critics compare a realist picture of weak global constitutional norms with an idealized picture of strong domestic constitutions: *Ibid.*, pp. 104–105.

³³⁵ *Ibid.*, p. 109.

³³⁶ *Ibid.*, p. 115.

³³⁷ ECORYS, ‘Trade Sustainability Impact Assessment in support of negotiations of a DCFTA between the EU and Egypt: Final Report’ (above, n. 19), p. 86.

³³⁸ Armin von Bogdandy, Matthias Goldmann, and Ingo Venzke, ‘From Public International to International Public Law: Translating World Public Opinion into International Public Authority’, Max Planck Institute for Comparative Public Law & International Law (MPIL), Research Paper No. 2016-02, 25 February 2016. The authors have – to a certain extent in response to both constitutional and global administrative law approaches – developed the theory of international public authority, which provides a legal concept that explains how the pursuit of public interests by international actors is enabled and disciplined. It is not

This plays an important role in particular for part III of this book, where I argue that there is an obligation of states and international organizations to assess the human rights impacts of their decisions, irrespective of where they occur (which I will subsume under a principle of affectedness). This, however, requires to re-think concepts of sovereignty as understood under traditional public international law. First, why should state A have an *obligation* to consider the human rights impacts its acts have on people living in state B – and not only take care of the human rights of its own citizens? Second, why should state A have a *right* to assess the human rights impacts that occur in state B, even though this may require state A to make politically sensitive judgments on the human rights situation in state B? These questions can only be addressed in a meaningful manner if one looks beyond the limits of traditional state-centered international law.

In particular part IV of this book, however, will analyze the institutionalization of HRIAs more through an administrative law perspective, focusing on the operationalization of HRIAs and the rules and principles that guide the conduct of HRIAs in every-day decision making. It therefore relates to approaches like GAL, which describes another legal approach to conceptualize acts that used to be discussed under the buzz-word “global governance”. While also concerned with the use and limitation of the exercise of authority in international or transnational settings, it focuses more on international processes and procedures.³³⁹ GAL scholars have argued that domestic administrative law has transcended beyond the national sphere, and that central principles such as participation, transparency or (quasi-)judicial review of decisions are increasingly reflected in the norms and practices of international organizations. Global administrative law also goes beyond the recognized sources of public international law,³⁴⁰ and “the evolving regulatory structures are each confronted with demands for transparency, consultation, participation, reasoned decisions and review mechanisms to promote accountability. These demands, and responses to them, are increasingly framed in terms that have a common normative character, specifically an administrative law character. The growing commonality of these administrative law-type principles and practices is building a unity between otherwise disparate areas of governance.”³⁴¹

3.2.1.5 “Human Rights Protection through Organization and Procedure” - A Doctrinal Construction for an (emerging) HRIA Law

HRIAs respond to human rights risks: before adopting a policy, it is often unclear whether the policy will affect the enjoyment of human rights (due to “factual uncertainty”), and where it does, it is often unclear whether such effect on the *enjoyment* of human rights constitutes, in a technical legal sense, an *infringement* or *violation*³⁴² of human rights (due to “normative uncertainty”). Constitutional and administrative law has developed different concepts on how

necessary to go into further detail for the purposes of the present thesis. On this (also semantic) shift also: Stefan Kadelbach, “From Public International Law to International Public Law: A Comment on the “Public Authority” of International Institutions and the “Publicness” of their Law”, in: Armin von Bogdandy, Rüdiger Wolfrum, Jochen von Bernstorff, Philipp Dann & Matthias Goldmann (eds), *The Exercise of Public Authority by International Institutions* (Berlin, Heidelberg), 2010, pp. 33-49.

³³⁹ Dunoff and Trachtman, ‘A Functional Approach to International Constitutionalization’ (above, n. 331), p. 33

³⁴⁰ Kingsbury, ‘The Concept of ‘Law’ in Global Administrative Law’ (above, n. 69), p. 26.

³⁴¹ Ibid., p. 25.

³⁴² On these differences between impacts on the enjoyment of human rights and an infringement of human rights: Zerk, ‘Human Rights Impact Assessment of Trade Agreements’ (above, n. 30), 15 et seq.

public authorities bound by human rights, the rule of law and the principle of democracy shall make such decisions under uncertainty and risk.³⁴³ One concept is that of human rights protection through organization and procedure,³⁴⁴ a concept that emerged originally in response to new risks caused by new technologies.³⁴⁵ However, this concept can also be applied to other forms of risks, including human rights risks caused by economic policy reforms, such as those described above. The concept of human rights protection through organization and procedure provides guidance where decision-makers are confronted with human rights risk in a formerly unknown way, and where consequently substantive human rights law provides little or no guidance. I therefore argue that the institutionalization of HRIAs could be understood as a form of human rights protection through organization and procedure. Like in the case of technological innovations, the human rights impacts of new economic policies are often either factually uncertain or can thus not be normatively evaluated in binary terms of legality vs. illegality.

The concept of human rights protection through organization and procedure can be traced back to decisions of the German Federal Constitutional Court since the late 1970s. In its *Mülheim-Kärlich* decision from 1979, the Court held that particularly in circumstances where public authorities have to assess risks to the life and health of individuals, the fundamental rights laid down in the German constitution (*Grundgesetz*) also possess a procedural dimension; public authorities have to ensure that the “procedural design, i.e. the conditions under which the outcome is determined, take the rights at stake into account.”³⁴⁶ Under these circumstances, procedural and organizational institutions might be the only measure to prevent that the area between law and technology turns into a “legal no-man’s-land”.³⁴⁷ Such a shift from substantive standards to procedural safeguards occurred as a consequence of genuine uncertainty.

In essence, the Court later confirmed that procedural human rights protection is essential where fundamental rights cannot substantively grant protection.³⁴⁸ This is not limited to technological innovations but also includes risks of economic innovations that must be assessed by social scientists. This is reflected in the Federal Constitutional Court’s *Co-Determination* case where the Court had to review whether a statute requiring co-determination, i.e. labor representation in a firm’s corporate board, violates the fundamental freedom to conduct business. However, the actual impacts of that statute were uncertain; a prognosis decision was therefore necessary.³⁴⁹

³⁴³ For an overview of different risk concepts Martin Delhey, *Staatliche Risikoentscheidungen - Organisation, Verfahren und Kontrolle* (Baden-Baden: Nomos Verlagsgesellschaft, 2014), 34 et seq.

³⁴⁴ Häberle, ‘Grundrechte im Leistungsstaat: Mitbericht’ (above, n. 45), pp. 86–90; Robert Alexy and Julian Rivers, *A Theory of Constitutional Rights* (Oxford: Oxford Univ. Press, 2010), p. 329; Kischel, *Die Begründung* (above, n. 45), 123 ff.; Denninger, ‘Staatliche Hilfe zur Grundrechtsausübung durch Verfahren, Organisation und Finanzierung’ (above, n. 45).

³⁴⁵ Udo Di Fabio, *Risikoentscheidungen im Rechtsstaat* (Tübingen: Mohr, 1994), p. 7; Liv Jaeckel, *Gefahrenabwehrrecht und Risikodogmatik* (Tübingen: Mohr Siebeck, 2010), p. 46; Andreas Beutin, *Die Rationalität der Risikoentscheidung* (Baden-Baden: Nomos Verl.-Ges, 2007), 1. Aufl., 17 ff.

³⁴⁶ Rainer Nickel, ‘Extradition, Human Rights, and the Public Order - the “Extradition to India” - Decision of the FCC’, *German Law Journal*, 4 (2003), pp. 1241–1254, p. 1252.

³⁴⁷ Dissenting opinion (*Sondervotum*) in: BVerfG, Order of 20 December 1979, *Mülheim-Kärlich*, 1 BvR 385/77, para 84 (juris).

³⁴⁸ BVerfG, Judgment of 22 February 1994, *8th Rundfunkentscheidung*, 1 BvL 30/88, para 164 (juris); Denninger, ‘Staatliche Hilfe zur Grundrechtsausübung durch Verfahren, Organisation und Finanzierung’ (above, n. 45), p. 644.

³⁴⁹ BVerfG, Judgment of 1 March 1979, 1 BvR 532/77, *Codetermination*, para 108 et seq. (juris); on the prognosis element: Brun-Otto Bryde, ‘Tatsachenfeststellungen und soziale Wirklichkeit in der Rechtspre-

This concerns thus a risk of regulation, which is structurally similar to the risk-of-trade-regulation cases mentioned in the introduction. Before this background, the Court held that the legislative procedure must comply with certain standards, and that it is in particular necessary to carefully assess the expected impacts based on comprehensive scientific assessments.

An important consequence is that compliance with these organizational and procedural norms become constitutional safeguards for human rights protection, and the violation of these “constitutionally loaded” procedural and organizational yardsticks would in itself be a violation of the underlying substantive human rights principles the procedural/organizational provisions serve to protect,³⁵⁰ and consequently, the violation of these procedural and organizational norms would also render the final decision unconstitutional and invalid.³⁵¹

This anticipates a potential objection against HRIAs in international economic law, namely that the human rights impacts in particular of abstract economic policies are often difficult to predict. If one understands institutionalized HRIAs as a form of human rights protection through organization and procedure, uncertainty would not be an objection against but rather an argument in favor of HRIAs: They are required exactly because of the uncertain factual and normative consequences of an initiative – e.g. a trade or development policy. This relationship between law, uncertainty and risk will be analyzed in more detail below (see chapter 5).

While this only supports the claim that procedural and organizational norms can protect human rights, it is still unclear how exactly these norms must be designed in order to meet these normative expectations. Clearly not every procedural norm that provides for participation or requires the consideration of human rights consequences would suffice. On a general level, one can distinguish two ideal-types: an optimization approach and a minimal-protection approach. The optimization approach would transfer the duty to optimize the realization of human rights to procedural and organizational norms.³⁵² Applied to participation and transparency rights, such an optimization approach means that people generally have a right to access to information and generally have a right to participate in decision-making to the fullest extent possible unless a lower degree of transparency or participation is justified.³⁵³ A minimal-protection approach, on the other hand, would assume that procedural and organizational human rights imperatives only exists in situations where they are elementary and absolutely indispensable to realize substantive human rights obligations.³⁵⁴ In such a view, the object and goal of a specific policy deci-

chung des Bundesverfassungsgerichts’, in: Peter Badura and Horst Dreier (eds.), *Festschrift 50 Jahre Bundesverfassungsgericht*, pp. 533–561, p. 534.

³⁵⁰ Häberle, ‘Grundrechte im Leistungsstaat: Mitbericht’ (above, n. 45), 86 ff.; Dieter Grimm, ‘Verfahrensfehler als Grundrechtsverstöße’, *NVwZ* (1985), pp. 865–872; Anja Kleesiek, *Zur Problematik der unterlassenen Umweltverträglichkeitsprüfung* (Berlin: Duncker & Humblot, 2010), p. 25; Irina Bonin, *Grundrechtsschutz durch verfahrensrechtliche Kompensation bei Maßnahmen der polizeilichen Informationsvorsorge* (Stuttgart: Richard Boorberg Verlag, 2012).

³⁵¹ Grimm, ‘Verfahrensfehler als Grundrechtsverstöße’ (above, n. 350), p. 865.

³⁵² Alexy and Rivers, *A Theory of Constitutional Rights* (above, n. 344), p. 47; dissenting opinion (*Sondervotum*) in: BVerfG, *Mülheim-Kärlich* (above, n. 347), para 75 et seq. (juris); “Effective fundamental rights protection” as the yardstick for human rights protection through procedure: BVerfG, Order of 8 February 1983, *Gegendarstellung*, 1 BvL 20/81, para 31 (juris).

³⁵³ See section 7.2.4.

³⁵⁴ In this sense potentially: BVerfG, Order of 20 April 1982, *Anwaltsverschulden*, 2 BvL 26/81, para 141 (juris); Grimm, ‘Verfahrensfehler als Grundrechtsverstöße’ (above, n. 350), p. 867; Denninger, ‘Staatliche Hilfe zur Grundrechtsausübung durch Verfahren, Organisation und Finanzierung’ (above, n. 45), p. 646:

sion would determine if participation is required as the procedural part of the affected substantive human right.

At a very minimum, human rights protection through organization and procedure requires the consideration of human rights impacts (see chapter 4). In particular, where likely and significant impacts are identified, public authorities must gather information and generate knowledge about a decision's impacts³⁵⁵ (see chapters 5 and 6). An essential element of human rights protection through procedure is communication between decision-makers and those affected by the decision in order to be able to consider the interests and concerns of all potentially affected at an early stage: this can, in many cases, be more effective for the realization of substantive human rights than ex-post judicial review³⁵⁶ (see, on participation, chapter 7). Insofar as decisions under uncertainty are based on scientific evidence - depending on the policy in question this may range from natural to social sciences - this must represent the state-of-the-art, and there is an obligation to consider all relevant evidence (see chapter 8). The human rights compatibility of a project or policy can, consequently, change if new knowledge becomes available: If proceduralized human rights protection requires a link with the *latest* state of technology and science, it is necessary to not destroy this link between law and science once a decision has been taken, given that science is per se a dynamical process in time. Consequently, human rights protection also becomes a dynamical process and public authorities must review, ex-post, whether new information becomes available that requires a different evaluation of said project or policy (obligation to monitor, or *Beobachtungspflicht*) and, where necessary, to adjust the decision accordingly (obligation to remedy, or *Nachbesserungspflicht*).³⁵⁷ The German Federal Constitutional Court established such an obligation to monitor and remedy in the *Kalkar-I* decision where it had to review the human rights compatibility of a license for a fast-breeder technology, an at that time new nuclear reactor program. The Court emphasized the advantages of flexible laws and their ability - and necessity! - to adjust to new scientific and technological standards: to "fix a safety standard by establishing rigid rules, if that is even possible, would impede rather than promote technical development and adequate safeguards for fundamental rights"; as a consequence, the "executive must assess and constantly adjust safety measures".³⁵⁸ One way to discharge this duty would be to conduct regular ex-post impact assessments and to ensure that the legal act in question - a legislative or regulatory act, a trade and development agreement, etc. - provides for sufficient flexibility mechanisms to adapt to new findings (see section 9.1.2.1.5).

Human rights protection through organizational and procedural norms requires that compliance with these norms is ensured. This is evident in domestic systems, and compliance with, for ex-

"Grundrechtsgeboten können dann nur, aber auch immer solche Strukturen sein, die für die Herstellung der spezifischen Kommunikation prozedural oder organisatorisch unabdingbar sind, deren Verfehlung also zum Zusammenbruch der rational geleiteten Kommunikation führen muss".

³⁵⁵ Ibid., p. 654.

³⁵⁶ Häberle, 'Grundrechte im Leistungsstaat: Mitbericht' (above, n. 45), p. 88; Denninger, 'Staatliche Hilfe zur Grundrechtsausübung durch Verfahren, Organisation und Finanzierung' (above, n. 45), p. 625.

³⁵⁷ Alexander Windoffer, *Verfahren der Folgenabschätzung als Instrument zur rechtlichen Sicherung von Nachhaltigkeit* (Tübingen: Mohr Siebeck), p. 136; BVerfG, Order of 18 December 1968, *Mühlengesetz* 1 BvL 5/64, para 28 (juris); BVerfG, Judgment of 16 March 2004, *Kampfhunde*, 1 BvR 1778/01, para 67, 74 ff. (juris).

³⁵⁸ BVerfG, Order of 8 August 1978, *Kalkar I*, 2 BvL 8/77, para 111 et seq. (juris), translated in and cited from: Donald Kommers and Russel Miller, *The Constitutional Jurisprudence of the Federal Republic of Germany* (Durham and London: Duke University Press, 2012), 3rd edition, p. 181.

ample, the obligation to conduct participatory impact assessments can be enforced by national courts. However, also other mechanisms beyond judicial enforcement exist that can increase compliance with IA law (see in particular chapters 9 and 10). At the same time, the obligation to protect human rights through organization and procedure is not costless. Consequently, too much transparency, participation and accountability can have counter-productive effects and may illegitimately reduce the role of public authorities. Therefore, it is important to determine which initiatives require a heightened level of scrutiny, in particular which initiatives require a full and participatory Impact Assessment. As will be discussed in chapters 5 and 6, the necessity and scope of Impact Assessments generally depend on the likelihood of significant impacts, and the depth of the analysis must be proportionate to the scope of the expected impacts.³⁵⁹

3.2.1.6 Interim conclusion

The first part of this chapter has focused on the “publicness” of public law. It has demonstrated that, from an international perspective, uncertainty on the one hand and a growing interconnectedness on the other hand challenge traditional concepts of public law. In response to these legitimacy deficits, the role of law has changed: from a command-and-control function to a guiding function, and from public international to international public law. In essence, the role of procedure and the relevance of principles have become more important. Based on this understanding of public law, the institutionalization of Human Rights Impact Assessments can be described as a legal phenomenon: there are procedural rules and legal principles guiding the conduct of HRIAs, and institutionalized HRIAs can protect human rights through organization and procedure.

3.2.2 The Role of Law in the Institutionalization of HRIAs

The remainder of this chapter will focus on the concept of law. It serves as a basis to analyze to what extent institutionalized HRIAs are already governed by rules and principles that may qualify as “law”. Are institutionalized HRIAs merely a policy tool, or already a legal tool? Is there an obligation to conduct HRIAs, if so, does law prescribe how to conduct them – and would the failure to do so have any legally relevant consequences? Unlike in EIA law, no comparable HRIA Treaty, Act, Directive or Regulation exists so far that would prescribe the conduct of HRIAs in a clearly binding manner. Many norms governing HRIAs are broad legal principles. Numerous specific rules addressing HRIAs exist, however, they are established in guidelines or other documents which are not directly binding externally. This, however, does not mean that they are legally irrelevant or might not produce an indirectly binding effect. Therefore, the following sections will first analyze the role of “hard” and “soft” law (see section 3.2.2.1). This is mainly relevant where HRIA specific rules are laid down in internal guidelines (see section 3.2.2.2). The next section will then analyze the role principles play for HRIAs (see 3.2.2.3). This will set the stage for the legal analysis of HRIA norms in the following chapters.

³⁵⁹ This principle is, in essence, broadly recognized: Each state must undertake steps “to the maximum of its available resources” to achieve the full realization of economic, social and cultural rights (Article 2 (1) ICESCR); similar: Häberle, ‘Grundrechte im Leistungsstaat: Mitbericht’ (above, n. 45).

3.2.2.1 The Concept(s) of Hard and Soft Law

The role of HRIA-law has been described above as meta-regulation: as a set of norms that, without necessarily producing a direct external effect, determine how public authorities shall make decisions. So why is it important to understand the nature of these rules and principles? Obviously, whether a rule is binding or not matters for questions concerning adjudication: can courts annul a statute, a treaty or an administrative act because an agency failed to conduct a proper impact assessment?³⁶⁰ Whether a rule or principle is binding or not is less relevant for other questions, for example from a compliance perspective: There are many binding rules that are often neglected, and many non-binding rules that are generally respected. Insofar as meta-regulation is concerned – and not the regulation of private behavior and thus the limitation of individual freedoms – it is important not to over-emphasize the “is it law?” question.³⁶¹ Nowadays, also “domestic administrative practice have acknowledged a number of forms of preparation, of internal rule-making, procedures which have a strong impact on the legal processes, without being (unanimously) regarded as being legal acts or legal norms in the stricter sense”.³⁶² It is therefore important to not ignore the legal world of internal administrative law,³⁶³ such as – as I argue here – European Commission guidelines on the conduct of HRIAs.

The controversy about the nature of law has traditionally often been presented as a battle between two competing schools of thoughts: naturalism and positivism, with natural law grounded on considerations of justice and positivism focusing on law’s basis in authority.³⁶⁴ Positivists claim that legally valid norms are separable from moral claims and require that the norm is based on a “conventional criterion of legal validity accepted in the particular legal system”.³⁶⁵ Such a rule of recognition establishes how legally valid norms are created, changed and adjudicated.³⁶⁶ In international law, rules of recognition determine how treaties are concluded or how customary law emerges, and consequently norms – such as human rights – based on treaties and customary law are not only moral but also legal norms. Whether and to what extent there is a legal obligation to conduct impact assessments would also require that these rules and principles – the obligation to conduct IAs and take the results into consideration – can be traced back to these recognized sources of law.

Legal positivist theories of law at times require what has been called the social fact thesis, such as “secondary rules of recognition” (H.L.A. Hart, see below), the will of states³⁶⁷ or the “basic

³⁶⁰ See section 9.2 on direct and indirect judicial review.

³⁶¹ Karl-Heinz Ladeur, ‘The Evolution of General Administrative Law and the Emergence of Postmodern Administrative Law’ (above, n. 64), p. 8. Similar, about the denial of “*internal* administrative law”: Jerry Mashaw, ‘Reluctant Nationalists: Federal Administration and Administrative Law in the Republican Era, 1801-1829’, *Yale Law Journal*, 116 Yale L.J. (2007) (2007), pp. 1636–1740, p. 1636.

³⁶² Karl-Heinz Ladeur, ‘The Evolution of General Administrative Law and the Emergence of Postmodern Administrative Law’ (above, n. 64), p. 10.

³⁶³ Mashaw, ‘Reluctant Nationalists: Federal Administration and Administrative Law in the Republican Era, 1801-1829’ (above, n. 65), p. 1740.

³⁶⁴ Nigel Simmonds, *Central Issues in Jurisprudence* (London: Sweet & Maxwell, 2008), 3rd ed, p. 141.

³⁶⁵ *Ibid.*, p. 147.

³⁶⁶ Herbert L. A. Hart, *The Concept of Law* (Oxford: Oxford Univ. Press, 2012), 3. ed., 100 ff.

³⁶⁷ Heinrich Triepel, *Völkerrecht und Landesrecht* (Leipzig, 1899 (reprint 1958)), pp. 31–32.

norm".³⁶⁸ In particular early positivists like Bentham, Austin or Weber claim that law requires factual obedience and enforcement mechanism. According to Weber "[a]n order will be called [...] law if it is externally guaranteed by the probability that physical or psychological coercion will be applied by a *staff* of people in order to bring about compliance or avenge violation".³⁶⁹ If coercion were a constitutive element of "law", it would hardly make sense to talk about an emerging HRIA law.

Even among positivists, such a narrow approach is not widely accepted. Already H.L.A. Hart criticized this narrow interpretation as providing only a partial account of law, namely the one that imposes on citizens the obligation "to do or abstain from certain actions, whether they wish to or not".³⁷⁰ While this is a necessary element in all legal orders, a system only consisting of these kinds of freedom-restricting norms would be significantly under-developed. Hart therefore criticizes Austin's concept of coercion and obedience as insufficient, in particular because the concept of obedience hardly explains the official creation, identification, use and application of the law, for example by legislators or judges.³⁷¹ Instead of coercion and obedience, Hart regards recognition as an essential criterion of law in a legal system, and the "ultimate rule of recognition" can be "regarded from two points of view: one is expressed in the external statement of fact that the rule exists in the actual practice of the system; the other is expressed in the internal statement of validity made by those who use it in identifying the law".³⁷² Hart himself recognizes the vagueness and complexity to recognize that such a system exists and therefore the need to identify more specific criteria on how to identify a recognizable legal system. Therefore, Hart emphasizes the need for a shared official acceptance of the rule of recognition.³⁷³ Surprisingly, recognition by public officials is an essential element of Hart's theory: "On the one hand, those rules of behavior which are valid according to the system's ultimate criteria of validity must be generally obeyed, and, on the other hand, its rules of recognition specifying the criteria of legal validity and its rules of change and adjudication must be effectively accepted as common public standards of official behavior by its officials".³⁷⁴ Kingsbury points out that there is no common rule of recognition shared among all participants in international law beyond traditional public international law concerned with inter-state relations. However, he suggests that there "may well exist [...] different rules of recognition within different social-institutional-sectoral groupings in specific practice areas of global administrative law."³⁷⁵ In this sense, for example, the World Bank operational policies are formally enacted and (generally) accepted by World Bank officials, but also by other actors involved, such as NGOs or companies which officially endorse these or similar social and environmental standards as part of their corporate social responsibility agenda. Similarly, the European Commission's internal guidelines oblige Commission staff to conduct HRIAs in a transparent and participatory manner. Arguably, at least the core provisions

³⁶⁸ „Such a proposition, establishing the objective validity of the norms of a moral or legal order, will here be called a *basic norm* (*Grundnorm*): Hans Kelsen, *Pure Theory of Law* (Berkeley: University of California Press, 1967), p. 8; Joseph Raz, 'Kelsen's Theory of the Basic Norm', *American Journal of Jurisprudence*, 19 (1974), pp. 94–111; on the "social fact thesis" in this context: Graham Hughes, 'Validity and the Basic Norm', *Cal. L. Rev.*, 59 (1971), pp. 695–714, p. 705.

³⁶⁹ Max Weber, *Economy and Society* (Berkeley: University of California Press, 1978), p. 34.

³⁷⁰ Hart, *The Concept of Law* (above, n. 366), p. 81.

³⁷¹ *Ibid.*, 112 f.

³⁷² *Ibid.*, p. 112.

³⁷³ *Ibid.*, p. 115.

³⁷⁴ *Ibid.*, pp. 116.

³⁷⁵ Kingsbury, 'The Concept of 'Law' in Global Administrative Law' (above, n. 69), p. 30.

are accepted as public standards of good decision-making by Commission officials and external actors involved in EU law and policy making. Pushed a little further, the reference to different “social-institutional-sectoral groupings” may imply that also non-state actors are not only increasingly subjects of public international law in the sense that they can have rights and duties, but that they also participate in the evolution of international public law.³⁷⁶

Against this background, the following section illustrates relevant hard and soft law sources of HRIA and discusses how soft-law provisions relevant to HRIAs can, indirectly, become legally binding norms.

3.2.2.2 Sources of HRIA Law and Self-engagement: Turning Soft-Law into Binding Commitments

Impact assessments are regulated by different types of norms. Traditional sources of public international law relevant for international (environmental) impact assessments (see Article 38 ICJ Statute) include treaty law, customary law and general principles, as well as judicial decisions and scholarly writings. As a public law approach goes beyond these inter-state relations, domestic and institutional law also become relevant sources. EU constitutional law, for example, establishes human rights as general principles of EU external relations law which implies a general obligation to take extraterritorial human rights impacts into consideration. The same is true for “secondary” or “internal tertiary” law. The latter contain norms that not only recommend, but at least internally require the conduct of social and/or human rights impact assessments. These internal norms generally bind an institution’s staff directly, and can thus have an indirect external effect.³⁷⁷

IAs are often governed by norms which have not been enacted through an official law-making process, but are generally non-binding “soft law”. The controversy about the nature and (non-)sense of “soft-law” cannot and need not be reappraised here.³⁷⁸ If and insofar as so-called soft law de-facto influences decision-making, it has a guiding function; as the guiding function is an important element of public law as understood here, the difference between “binding” and “non-binding” is insofar not of major importance. As has been observed elsewhere, non-binding norms can have a comparable or even stronger effect than formally binding norms.³⁷⁹ This re-

³⁷⁶ This reflects a school of thought in constitutional law which regards the broader public as part of the open society of constitutional interpreters: Häberle, ‘Die offene Gesellschaft der Verfassungsinterpreten: Ein Beitrag zur pluralistischen und „prozessualen“ Verfassungsinterpretation’ (above, n. 210).

³⁷⁷ Dann, *The Law of Development Cooperation* (above, n. 4), p. 317.

³⁷⁸ For the probably most comprehensive overview so far see Goldmann, *Internationale öffentliche Gewalt* (above, n. 278); on the ability of soft law to quickly respond to new challenges: Brun-Otto Bryde, *Internationale Verhaltensregeln für Private* (Frankfurt am Main: Metzner, 1981), p. 4.

³⁷⁹ On the effects of soft-law: Bryan Druzin, ‘Why does Soft Law Have any Power Anyway?’, *Asian Journal of International Law* (2016), pp. 1–18; Goldmann, *Internationale öffentliche Gewalt* (above, n. 278), 200 ff.; Dann, *The Law of Development Cooperation* (above, n. 4), p. 39; Enzo Cannizzaro and Emanuele Rebasti, ‘Soft law in the EU legal order’, in: Julia Iliopoulos-Strangas and Jean-François Flauss (eds.), *The Soft Law of European Organisations*, pp. 209–232. However, the UN Special Rapporteur recommends that states implement the UN Guiding Principles on human rights impact assessments of trade and investment agreements and „make them legally binding in the domestic legal order“: UN Human Rights Council, Report of the Independent Expert on the promotion of a democratic and equitable international order, Alfred-

quires to also consider provisions in administrative guidelines, ministerial accords, memoranda of understanding, etc.³⁸⁰ In addition, soft law can become relevant for the interpretation of existing hard law, can “prepare” the emergence of future hard law, or be a preliminary stage to customary law.³⁸¹ They serve for experimental learning, and – for good or for bad – may create a sort of path-dependency.³⁸² This means that the creation and design of soft-law essentially pre-determines the later enactment of “hard” law. Ignoring soft law would thus mean to ignore important developments of public law. Finally, as will be seen, different doctrines of constitutional and administrative law also serve as a “transformer” that converts soft law – indirectly – into hard law or other-wise establishes binding obligations. For example, an internal administrative guideline or handbook may create “legitimate expectations” and thus bind future decision-making. States, the European Union or International Organizations often publicly announce to conduct HRIAs and regulate the requirements in non-binding guidelines. These propositions can arguably become, under certain circumstances, a binding and judicially reviewable commitment under to the principle of legitimate expectations or the principle of non-retrogression. Finally, soft law can have a legitimizing function. As will be discussed later, third states may raise legitimacy concerns if, for example, the EU assesses the human rights impacts an international agreement may have on that third state.³⁸³ Soft law instruments – for example those recommending the conduct of transnational HRIAs – may have a legitimizing function:³⁸⁴ the assessment of human rights impacts in, for example, Myanmar, would arguably be no interference into Myanmar's sovereignty rights if that particular assessment complies with an adopted UN recommendation, even if the latter is non-binding.

3.2.2.2.1 Legitimate Expectations in Public Law

Public authorities, including the European Commission, have increasingly drafted and published guidelines promising the conduct of HRIAs for certain initiatives. Such a promise could become externally binding under the principle of legitimate expectations. The principle of legitimate expectations is recognized in the administrative and constitutional law of different legal systems from all over the world.³⁸⁵ Especially in common law systems, the principle of legitimate expectation is understood as an extension of the rules of natural justice as part of fair administrative justice.³⁸⁶ This also includes rules and principles governing the conduct of impact assessment.

Mauricede Zayas, A/HRC/30/44, para 62 (j); see also: Vivian Kube, *EU Human Rights, International Investment Law and Participation* (Springer, 2019), p. 243.

³⁸⁰ Andrew Guzman, ‘A Compliance-based Theory of International Law’, *California Law Review*, 90 (2002), pp. 1823–1887, p. 1828.

³⁸¹ Similar, even though in the context of the legal nature of international corporate codes of conduct: Bryde, *Internationale Verhaltensregeln für Private* (above, n. 378), p. 23.

³⁸² Similar on what he calls “network effects”: Druzin, ‘Why does Soft Law Have any Power Anyway?’ (above, n. 379).

³⁸³ See section 4.3.3.

³⁸⁴ In this sense, even though in a different context: Bryde, *Internationale Verhaltensregeln für Private* (above, n. 378), 27 et seq.

³⁸⁵ Søren J. Schønberg, *Legitimate expectations in administrative law* (Oxford: Oxford University Press, 2000); Matthew Groves, *Legitimate Expectations in the Common Law World* (London: Bloomsbury Publishing PLC, 2017).

³⁸⁶ Geo Quinot, ‘Substantive Legitimate Expectations in South African and European Administrative Law’, *German Law Journal*, 5 (2004), p. 74.

For example, the UK High Court of Justice had to decide whether the promise to consult affected individuals in the context of an environmental impact assessment raised “legitimate expectations”.³⁸⁷ The High Court clarified that such an expectation is legitimate “[o]nly if the reasonable bystander would regard the promise as being made in the sense contended for by the applicants will his expectation be regarded as not merely reasonable but legitimate also.”³⁸⁸ In the specific case the court confirmed that the plaintiff legitimately expected to be consulted during the administrative procedure: “For in my judgment, once one postulates a promise of consultation in advance of a decision in which the promisee has a sufficient interest, that of itself founds a legitimate expectation”.³⁸⁹ A doctrinal approach of administrative self-limitation in German law focuses in particular on principles of equality and bona fide and the assumption that an agency will not, without justification, treat similar cases differently. Such a self-limiting effect can therefore generally occur when an agency complies or promises to comply with unitary standards, in particular if it has enacted internal guidelines.³⁹⁰ It can then be expected that the agency will respect its own guidelines in the future: Not only because the coherent application is required in order to treat similar cases alike, but also because the protection of confidence is a central rule of law principle.³⁹¹

Under EU case law, the principle of legitimate expectation requires that, “[f]irst, precise, unconditional and consistent assurances originating from authorized and reliable sources must have been given to the person concerned by the Community authorities. Second, those assurances must be such as to give rise to a legitimate expectation on the part of the person to whom they are addressed. Third, the assurances given must comply with the applicable rules”.³⁹² However, the requirement “to whom they are addressed” must not be interpreted narrowly: a promise can be addressed to a large number of individuals.³⁹³

The principle of legitimate expectation is also recognized in international law.³⁹⁴ The investment tribunal in *Total v. Argentine Republic* assumed that the concept of legitimate expectations is rather “based on the requirement of good faith, one of the general principles referred to in Article 38(1) lit. c) of the Statute of the International Court of Justice as a source of international

³⁸⁷ Queen’s Bench Division, *R v Swale Borough Council and Medway Ports Authority ex parte The Royal Society for the Protection of Birds* (1990).

³⁸⁸ *Ibid.*, p. 141.

³⁸⁹ *Ibid.*, p. 140.

³⁹⁰ Jürgen Schwarze, *Europäisches Verwaltungsrecht* (Baden-Baden: Nomos Verl.-Ges, 2005), 2nd edition, LXXI.

³⁹¹ BVerwG, Judgment of 17 April 1970, VII C 60/68, para 21 et seq. (juris); BVerwG, Judgment of 8 April 1997, 3 C 6/95, para 19 (juris).

³⁹² CFI, Judgment of 30 June 2005, T-347/03, *Branco* (2005), para 102; General Court, Judgment of 19 September 2012, T-265/08, *Germany v. Commission*, para 142.

³⁹³ For example to (potentially) all holders of herds and milk farms: ECJ, Judgment of 28 April 1988, Case 120/86, *Mulder*.

³⁹⁴ An investor is generally “entitled to rely on specific representations or assurances made directly to them by the host State and upon which they were induced to invest” : Felipe Mutis Téllez, ‘Conditions and Criteria For The Protection of Legitimate Expectations Under International Investment Law’, *ICSID Review* (2012), pp. 1–11, p. 4. Furthermore, in *Saluka Investments B.V. v. The Czech Republic*, the tribunal held that the investor’s reasonable expectations “need not be based on an explicit assurance from the Czech Government” as long as it “could reasonably expect” that the government would act in a “consistent and even-handed manner” : Arbitral Tribunal, *Saluka Investments BV v. The Czech Republic* (2006), p. 329.

law”.³⁹⁵ The principle of good faith and consequently of legitimate expectations would thus, in principle, be applicable to all obligations under international law.³⁹⁶ At the same time, the limits of the principle must be borne in mind. In *EDF (Services) Limited v Romania*, the tribunal made clear that the principle of legitimate expectations must be interpreted in light of the consequences it has for the scope of discretion of public authorities. The tribunal stated that a broad application to vague promises would impose a significant burden: if legitimate expectations create obligations under the fair and equitable treatment clause, it could mean a “virtual freezing of the legal regulation of economic activities”.³⁹⁷ In consequence investors can only legitimately and reasonably rely on “specific promises or representations [...] made by the State to the investor”.³⁹⁸ This is an important point also with regard to the question that will be discussed later, namely to what extent the promise to conduct HRIAs for certain projects or policies can create legitimate expectations. While impact assessments are not cost-neutral and can cause significant delays, they do not result in a “virtual freezing” of public decision-making: they do not create “substantive” but only “procedural” legitimate expectations. Consequently, it appears justified to apply the principle of legitimate expectations more broadly. Unlike in investment law, the principle of legitimate expectations, in many other constellations, does not unduly restrict the discretion of states or agencies: guidelines that raise the legitimate expectation that HRIAs will be conducted are not only relatively easy to enact but also easy to amend or abolish *with effect for the future*. The agency can therefore generally repeal such a guideline relatively easily. Therefore, the legal effect of administrative self-limitation based on legitimate expectations or *bona fidae* can best be described by what Ossenbühl calls “elastic commitment” (*elastische Bindung*).³⁹⁹

3.2.2.2.2 Revocation of HRIAs: a Retrogressive Measure Affecting Economic, Social and Cultural Human Rights?

If an authority implements an impact assessment system, albeit based on non-binding guidelines, and if the system includes the consideration of economic, social and cultural rights, the principle of non-retrogression⁴⁰⁰ may also produce a limited binding effect and may render the revocation or non-application of the HRIA guidelines illegal. Under Art. 2 (1) of the ICESCR, a duty-bearer must “undertake[s] to take steps [...] to the maximum of its available resources, with a view to achieving progressively the full realization of the rights recognized in the present Covenant”. This principle of progressive realization is complemented by the principle of non-retrogression which means that, in any case, the deterioration of the level of human rights protection would be an infringement. Such infringement would need to be justified.⁴⁰¹ Arguably, an HRIA regime can qualify as a procedural mechanism to fulfill human rights obligations. If an au-

³⁹⁵ ICSID Arbitral Tribunal, ICSID Case No. ARB/04/1, *Total S.A. v Argentine Republic (decision on liability)*, para 128.

³⁹⁶ Article 31 (1) VCLT; ICJ, *Nuclear Tests (New Zealand v. France)* (above, n. 115), para 49.

³⁹⁷ Arbitral Tribunal, ICSID Case No. ARB/05/13, *EDF (Services) Limited v. Romania* (2009), para 217.

³⁹⁸ *Ibid.*

³⁹⁹ Quoted in: Thomas von Danwitz, *Europäisches Verwaltungsrecht* (Berlin, Heidelberg: Springer, 2008), p. 252.

⁴⁰⁰ UN Committee on Economic, Social and Cultural Rights, *General Comment No 3 - The nature of States parties obligations (Art. 2, para 1)* (1990), para 9.

⁴⁰¹ *Ibid.*

thority used to conduct HRIAs in the past (even if only based on a not externally binding self-commitment) but fails to do so now, this might be regarded as a step backward and thus a violation of the principle of non-retrogression. However, to what extent this is actually the case is difficult to determine, and it is not clear to what extent such a binding effect would always be desirable. First, it must be demonstrated that human rights impact assessments actually *do* contribute to the realization of human rights. Otherwise, the refusal to conduct them in the future would not be a move backward. Second, the principle of non-retrogression may produce counter-productive effects as it punishes agencies that implement a high level of human rights protection and can deter agencies from experimenting with different human rights instruments. As Mary Dowell-Jones put it, the principle of non-retrogression can be an “extremely crude and unsatisfactory yardstick for measuring compliance with progressive achievement of the Covenant”.⁴⁰² Therefore, a binding effect based on the principle of non-retrogression must be limited to cases where the failure to conduct impact assessments is evidently a retrogressive step. This requires actual proof that impact assessments contribute to the realization of economic, social and cultural rights.

3.2.2.3 The Role of Principles for HRIAs

HRIAs are largely guided by legal principles, in particular participation, transparency, non-discrimination and accountability. In addition, the object of the assessment, human rights, can also be conceptualized as principles. Often, human rights contain no clear-cut rules but require a balancing of competing principles understood as legally recognized interests. This section therefore elaborates on the role of principles, in particular in contrast with rules. There are different views on what principles are.⁴⁰³ A certain consensus appears to exist insofar as principles are, compared with rules, rather broad normative propositions that do not allow to make a specific judgment of compliance or non-compliance without further specification and/or balancing of competing principles.

Principles can be defined according to their *nature* and their *function* – even though these criteria are interdependent. Legal principles are, even though less precise than rules, binding in the sense that they enable and require judgments of legality or illegality in the light of overarching values.⁴⁰⁴ Human rights as laid down in international treaties or recognized as customary international law can be conceptualized as legal principles. Principles can also be distinguished according to their function, in particular as “heuristic” and “guiding” principles, both for the application and creation of law.⁴⁰⁵ First, principles can guide decision-making. This is also true for

⁴⁰² Mary Dowell-Jones, *Contextualising the International Covenant on Economic, Social and Cultural Rights* (Leiden: Nijhoff, 2004), p. 52.

⁴⁰³ Armin von Bogdandy, ‘General Principles of International Public Authority: Sketching a Research Field’, *German Law Journal*, 9 (2008); Dann, *The Law of Development Cooperation* (above, n. 4), 220 ff.; Goldmann, *Internationale öffentliche Gewalt* (above, n. 278), 417 ff.; for a detailed analysis of functions and impacts of constitutional principles: Franz Reimer, *Verfassungsprinzipien* (Berlin: Duncker & Humblot, 2001), 284 ff.

⁴⁰⁴ Bogdandy, ‘General Principles of International Public Authority: Sketching a Research Field’ (above, n. 403), p. 1912.

⁴⁰⁵ Jakab distinguishes between the legal function in applying the law and a meta-normative function in creating law: András Jakab, ‘Re-Defining Principles as ‘Important Rules’: A Critique of Robert Alexy’, in: Martin Borowski (ed.), *On the Nature of Legal Principles*, Proceedings of the Special Workshop “The prin-

non-binding principles, which may be based on declarations (e.g. UN General Assembly Resolutions, or political declarations such as the Paris Declaration), but which can nevertheless align state behavior.⁴⁰⁶ Second, principles – in this sense sometimes called “structural principles” – also have a heuristic function, which means that they structure and systematize legal material to make it manageable.⁴⁰⁷

Methodologically, principles can be reconstructed inductively or deductively. Inductively, principles are developed from existing (administrative) rules,⁴⁰⁸ including those found in the “practice of global governance”.⁴⁰⁹ This means for the present thesis to look into different types of norms determining how to conduct impact assessments and identify principles common to these provisions. One example is the principle of proportionate analysis which determines the depth of analysis required for impact assessments.⁴¹⁰ Deductively, specific principles applicable to human rights impact assessments would be developed from general principles (e.g. general human rights principles and standards) and then specified and applied to impact assessments. In consequence, the obligation to conduct HRIAs in a transparent, participatory and non-discriminatory manner is also based on deductively reconstructed principles of human rights law.

Legal, structural and guiding principles are relevant for HRIAs. As mentioned before, this affects both the HRIA procedure and the object of the assessment. The process generally requires, to a certain degree, compliance with principles of transparency and participation on a non-discriminatory basis. At a more specific level, the distinction between legal and structural principles becomes more important. For example, the EU increasingly relies on advisory bodies and expert committees to assess the impacts of its policies. The legal principle of non-discrimination means that the EU may not discriminate, when appointing committee members, based on criteria such as gender or race. Arguably, this is not the major problem with the advisory committee appointment. Rather, a problematic dispute concerns the discrimination between for-profit and not-for-profit representatives: The composition of expert committees is regularly criticized for its alleged bias in favor of business interests. This is not compatible with the principle of balanced representation, a non-binding principle identified in internal EU law.⁴¹¹ It is arguably not a violation of the human rights principle of non-discrimination because the distinction between for-profit and not-for-profit representation is not a suspect class. However, even as a structural/guiding principle, the principle of balanced representation serves several important functions: First, it guides the competent institutions when appointing committee members (even

principles theory” held at the 23rd World Congress of the International Association for Philosophy of Law and Social Philosophy (IVR), Kraków, 2007, pp. 145–159, pp. 156–159.

⁴⁰⁶ An example is the principle of ownership in international development law: it is recognized in political declarations, to a certain extent applied by donor organizations, but (at least so far) the violation of the principle of ownership would not result in the invalidation of a funding decision: Dann, *The Law of Development Cooperation* (above, n. 4), 222 ff.

⁴⁰⁷ Bogdandy, ‘General Principles of International Public Authority: Sketching a Research Field’ (above, n. 403), 1910 f.; Jakab, ‘Re-Defining Principles as ‘Important Rules’: A Critique of Robert Alexy’ (above, n. 405), p. 155; Dann, *The Law of Development Cooperation* (above, n. 4), 222 ff.

⁴⁰⁸ Michael Riegner, ‘Legal frameworks and general principles for indicators in sovereign debt restructuring: Paper prepared for the Third Session of the UNCTAD Working Group on a Debt Workout Mechanism’, 1 May 2014, p. 18.

⁴⁰⁹ Kingsbury, ‘The Concept of ‘Law’ in Global Administrative Law’ (above, n. 69), p. 24.

⁴¹⁰ See section 8.3.2.

⁴¹¹ See section 5.5.3.2.2.

though, as critics say, not sufficiently) and requires at least political justification for appointments. Second, it is a principle of good administration and thus subject to review by the European Ombudsman. Finally, it might become a binding principle once recognized as customary law or under the principle of legitimate expectations.

While the previous paragraph focused on the HRIA procedure, the next question regards the role principles play regarding the object of the assessment, namely the assessment of human rights impacts. One goal of impact assessments is to increase the positive and reduce the negative consequences a decision has on human rights. This often requires a balancing between competing interests, many of which can be expressed in human rights terms. Where clear normative guidance is missing, human rights apply as general principles. If and insofar as competing human rights impacts are identified, it becomes necessary to balance these rights against each other in line with the principle of proportionality. Generally, public authorities enjoy a discretion or margin of appreciation in this context, and the same is true for those conducting impact assessments. The objective is to *optimize* the realization of all human rights by either increasing the positive or reducing the negative impacts.⁴¹² Optimization requires a balancing of competing rights and legal interests. Consequently, it is more than a non-binding political promise to take human rights impacts into account: it implies that certain policy options might be held to be illegal. Of course, in many cases, there is no clear-cut answer as to where the right balance is. Nevertheless, where no such balancing takes place, where the balancing is based on clearly wrong factual assumptions, or where the result is evidently disproportionate, an impact assessment would arguably be legally defective. Whether or not this affects the final decision to be informed by the IA is a question to be addressed in the final two chapters.

The term “optimization” in the context of human rights is often associated with Alexy’s theory of constitutional rights.⁴¹³ Such an optimization approach was subject to fundamental criticism.⁴¹⁴ According to Habermas, the concept of optimization is problematic because of the “premise that

⁴¹² On optimization in cases of regulation for and of innovation: Hoffmann-Riem and Fritzsche, ‘Innovationsverantwortung - zur Einleitung’ (above, n. 195), 17 f.

⁴¹³ Alexy and Rivers, *A Theory of Constitutional Rights* (above, n. 344), p. 47. Critical of Alexy, emphasizing the “collateral damage” caused by the doctrine of balancing: Matthias Jestaedt, ‘The Doctrine of Balancing - its Strengths and Weaknesses’, in: Matthias Klatt (ed.), *Institutionalized reason*, pp. 152–172, 159 ff.; see also Matthias Klatt and Moritz Meister, *The constitutional structure of proportionality* (Oxford: Oxford Univ. Press, 2012), 1. ed, p. 137.

⁴¹⁴ Criticism was expressed from different political angles. Carl Schmitt and Ernst Forsthoff stated that an understanding of fundamental rights and human rights as an objective system of values implies the risk that individual freedom is replaced by the “tyranny” of values: Ernst Forsthoff, ‘Zur heutigen Situation der Verfassungslehre’, in: Barion, Hans, et al. (ed.), *Epirrhosis*, pp. 185–211, p. 190; Carl Schmitt, *Die Tyrannei der Werte* (Berlin: Duncker & Humblot, 2011), 3. Aufl. A related concern is that the objectivization of human rights as principles and the necessary balancing requirement lead to an overload of constitutional determination and a shift of political processes from the legislature to constitutional courts: Ernst-Wolfgang Böckenförde, *Staat, Verfassung, Demokratie* (Frankfurt am Main: suhrkamp, 1992), 2. Aufl., 187 ff. Irrespective of whether Schmitt’s and Forsthoff’s concerns are justified in domestic constitutional law, there is hardly a risk of a “tyranny of values” imposed by an objectivized order of human rights as principles in the international sphere: Constitutional determination at the global level is (at least now and in the near future) no risk to individual freedoms. Similarly, Böckenförde’s observation about the political shift from legislatures to courts might be a valid critique for well-established national constitutional democracies. Given the absence of a global legislature, it is not a major concern for international decision-making. Moreover, with regard to EU external relations, EU case law does not apply human rights and other constitutional principles to an extent that comes even close to the type of constitutional determinism criticized above.

assimilates legal principles to values”, whereby norms have a deontological sense while values are teleological.⁴¹⁵ Such an understanding would, already on a conceptual level, downgrade human rights as principles to the level of policies: “For if in cases of collision all reasons can assume the character of policy arguments, then the fire wall erected in legal discourse by a deontological understanding of legal norms and principles collapses. [...] Every value is inherently just as particular as every other, whereas norms owe their validity to a universalization test.”⁴¹⁶ In the end, if human rights are understood as values and if optimization shall resolve collisions, almost everything becomes a matter of balancing, and principles may lose their normative character.⁴¹⁷ Principles based on deontological assumptions must therefore be protected from such a cost-benefit analysis.⁴¹⁸

This criticism should be taken seriously. As will be seen, there is a certain trend in impact assessments to compare and thus “balance” negative effects on certain human rights with the expected positive effects in other areas, such as economic growth. However, it is necessary to consider the different functions human rights can play, as has been illustrated above,⁴¹⁹ namely as (individual) entitlements or rights on the one hand, and as non-individualised policy objectives on the other hand. As entitlements, human rights establish legal boundaries that restrict the exercise of public authority. Criticism against optimization raises most concerns here. However, insofar as human rights function as legally binding but non-individualised *policy objectives* guiding rule and policy-making, optimization is less problematic. It is rather justified insofar as human rights as policy objectives supplement the protection granted by human rights entitlements (enforced through adjudication). This includes situations where acts of a public authority are likely to have some impact on human interests and the enjoyment of human rights, even though such an impact would not constitute a human rights infringement in the technical sense. So the EU must, even absent specific human rights entitlements, orient its internal and external policies towards human rights (see Articles 3 (5) and 21 TEU). Like in domestic regulatory law and policy-making,⁴²⁰ some form of optimization is unavoidable. It does not downgrade human rights to pure values if optimization takes place ex-ante during law and policy-making; this would, in particular, not exclude the option of affected individuals to claim, ex-post, a violation of their human rights as rights in human rights litigation. In other words: human rights can function as rights/entitlements and *also* as optimization principles which guide the exercise of public authorities in all policy areas.⁴²¹ Institutionalized HRIAs do not replace human rights adjudication, but are a mechanism to give (ideally) more effect to the enjoyment of human rights in general.

⁴¹⁵ Habermas, *Between Facts and Norms* (above, n. 320), p. 255.

⁴¹⁶ Ibid., p. 259.

⁴¹⁷ Axel Tschentscher, ‘Interpreting Fundamental Rights: Freedom versus Optimization’, 4 May 2012, p. 7.

⁴¹⁸ Habermas, *Between Facts and Norms* (above, n. 320), p. 260.

⁴¹⁹ See section 2.4.2.

⁴²⁰ Hilson, ‘Rights and Principles in EU Law: A Distinction Without Foundation?’ (above, n. 195), p. 210; on optimization and constitutional principles in regulatory law: Hoffmann-Riem and Fritzsche, ‘Innovationsverantwortung - zur Einleitung’ (above, n. 195), 17 f.

⁴²¹ For an analysis of human rights as rights and optimization principles in international law: Henninger, *Menschenrechte und Frieden als Rechtsprinzipien des Völkerrechts* (above, n. 194), 293 et seq.

3.3 Interim Conclusion and Outlook

This thesis reconstructs the institutionalization of HRIAs through the lenses of public law, as a framework for the legal analysis of norms guiding the conduct of HRIAs. This chapter has focused on the two aspects of public law: its “publicness” and its “lawness”. It is before this background that the following three parts of this book will analyze the obligation to assess human rights impacts of public initiatives in general and in EU decision-making in particular.

The following parts will address three broad questions: First, why should public authorities be obligated to assess human rights impacts irrespective of where they occur (Part III)? Second, how should public authorities conduct HRIAs, in particular absent specific statutory provisions (Part IV)? And finally, what rules and principles can give effect to HRIAs in the sense that the exercise of public authority is restricted and that acts of public authorities become “more” compliant with human rights obligations (Part V)?

PART III: THE OBLIGATION TO ASSESS HUMAN RIGHTS IMPACTS AND THE PRINCIPLE OF AFFECTEDNESS

4 CHAPTER 4: IMPACT ASSESSMENTS AND THE PRINCIPLE OF AFFECTEDNESS

4.1 The Obligation to Take Impacts on Humanity into Consideration: The Principle of Affectedness

The previous chapter identified several potential legitimacy deficits: acts of public authorities can have significant effects on the rights and interests of people in third countries, and traditional legitimacy concepts – in particular state consent as a source of legitimacy under public international law – can be insufficient. It has also been argued that one legal response to these legitimacy deficits could be the institutionalization of HRIAs, i.e. the meta-regulation of public decision-making through rules and principles guiding the conduct of HRIAs as part of an institution's decision-making process. However, in order to increase legitimacy and avoid that HRIAs are misused as a pretext to justify policy decisions, it is important that public law rules and principles determine if, how, and to what extent HRIAs are to be conducted.

This chapter addresses the first and most general question in this context, namely whether public authorities have an obligation or responsibility to assess the human rights impacts of their initiatives, and, if answered in the affirmative, if this is also the case irrespective of where these impacts occur. This would imply that international organizations and states bear at least minimum responsibilities towards humanity and not only towards their own citizens (of states) or members (of IOs). Such an obligation may be questioned from two perspectives: first, a central paradigm that prevails in many democratic theories and in traditional public international law seems to be that governments are accountable only to their citizens (or foreigners living on a state's own territory) unless explicit legal exceptions exist under national or international law. At the risk of overgeneralizing, the underlying assumption would be that human interests are best served if every state takes care of its own population. Consequently, even if state activities have an impact on foreign territory, the affected state or affected individuals are generally not entitled to participate in the decision-making process⁴²² unless law clearly and exceptionally states otherwise. So how would a general duty to assess human rights impacts regardless of where they occur – absent specific treaty or statutory obligations to do so – relate to the *acting* state's sovereignty? Second, the third state where human rights impacts are possible may also raise objections. For example, if EU institutions assess the human rights impacts of EU trade and investment policies on third states like Myanmar, such an assessment would be impossible without an analysis of the current human rights situation in Myanmar. It is a politically sensitive issue for the European Union to assess the level of human rights compliance in third states. Affected states like Myanmar could argue that they themselves – or UN organizations with the necessary mandate – have the exclusive right to make judgments about human rights compliance. So how would the assessment of human rights impacts occurring in third states relate to the *affected* state's sovereignty? ⁴²³

⁴²² Brian Bernhardt, *A Theory of Democratic Self-Determination: Affectedness, Sovereignty and Nonterritorial Political Boundaries*, January 2010, p. 3, available at:

<http://citeseerx.ist.psu.edu/viewdoc/download?doi=10.1.1.874.7785&rep=rep1&type=pdf>

⁴²³ Zerk, 'Human Rights Impact Assessment of Trade Agreements' (above, n. 30), p. 21.

In this chapter, I argue that such an obligation to assess impacts on human rights and interests irrespective of where they occur (“impacts on humanity”)⁴²⁴ emerges as a principle of international law, namely a *legal principle of affectedness* (“PoA”). Such a principle has been proclaimed in political theory and philosophy in contrast with statist democratic theories. In a nutshell, the principle states that all those affected by a decision should have the right to participate or have the right that their interests be considered in the decision-making process.⁴²⁵ This principle introduces a complementary dimension of responsibility which is not defined by citizenship or residency within territorial borders, but by actual affectedness. It is complementary in the sense that it does clearly not mean that states must grant the exact same rights to citizens and foreigners living in third countries (“distant strangers”⁴²⁶), but that the rights and interests of distant strangers must at least be taken into consideration in the decision-making process if they are likely to be significantly affected. This is also because “affectedness” in this sense can best be described as a curve reflecting different degrees of affectedness – and correspondingly different degrees of legal obligations and different levels of participation rights. This is an advantage compared with the inflexible binary boundaries defined by nationality or territory.⁴²⁷ The institutionalization of HRIAs arguably responds to the need to establish additional and more flexible decision-making procedures in order to consider impacts of different degrees – regardless of where these impacts occur. At the same time, the principle of affectedness allows to reconcile the extraterritorial application of human rights with the democratic principle of self-determination in cases where a state or public organization does not exercise effective control or authority over foreign territory or individuals on foreign soil,⁴²⁸ but where a policy decision only

⁴²⁴ Term borrowed, inter alia, from: Benvenisti, ‘Sovereigns as Trustees of Humanity: On the Accountability of States to Foreign Stakeholders’ (above, n. 2).

⁴²⁵ Eugene A. Rosa, Ortwin Renn, and Aaron M. McCright, *The Risk Society Revisited* (Temple University Press, 2014), p. 178; Regina Kreide, ‘The Ambivalence of juridification: On Legitimate Governance in the International Context’, *Global Justice: Theory Practice Rhetoric* (2009), 18–34, p. 28; Bryde, ‘International Democratic Constitutionalism’ (above, n. 2), p. 117; Robert A. Dahl, *Democracy and its critics* (New Haven: Yale University Press, 1989), p. 129; Armin von Bogdandy, ‘Demokratie, Globalisierung, Zukunft des Völkerrechts: Eine Bestandsaufnahme’, *Zeitschrift für ausländisches öffentliches Recht und Völkerrecht (ZaöRV)*, 63 (2003), pp. 853–877.

⁴²⁶ The term „distant strangers“ refers to non-citizens and non-residents. Similar: Ganesh, ‘The European Union’s Human Rights Obligations Towards Distant Strangers’ (above, n. 49).

⁴²⁷ Bryde, ‘Das Demokratieprinzip des Grundgesetzes als Optimierungsaufgabe’ (above, n. 47), p. 64. If any concern, however remote, were sufficient, world society would be the only basis for political legitimacy, which in turn would considerably restrict the possibility of effective participatory decision-making processes. There must therefore be different degrees of affectedness. The goal should be to identify more pragmatic solutions with more or less great involvement. This may imply under certain circumstances also a pluralism of overlapping democratic decision-making units instead of a fixation on the nation-state level. In this sense: Brun-Otto Bryde, ‘Grenzüberschreitende Umweltverantwortung und ökologische Leistungsfähigkeit der Demokratie’, in: Klaus Lange (ed.), *Gesamtverantwortung statt Verantwortungspartitionierung im Umweltrecht*, pp. 75–91, p. 78.

⁴²⁸ These restrictive criteria have been applied by the ECtHR to define the scope of territorial human rights jurisdiction: ECtHR, Application no. 52207/99, *Bankovic and Others v Belgium and Others* (2001); ECtHR, Application No 55721/07, *Al-Skeini and Others v United Kingdom* (2011). Based on this case law, several authors have argued that, for reasons of democratic self-determination, the exercise of normative authority would be necessary to establish extraterritorial human rights obligations; the mere factual effects of a policy decision on distant strangers would, in contrast, not be sufficient: Samantha Besson, ‘The Extraterritoriality of the European Convention on Human Rights: Why Human Rights Depend on Jurisdiction and What Jurisdiction Amounts to’, *Leiden Journal of International Law*, 25 (2012), pp. 857–884, p. 884; Ganesh, ‘The European Union’s Human Rights Obligations Towards Distant Strangers’ (above, n. 49), p. 503. Critical of this normative approach and arguing in favor of a “factualist” view on territorial jurisdic-

factually affects the human rights of distant strangers. Instead of only establishing a legal relationship between a state and those subjected to its authority, a principle of affectedness can create a legal relationship between the duty-bearer (in our case in particular: the EU) and the right-holder living on a foreign territory.⁴²⁹

Such a principle of affectedness is increasingly reflected in legal developments, inter alia, in international environmental, human rights and economic law, which I will examine in this chapter. In line with Benvenisti's recent reconceptualization of sovereignty as trustees of humanity,⁴³⁰ I argue that these rules and principles that require to consider impacts irrespective of where they occur are not an exception to but rather an expression of a reconceptualized principle of sovereignty. This claim is, as a quick look at the realities of political decision-making demonstrates, often counterfactual. In many cases, it might be the unwillingness of decision-makers to take human rights impacts into account. Strong financial, economic or other interests can be the reason. However, non-compliance with obligations is not always an issue of unwillingness, but can also be an issue of inability: A lack of awareness of potential impacts or uncertainty about how to adequately evaluate these impacts are often among the reasons for an apparent lack of commitment.⁴³¹

The starting point for this chapter is the idea of a principle of affectedness as developed in political theory (see section 4.2). Against this background, this chapter analyzes developments in international environmental, human rights and economic law which indicate a responsibility to assess impacts on human rights and interests regardless where these impacts occur: This reflects the emergence of a *legal* principle of affectedness (see sections 4.4-4.7). However, before it is possible to claim that a legal principle emerges, it is necessary to also understand how such a principle would relate to the sovereignty claims of the acting and affected states (see section 4.3). It will therefore be demonstrated that the concept of sovereignty has always been adapted to changing realities and defined by other principles. In particular, the scope of one state's sovereignty is limited by other states sovereignty – and, at least since the second half of the 20th century, also by other principles of international law, in particular human rights. It is in this context that a legal principle of affectedness would not be incompatible with sovereignty but rather another principle that determines the scope of sovereignty. This finding is fully compatible with the basic rationale that justifies sovereignty in the first place, namely to serve the fundamental interests of humanity.

tion: Peters, 'Global Constitutionalism: The Social Dimension' (above, n. 189), p. 304. See section 4.7.4.4 for a closer analysis of the normative and facticist theories.

⁴²⁹ Similar: Cedric Ryngaert, 'EU Trade Agreements and Human Rights: From Extraterritorial to Territorial Obligations', *International Community*, 20 (2018), pp. 374–393. This will be discussed in more detail below (see section 4.7.4.4).

⁴³⁰ Benvenisti, 'Sovereigns as Trustees of Humanity: On the Accountability of States to Foreign Stakeholders' (above, n. 2). However, Benvenisti largely basis his argument on a pre-existing legal analysis, in particular on constitutionalism and Global Administrative Law scholarship.

⁴³¹ An interview with an official of the World Bank's Development Research group confirms that normative uncertainty can increase what appears to be non-compliance, because in an organization like the World Bank "the objectives of the institution are a little unclear, the norms are a little unclear, the roles are a little unclear, [and] there are so many nationalities [and] so many disciplines", quoted in: Sarfaty, *Values in Translation* (above, n. 13), p. 78.

Such an obligation to take the rights and interests of those affected into account is still very vague,⁴³² and especially in the global context, a legal principle of affectedness raises many follow-up questions:⁴³³ How should, for example, the scope of affected stakeholders be defined – and what exactly does it mean to be “involved” in decision-making? How can transnational or international decision-making processes be designed in order to enhance transparent, participatory, and principle-based deliberation? How can deliberative processes interact with scientific practices? Are there – judicial or other – mechanisms available to sanction decision-makers who fail to comply with these requirements? The obligation (or in certain cases at least self-commitment) to conduct impact assessments – including impacts on humanity – is a consequence and confirmation of a principle of affectedness. A closer analysis of impact assessment regimes can therefore contribute to finding answers to these follow-up questions, which will therefore be addressed in parts IV and V.

4.2 Principle of Affectedness in Political Theory

The growing interconnectedness of the globalized world calls for new answers to old questions about legitimacy and accountability beyond the state.⁴³⁴ Increasingly, state authorities make decisions that affect not only the collective autonomy of other states but also the individual autonomy of people living there. Similar concerns arise in the context of the exercise of authority by international organizations or trans-governmental networks.⁴³⁵ Individuals or groups of individuals significantly affected by a decision often have “no say in its creation, simply because the locus of that decision-making power is on another side of a territorial border”.⁴³⁶ This raises questions of legality and legitimacy: First, is it *legal* to exclude the rights, interests and needs of affected individuals because they are not subject to the acting sovereign’s effective territorial control? Answers can mainly be found in international law. Second, is it *legitimate* to exclude affected individuals or groups for that reason? This touches upon legal, political and democratic theory.

Many liberal democratic theories are based on the concept of the nation-state. What one might broadly embrace as “representative” models of democracy assumes that it is necessary to aggregate the preferences of all individuals which are part of a community usually defined as *demos*.⁴³⁷ This is realized through territorially-based electoral mechanisms. As this concept is

⁴³² Regina Kreide, ‘Re-embedding the market through law’, in: Christian Joerges and Josef Falke (eds.), *Karl Polanyi, globalisation and the potential of law in transnational markets*, pp. 41–64.

⁴³³ In a similar context already: Craik, ‘Deliberation and Legitimacy in Transnational Governance: The Case of Environmental Impact Assessments’ (above, n. 177); Benvenisti, ‘Sovereigns as Trustees of Humanity: On the Accountability of States to Foreign Stakeholders’ (above, n. 2); Kreide, ‘Re-embedding the market through law’ (above, n. 432).

⁴³⁴ See already above section 3.2.1.1. and 3.2.1.2.

⁴³⁵ Craik, ‘Deliberation and Legitimacy in Transnational Governance: The Case of Environmental Impact Assessments’ (above, n. 177).

⁴³⁶ Brian Bernhardt, ‘A Theory of Democratic Self-Determination: Affectedness, Sovereignty and Nonterritorial Political Boundaries’ (above, n. 422), p. 3.

⁴³⁷ On the importance of the aggregation of interests: James Madison, ‘Federalist No. 10’; for an overview of different models: David Held, *Models of Democracy* (Cambridge: Polity Press, 2006), 3. ed.; critical in particular against a simplified understanding of demos as the “sum of all nationals”: Bryde, ‘Das Demokratieprinzip des Grundgesetzes als Optimierungsaufgabe’ (above, n. 47), p. 60.

based on majoritarian preferences, specific legal provisions, such as human rights and the rule of law, shall protect the interests of minorities. The legitimacy of public authority exercised by the state is largely maintained due to a shared commitment to the “rules of the game”⁴³⁸ and the equal participation of all citizens. Compliance is enforced through judicial and non-judicial mechanisms, and individuals, who claim that their rights and interests are violated, usually have access to different review mechanisms. The *demos* thesis is powerful and in particular appealing due to its clarity and simplicity. In general, governments would be responsible towards their citizens, and responsibility towards foreigners in third countries (“distant strangers”) or towards other states would only exist where exceptionally established under international law. Extraterritorial impacts on human rights are not a fundamental concern due to the clear dichotomy between members of the *demos* and “the others”. Under the *demos* thesis, there would be no a priori responsibility to assess extraterritorial human rights impacts unless the democratically elected legislator decides, by statute or consent given to an international agreement, to establish such a duty.

Such statist approaches can be criticized on different accounts. First, the inclusion of citizens and exclusion of the others based on nationality is a somewhat arbitrary criterion that is in itself difficult to democratically justify. The so-called *boundary problem* becomes especially apparent in times of globalization: While democratic procedures guarantee self-authorship, the boundaries of the *demos* itself are not determined democratically.⁴³⁹ Linking democracy to the concept of the *demos* is also problematic because it disregards the complexities of modern societies. The legal division of society into “nationals” and “foreigners” considerably simplifies a complex transnational reality and misses the needs of modern complex societies.⁴⁴⁰

Second, statist approaches seem blind to imbalances of power between states. Economically powerful states can exert a strong influence on the behavior of poorer states, for example by imposing conditionalities in debt restructuring programs or ODA transfers.⁴⁴¹ This economic pressure undermines, critics argue, the democratic decision-making process and depreciates the legitimating potential of formal state consent. Third, statist theories only uncomfortably fit with the increasing autonomy and authority of international organizations and trans-governmental networks. Many activities can be described as an exercise of public authority that legally or factually affects both states and individuals and therefore raises legitimacy concerns.⁴⁴² At the risk of generalizing too much, there are two potential consequences for statist theories: either to dismiss the claim that such an exercise of authority is problematic for democratic legitimacy, or to call for a re-nationalization of politics and a drawback on national democratic institutions.

⁴³⁸ Craik, ‘Deliberation and Legitimacy in Transnational Governance: The Case of Environmental Impact Assessments’ (above, n. 177).

⁴³⁹ Archon Fung, ‘The Principle of Affected Interests: An Interpretation and Defense’, in: Jack Nagel and Rogers Smith (eds.), *Representation*, pp. 236–268, p. 237; similar even though uncomfortable with the term “boundary” due to its geographic connotation: Robert Goodin, ‘Enfranchising All Affected Interests, and Its Alternatives’, *Philosophy & Public Affairs*, 35, no. 1 (2007); a justification for inclusiveness: Dahl, *Democracy and its critics* (above, n. 425), 119 ff.

⁴⁴⁰ Brun-Otto Bryde, ‘Wandlungen des Rechtssystems in der Einwanderungsgesellschaft’, in: Brun-Otto Bryde (ed.), *Das Recht und die Fremden*, pp. 7–13, p. 8.

⁴⁴¹ Goldmann, ‘Human Rights and Sovereign Debt Workouts’ (above, n. 3); Fischer-Lescano, *Human rights in times of austerity policy* (above, n. 3).

⁴⁴² On the Exercise of Public Authority and its effect on states and citizens see section 3.2.1.

Other authors, who take the challenges of globalization seriously but are unwilling to pull the re-nationalization card⁴⁴³, call for new concepts of democracy. One proposal – even though still within the representative models of democracy – is to design a *democracy without demos*⁴⁴⁴. Instead of the collective national „demos“, the individual should be the point of reference for democracy: Democracy should not be built on national citizenship alone, but on the equal worth of all human beings. All individuals who are subject to a government’s authority should be able to participate in its collective decision-making and be able to enjoy basically the same rights as national citizens do so far.⁴⁴⁵ However, the “all-subjected principle” aims at including foreigners who live on a state’s territory or are otherwise subject to a state’s effective control. The question raised above is also concerned with the rights, interests and needs of individuals irrespective of where they live, but who are nevertheless affected by a public authority’s decisions. i.e. “distant strangers”.

Another proposal to close the legitimacy gaps in times of globalization starts from a different perspective, namely by attempts to extend democratic institutions globally⁴⁴⁶. The objective is to either construct new or “democratize” existing global institutions in order to regulate problems with global impacts. Even though it might be possible and desirable to reform institutions, it is doubtful whether it is possible or desirable to put too much trust in “global democratic institutions”, for both practical and normative reasons. First, even small steps towards a more balanced contribution of voting rights in international institutions, e.g. in the UN Security Council or the World Bank, are rarely successful; a democratic world government is therefore, at least for the time being, extremely unrealistic. Second, such an approach ignores the advantages of plurality and diversity. Third, democratic theory and research suggest that there is a perfect size of a representative democracy.⁴⁴⁷ While debatable whether the EU or the US has already achieved (or, for critical commentators, even exceeded) the “perfect size”, a world democracy would, based on these empirical and theoretical insights, have exceeded this size by far.

In contrast to representative models of democracy, deliberative democratic theories are less dependent on territorial boundaries without requiring the establishment of (close to) unrealistic global institutions. Unlike representative models which focus on the aggregation of individual preferences, deliberative approaches also emphasize principled discourse, reason-giving and reciprocal justification as a source of democratic legitimacy; these justifications are to be di-

⁴⁴³ On signs for trends of a re-nationalization of legal cultures already: Brun-Otto Bryde, ‘Remarks at the Opening of the Symposium Celebrating the 10th Anniversary of the German Law Journal – In Praise of Transnationalism’, *German Law Journal*, 10 (2009), pp. 1291–1294, p. 1293.

⁴⁴⁴ Catherine Colliot-Thélène, *Demokratie ohne Volk* (Hamburg: Hamburger Edition, HIS, 2011); on this debate already: Bryde, ‘Das Demokratieprinzip des Grundgesetzes als Optimierungsaufgabe’ (above, n. 47).

⁴⁴⁵ Sofia Näsström, ‘The Challenge of the All-Affected Principle’, *Political Studies*, 59 (2011), pp. 116–134, p. 117.

⁴⁴⁶ Daniele Archibugi, ‘The Architecture of Cosmopolitan Democracy’, in: Garrett W. Brown and David Held (eds.), *The Cosmopolitanism Reader*, pp. 312–333; for an overview see also: Goodin, ‘Enfranchising All Affected Interests, and Its Alternatives’ (above, n. 439).

⁴⁴⁷ Robert Alan Dahl and Edward Roef Tufte, *Size and Democracy* (Stanford, Calif.: Stanford Univ. Press, 1973). The same is true for the perfect size of constituencies: “By enlarging too much the number of electors, you render the representatives too little acquainted with all their local circumstances and lesser interests; as by reducing it too much, you render him unduly attached to these, and too little fit to comprehend and pursue great and national objects.” Madison, ‘Federalist No. 10’ (above, n. 437).

rected to those potentially affected by a decision, irrespective of territorial boundaries.⁴⁴⁸ This is why deliberative theories more comfortably fit with post-national concepts of democracy such as “*universal cosmopolitanism*”. Still, those affected by state actions are mostly people living in that state’s territory. However, territorial boundaries and a historically or culturally grown community (*demos*) do not define who may take part in democratic deliberation.⁴⁴⁹ It thus seems possible to conceive democracy in a modern transnational reality without the precondition of a pre-existing national *demos*.⁴⁵⁰ The danger of the externalization of costs becomes smaller the more successfully one brings together affectedness and decision-making responsibility. In this context, Bryde refers to the democratic ideal of the greatest possible congruence of political decision and affectedness.⁴⁵¹ The need to justify decisions also towards “distant strangers” has been framed as the “principle of affectedness” or “principle of affected interests” in political theory as defined above, namely stating that all those who are affected by an act of (public) authority shall also be involved or at least be enabled to be involved in its creation.⁴⁵² In consequence, the long-term goal would not be to create a world state. What is necessary is, more modestly, the restructuring of legitimacy in international law, so that international law refers (also) to the people instead of (only or primarily) to states. Therefore, procedures and institutions are necessary which replace a mere intergovernmental reconciliation of interests with one that also provides for the reconciliation of interests of the affected people of the respective area, and enables their articulation and inclusion in the decision-making process.⁴⁵³ It is before this background that the institutionalization of HRIAs can contribute to such a more inclusive representation of affected interests.⁴⁵⁴

I will not elaborate more on the fundamental concepts of cosmopolitan and deliberative democratic theory. My objective is much more modest. There is abundant normative and conceptual literature on democracy beyond the nation-state and on how to make democracy work in times of globalization. I rather take these normative considerations as a starting point and argue that the responsibility to assess impacts on human rights and interests, irrespective of where they occur, is now also reflected in different areas of international and institutional law and thus a legal concretization of the philosophical principle of affectedness.

⁴⁴⁸ Craik, ‘Deliberation and Legitimacy in Transnational Governance: The Case of Environmental Impact Assessments’ (above, n. 177).

⁴⁴⁹ Still, some theorists are hesitant to renounce the term *demos* and re-define it in terms that would give sense to the concept of a global *demos*, for example: Christian List and Mathias Koenig-Archibugi, ‘Can There Be a Global *Demos*?: An Agency-Based Approach’, *Philosophy & Public Affairs*, 38 (2010), pp. 76–110. Terry MacDonald, on the other hand, suggests to take a pragmatic approach instead and focuses on a “*stakeholder*” community: Terry MacDonald, *Global stakeholder democracy* (Oxford: Oxford Univ. Press, 2008), 1. publ, 83 ff.

⁴⁵⁰ In this sense already: Bryde, ‘Wandlungen des Rechtssystems in der Einwanderungsgesellschaft’ (above, n. 440), p. 13; Bryde, ‘Kritik der Volks-Demokratie - Demokratie diesseits und jenseits des Nationalstaats’ (above, n. 309).

⁴⁵¹ Bryde, ‘Grenzüberschreitende Umweltverantwortung und ökologische Leistungsfähigkeit der Demokratie’ (above, n. 427), p. 76.

⁴⁵² In this sense: Dahl, *Democracy and its critics* (above, n. 425), p. 129; Bryde, ‘International Democratic Constitutionalism’ (above, n. 2), p. 117; Kreide, ‘The Ambivalence of juridification: On Legitimate Governance in the International Context’ (above, n. 425), p. 28; Bogdandy, ‘Demokratie, Globalisierung, Zukunft des Völkerrechts: Eine Bestandsaufnahme’ (above, n. 425).

⁴⁵³ Bryde, ‘Grenzüberschreitende Umweltverantwortung und ökologische Leistungsfähigkeit der Demokratie’ (above, n. 427), p. 82.

⁴⁵⁴ On the normative and practical limits of a principle of affectedness: *Ibid.*, p. 78.

4.3 Sovereignty and a Legal Principle of Affectedness

So what would constitute a *legal* principle of affectedness? The following section demonstrates that there is an increasing set of legal norms and case law indicating that IOs, states or the EU as a state-like entity are obliged to assess impacts on humanity irrespective of territorial borders (see sections 4.4 - 4.7). However, one might object that this is in conflict with the principle of sovereignty and an (apparently) corresponding responsibility of a government only towards its own citizens. If this is true, then all these norms are only an *exceptional* obligation to assess impacts on those affected irrespective of where they live. They could not, however, prove the emergence of a legal principle of affectedness which would impose an obligation to consider human rights impacts even absent a specific treaty or statutory obligation. Therefore, it is necessary to take a closer look at the development of sovereignty first. In this section, I will argue that the principle of sovereignty, which is not absolute but rather relative and thus restricted and defined by other principles, is also restricted (and thus defined) by the emerging principle of affectedness and the obligation to take other-regarding rights and interests into account.

4.3.1 The Principle of Affectedness and the Acting State's Sovereignty

It is now common to distinguish between external and internal sovereignty.⁴⁵⁵ Internal sovereignty, roughly speaking, refers to the supreme authority within a territory, while external sovereignty is understood as the sovereign's right to be free from external influence. The two dimensions are thus interconnected: the right to be free from external interference aims at protecting a state's internal affairs. Both dimensions of sovereignty contain an element of freedom – freedom from church, freedom from foreign empires, freedom from colonial powers: "Sovereignty articulates the hope of experiencing the thrill of having one's life in one's own hands".⁴⁵⁶ In essence, it is widely recognized as a fundamental principle of international law that shall enhance collective and, even though the exact content is controversial, individual self-determination.⁴⁵⁷

Due to the principles of internal sovereignty and the right to self-determination, democratically elected governments have an obligation to respect the interests of their citizens and may there-

⁴⁵⁵ Samantha Besson, 'Sovereignty', in: Rüdiger Wolfrum (ed.), *Max Planck Encyclopedia of Public International Law [MPEPIL]*; Jean Cohen, 'Sovereignty in the Context of Globalization: A Constitutional Pluralist Perspective', in: Samantha Besson and John Tasioulas (eds.), *The Philosophy of International Law*, pp. 261–280, p. 263.

⁴⁵⁶ Martti Koskeniemi, 'What Use for Sovereignty Today?', *Asian Journal of International Law*, 1 (2011), pp. 61–70, p. 70: „Today, it stands as an obscure representative of an ideal against disillusionment with global power and expert rule. In the context of war, economic collapse, and environmental destruction, in spite of all the managerial technologies, sovereignty points to the possibility, however limited or idealistic, that whatever comes to pass, one is not just a pawn in other people's games but, for better or for worse, the master of one's life."

⁴⁵⁷ Unlike Bodin, liberal theorists later emphasized the democratic element of sovereignty. John Stuart Mill states that the best form of government is one in which "the sovereignty [...] is vested in the entire aggregate of the community" where every citizen has a voice in the exercise of that sovereignty and is "at least occasionally, called on to take an actual part in the government": John Stuart Mill, *Considerations on Representative Government* (London: Parker Son and Bourn, 1861), p. 53.

fore have good reasons to give priority to their interests.⁴⁵⁸ There would be no reason to take other-regarding interests into account if individual and collective autonomy fitted perfectly so that individual rights are fully represented by each person's own government.⁴⁵⁹ Consequently, sovereignty can be justified insofar as it best serves the interests of humanity. In this line of argument, "the main justification for the appropriation of territory to governments is that the prevention of mutual mischief among the human beings using it cannot otherwise be adequately secured"⁴⁶⁰. Two main consequences follow: First, the principle of non-intervention prohibits the intervention into other states' internal affairs. This is still good law and an important principle to preserve peaceful co-existence. A second and, for the present argument, more relevant even though often neglected consequence is that such a traditional concept of sovereignty "shielded states from being required to internalize the rights and interests of noncitizens in their policymaking" and offered legal as well as political arguments to exclude "the other".⁴⁶¹ If this is true, then other-regarding norms are rather exceptions and can probably not be classified as evidence for an emerging principle of affectedness. However, the previous section explained that state sovereignty does often not protect individual rights and interests in a globalized world. Establishing institutions and procedures, such as HRIAs that also take extraterritorial impacts into account, would therefore be a potential solution to compensate for the increasing mismatch between territorial sovereignty and affectedness. In consequence, a modern understanding of the principle of sovereignty not only allows for, but also supports the claim that states and international authorities have, under certain circumstances, an obligation to assess impacts on human rights and interests.⁴⁶² While there is a broad consensus that this is the case for environmental impacts felt in neighboring territories, the same is increasingly true for certain non-environmental impacts in areas such as development finance or trade policies.

Consequently, the traditional concept has come under attack due to the realities of globalization and the resulting normative changes in many areas of international law over the last years. Without denying the importance of state sovereignty, the traditional understanding is increasingly challenged. A fundamental critique and a reconstruction of the concept of sovereignty as a "Trusteeship for Humanity" has recently been reaffirmed and further developed by Eyal Benvenisti⁴⁶³: If sovereignty is used as a justification to exclude others from the political decision-making process, one must go a step further and ask how sovereignty *itself* can be justified today. If sovereignty is the principled argument to exclude others from political deliberation, then a changed concept of sovereignty also influences the relevance individuals, independently of their citizenship and place of residence, should play in public decision-making. Benvenisti's central claim is that, due to a reconceptualization of sovereignty, states are required to "also to take foreigners' interests seriously into account even absent specific treaty obligations"; ⁴⁶⁴ this is not only "morally required", but the concept of trusteeship for humanity "already manifests itself in

⁴⁵⁸ Benvenisti, 'Sovereigns as Trustees of Humanity: On the Accountability of States to Foreign Stakeholders' (above, n. 2), p. 301.

⁴⁵⁹ Why this is not the case has already been explained above, see section 3.2.1.2.

⁴⁶⁰ Henry Sidgwick, *The Elements of Politics* (London: MacMillan and Company, 1919), Ch. XV Sec. 4.

⁴⁶¹ Benvenisti, 'Sovereigns as Trustees of Humanity: On the Accountability of States to Foreign Stakeholders' (above, n. 2), p. 298.

⁴⁶² Ibid.

⁴⁶³ Ibid.

⁴⁶⁴ Ibid., p. 297.

certain doctrines of international law and in specific judicial decisions”.⁴⁶⁵ The following section will analyze the relationship between territoriality, humanity and sovereignty in order to support the argument that sovereignty should be re-defined in light of a principle of affectedness.

4.3.2 Sovereignty and the Changing Role of Territoriality

Few principles in international law are so powerful and still so hard to grasp: While for some scholars of international law the “whole of the law could be expressed in terms of the coexistence of sovereignties”,⁴⁶⁶ others have predicted (and welcomed) its decline or even death.⁴⁶⁷

Sovereignty as a principle has been in permanent reconstruction,⁴⁶⁸ and the nexus between territoriality and sovereignty was not important to pre-modern concepts of sovereignty.⁴⁶⁹ An important turning point in the theory of sovereignty is found in the works of Bodin, Hobbes and Rousseau, to name but the most influential authors. Bodin prominently re-conceptualized sovereignty as the “absolute and perpetual power of a commonwealth”⁴⁷⁰ and reconstructed sovereignty as an element of statehood⁴⁷¹. While still recognizing God as the ultimate authority whose divine laws limited the sovereign, these laws could not be invoked by citizens; rather, sovereign authority over a territory could not be shared or divided, as otherwise chaos and civil war would be the consequence: The legitimacy of sovereignty lies in “general security and well-being”.⁴⁷² Bodin and other theorists thus developed a political theory that helped to justify the claim of absolute sovereignty based on territorial boundaries.⁴⁷³ While still rather a *political* theory, the concept of absolute sovereignty soon became a fundamental principle of international law,⁴⁷⁴

⁴⁶⁵ Ibid.

⁴⁶⁶ Ian Brownlie, *Principles of Public International Law* (Oxford: Oxford Univ. Press, 2008), 7. ed., p. 289.

⁴⁶⁷ Christoph Schreuer, ‘The Waning of the Sovereign State: Towards a New Paradigm for International Law?’, *European Journal of International Law*, 4 (1993), pp. 447–471; Sovereignty has been “de-throned”: W. Michael Reisman, ‘Sovereignty and Human Rights in Contemporary International Law’, *American journal of international law* (1990), p. 866, p. 668.

⁴⁶⁸ Koskeniemi explains these “shifts of meaning” by reference to what he calls non-legal „pure fact“ arguments: Koskeniemi, *From Apology to Utopia* (above, n. 13), p. 572.

⁴⁶⁹ Not only Greek political theory, but also Ancient institutions, for example during the Roman Republic, made reference to a somehow popular sovereign (Vincent Farenga, *Citizen and Self in Ancient Greece* (New York, NY: Cambridge Univ. Press, 2006), p. 327). Christianity later identified God as the only true sovereign, so that all law existing and power exercised on earth was limited by God’s will (Donald S. Lutz, *Principles of constitutional design* (Cambridge, New York: Cambridge University Press, 2006), p. 36). An influential doctrine of sovereignty until the writings of Bodin was the doctrine of the “two-swords” which stated that two different but equal powers on earth are existing with different spheres of responsibility, namely the religious authorities headed by the pope, and the secular authorities headed by the emperor. Neither power on earth, only God was truly sovereign; however, where God’s will did not command, humans were free to act (Ibid., p. 41). This implies that sovereignty was not (directly) territorially bound but could, for example, be claimed by the Catholic Church over all religious matters worldwide.

⁴⁷⁰ Jean Bodin, *On Sovereignty* (Cambridge: Cambridge Univ. Press, 1992), p. 1.

⁴⁷¹ Hermann Heller, *Die Souveränität* (Berlin: de Gruyter, 1927), p. 14.

⁴⁷² Koskeniemi, *From Apology to Utopia* (above, n. 13), p. 78.

⁴⁷³ Daniel Philpott, Sovereignty, in: The Stanford Encyclopedia of Philosophy, 2016, available at: <<https://plato.stanford.edu/archives/sum2016/entries/sovereignty/>>.

⁴⁷⁴ Whether and to what extent this interpretation of “traditional absolute sovereignty” is true, is not of major relevance here. See, for example: José Alvarez, *The Impact of International Organizations on International Law* (Brill: 2017), p. 395. Even if this understanding of sovereignty as traditionally absolute is a myth, it was a powerful myth that influenced mainstream legal reasoning.

understood as the ultimate authority over a community and, increasingly a territory.⁴⁷⁵ However, at the beginning of the 20th century, the traditional concept – or “myth” – of absolute sovereignty came officially to an end. A controversial issue in the *Wimbledon* case was whether the application of Article 380 of the Versailles Treaty was reconcilable with Germany’s sovereignty. The Permanent International Court of Justice rejected the idea of absolute sovereignty, and held that the right of states to conclude binding treaties is not an abandonment but an “attribute of State sovereignty”.⁴⁷⁶ This is another change or reconstruction of sovereignty, which is now generally accepted. This recognition that sovereignty is not absolute but relative is more complex than can be described here. However, what is important to note is that the shift from absolute to relative sovereignty had normative and practical consequences. A state’s sovereignty could now only be defined in relation to other principles, in particular the sovereignty of other states or other principles of international law. With the emergence of new obligations and new principles of international law, the content of sovereignty quasi automatically changed. In the first half of the 20th century, the scope of sovereignty was mainly defined by balancing the competing claims of different states to sovereignty. It is in this context that the Permanent Court of Arbitration clarified that sovereignty contains a right but also has as “corollary a duty: the obligation to protect within the territory the rights of other States, in particular their right to integrity and inviolability in peace and in war, together with the rights which each State may claim for its nationals in foreign territory.”⁴⁷⁷ After World War II, other principles – in particular international core human rights – increasingly re-defined the scope and content of sovereignty.⁴⁷⁸ It is in the light of these developments that an emerging legal principle of affectedness can be conceptualized as a “corollary duty”: not only the “obligation to protect within the territory the rights of other States” as the Court held, but also to at least take into account the human rights of distant strangers who are significantly affected by a policy decision.

The content and scope of sovereignty is therefore not an absolute pre-existing value but rather a principle the scope of which is determined by other rules and principles – which may change over time.⁴⁷⁹ This is comparable with property rights: While physical things are pre-existing in

⁴⁷⁵ The early 20th century “Lotus” interpretation of territorial sovereignty would still be difficult to reconcile with a principle of affectedness: PCIJ, *S.S. Lotus* (France. v. Turkey.), 1927, P.C.I.J. (ser. A) No. 10. Judgment, 7 September (Sept. 7), 1927. Similarly, the concept of what would now be called internal sovereignty also changed. Sovereignty increasingly emancipated from a monarch and was attributed to the state vis-à-vis non-state actors on the territory – and in Anglo-Saxon legal traditions to the “sovereign” Parliament. Anne Peters, ‘Humanity as the A and Ω of Sovereignty: European Journal of International Law’, 20 (2009), pp. 513–544, 515 f.

⁴⁷⁶ PCIJ, *S.S. Wimbledon* (1923), p. 25; Jan Klabbers, *International law* (Cambridge: Cambridge Univ. Press, 2013), 23 f.

⁴⁷⁷ Perm. Ct. of Arbitration, *Island of Palmas* (1928), p. 839. The conceptual shift has already been observed by scholars of that time such as Heller: Heller, *Die Souveränität* (above, n. 471). Heller entitles the first chapter of his book on sovereignty as *Die geistesgeschichtliche Krisis des Souveränitätsdogmas* (“the crisis of the sovereignty doctrine in the history of thought”).

⁴⁷⁸ Under current international law, the core principle of sovereignty is laid down in Article 2 (1) UN-Charter and specified by the Declaration on Principles of International Law concerning Friendly Relations and Cooperation among States in accordance with the Charter of the United Nations New York, 24 October 1970. The Declaration states that “equal sovereignty” consists “in particular” of six elements, including the “right freely to choose and develop its political, social, economic and cultural systems”, but at the same time the “duty to comply fully and in good faith with its international obligations”. This is a clear confirmation of a relative concept of sovereignty.

⁴⁷⁹ Mehrdad Payandeh, ‘The Concept of International Law in the Jurisprudence of H.L.A. Hart’, *The European Journal of International Law*, 21 (2011), pp. 967–995, p. 976. In particular if one considers the fluc-

the real world, property as the authority over such things is a theoretical legal concept. Property is constructed and defined by law. Property rights – in particular the right to exclude others from the use of one’s property – must be justified. Various justification approaches exist, be it for land or IP rights, which find justification for why property serves a common public interest. In other words: “private property is continually in need of public justification”.⁴⁸⁰ The same is true with sovereignty: While land and people exist in the real world, sovereignty as the authority over portions of the earth (and over people) is a theoretical and legal concept constructed and defined by law.⁴⁸¹ If and insofar sovereignty also contains – like property – the right to exclude others, sovereignty should also be “continually in need of public justification”.

Against this background, sovereignty can be justified if it serves the interest of humanity. Benvenisti, Bryde, Peters and others have pointed out that humanity – or the common interest of mankind⁴⁸² - should be an essential, if not the ultimate source of legitimacy in international law, and sovereignty should be reconstructed in the sense that sovereign actors are “agents of humanity”.⁴⁸³ Benvenisti has emphasized that the idea that sovereignty must be interpreted in the light of humanity is not new. For example, Vattel already assumed that sovereigns must take into account certain basic rights of foreigners, and that humanity imposes obligations among nations to the best of their societies. In the *Law of Nations*, he stated that “[n]ations being obliged by nature reciprocally to cultivate human society [...] are bound to observe towards each other all the duties which the safety and advantage of that society require”.⁴⁸⁴ For Vattel, the right to exclude others based on sovereignty claims or property claims requires justification, at least where fundamental human interests are concerned: just like property cannot “be introduced to the prejudice of the right acquired by every human creature, of not being absolutely deprived of such things as are necessary - no nation can, without good reasons, refuse even a perpetual residence to a man driven from his country.”⁴⁸⁵ While Vattel still bases his writings, at least to a certain extent, on theological foundations pointing out that the earth is God’s gift and thus belongs to “mankind in general”,⁴⁸⁶ Kant comes to a similar conclusion on more secular grounds. Kant emphasizes the “common possession of the surface of the earth” and that all human beings must “tolerate one another as neighbors”, pointing out that “originally no one has more of a right to be

tuation and development of the principle of sovereignty, it is slightly misleading if one nowadays describes sovereignty in opposition to other norms such as human rights: Besson, ‘Sovereignty’ (above, n. 455), 48, 50.

⁴⁸⁰ Jeremy Waldron, Property and Ownership, available at:

<https://plato.stanford.edu/archives/win2016/entries/property/> with further reference.

⁴⁸¹ Besson, ‘Sovereignty’ (above, n. 455), para 46.

⁴⁸² Bryde, ‘International Democratic Constitutionalism’ (above, n. 2), p. 107.

⁴⁸³ Benvenisti, ‘Sovereigns as Trustees of Humanity: On the Accountability of States to Foreign Stakeholders’ (above, n. 2), p. 300; Peters, ‘Humanity as the A and Ω of Sovereignty: European Journal of International Law’ (above, n. 475).

⁴⁸⁴ Emerich de Vattel, *The Law of Nations, or, Principles of the Law of Nature* (Indianapolis: Liberty Fund, 2008), Book II. Ch. I § 1. Vattel, however, recognized that his claim to humanity was counterfactual and likely not to be endorsed by realist politicians: “The following maxims will appear very strange to cabinet politicians: and such is the misfortune of mankind, that, to many of those refined conductors of nations, the doctrine of this chapter will be a subject of ridicule. Be it so!” (ibid). For a closer analysis already: Benvenisti, ‘Sovereigns as Trustees of Humanity: On the Accountability of States to Foreign Stakeholders’ (above, n. 2), p. 307 et seq.

⁴⁸⁵ Emerich de Vattel, *The Law of Nations, or, Principles of the Law of Nature* (above n. 484), , Book I § 231.

⁴⁸⁶ Ibid., Book I § 203; Benvenisti, ‘Sovereigns as Trustees of Humanity: On the Accountability of States to Foreign Stakeholders’ (above, n. 2), p. 310.

at a given place on earth than anyone else".⁴⁸⁷ In consequence, "whatever the amount of resources one country has, it is withdrawn from the inhabitants of other countries."⁴⁸⁸

The notion of equal moral worth is now widely shared and a fundamental basis of human rights.⁴⁸⁹ Based on this fundamental assumption, at least a liberal state based on human rights cannot be regarded as a "private club", but rather requires "public dialogue by which each person can gain social recognition of his standing as a free and rational being".⁴⁹⁰ Consequently, the equal moral worth of all human beings, combined with the current global interdependency, require to enter into such a "public dialogue" even beyond territorial borders where distant strangers are affected. It requires, in other words, the "recognition of a fundamental legal obligation upon sovereigns to note the interests of others when making policy choices that directly affect them".⁴⁹¹

Consequently, the exclusion of humans in spite of their equal moral worth can be justified if such a concept of sovereignty is a vehicle for collective and individual self-determination and thus, in the end, serves humanity.⁴⁹² This would be the case if it were true that human rights and interests were best served if each government of each sovereign state was solely responsible to protect the rights and interests of citizens and residents living on its territory. The previous chapter has already examined some of the root causes why such an assumption is not true, at least not anymore in a world with transboundary pollution and in an economically interconnected world with significant power imbalances (see sections 1.1 and 3.2.1.2). Consequently, the justification for sovereignty must be re-examined. To resume the comparison with property rights: Under domestic law, the justification of property rights requires that the use of property must also respect the rights of others, for example a neighbor's property. The right to exclude others from one's property is, therefore, normatively justified if the owner also owes positive duties in the public interest.⁴⁹³ Applied to the principle of sovereignty, Benvenisti suggests to "conceive of international law as imposing the obligation on sovereigns as power-wielding property owners to take other-regarding interests into account when managing the resources assigned to them, and thereby to increase global welfare."⁴⁹⁴ This is, in other words, a reconceptualization of the concept of sovereignty in light of a principle of affectedness. As will be seen, this reconceptualization of the concept of sovereignty is reflected in and supported by an increasingly developing set of rules and principles of national and international environmental, human rights and economic law. Before focusing on these developments, the next section will address the second ob-

⁴⁸⁷ Immanuel Kant, *Toward Perpetual Peace and other writings on politics, peace, and history* (New Haven: Yale University Press, 2006), p. 82.

⁴⁸⁸ Janos Kis, 'The Unity of Mankind and the Plurality of States', in: Ralf Dahrendorf (ed.), *The Paradoxes of Unintended Consequences*, pp. 89–125, p. 111.

⁴⁸⁹ Brun-Otto Bryde, *Das Verfassungsprinzip der Gleichheit*, 2012 (Halle an der Saale, 2012), p. 5; Benvenisti, 'Sovereigns as Trustees of Humanity: On the Accountability of States to Foreign Stakeholders' (above, n. 2), p. 307 with detailed reference.

⁴⁹⁰ Bruce A. Ackerman, *Social Justice in the Liberal State* (New Haven: Yale University Press, 1980), p. 93.

⁴⁹¹ Benvenisti, 'Sovereigns as Trustees of Humanity: On the Accountability of States to Foreign Stakeholders' (above, n. 2), p. 317.

⁴⁹² Ibid.

⁴⁹³ Morris R. Cohen, 'Property and Sovereignty', *Cornell Law Quarterly*, 13 (1927), 8–30, p. 26; Benvenisti, 'Sovereigns as Trustees of Humanity: On the Accountability of States to Foreign Stakeholders' (above, n. 2), p. 311.

⁴⁹⁴ Ibid., p. 310.

jection that could be raised against an emerging principle of affectedness, namely sovereignty claims raised by the *affected* state.

4.3.3 The Principle of Affectedness and the Affected State's Sovereignty

In particular countries in the Global South are often critical of extraterritorial human rights obligations or human rights obligations for international organizations.⁴⁹⁵ If the European Union conducts an HRIA of its policies, it considers impacts that might occur within the EU territory as well as those in third states. Such an assessment also requires an analysis of the human rights “baseline scenario” in the third state, an often sensitive political issue. What sovereignty claims could a state on whose territory negative impacts on individuals might occur (i.e. the “affected state”) raise against other states or international organizations assessing these impacts from a human rights perspective?⁴⁹⁶

To answer this question, it is helpful to distinguish between an enforcement constellation and a self-restraint constellation. By *enforcement constellation* I mean situations where states or international organization use instruments to enforce human rights in the affected states. This ranges, at extreme, from so-called humanitarian interventions to, more frequently, human rights conditionalities.⁴⁹⁷ Here, human rights clauses are either used as incentives for benefits in the case of compliance or as a sanction in the case of non-compliance with human rights standards in the affected state.

The principle of affectedness – and the corresponding obligation to assess human rights impacts regardless where they occur – refers primarily to a *self-restraint constellation*. The objective is not to support a human rights initiative against that state's government, nor to enforce compliance with human rights standards abroad. Rather, it looks at the role of public authorities – IOs, the EU or states – and the positive and negative impacts *their* initiatives might have on the realization of human rights.⁴⁹⁸ It is a consequence of the duty to respect human rights, namely to refrain from activities that violate these rights. It encompasses the obligation of duty-bearers to take potential human rights impacts into account (procedural element), no matter where they occur, and potentially abstain from certain policy options that violate human rights (substantive element).

Nevertheless, in-depth human rights impact assessments require identifying the baseline scenario, which means an analysis of the human rights situation in the respective partner coun-

⁴⁹⁵ Some developing countries were also critical when industrialized states started to consider international environmental impacts of trade agreements as they feared this was an attempt to justify barriers to trade disadvantaging developing countries: James Salzmänn, ‘Executive Order 13,141 and the Environmental Review of Trade Agreements’, *American journal of international law*, 95 (2001), pp. 366–380, 378 et seq.

⁴⁹⁶ On these sovereignty objections see: Zsolt Körtvélyesi, ‘Inconsistency and Criticism: Mapping Inconsistency Arguments Regarding Human Rights Promotion in EU External Relations’, in: Wolfgang Benedek et. al. (eds.), *European Yearbook on Human Rights 2016*, 223–242, p. 230.

⁴⁹⁷ Lorand Bartels, *Human Rights Conditionality in the EU's International Agreements* (Oxford: Oxford Univ. Press, 2005).

⁴⁹⁸ Adam McBeth, *International economic actors and human rights* (London, New York, N.Y.: Routledge, 2010), p. 180.

try.⁴⁹⁹ So it is impossible to assess the impacts of one's own initiative without considering the pre-existing human rights situation in other countries. This would often require a critical analysis of the human rights situation, which is politically sensitive.⁵⁰⁰ The affected states might therefore claim an interference in their internal affairs. From a legal perspective, one can therefore ask under what conditions this might constitute a violation of the principle of non-intervention. Admittedly, the protection of human rights is not (anymore) regarded as part of a state's internal affairs. Still, the problem here is rather to what extent a foreign state or organization would be entitled to "pass judgment" by evaluating and publicly informing about said human rights situation.⁵⁰¹ Even under the recognition of human rights as *erga omnes* obligations, states must maintain a certain degree of autonomy on how exactly to implement human rights related policies.⁵⁰² Nevertheless, the preparation of (even critical) HRIA reports about the human rights situation in third states is sufficiently far away from a violation of the non-intervention principle.

Evidently, the preparation of such a critical HRIA report concerning third countries does not contain elements of coercion: neither physical nor – if applicable – economic coercion.⁵⁰³ Still, one could discuss to what extent an illegal intervention can occur even below the level of physical or economic coercion.⁵⁰⁴ For example, it has been argued that information policies that promote democracy or a regime change abroad can violate the non-intervention principle. One illustrative example concerns official financial support to radio broadcasting targeted to citizens in third countries to promote democracy, as in the case of Radio Free Europe/Radio Liberty.⁵⁰⁵ However, even if one assumed that such activities constituted an interference, this constellation would still be different from human rights impact assessments: in the Radio Liberty case, the goal was arguably to change the political opinion of citizens in third states. There is at least an intention to somehow interfere.⁵⁰⁶ Funding Radio Liberty was not an exercise of self-restraint.

In contrast, the European Commission's Handbook for Trade Sustainability Impact Assessment reaffirms, as far as human rights analysis is concerned, the self-restraint constellation:

This analysis is not intended to pass judgement on the actual human rights situation in a country, nor to decide whether the country is eligible for the conclusion of trade negotia-

⁴⁹⁹ For example: DEVELOPMENT Solutions, 'Sustainability Impact Assessment (SIA) in support of an investment protection agreement between the European Union and the Republic of the Union of Myanmar: Final Report', June 2016, pp. 136–150; Walker, 'Human Rights in the Trade and Sustainability Impact Assessment of the EU-Tunisia Free Trade Agreement' (above, n. 57), p. 105.

⁵⁰⁰ Similar: Zerk, 'Human Rights Impact Assessment of Trade Agreements' (above, n. 30), p. 20.

⁵⁰¹ The "disappearance" of the *domaine reserve* does not imply a right of all other states to enforce human rights compliance by all means: Brun-Otto Bryde, 'Verpflichtungen Erga omnes aus Menschenrechten', in: Walter Kälin and others (eds.), *Aktuelle Probleme des Menschenrechtsschutzes*, pp. 165–190, 172 et seq.

⁵⁰² Ibid., p. 175.

⁵⁰³ Dann, *The Law of Development Cooperation* (above, n. 4), 247 ff.; on economic pressure and the principle of non-intervention: Bryde, 'Die Intervention mit wirtschaftlichen Mitteln' (above, n. 303).

⁵⁰⁴ By way of example: Körtvélyesi, 'Inconsistency and Criticism: Mapping Inconsistency Arguments Regarding Human Rights Promotion in EU External Relations' (above, n. 496), p. 230. Bryde indicated that a violation of the principle of non-intervention does not per se require coercion and that even comparatively harmless situations might be covered: Bryde, 'Die Intervention mit wirtschaftlichen Mitteln' (above, n. 303), p. 237.

⁵⁰⁵ Jakub Grygiel, 'The Costs of Respecting Sovereignty', *Orbis*, 54 (2010), pp. 268–283, p. 281.

⁵⁰⁶ For a more detailed analysis of the subjective element as one criterion indicating an unlawful intervention: Bryde, 'Die Intervention mit wirtschaftlichen Mitteln' (above, n. 303), p. 239.

tions; but rather to bring to the attention of negotiators the potential impacts of the trade measures under negotiation and thus to support sound policymaking.⁵⁰⁷

Consequently, a subjective criterion that might indicate a problematic intervention is not fulfilled here.⁵⁰⁸

Besides such a subjective indication, there is also an objective criterion that speaks against an unlawful intervention, namely the fact that there is a close nexus between the critical human rights analysis and the “analyzing” authority’s own initiative (e.g. the enactment of a trade policy). Such a nexus requirement also exists in domestic subsidy and benefits law, where conditions attached to financial assistance are often criticized as violating the recipient’s autonomy. This is why administrative and constitutional law often requires that a relationship between the initiative and the attached condition exists. In German administrative law, this is defined as a “thematic nexus” (*“sachlicher Zusammenhang”*),⁵⁰⁹ whereas in the context of “unconstitutional spending”, the US Supreme Court requires a “rational relationship”.⁵¹⁰ Similarly, the affected state’s sovereignty and the human rights of people affected can best be protected if the assessment of human rights conditions in the affected states are considered insofar as they are related to the planned initiative. So even if one takes the aforementioned objections based on sovereignty claims against Radio Free Europe seriously, the thematic nexus and the lack of intent to pass judgment distinguish that case from extraterritorial HRIA reports.

Consequently, the claim that the preparation of (critical) HRIA reports informing about the human rights situation in third states infringes the affected state’s sovereignty is unfounded, at least if there is a sufficient nexus with the own initiative the acting authority wishes to assess. This requires that the human rights review in third states is necessary and conducted in good faith to prepare an assessment of the human rights impacts of one’s own initiatives.

4.3.4 Interim Conclusion and Consequences

The major consequence of such a reconstruction of sovereignty in the light of a principle of affectedness is that the decisive question is not “why should states take international impacts into account” but rather “why should they not”. Benvenisti points out that “the principle of (individual and collective) self-determination itself entails limitations on the exclusive rights of sovereign

⁵⁰⁷ European Commission, ‘Handbook for Trade Sustainability Impact Assessment’ (above, n. 212), p. 21; critical: Nicolas Hachez and Brecht Lein, ‘Assessing EU Human Rights Impact Assessments’, in: Wolfgang Benedek and et. al. (eds.), *European Yearbook on Human Rights 2016*, pp. 243–256, p. 251.

⁵⁰⁸ Without an intention to interfere and induce, for example, a regime change, a controversial verbal exchange about another state’s human rights situation is arguably not anymore in need of justification under the non-intervention principle. It would not qualify as a severe interference. Instead, the state criticized can (and usually does) respond and rebut such criticism. In this sense already: Bryde, ‘Verpflichtungen Erga omnes aus Menschenrechten’ (above, n. 501), pp. 176–177. Similarly, even a detailed analysis of the human rights situation in a third state and a critical HRIA report would not be fundamentally different from broadly accepted common state practice to critically discuss human rights as *erga omnes* obligations at an international scale.

⁵⁰⁹ Michael Rodi, *Die Subventionsrechtsordnung* (Tübingen: Mohr Siebeck, 2000), p. 712.

⁵¹⁰ “[C]onditions on federal grants must have a rational relationship to the federal interest at stake”, Alexander Wentworth-Ping, ‘Funding Conditions and Free Speech for HIV/AIDS NGOs: He who pays the piper cannot always call the tune’, *Fordham Law Review*, 81 (2012), pp. 1097–1147, p. 1103.

peoples. States should therefore render an account to foreign interests and allow foreign participation in their decision-making processes in ways that effectively remedy the democratic deficits that inhere in the current state system.”⁵¹¹

This thesis will not challenge the assumption that sovereignty is often necessary to protect individual freedom and self-determination of local communities. It rather asks how to reconceptualize the principle of sovereignty due to the consequences of globalization. Based on the inability of states to fully shield their citizens and inhabitants from adverse impacts caused by the activities of other states and international organizations, it is justified to establish a general principle of affectedness, obliging public actors even absent specific obligations to take the rights and interests of potentially affected stakeholders into account. Before the background of the reconstruction of sovereignty, the following part will analyze environmental, economic and human rights law to identify legal sources that reflect and confirm such a principle of affectedness.

The principle of affectedness thus understood is the broad normative framework for HRIAs that consider internal and external impacts. At the same time, the fact that states or the European Union increasingly conduct HRIAs also reaffirms the emergence of such a principle of affectedness: it demonstrates state practice and, potentially, *opinio iuris*. Still, it should also be noted that the principle of affectedness has been defined as an *emerging* one. This means that there is not yet a general consensus, but “only” broad support as expressed in different legal documents, case law and political statements. Over the past years, the number of specific rules and practices to take impacts on humanity in account increased, so that there is a trend towards such a principle of affectedness. The legal character of such an emerging principle does not mean that it has to be uncontested or overwhelmingly respected. *Legally*, there are other relevant principles, and in representative democracies, it may very well be justified that governments act primarily in the interest of their own population (by which I mean citizens and people living on their territory). *Politically*, it might be contested because politicians are usually unwilling to assume legal responsibility for people living in far-away countries, which can be illustrated by the unwillingness to make legal commitments to realize the 0.7 % ODA target. Nevertheless, the fact that there are conflicting principles and political resistance does not speak against the legal character of a principle: The very nature of principles is that they are balanced against other principles, and it is equally not uncommon that legal norms are at times counterfactual and/or in conflict with political preferences. This does not deprive them of their normative character.⁵¹² However, the identification of an emerging principle of affectedness has an additional value. First, it provides a constitutional and theoretical basis for norms and practices that require to consider human rights impacts regardless where they occur, and it readjusts the relationship of these norms with sovereignty. And second, it results in an argumentative shift of the burden of proof: It requires to justify the exclusion of others from political and legal discourse, not vice-versa. Before this background, the remainder of this chapter will analyze how the principle of affectedness is reflected in international environmental, human rights and economic law.

⁵¹¹ Benvenisti, ‘Sovereigns as Trustees of Humanity: On the Accountability of States to Foreign Stakeholders’ (above, n. 2), p. 313.

⁵¹² Dann, *The Law of Development Cooperation* (above, n. 4), p. 13.

4.4 Environmental Law and the Principle of Affectedness

The first part of this chapter has outlined the contours of a principle of affectedness in political and legal theory, and its relationship with the principle of sovereignty. This second part of this chapter looks at different areas of law which support the claim that public authorities are under an obligation to assess impacts on human rights and interests regardless of where they occur.

The assessment of international impacts is of major importance for international environmental law, and duties to take trans- or international impacts into account are found in numerous legal sources. In the following, I will provide a brief overview of the explicit and implicit, binding and non-binding commitments to conduct environmental impact assessments and consider impacts irrespective of where they occur. On a general level, the emergence of an international environmental impact assessment law⁵¹³ demonstrates that international law increasingly recognizes other-regarding norms and duties. As environmental impact assessments can also protect the rights of those affected, the increasing recognition of an obligation to conduct transnational EIAs also reflects the principle of affectedness. Substantively, environmental impacts, such as the pollution of rivers or the destruction of forests which are the livelihood basis for local communities, can infringe core human rights such as the right to health, the right to adequate housing or the right to food, to name but a few examples. Assuming that an EIA aims at avoiding or mitigating adverse impacts on the environment, it also promotes environment-related human rights.⁵¹⁴ In his separate but concurring opinion in the *Gabcikovo-Nagymaros* case, judge Weeramantry describes the protection of the environment as “a vital part of contemporary human rights doctrine, for it is a *sine qua non* for numerous human rights such as the right to health and the right to life itself”.⁵¹⁵

There exists a second link, taking a rather procedural perspective. Not only do environmental and human rights norms overlap; rather, EIA law also implements many procedural human rights standards. Most EIA norms require, for example, participation and consultation; even absent explicit human rights language, these procedures are enhancing human rights such as the right to meaningful participation.⁵¹⁶ Several regional human rights courts and bodies found that human rights law requires, under certain circumstances, the conduct of environmental and social impact assessments. Doctrinally, this obligation could be qualified as part of the duty to fulfill, which implicates positive obligations on public authorities to take positive measures to “establish the legal, institutional and procedural preconditions so that individuals can actually realize their rights”.⁵¹⁷

⁵¹³ Craik, *The International Law of Environmental Impact Assessment* (above, n. 59).

⁵¹⁴ This is explicitly confirmed by different international declarations and conventions: *Declaration of the United Nations Conference on the Human Environment*, Stockholm, 16 June 1972 (“Man has the fundamental right to [...] adequate conditions of life, in an environment of a quality that permits a life of dignity and well-being [...]); *Additional Protocol to the American Convention on Human Rights in the Area of Economic, Social and Cultural Rights*, Protocol of San Salvador, ratified by 16 American states (as of January 2014).

⁵¹⁵ ICJ, *Case concerning the Gabcikovo-Nagymaros Project* (1997), 91 f.

⁵¹⁶ Art. 25 ICCPR; Henry Steiner, ‘Political Participation as a Human Right’, *Harvard Human Rights Yearbook* (1988), pp. 77–134.

⁵¹⁷ Dann, *The Law of Development Cooperation* (above, n. 4), p. 276. This dimension is not uncontroversial. Critics object that decisions on how to spend money are primarily decisions that should be taken by parliament, and that a justiciable duty to fulfill human rights is, due to the costs involved, incompatible with the principle of separation of powers and that they are financially burdensome. However, civil and politi-

While EIAs first emerged in domestic settings, their internationalization followed soon. As environmental pollution does not respect territorial borders⁵¹⁸, many states had a strong and often⁵¹⁹ reciprocal interest in adopting regulation that aims at avoiding or mitigating transnational and global harm.⁵²⁰ So what are the legal sources containing obligations to conduct EIAs in general and to assess impacts on humanity in particular?

4.4.1 Explicit EIA Commitments: International Treaty Law and the Principle of Non-Discrimination

The first international treaty explicitly establishing an obligation to conduct EIAs is the 1978 Kuwait Regional Convention for Co-operation on the Protection of the Marine Environment from Pollution ("Kuwait Convention"), obliging the State Parties to "endeavor to include an assessment of the potential environmental effects in any planning activity..." - the threshold triggering the duty to conduct an EIA is "significant risks of pollution".⁵²¹ Only a few years later, the United Nations Convention on the Law of the Sea (UNCLOS) was adopted. Section 4 (Articles 204 – 206 UNCLOS) deals with monitoring and environmental assessment. Art. 206 states that, "[w]hen States have reasonable grounds for believing that planned activities under their jurisdiction or control may cause substantial pollution of or significant and harmful changes to the marine environment, they shall, as far as practicable, assess the potential effects of such activities on the marine environment and shall communicate reports of the results of such Assessments".⁵²² A number of other international treaties contain EIA commitments, even though the details on

cal rights are not costless either, as states must establish systems for effective human rights compliant law enforcement mechanisms: James W. Nickel, *Making Sense of Human Rights* (Malden: Blackwell Publishing, 2007), p. 148. Depending on the scope and detail, the conduct of impact assessments is not costless. Scarce financial resources are the most important practical limitation for a duty to fulfill, as is also explicitly recognized under international law, such as Art. 2 (I) of the ICESCR which provides that a state must employ "the maximum of its available resources" to "progressively" achieve full realization of these rights. However, the courts' decisions are not incompatible: The requirement to conduct ESIA is still very broad, and the states still have what I would call a procedural and organizational margin of appreciation on the exact design and details of the respective impact assessments.

⁵¹⁸ This is now a truism. Still, legal problems caused by an incompatibility between borders and environmental policies continue to exist. See already: Bryde, 'Grenzüberschreitende Umweltverantwortung und ökologische Leistungsfähigkeit der Demokratie' (above, n. 427).

⁵¹⁹ On the limits of reciprocity in traditional environmental law: *Ibid.*, p. 81. Bryde points out that there are inequalities in the distribution of cross-border impacts in individual areas. For example, water flows downhill, i.e. away from the polluter. At a higher level of abstraction, however, reciprocity works. Every state can be affected by some sort of harmful transboundary effects. To pick up the example again: The state at the source of the river may have little fear of water pollution. Nevertheless, transboundary air pollution remains a risk. At this higher level of abstraction, therefore, there is arguably a mutual interest in establishing general procedures for dealing with transboundary immissions.

⁵²⁰ EIAs seemed to be a useful instrument of international environmental governance. Today, we find a great variety of norms in the form of international treaties, international institutional and administrative law including guidelines or commentaries. The diversity of norms and instruments might be due to the adaptability and flexibility of the EIA process, which is its strength and, for critics, also its major weakness.

⁵²¹ *Kuwait Regional Convention for Co-operation on the Protection of the Marine Environment from Pollution* (Adopted in Kuwait on 1978) Art. XI on "Environmental Assessment". The Convention does not specify the term "significant risk", nor does it specify any further requirements. It is rather a commitment to develop rules and technical guidelines for EA processes (see Art. XI (b) and (c)).

⁵²² United Nations, *Convention on the Law of the Sea* (above, n. 114) Art. 206.

how exactly to conduct EIAs are not further elaborated.⁵²³ Of particular relevance here is the Convention on Environmental Impact Assessment in a Transboundary Context (“Espoo Convention”).⁵²⁴ The Espoo-Convention is neither limited to a geographic area nor to a discrete environmental regime. It is rather a cross-cutting convention applying to basically all initiatives as long as the impacts are felt in another state. In these cases, it contains, inter alia, notification duties and equal participation rights for the affected public in the third state(s) where environmental impacts are felt.⁵²⁵ This is a clear expression of the principle of affectedness.

4.4.2 Nondiscrimination Principle

A clear reflection of a legal principle of affectedness is the environmental law principle of non-discrimination, requiring that “states apply their own environmental laws without discriminating between internal environmental harm and environmental harm to areas external to the state”.⁵²⁶ This principle does not per se establish a duty to conduct transnational impact assessments, but rather “transnationalizes” impact assessments if they are required under national law. It means that a state must involve stakeholders in other states to the same extent as its own nationals. Especially relevant for the law of impact assessments is the principle of equal access, which requires that “states provide all persons affected by environmental decisions access on an equal basis to participatory decision-making processes regardless of whether they reside within or outside the state in question”.⁵²⁷ This principle makes clear that sovereignty may not be used as a justification to exclude affected states and affected individuals living in third countries from the decision-making process. So individuals residing in that country must have equal procedural rights, and are entitled to the equal treatment of substantive environmental standards⁵²⁸. Nevertheless, people in third countries are structurally disadvantaged: First, they usually do not profit from the *positive* impacts of the intervention (such as job creation, tax revenues, energy security...)⁵²⁹. Second, they are politically disenfranchised, as they are not allowed to vote and are relatively distant from the political decision-making process. Nevertheless, the nondiscrimination principle is an expression of the principle of affectedness, assigning responsibility not along territorial borders but along actual effects.

If the logic of the environmental non-discrimination would also apply to areas beyond the environmental sphere, the consequence would be that public authorities must – if they are required to assess the economic, social or human rights impacts of their initiatives on their own citizens –

⁵²³ For example, the EIA commitments in UNFCCC and CBD do not provide for details on the EIA process, but rather leave broad discretion to member states: Craik, *The International Law of Environmental Impact Assessment* (above, n. 59), p. 88. International EIA-law is thus relatively deferential with regard to the procedural design, which shows respect for the particularities of different administrative regimes in different member states.

⁵²⁴ UNECE, *Convention on Environmental Impact Assessment in a Transboundary Context* (above, n. 114) (“Espoo Convention”).

⁵²⁵ Art. 2 (6) of the Espoo Convention; Craik, *The International Law of Environmental Impact Assessment* (above, n. 59), p. 102: The Espoo Convention could become the basis for a “transboundary EIA treaty”: John Knox, ‘Assessing the candidates for a global treaty on transboundary environmental impact assessment: | Vol. 12(1);’, *New York University Environmental Law Journal*, 12 (2003), 153 - 168, p. 158.

⁵²⁶ Craik, *The International Law of Environmental Impact Assessment* (above, n. 59), p. 55.

⁵²⁷ Ibid.

⁵²⁸ OECD, *Recommendation of the Council on Principles concerning Transfrontier Pollution* (1974), C(74)224 especially para 4-6; similar: Art. 2 (6) of the Espoo Convention.

⁵²⁹ Craik, *The International Law of Environmental Impact Assessment* (above, n. 59), 57 f.

also consider, without discrimination, the same impacts that might occur to distant strangers. For example, if a state establishes a HRIA regime, the aforementioned non-discrimination principle would imply that the state may not restrict the assessment to those impacts that occur on the state's territory. This argument can be made in particular as human rights are rooted in the equal moral worth of all humans.⁵³⁰ However, the territorial scope of human rights obligations is controversial with regard to the scope of substantive human rights obligations. This will be addressed below. However, as the environmental principle of non-discrimination indicates, it seems useful to distinguish between substantive and procedural elements. Extraterritorial human rights obligation in the substantive sense means that an act that produces effects abroad would be illegal because it violates the human rights of distant strangers. This is the case where this effect would count as a violation (unjustified infringement) of human rights. The procedural element, however, would only oblige decision-makers to assess and take into account potential human rights impacts on distant strangers. Failure to do so would constitute an abuse of discretion. The first case primarily concerns human rights as *rights*. In the second case, a violation would already consist in the failure to adequately consider human rights as optimization principles shaping *policy objectives*. This will be addressed in more detail below.

4.4.3 The No-Harm Principle and Transboundary Impacts

The environmental no-harm principle can also establish an obligation to assess transnational environmental impacts even absent specific treaty obligations. The no-harm principle and the non-discrimination principle in international environmental law indicate that impacts on the natural and human environment must be taken into account, no matter where they occur. Consequently, it can be argued that the no-harm principle also contains a procedural obligation to assess the potentially harmful consequences of certain initiatives, while the non-discrimination principle makes clear that it does not matter where the impacts occur.

⁵³⁰ It is noteworthy that the non-discrimination principle also exists in (international) human rights law. A certain overlap exists insofar as the non-discrimination principles both have an intrinsic value. In human rights, the principle prohibits the unjustified discrimination due to characteristics such as religion, gender, or race, whereas the relevant criterion in environmental law is territorial boundaries. In other words: The objective of non-discrimination in human rights law is the protection of mainly vulnerable and disenfranchised humans irrespective of religion, gender or race. Like in environmental law, it has an intrinsic value. This is in contrast with the non-discrimination principle in international trade law which is primarily an instrumental or functional principle that serves to establish a multilateral trading system. (This is not uncontroversial, as in particular the "Alston-Petersmann controversy" illustrates: Ernst-Ulrich Petersmann, 'Time for a United Nations 'Global Compact' for Integrating Human Rights into the Law of World-wide Organizations: Lessons from European Integration', *European Journal of International Law*, 13 (2002), pp. 621–650; Philip Alston, 'Resisting the Merger and Acquisition of Human Rights by Trade Law: A Reply to Petersmann', *European Journal of International Law* (2002), pp. 815–844. Convincing: Joseph, *Blame it on the WTO?* (above, n. 3), 32 ff.). Essentially, the non-discrimination principle in trade law is not intended to protect the most vulnerable groups or communities in society, but rather used to tear down trade barriers and increase the international exchange of goods and services. This is not to say that liberal trade based on non-discrimination might not be beneficial to the most vulnerable small-scale farmers or indigenous communities who wish to export their products. However, apart from the fact that there is abundant evidence that this is not the case, supporting disenfranchised communities is not even what the non-discrimination principle is intended to do. From a normative perspective, it is socially neutral; from an empirical perspective, it might even be socially harmful.

The “no-harm principle”⁵³¹ is a well-established principle in international environmental law, but has also been evoked in other areas, including human rights and development cooperation law. The principle was first formally endorsed in judicial proceedings in the Trail Smelter arbitration case deciding a dispute between Canada and the United States about transboundary pollution. The arbitral decision held that “[n]o state has the right to use or permit the use of its territory in such a manner as to cause injury by fumes in or to the territory of another or the properties or persons therein, when the case is of serious consequence and the injury is established by clear and convincing evidence”.⁵³² This *judicial* interpretation has later been confirmed at the *political* stage by the Stockholm Declaration and the Rio Declaration which respectively make clear that “States have, in accordance with the Charter of the United Nations and the principles of international law, the sovereign right to exploit their own resources pursuant to their own environmental and developmental policies and the responsibility to ensure that activities within their jurisdiction or control do not cause damage to the environment of other States or of areas beyond the limits of national jurisdiction”.⁵³³ Similarly the UN General Assembly emphasized “that, in the exploration, exploitation and development of their natural resources, States must not produce significant harmful effects in zones situated outside their national jurisdiction”.⁵³⁴ Both the Panel in the Trail-Smelter case and the respective declarations assume that the no-harm-principle is mainly rooted in the principle of sovereignty and non-intervention: states have a sovereign right to exploit natural resources, but this right is limited by other states’ sovereignty and their right to be free from inadmissible transboundary pollution. In its advisory opinion on the Legality of the Threat or Use of Nuclear Weapons, the ICJ detached the no-harm principle from the use of natural resources and found that a “general obligation of States to ensure that activities within their jurisdiction and control respect the environment of other States or of areas beyond national control is now part of the corpus of international law relating to the environment”.⁵³⁵ The existence of the no-harm principle is also confirmed by a number of non-binding legal documents, such as the ILC Draft Articles on the Prevention of Transboundary Harm.⁵³⁶ Unsurprisingly, the precise scope and content remain controversial.⁵³⁷ It is not necessary to go into further detail here. What matters is that the no-harm principle, in particular if read in conjunction with the non-discrimination principle, contains an obligation to take envi-

⁵³¹ The no-harm principle is similar to but not identical with the harm principle which John Stuart Mill applied to *justify* the exercise of public authority in his essay “On Liberty”: “That the only purpose for which power can be rightfully exercised over any member of a civilised community, against his will, is to prevent harm to others”, cited from: John Stuart Mill, ed., *Utilitarianism and On Liberty*, 2. ed., p. 94. The no-harm principle has therefore two dimensions: It obliges states to refrain themselves from undertaking harmful activities (negative duty) and to prevent private actors from doing so (positive duty).

⁵³² Arbitral Trib., *Trail Smelter Arbitral Decision* (above, n. 115).

⁵³³ *Declaration of the United Nations Conference on the Human Environment* (1972) Principle 21; *Rio Declaration on Environment and Development* (1992) Principle 2.

⁵³⁴ UN General Assembly, *Co-operation between States in the field of the environment*, A/RES/2995(XXVII).

⁵³⁵ ICJ, *Legality of the Threat or Use of Nuclear Weapons* (1996), para 29. Unlike in the area of human rights, the transnational and extraterritorial scope of obligations under international environmental law is less controversial.

⁵³⁶ International Law Commission, *Commentaries to Draft Articles on Prevention of Transboundary Harm from Hazardous Activities* (above, n. 91).

⁵³⁷ For a critical review of the harm-principles in environmental, human rights and development law cf. Adrian Di Giovanni, ‘A Pebble in the Shoe: Assessing International Uses of Do No Harm’, *Völkerrechtsblog*, 15 October 2014.

ronmental impacts into consideration and prevent harm regardless where it is expected to occur.⁵³⁸

4.4.4 Customary EIA-Obligations and International Case Law

Over the past decades, the ICJ has further refined the non-discrimination and no-harm principles, and – step by step – recognized an obligation to conduct transboundary EIAs under general international law.⁵³⁹ Similarly, it can be argued that an obligation to assess human rights impacts – and ultimately to conduct HRIAs – can be based on the substantive obligation to respect, protect and fulfill human rights.⁵⁴⁰ Therefore, the path towards the recognition of customary law EIA obligation shall briefly be illustrated, also in order to better understand whether similar developments exist in the context of HRIAs.

The issue arose most prominently in the *Gabcikovo-Nagymaros Case*,⁵⁴¹ a dispute between Hungary and Slovakia concerning the implementation and termination of the Budapest Treaty (1977), in which the states agreed to construct a dam and power generation project on the Danube River. Hungary terminated the contract, claiming that the project imposed huge risks to the Hungarian environment, but Slovakia denied these allegations and unilaterally installed a comparable project on Slovakian soil. Hungary claimed that the revised projects had negative impacts on Hungary's access to the water of the Danube.

The Treaty of 1977 does not explicitly require an EIA. However, in the Court's reading of the Treaty, the project's impact on the environment are found to be a key issue that needs to be taken into account, given that the number of scientific reports shows that environmental risks are "considerable".⁵⁴² In order to evaluate these environmental risks, the Court continues, "[c]urrent standards must be taken into consideration"; unfortunately, the Court does not specify what these standards are. Instead, the state parties "should look afresh at the effects on the environment of the operation of the Gabcikovo power plant".⁵⁴³ It is made clear that it is not the Court's task to determine the final results. Rather, it obliges the state parties to conduct "meaningful" negotiations in order to "find an agreed solution that takes account of the objectives of the Treaty, which must be pursued in a joint and integrated way, as well as the norms of international environmental law and the principles of the law of international watercourses."⁵⁴⁴ This deference to state party negotiations probably reflects the tension between the no-harm principle and the principle of sovereignty concerning the use of natural resources, a tension which the ICJ was

⁵³⁸ See also: Craik, *The International Law of Environmental Impact Assessment* (above, n. 59), p. 67.

⁵³⁹ ICJ, *Costa Rica v. Nicaragua, Certain Activities carried out by Nicaragua in the Border Area* (above, n. 115), 101 and 104: "The Parties broadly agree on the existence in general international law of an obligation to conduct an environmental impact assessment concerning activities carried out within a State's jurisdiction that risk causing significant harm to other States, particularly in areas or regions of shared environmental conditions."

⁵⁴⁰ See section 4.7 for a closer doctrinal human rights law analysis.

⁵⁴¹ ICJ, *Case concerning the Gabcikovo-Nagymaros Project* (above, n. 115).

⁵⁴² Ibid. at para 140. This legal interpretation emphasizes the role of the scientific community and civil society: Scientists and experts can, if they produce sufficient evidence of the harm, help to trigger the need to conduct an impact assessment.

⁵⁴³ Ibid., para 140.

⁵⁴⁴ Ibid., para 141.

unwilling to approach on more substantive terms. The Court requires that all relevant rules, principles and interests are taken “into account”, but does not state that EIAs are the only way to do so.⁵⁴⁵ One might say that the ICJ grants a rather broad “margin of appreciation” on how exactly to implement this obligation.

In his separate opinion, Judge Weeramantry goes a step further. He believes there is, under current environmental law, a duty for ex-ante and ex-post environmental impact assessments that should be read into the treaty:

“Environmental law in its current state of development would read into treaties which may reasonably be considered to have a significant impact upon the environment, a duty of environmental impact assessment and this means also, whether the treaty expressly so provides or not, a duty of monitoring the environmental impacts of any substantial project during the operation of the scheme.”⁵⁴⁶

Environmental impact assessments are, in Weeramantry’s opinion, a “specific application of the larger general principle of caution”⁵⁴⁷ and recognized in a variety of international documents. However, even he stops short of claiming a customary duty to conduct EIAs; instead the formulation that the “environmental impact principle” has “reached the level of general recognition”⁵⁴⁸ leaves the normative status of such a principle slightly vague.

In the *Nuclear Test Cases*, New Zealand and Australia tried to prevent France from conducting nuclear tests due to the radioactive risks. New Zealand complained in 1995, when France announced another series of nuclear tests in the Pacific area, that France had not conducted a prior and adequate environmental impact assessment; New Zealand argued that such an obligation existed both under international treaty law⁵⁴⁹ and as a general duty under international environmental law:

“[O]nce a duty to protect the environment exists, and once the interests of other States are recognized, any activity posing a risk to the environment must logically be subject to a prior requirement of risk assessment.”⁵⁵⁰

The argument is that a substantive duty to protect the environment – in this case mainly the marine environment in the South Pacific – logically requires states to make sure that no such risks to the environment exist. One could object that a general substantive duty to protect the environment does not contain a specific duty to engage in a specific and normally legally regulated IA-procedure. However, this concern is rebutted by New Zealand with the remark that the use of the term EIA is “simply a convenient term to describe a process whereby a party carries out a clear, legal duty”.⁵⁵¹ France does not object that there is such a duty to prevent harm and that states must assess risks before taking action, and that EIAs are one of the existing instru-

⁵⁴⁵ Craik, *The International Law of Environmental Impact Assessment* (above, n. 59), p. 114.

⁵⁴⁶ ICJ, *Case concerning the Gabčíkovo-Nagymaros Project*, (above, n. 515), p. 112.

⁵⁴⁷ Ibid., p. 113.

⁵⁴⁸ Ibid., p. 111.

⁵⁴⁹ ICJ, *Nuclear Test Cases - Oral Pleadings* (above, n. 88), p. 22.

⁵⁵⁰ Ibid., p. 25. Reference is also made to the Draft Articles on Liability for Injurious Consequences arising out of Acts not Prohibited by International Law.

⁵⁵¹ Ibid., p. 22.

ments to discharge such an obligation⁵⁵². Rather, the French position was that risks and impacts had been adequately assessed. Therefore, both parties agreed that there generally exists a duty to conduct, in a broad sense, environmental impact assessments; disagreement persisted regarding the adequacy of the procedures applied in the concrete case. The French representative argues in favor of a “considerable margin of appreciation” for states on how to make sure, in advance, that their potentially dangerous activities do not cause environmental harm.⁵⁵³

This supports the view that states recognize, as customary international law, the obligation to conduct transboundary environmental impact assessments and to cooperate in the context of initiatives that can have an impact on other states’ legitimate interests.⁵⁵⁴ As the ICJ refused to hear the case due to a lack of jurisdiction, it did not speak out on New Zealand’s arguments. The judges of the minority however “cautiously embraced”⁵⁵⁵ this approach, and Judge Weeramantry finds that the principle of environmental assessment has “reached the level of general recognition at which this court should take notice of it”.⁵⁵⁶

The ICJ later used the chance to further clarify this still foggy description and confirmed in its *Pulp Mill* decision that

“it may now be considered a requirement under general international law to undertake an environmental impact assessment where there is a risk that the proposed industrial activity may have a significant adverse impact in a transboundary context, in particular, on a shared resource.”⁵⁵⁷

Still cautious (“may”), the Court most recently turned the “may” into a “must” in a case concerning *Costa Rica v. Nicaragua*:

“Although the Court’s statement in the *Pulp Mills* case refers to industrial activities, the underlying principle applies generally to proposed activities which may have a significant adverse impact in a transboundary context. Thus, to fulfil its obligation to exercise due diligence in preventing significant transboundary environmental harm, a State must, before embarking on an activity having the potential adversely to affect the environment of another State, ascertain if there is a risk of significant transboundary harm, which would trigger the requirement to carry out an environmental impact assessment.”⁵⁵⁸

It has been a long path until the obligation to conduct EIAs was clearly recognized as a principle under international law. A similar development can be observed in the context of human rights.

⁵⁵² Ibid., p. 57.

⁵⁵³ Ibid.: “[...] une marge considérable d’appréciation à chaque Etat concerné quant à la façon de s’assurer préalablement à l’entreprise d’activités qui seraient potentiellement dangereuses, que leur incidence sur l’environnement ne serait pas dommageable.”

⁵⁵⁴ Markus W. Gehring, “Tools for More Sustainable Trade Treaties with Developing Countries” (above, n. 62).

⁵⁵⁵ Craik, *The International Law of Environmental Impact Assessment* (above, n. 59), p. 113.

⁵⁵⁶ ICJ, *Case concerning the Gabčíkovo-Nagymaros Project*, (above, n. 515), p. 111.

⁵⁵⁷ ICJ, I.C.J. Reports 2010, p. 14, *Pulp Mills on the River Uruguay (Argentina v. Uruguay)* (2010), para 204.

⁵⁵⁸ ICJ, *Costa Rica v. Nicaragua, Certain Activities carried out by Nicaragua in the Border Area* (above, n. 115), para 111.

The substantive scope of extraterritorial human rights obligations is controversial. It is in particular unclear to what extent a state (or supra- and international organizations) must refrain from activities that may infringe human rights outside its territory (duty to respect), or whether there is even an obligation to protect human rights abroad (duty to protect). Nevertheless, there is a commitment (at least among Western states) that human rights are important objectives, and that the realization of human rights abroad must, where possible, at least not be obstructed. There is not yet an obligation under customary law to conduct an HRIA similar to the obligation to conduct transboundary EIAs as the ICJ found in *Costa Rica v. Nicaragua*. Rather, we are probably now more in the era of the *Nuclear Test* decisions where an obligation to assess human rights impacts is “cautiously embraced”. A positive exception is EU law which clearly establishes an obligation to take human rights impacts into account, regardless where they occur (see section 4.7.4).

4.5 Development Cooperation Law and the Principle of Affectedness

In this section, I will argue that the principle of affectedness is also reflected in development cooperation law. International development law⁵⁵⁹ focuses on how states or international organizations award Official Development Assistance (ODA),⁵⁶⁰ but can also relate to other types of financial assistance which the OECD classified as Other Official Flows (OOF).⁵⁶¹

4.5.1 Explicit Commitments to Assess Social and Human Rights Impacts

Obligations to assess impacts on human rights are now laid down in different sources of institutional development law. Donors have increasingly regulated their developmental decision-making procedures by legal rules and principles, mostly in the form of international (non-binding) agreements and (internally binding) administrative rules.⁵⁶² This includes, in part, explicit commitments to conduct environmental, social and human rights impact assessments⁵⁶³. The institutionalization of these impact assessments can be explained from a different perspective. One is the paradigmatic shift in development theory and practice from macroeconomic growth to projects and policies directly targeted at individual capabilities and poverty reduction, including human rights-based approaches to development.⁵⁶⁴ Due to the social backlash against the negative side-effects of many development projects and policies, a critical reflection of prior

⁵⁵⁹ Dann, *The Law of Development Cooperation* (above, n. 4); Philipp Dann and Martin Wortmann, ‘Development Cooperation and Humanitarian Aid’, in: Herwig Hofmann, Gerard C. Rowe, and Alexander Türk (eds.), *Specialized Administrative Law of the European Union*, pp. 128–149.

⁵⁶⁰ Dann, *The Law of Development Cooperation* (above, n. 4), 9 ff.

⁵⁶¹ Defined as “official sector transactions that do not meet official development assistance (ODA) criteria”, source: *OECD Data*, available at <https://data.oecd.org/drf/other-official-flows-oof.htm> <last accessed 29 Jan 2017>.

⁵⁶² Dann, *The Law of Development Cooperation* (above, n. 4), 9 ff.

⁵⁶³ On environmental, social and cultural impact assessments project aid (World Bank): *Ibid.*, p. 365; in the institutional law of the IFC: IFC, *Performance Standards* (above, n. 121), in particular PS 1; see also: International Business Leaders Forum (IBLF) and the International Finance Corporation (IFC), ‘Human Rights Impact Assessment and Management’ (above, n. 90); EBRD, *Environmental and Social Policy* (2019), in particular Performance Requirement 1 (human rights are part of the EBRD’s definition of “social”).

⁵⁶⁴ Philip Alston, ‘Ships passing in the night: The current state of human rights and development debate seen through the lens of the Millennium Development Goals’, *Human rights quarterly* (2005), pp. 755–829; Amartya Kumar Sen, *Development as Freedom* (Oxford: Oxford Univ. Press, 1999).

practices became necessary.⁵⁶⁵ In consequence, concepts of development were redefined. Poverty was increasingly regarded as multi-dimensional:⁵⁶⁶ it means not only the “liberation of individuals from material want but also the shaping of the individual’s social, ecological and political environment”.⁵⁶⁷ Especially Western donors were increasingly interested in better understanding the consequences of their development initiatives and foreign policies on human rights and development.⁵⁶⁸ As in particular participatory and transformative impact assessment theories assume that IAs can lead to individual empowerment and increase institutional accountability, the increasing interest in HRIAs since the past 15 – 20 years fits comfortably with the new development paradigms.⁵⁶⁹

Consequently, the World Bank and regional development banks require impact assessments considering environmental, social and often explicitly – with the exception of the Asian Development Bank and IBRD/IDA – human rights consequences.⁵⁷⁰ In particular under the World Bank’s new Environmental and Social Framework, the role of risk and impact assessments becomes more prominent: The Bank will oblige borrowers to conduct environmental and social assessments of projects proposed for Bank financing to “help ensure that projects are environmentally and socially sound and sustainable”.⁵⁷¹ Some of these norms are “internally” binding and can become indirectly binding for borrowers as they must be applied by the institution’s employees. For example, the World Bank’s “old” Safeguards and the “new” ESS become externally binding when incorporated into the loan agreement.⁵⁷² Other norms are merely non-binding recommendations and guidelines. These norms cover the choice of a project or policy to be funded, e.g. by assessing the overall human rights situation in partner countries, and the responsibility in the design and delivery⁵⁷³ of these projects and policies, e.g. by assessing the impacts of projects on social standards and human rights. For similar reasons, the OECD has called to apply similar standards, including the conduct of environmental, social and human rights impact assessments for all types of officially supported export credits.⁵⁷⁴ Many domestic institutions granting export credit and investment guarantees have adopted guidelines on the assessment of

⁵⁶⁵ Dann, *The Law of Development Cooperation* (above, n. 4), p. 102.

⁵⁶⁶ World Bank, *World Development Report 2000/2001* (New York: Oxford University Press, 2001).

⁵⁶⁷ Dann, *The Law of Development Cooperation* (above, n. 4), p. 119.

⁵⁶⁸ Lisa Forman and Gillian MacNaughton, ‘Moving Theory into Practice: Human Rights Impact Assessment of Intellectual Property Rights in Trade Agreements’, *Journal of Human Rights Practice*, 7 (2015), pp. 109–138, p. 119.

⁵⁶⁹ Ibid.; Walker, ‘Human Rights Impact Assessments: Emerging Practices and Challenges’ (above, n. 31), p. 391.

⁵⁷⁰ World Bank, Environmental and Social Framework (ESF), in particular: Environmental and Social Standard (ESS) 1, previously: OP/BP 4.01; European Bank for Reconstruction and Development (EBRD): Environmental and Social Policy, As approved by the Board of Directors at its Meeting on 7 May 2014; African Development Bank (AfDB): Operational Safeguard 1; Asian Development Bank (ADB): Safeguard Policy Statement, June 2009; Fujita, *The World Bank, Asian Development Bank and Human Rights* (above, n. 311), 54 ff.

⁵⁷¹ ESS 1 para 3.

⁵⁷² Dann, *The Law of Development Cooperation* (above, n. 4), p. 188; Dann and Riegner, ‘The World Bank’s Environmental and Social Safeguards and the evolution of global order’ (above, n. 116), p. 552.

⁵⁷³ Fujita, *The World Bank, Asian Development Bank and Human Rights* (above, n. 311), p. 16.

⁵⁷⁴ OECD, *Recommendation of the Council on Common Approaches for Officially Supported Export Credits and Environmental and Social Due Diligence (The “Common Approaches”)* (2012), C(2012)101.

social, environmental and human rights impacts.⁵⁷⁵ The IFC Performance Standards contain a similar commitment. The structurally similar Equator principles (III) extend the responsibility to assess the environmental, social and human rights consequences of initiatives to private financial institutions.⁵⁷⁶

In addition to these specific requirements to conduct human rights-related impact assessments, principles of development cooperation law arguably also require assessing impacts on human rights and interests, irrespective of where they occur. The main focus here will be on the principle of poverty reduction and the principle of Policy Coherence for Development. Other principles important for development cooperation, such as the principle of sovereignty (collective autonomy) and human rights (individual autonomy),⁵⁷⁷ were already discussed above.

4.5.2 The Principle of Poverty Reduction

The assessment of impacts on human rights and interests regardless where they occur can serve to advance the Principle of Poverty Reduction. There is a broad political commitment among states and International Organizations to contribute to poverty reduction. Poverty reduction has also emerged as a structural principle of international development law.⁵⁷⁸ Taking this commitment seriously would imply to assess the impacts different policies can have on the lives of the global poor – an embodiment of the principle of affectedness. However, poverty reduction can arguably also be seen as a human rights imperative⁵⁷⁹ and thus a legal principle. This is confirmed by other legal sources. Most prominently, Articles 1 (3), 55 and 56 of the UN Charter require member states to promote “higher standards of living”. The principle of poverty reduction is also reflected in the World Bank’s secondary law.⁵⁸⁰ It has been argued above that, while the positive obligations stemming from these commitments are highly controversial, they at least contain an obligation to consider the impacts a particular initiative can have on the realization of these legal principles. On such an abstract level, a legal principle of poverty reduction contains

⁵⁷⁵ For an overview: Markus Krajewski, ‘Investment guarantees and international obligations to reduce poverty: A human rights perspective’, in: Krista Nadakavukaren Schefer (ed.), *Poverty and the International Economic Legal System*, pp. 189–210.

⁵⁷⁶ For a list of institutions which adopted the Equator Principles see:

<https://equator-principles.com/members-reporting/>. Similarly, other guidelines – often established in close cooperation with the private for-profit sector – recommend assessing the human rights impacts of an investor’s activities irrespective of the involvement of financial institutions. The IFC and International Business Leaders Forum (IBLF) have developed a guide on HRIA, thus endorsing a responsibility but no obligation to conduct HRIAs. Similarly, the report of the Special Representative on transnational corporations and human rights endorses the responsibility of private investors to conduct HRIAs. Report of the Special Representative of the Secretary-General on the issue of human rights and transnational corporations, ‘Protect, Respect and Remedy: a Framework for Business and Human Rights’, Human Rights Council, A/HRC/8/5, 7 April 2008, para 61.

⁵⁷⁷ Dann, *The Law of Development Cooperation* (above, n. 4), 238 ff.

⁵⁷⁸ Ibid., 222 ff.

⁵⁷⁹ Pogge, *World Poverty and Human rights* (above, n. 255); Dann, *The Law of Development Cooperation* (above, n. 4), 108 ff.; Alston, ‘Ships passing in the night: The current state of human rights and development debate seen through the lens of the Millennium Development Goals’ (above, n. 564).

⁵⁸⁰ While the founding documents of the World Bank Group do not mention poverty, the Bank’s Operational Policies, an important source of secondary World Bank law, have defined “sustainable poverty reduction” as the central objective of World Bank activities (World Bank, OP 1.00).

what one could call a *commitment to commit*: States and international organizations must engage in constructive cooperation with the goal of poverty reduction.⁵⁸¹

EU constitutional law contains an explicit commitment to contribute to poverty reduction. Art. 208 (1) of the TFEU explicitly states: “Union development cooperation policy shall have as its primary objective the reduction and, in the long term, the eradication of poverty”. This is a commitment towards distant strangers, and HRIAs, which also take extraterritorial effects into account, can be one instrument to operationalize such a commitment.

4.5.3 Principle of Policy Coherence for Development (PCD)

The principle of Policy Coherence for Development (“PCD”) requires public authorities to consider the effects their “non-development” initiatives could have on international development policies.⁵⁸² As development policies of industrialized countries are by definition outward-oriented and concern interests of people living in developing countries, the PCD principle also reflects a principle of affectedness. It is now largely uncontested that non-development policies of richer states in areas such as trade or project finance can have both negative and positive impacts on poorer countries and the development objective of poverty reduction. The concept of PCD emerged in the international discourse in the early 1990s, when it became clear that, among the already well-known obstacles, different aspects of globalization – from trade and finance via migration to climate change – can also hamper the effectiveness of development aid.⁵⁸³ As early as 1994, the OECD required, in its Procedural Guidelines on Trade and Environment that “governments should examine or review trade and environmental policies and agreements with potentially significant effects on the other policy area and identify alternative policy options for addressing concerns”.⁵⁸⁴ Impact Assessments can provide a mechanism to implement and pursue the PCD.⁵⁸⁵

Even though there is not yet a single, specific definition of what exactly the PCD means, it is widely agreed that states (or international organizations) should, in pursuing their domestic and international policy objectives, at a minimum avoid negative impacts on the prospects of developing countries (“do no harm”) or, in positive terms, also look for ways to exploit the potential benefits between different policies on developmental goals⁵⁸⁶ (“do-good”). The Sustainable Development Goals now call to “promote a universal, rules-based, open, non-discriminatory and equitable multilateral trading system under the WTO” (SDG 17.10), and, more generally, “en-

⁵⁸¹ Dann, *The Law of Development Cooperation* (above, n. 4), p. 237, arguing that this is the consequence of a *structural* principle of development and poverty reduction.

⁵⁸² On Impact Assessment and International Development: Camilla Adelle, ‘International Development’, in: Claire A. Dunlop and Claudio M. Radaelli (eds.), *Handbook of Regulatory Impact Assessment*, pp. 257–267.

⁵⁸³ European Commission, ‘Commission Staff Working Document: EU 2013 Report on Policy Coherence for Development’, SWD(2013) 456 final, 31 October 2013, p. 16.

⁵⁸⁴ Quoted from (and critically discussed by): Markus W. Gehring, ‘Tools for More Sustainable Trade Treaties with Developing Countries’ (above, n. 62), p. 73.

⁵⁸⁵ Adelle, ‘International Development’ (above, n. 582), p. 257.

⁵⁸⁶ European Commission, ‘Commission Staff Working Document: EU 2013 Report on Policy Coherence for Development’ (above, n. 583), p. 16.

hance policy coherence for sustainable development” (SDG 17.14).⁵⁸⁷ The importance of PCD has been affirmed by the *Busan Partnership for Effective Development Cooperation in 2011*⁵⁸⁸ and also been promoted by the OECD, e.g. by providing guidelines and methodologies on how to better implement PCD into the policy-process and by making PCD part of the DAC Peer Review.

The OECD, but also scholars and NGOs, emphasize three elements as particularly important for effective implementation: political commitment, adequate institutional structures to enhance policy coherence, and coordination mechanisms.⁵⁸⁹ Critics argue that, even though the importance of PCD is largely unquestioned, political leadership and political focus on PCD-commitments has waned over the last years.⁵⁹⁰ Like in so many other policy areas, political commitment is indeed important, but hard to enforce, even where legal obligations exist.⁵⁹¹ The other elements, however, are also legally relevant. The *institutional* approach focuses on how different institutions, ministries and departments are involved in the preparation of new policies. To what extent is, for example, the Commission’s DG “Development and Cooperation” involved in the legislative drafting process where different policy sectors are concerned? Are they able to comment, at an early stage, on potential effects a draft trade or financial regulation might have on small-scale farming in Sub-Saharan Africa? *Instrumental* approaches focus rather on the administrative instruments available to implement the PCD principle, and impact assessments, both ex-ante and ex-post in conjunction with respective monitoring and reporting mechanisms, can enhance PCD.

It is important to point out a major difference with the principle of coherence and efficiency, as identified in the law of development cooperation in relation to aid transfer.⁵⁹² This principle requires the alignment with recipients and the coordination among donors for the allocation and use of ODA.⁵⁹³ It is consequently a principle that guides and structures development policies in the narrow sense. The principle of Policy Coherence for Development, on the other hand, has a much broader scope: it does not aim at the coordination among donors, but at the coordination of aid and non-aid policies and the harmonization between non-aid policies and development objectives.⁵⁹⁴ This implies that states should assess the potential impacts their policies in areas such as trade and finance or migration might have on developing countries and people living therein.

⁵⁸⁷ Before the SDGs were adopted, MDG 8 reflected a similar commitment, which explicitly called upon states to “develop further an open, rule-based, predictable, non-discriminating trading and financial system” in order to reduce poverty.

⁵⁸⁸ 4th High Level Forum on Aid Effectiveness, *Busan Partnership for Effective Development Co-Operation* (2011) margin no. 9: “In this process, it is essential to examine the interdependence and coherence of all public policies – not just development policies – to enable countries to make full use of the opportunities presented by international investment and trade, and to expand their domestic capital markets.”

⁵⁸⁹ Galeazzi, Greta, et.al., ‘Insights from Developments in National Policy Coherence for Development Systems: Key Cross Cutting Issues and Dilemmas’, European Centre for Development Policy Management, in: Discussion Paper, No. 144, April 2013, 6 ff. with a slightly different terminology: Policy commitments, Institutional mechanisms, and Knowledge input and assessment mechanisms.

⁵⁹⁰ Ibid.

⁵⁹¹ It would be interesting to observe whether the new Belgian law that obliges Belgian policy makers to consider developmental impact of domestic policies has a measurable impact on the political decision-making process.

⁵⁹² Dann, *The Law of Development Cooperation* (above, n. 4), 284 ff.

⁵⁹³ Ibid., p. 291.

⁵⁹⁴ European Commission, ‘Commission Staff Working Document: EU 2013 Report on Policy Coherence for Development’ (above, n. 583), p. 16; Adelle, ‘International Development’ (above, n. 582), p. 257.

The legal character of the principle depends on the legal sources upon which it is constituted. On the international scale, binding legal commitments are rare. However, PCD is now part of EU constitutional law: Article 208 TFEU stipulates that the “Union shall take account of the objectives of development cooperation in the policies that it implements which are likely to affect developing countries”. It means that development objectives *must* be taken into consideration in all EU policies, whenever these are likely to have an impact on developing countries.⁵⁹⁵ Whereas theoretically all EU policies can have impacts on developing countries, the Council has identified five global challenges that should have priority for PCD: Trade and finance, Climate Change, Food security, Migration, and Security.⁵⁹⁶ The EU Economic and Social Committee states that PCD requires to “reform the instruments, bodies and policies pertaining to global governance of food security and trade” to bring trade policies in line with the right to food.⁵⁹⁷ It is before this background that the EU-Commission underlines the importance of impact assessments as a tool to align policy proposals along the PCD principle, and that the Council welcomes the “strengthening of the development dimension of the impact assessment tool as important instruments to improve PCD and the regular screening of the Commission Legislative and Work Programme from a PCD perspective”.⁵⁹⁸

Legal commitments on the state level are less explicit, even though state representatives are not hesitant to make nice-sounding political commitments on the international stage and to put these declarations of intent down in writing.⁵⁹⁹ However, some countries have enacted binding legal obligations. One example is Spain, which has already in 1998 included a commitment to policy coherence for development into its law of development cooperation. The statute states that the principle laid out therein “will inform all policies applied by public administrations within the framework of their respective competencies that may affect poor countries”.⁶⁰⁰ The Swedish development cooperation law contains a similar commitment since 2003,⁶⁰¹ and the most recent example is Belgium. In 2013, the Belgian Parliament enacted a new law on development cooperation, and one of the six overarching objectives is to achieve the *maximum coherence* between the different branches of Belgian politics and development objectives in order to ensure the efficiency of Belgian development cooperation.⁶⁰² However, as with many broad legal principles in the ambit of international relations, the judicial enforceability of this principle remains weak.

⁵⁹⁵ See also: European Union, *The European Consensus*, 2006/C 46/01, 9 and 35 ff; Council of the European Union, *Council Conclusions on Increasing the Impact of EU Development Policy: an Agenda for Change* (2012), doc. 9369/12, para 20.

⁵⁹⁶ Council of the European Union, *Council Conclusions on Policy Coherence for Development* (18 November, 2009), doc. 16079/09 margin no. 11; affirmed by Council of the European Union, *Council Conclusions on Increasing the Impact of EU Development Policy: an Agenda for Change* (above, n. 595) margin no. 22.

⁵⁹⁷ European Economic and Social Committee, *Opinion of the European Economic and Social Committee on ‘Trade and Food Security’* (above, n. 22), 1.1.7

⁵⁹⁸ Council of the European Union, *Council Conclusions on Policy Coherence for Development* (above, n. 596) margin no. 4.

⁵⁹⁹ For an overview: Galeazzi, Greta, et.al., ‘Insights from Developments in National Policy Coherence for Development Systems: Key Cross Cutting Issues and Dilemmas’ (above, n. 589), 8 f.

⁶⁰⁰ Kingdom of Spain, *Ley 23/1998, de 7 de julio, de Cooperación Internacional para el Desarrollo* [1998] Article 4; translation in OECD, ‘Development Assistance Committee (DAC) - Peer Review 2011 (Spain)’, p. 37.

⁶⁰¹ Galeazzi, Greta, et.al., ‘Insights from Developments in National Policy Coherence for Development Systems: Key Cross Cutting Issues and Dilemmas’ (above, n. 589), p. 8.

⁶⁰² Kingdom of Belgium, *Loi relative à la Coopération au Développement* [2013] Article 8.

4.6 Trade Law and the Principle of Affectedness

International trade law increasingly reflects a global principle of affectedness. This includes two dimensions: First, the obligation to assess the effect of regulatory measures on trade-related interests, and second, the obligation to assess the effect of trade law on non-trade related rights and principles, such as environmental protection and human rights. In practice, these dimensions are not always easy to separate. Even if one disagrees with the view that a right to trade is a human right, it can well be argued that a trade rule that enables small-scale farmers or fishermen in the Global South to export their products abroad helps to cover their basic needs and thus contributes to the realization of their right to an adequate standard of living.

4.6.1 International Trade Law and the Consideration of Transnational Impacts

One of the proclaimed principal objectives of international trade law is the contribution to sustainable development,⁶⁰³ which implies a responsibility especially of industrialized countries to take development-related impacts of their trade policies into account. The General Agreement on Tariffs and Trade (GATT 1994), for example, contains commitments of developed states to implement policies that advantage less-developed countries: Developed countries shall reduce and refrain from introducing “customs duties or non-tariff import barriers on products currently or potentially of particular export interest to less-developed contracting parties”.⁶⁰⁴ At the same time, other-regarding norms and institutions have emerged at a more procedural level,⁶⁰⁵ with the aim to consider the rights and interests of third countries and people living therein in trade policymaking. International trade law contains a number of procedural requirements that reflect a principle of affectedness.⁶⁰⁶ The Agreement on Subsidies and Countervailing Measures (“SCM-Agreement”) prohibits the use of subsidies that cause adverse effects on the interests of other Members and especially “injury to the domestic industry of another Member”⁶⁰⁷. With regard to customs matters, states must maintain “judicial, arbitral or administrative tribunals or procedures for the purpose, inter alia, of the prompt review and correction of administrative action relating to customs matters”.⁶⁰⁸ The GATS and TRIPS Agreements equally require making “due

⁶⁰³ Preamble to the Marrakesh Agreement Establishing the World Trade Organization; Art. XXXVI GATT (*General Agreement on Tariffs and Trade 1994*).

⁶⁰⁴ Art. XXXVII Sec. 1 lit. a) and b) of the GATT. This is not to say that it is a satisfactory commitment from a human rights perspective. For example, the effect is immediately mitigated by a qualifier (“to the fullest extent possible”). The term is relatively vague, and unlike in other disputes, no independent judicial authority is empowered to decide on the meaning of these terms on a case-by-case basis. The only remedy available is to report a dispute to the Contracting Parties for consultation: Ibid. Art. XXXVII Sec. 2.

⁶⁰⁵ The Generalized Systems of Preferences granting non-reciprocal tariff-reductions to certain products from less-developed countries will not be discussed here in further details. Rather, the focus is on other-regarding norms in the design and application of trade and trade-related policies.

⁶⁰⁶ On due-process obligation in international trade law see: Steve Charnovitz, ‘Transparency and Participation in the World Trade Organization’, *Rutgers L. Rev.*, 56 (2004); Ioannidis, ‘A Procedural Approach to the Legitimacy of International Adjudication: Developing Standards of Participation in WTO Law’ (above, n. 67).

⁶⁰⁷ Article 5 lit. a) of the SCM Agreement (*Agreement on Subsidies and Countervailing Measures*).

⁶⁰⁸ Article X:3 (b) GATT..

process” mechanisms available to foreign economic actors⁶⁰⁹. Similarly, when WTO members want to implement emergency measures, they have to consider the external impacts thereof. For example, when Member States make use of the General Exceptions under Article XX of the General Agreement on Tariffs and Trade by imposing measures “essential to the acquisition or distribution of products in general or local short supply,” those states must observe “the principle that all contracting parties are entitled to an equitable share of the international supply of such products.”⁶¹⁰ Similarly, “any new export prohibition or restriction on foodstuffs [...] shall give due consideration to the effects of such prohibition or restriction on importing Members’ food security.”⁶¹¹

Even though formally only states or state-like entities (the EU) are members of the WTO, this does not mean that individuals play no role in the WTO system. In a dispute between the European Communities and the United States, the WTO Panel emphasized the role of the individual in the WTO system by stating that “it would be entirely wrong to consider that the position of individuals is of no relevance to the GATT/WTO legal matrix. Many of the benefits to Members which are meant to flow as a result of the acceptance of various disciplines under the GATT/WTO depend on the activity of individual economic operators in the national and global marketplaces. The purpose of many of these disciplines, indeed one of the primary objects of the GATT/WTO as a whole, is to produce certain market conditions which would allow the individual activity to flourish.”⁶¹²

The obligation to provide for fair and open administrative procedures that allow taking interests of foreign states and distant strangers into account has also been confirmed by the WTO Appellate Body. In the Shrimp-Turtle case⁶¹³, India, Malaysia, Pakistan and Thailand filed a complaint against the United States, which required US shrimp trawlers use “turtle excluder devices” (TEDs) to protect sea turtles, and prohibited the import of shrimps unless the harvesting technology in the country of origin provided for a comparable type of protection. This essentially means that countries have to make sure that TEDs are used all the time. This results in significant costs for small shrimp farmers and could affect them in a vital manner. The US lost the case in particular because it had provided selected countries, mainly in the Caribbean, with financial and technical assistance and granted them longer transition periods. So the WTO Appellate Body did not consider a ban in order to protect the environment and endangered species per se incompatible with WTO law, but the discriminatory application thereof. The Report reflects the principle of affectedness as understood here: A domestic regulation causes different impacts in different countries,⁶¹⁴ and not only discriminates between WTO members, but also makes it more difficult for fishermen in Asian countries to compete with those in the Caribbean which received considerable support to comply with US laws. In consequence, the effects of trade measures must be considered in a non-discriminatory manner. As the Shrimp-Turtle case illus-

⁶⁰⁹ Art. VI:2 (a) of the GATS (*General Agreement on Trade in Services*); Articles 22 (2), 23 (1), 26 (1)41, and 46 of the TRIPS Agreement (*Agreement on Trade-Related Aspects of Intellectual Property Rights*).

⁶¹⁰ Benvenisti, ‘Sovereigns as Trustees of Humanity: On the Accountability of States to Foreign Stakeholders’ (above, n. 2), p. 316, with regard to Art. XX lit. j) GATT.

⁶¹¹ Art. 12 (1) lit. a) of the AoA (*Agreement on Agriculture*).

⁶¹² WTO, WT/DS152/R, *United States – Sections 301-310 of the Trade Act of 1974* (1999), 7.73.

⁶¹³ WTO Appellate Body, WT/DS58/AB/R, *United States – Import Prohibition of Certain Shrimp and Shrimp Products* (1998).

⁶¹⁴ Ibid., para 185–186.

trates, trade regulation does not only advantage multinational corporations. The obligation to take policy impacts into account can also serve to protect – and here overlaps with human rights may exist – vulnerable groups and individuals in far-away countries.

4.6.2 Impact Assessments of International Trade Agreements

A second trend regards the institutionalization of impact assessments of trade agreements. International trade policy has become a battleground where political and scholarly debates about the “virtues and vices of economic globalization” became a matter of “high politics”.⁶¹⁵ Critics argue that trade liberalization exacerbates inequalities and neglects environmental and labor standards, food security or more generally human rights concerns.⁶¹⁶ Others refute these objections and regard liberalization as essential to increase economic productivity, which would be necessary to lift people from poverty.⁶¹⁷ This shows that, on an analytical level, the *causes* and *extent* of the impacts of trade liberalization and the *consequences* that should be drawn are highly controversial. What even (most) supporters of trade liberalization admit, though, is the need for institutions and policies, be they at the global, regional or state level, to increase the productivity of citizens and make sure that everyone can profit from economic growth.⁶¹⁸ In other words, there is a broad consensus that international trade *can* have negative impacts on human rights, interests and needs if not properly managed. Critique of these negative social impacts has often been framed in human rights terms.⁶¹⁹ For a while, the “trade and human rights” debate mainly focused on how states can use human rights clauses in trade agreements in order to increase other states’ compliance with human rights: Trade law was used as an external instrument to increase human rights protection⁶²⁰ (described above as the enforcement constellation). Later, the trade and human rights debate focused more on the negative human rights impacts of international trade regulation itself, especially with regard to economic, social and cultural rights such as the right to food or health⁶²¹ (self-restraint constellation).

IAs were thus increasingly used as an instrument to avoid or mitigate negative impacts of trade regulation. In 1993, the OECD Ministerial Council recommended that “Governments should examine or review trade and environmental policies and agreements with potentially significant effects on the other policy area early in their development to assess the implications for the oth-

⁶¹⁵ Michael Trebilcock, *Understanding Trade Law* (Northampton/MA: Edward Elgar, 2011), p. 10.

⁶¹⁶ Critics of current trends in economic globalization and international trade policy: Dani Rodrik, *The Globalization Paradox* (Oxford: OUP Oxford, 2011); Joseph E. Stiglitz, *Making globalization work* (New York: Norton, 2007).

⁶¹⁷ Jagdish N. Bhagwati, *In Defense of Globalization* (Oxford, New York: Oxford University Press, 2007); Philippe Legrain, *Open World* (Chicago: Ivan R. Dee, 2004).

⁶¹⁸ Trebilcock, *Understanding Trade Law* (above, n. 615), p. 9; similar: John G. Ruggie, ‘International Regimes, Transactions, and Change: Embedded Liberalism in the Postwar Economic Order’, *International Organization*, 36 (1982), pp. 379–415, p. 392, who further developed the ideas by Karl Polanyi, *The great transformation* (Boston: Beacon Press, 1957, 1944).

⁶¹⁹ Harrison and Goller, ‘Trade and Human Rights: What Does ‘Impact Assessment’ Have to Offer?’ (above, n. 36), p. 590 on the need for human rights as an “external mechanisms for critiquing the social justice impact of international trade law rules”.

⁶²⁰ This is the case when trade agreements use human rights clauses as conditionalities: Bartels, *Human Rights Conditionality in the EU’s International Agreements* (above, n. 497).

⁶²¹ Harrison and Goller, ‘Trade and Human Rights: What Does ‘Impact Assessment’ Have to Offer?’ (above, n. 36), p. 590.

er policy area and to identify alternative policy options for addressing concerns.”⁶²² A year later the OECD published a document called “Methodologies for Environmental and Trade Reviews” with the general recommendation to “borrow” or “adopt” methodologies from traditional environmental impact assessments (EIA).⁶²³

In 1999, President Bill Clinton enacted Executive Order 13141, which determines that certain trade agreements require environmental review which shall be conducted by the US Trade Representative (Sec. 3 and 4 EO 13141). While the reviews must always focus on impacts occurring within US territory, reviews may “as appropriate and prudent [...] also examine global and transboundary impacts”.⁶²⁴ The implementation guidelines to the Executive Order define certain criteria, such as the scope and magnitude of reasonably foreseeable global and transboundary impacts, which serve as the basis to determine, in the scoping stage, whether it is appropriate and prudent to also examine these international impacts.⁶²⁵ These commitments have been elevated to legislative status in the Trade Act of 2002, which states that “[t]he President shall [...] conduct environmental reviews of future trade and investment agreements, consistent with Executive Order 13141 of November 16, 1999, and its relevant guidelines, and report to the Committee on Ways and Means of the House of Representatives and the Committee on Finance of the Senate on such reviews”.⁶²⁶

While it is remarkable that the obligation to conduct impact assessments of trade agreements, including even international impacts, was early-on enshrined in statutory law, especially many developing countries were not too excited. One reason was the fear that industrialized states might use environmental review or sustainability assessments to justify barriers to trade to the disadvantage of developing countries.⁶²⁷ However, recently there seems to be less resistance, especially with regard to impact assessments that also take the developmental consequences of trade agreements into account. For example, the Ministry of Trade of the Dominican Republic, supported by USAID, conducted an evaluation of the impacts of the DR-CAFTA agreement on productive sectors (*sectores productivos*) of the Dominican Republic.⁶²⁸

A binding obligation to conduct Human Rights Impact Assessments under international law is contained in a side agreement to the Canada-Colombia Free Trade Agreement, in which both parties agree to report each year to its national legislature on the “effect of the Free Trade Agreement between Canada and the Republic of Colombia on human rights in the territories of both Canada and Colombia”.⁶²⁹ In spite of the slightly different terminology, this is essentially an obligation to conduct ex-post HRIAs. However, clearly binding obligations in domestic statutes or international obligations considering not only environmental but also social and human rights

⁶²² Cited in: OECD, *Methodologies for Environmental and Trade Reviews*, OCDE/GD(94)103, p. 5.

⁶²³ Ibid., p. 11.

⁶²⁴ EO 13,141 Sec. 5 lit. b).

⁶²⁵ Guidelines for Implementation of EO 13141 in Section IV.B.5.

⁶²⁶ Trade Act (2002) Sec 2102 (c)(4).

⁶²⁷ Salzmann, ‘Executive Order 13,141 and the Environmental Review of Trade Agreements’ (above, n. 495), 378 et seq.

⁶²⁸ Evaluación del Impacto de DR-CAFTA en los Sectores Productivos de la República Dominicana (2011), available at: http://www.aird.org.do/2docongresoindustrial.do/Docs/Evaluacion_Impacto_DR-CAFTA_en_Sectores_Productivos.pdf (last visited: June 2020).

⁶²⁹ Art. 1 (1) Agreement Concerning Annual Reports on Human Rights and Free Trade Between Canada and the Republic of Colombia.

impacts are still rare. The quality of the assessments conducted so far has also been subject to criticism.⁶³⁰

The most comprehensive approach has been adopted by the EU impact assessment regime which will be more closely analyzed in the remainder of this book. The EU systematically conducts so-called Sustainability Impact Assessments (Trade SIA), where it analyzes the internal and external economic, environmental, social and – nowadays also – human rights consequences. The methodologies were first developed for the 1999 WTO negotiations and since then applied to the EU's major bi- or multilateral trade agreements as mainly independent studies conducted by external and independent consultants selected in a tendering process. Certain broad principles on how to conduct the assessment are prescribed by European Commission guidelines and applied in cooperation with the Commission.⁶³¹ The EU norms guiding impact assessments were not, at least not explicitly and from the very beginning, laid down in clearly binding primary or secondary law. Still, as will be seen below, the EU is under an obligation, inter alia, to examine the human rights impacts of its trade agreements occurring in third countries (see, in particular, section 4.7.4.2 and the discussion of the *Front Polisario* judgment). Moreover, even insofar as norms are not directly binding, they are not necessarily legally irrelevant (see section 6.1.4 for an analysis of the legal nature of EU impact assessment norms). Finally, even if the failure to conduct Impact Assessments has no clear *legal* consequences, it can raise *legitimacy* concerns. This is what happened in the context of the Anti-Counterfeiting Trade Agreement (ACTA) where, among other things, the lack of an Impact Assessments was heavily criticized by different Civil Society Organizations.⁶³² In response to this criticism, the Council of the European Union called, in 2012, upon all EU institutions to incorporate human rights in all impact assessments, and consequently, the European Commission guidelines – which were completely revised in 2015 – contain more detailed tools on how to consider human rights in impact assessments, including impacts occurring in third countries.⁶³³ In addition, many IAs of trade agreements were conducted not by public authorities but by scholars or CSOs as part of a human rights critique of planned trade agreements.⁶³⁴ These IAs contribute to a better understanding of opportunities and challenges of HRIA methodologies.⁶³⁵ Official guidelines therefore often refer to methodologies developed or tested by private IAs.⁶³⁶

⁶³⁰ James Harrison, 'Conducting a Human Rights Impact Assessment of the Canada-Columbia Free Trade Agreement: key issues', Background Paper Prepared for the CCIC Americas Policy Group, February 2009.

⁶³¹ For example: European Commission, 'Handbook for Trade Sustainability Impact Assessment' (above, n. 212), pp. 10–11; for an analysis of the Trade SIA conducted by ECORYS see: Walker, 'Human Rights in the Trade and Sustainability Impact Assessment of the EU-Tunisia Free Trade Agreement' (above, n. 57).

⁶³² European Commission, 'Anti-Counterfeiting Trade Agreement (ACTA): Civil Society Meeting', EU Commission, 25 March 2011.

⁶³³ See section 6.1.

⁶³⁴ E.g.: Paasch and others, *Right to Food Impact Assessment of the EU-India Trade Agreement* (above, n. 156).

⁶³⁵ For example, the comprehensive IA conducted by Simon Walker not only suggests a methodological framework, but also contains critical reflections on existing challenges, especially with regard to the fact that IAs are time-consuming and expensive: Walker *The Future of Human Rights Impact Assessments of Trade Agreements* (above, n. 28).

⁶³⁶ See the reference to academic literature in European Commission, *Guidelines on the analysis of human rights impacts in impact assessments for trade-related policy initiatives* (above, n. 42), p. 14.

4.7 Human Rights Law and the Principle of Affectedness

So far, I have identified rules and principles that require to assess impacts on human interests irrespective of where these impacts occur. Based on these rules, and in line with a reconstruction of sovereignty, I have argued for an emerging legal principle of affectedness. As a minimum, it requires that public authorities “weigh the interests of other stakeholders and consider internalizing them into their balancing calculus.”⁶³⁷ Such a principle modifies the content of sovereignty and complements a primarily territorially-bound accountability concept by an element of affectedness.

The remainder of this chapter will focus on the principle of affectedness and human rights. This focus is important for several reasons. First, this thesis is about *human rights* impact assessments. While the previous sections have identified obligations to take impacts relevant to *human interests* into account, this section focuses explicitly on *human rights*. Second, the obligation to apply human rights extraterritorially is a strong normative argument to further support the claim that there is an emerging legal principle of affectedness. At the same time, as has briefly been mentioned above, the principle of affectedness can also be a normative justification for the extraterritorial application of human rights even beyond the exercise of “authority and control”. Third, human rights are special rights: while they may function as guiding principles and policy objectives, first and foremost they are human entitlements. Consequently, it may not be sufficient to simply consider human rights effects in the “balancing calculus”; instead, impact assessments and human rights compliance review may overlap, and human rights can therefore also determine *how* impacts are to be assessed and evaluated (this latter aspect will be addressed in more detail in part IV below). In this context, the two “functions” of human rights will again become relevant. As illustrated above,⁶³⁸ human rights play a role as *individual entitlements* and as *constitutional policy objectives*.⁶³⁹ While these two functions are closely interrelated, it is nevertheless helpful to make this distinction, in particular to understand the different roles of human rights in impact assessments.

Compared with EIA obligations, international treaty law only exceptionally establishes an explicit duty to conduct social or human rights impact assessments. One of the few exceptions is Article 7 (3) of ILO Convention 169, which obligates governments to “ensure that, whenever appropriate, studies are carried out, in co-operation with the peoples concerned, to assess the social, spiritual, cultural and environmental impact on them of planned development activities. The results of these studies shall be considered as fundamental criteria for the implementation of these activities.” Another example is the trade agreement between Canada and Colombia which contains an obligation to monitor the human rights consequences of the agreement once entered into force.⁶⁴⁰

The doctrinal analysis will follow a two-step approach: First, it is to ask whether substantive human rights norms contain an obligation to assess the (unintended) human rights impacts of

⁶³⁷ Benvenisti, ‘Sovereigns as Trustees of Humanity: On the Accountability of States to Foreign Stakeholders’ (above, n. 2), p. 314.

⁶³⁸ See section 2.4.2.

⁶³⁹ On this distinction see section 3.2.2.3. See also Henninger, *Menschenrechte und Frieden als Rechtsprinzipien des Völkerrechts* (above, n. 194), 293 et seq.

⁶⁴⁰ Agreement concerning Annual Reports on Human Rights and Free Trade between Canada and the Republic of Colombia, signed on May 27, 2010.

an initiative. It has been argued above that the obligation to conduct EIAs can be based on substantive environmental law principles. Similarly, the following sub-section will ask whether substantive human rights law also implies an obligation to conduct HRIAs. There is emerging case law, in particular by the regional human rights courts, according to which human rights may require duty bearers to conduct an environmental and social impact assessments to discharge their human rights obligations. I will examine how such case law – which requires a formal process to assess a decision’s consequences (“*Folgenorientierung*”) – relates to human rights doctrine. The first part of this section concludes that substantive human rights require, under certain conditions, the ex-ante assessment of potential human rights impacts (see section 4.7.1).

Against this background, the second part of this section asks to what extent these obligations also apply irrespective of where these impacts occur, thus on a transnational and global scale. This essentially requires an analysis of extraterritorial human rights obligations (see section 4.7.2 et seq.), both under international and EU constitutional law.

4.7.1 Substantive Human Rights and the Assessment of Human Rights Impacts

Human rights case law is increasingly linked with the factual consequences of a decision,⁶⁴¹ and this is where a link with impact assessment regimes exists. In *Giacomelli vs. Italy*, the European Court of Human Rights has stated that a “governmental decision-making process concerning complex issues of environmental and economic policy must in the first place involve appropriate investigations and studies so that the effects of activities that might damage the environment and infringe individuals’ rights may be predicted and evaluated in advance and a fair balance may accordingly be struck between the various conflicting interests at stake”.⁶⁴² In a similar vein, the African Commission on Human and Peoples’ Rights equally identified such an obligation. In the case concerning the economic activities in the Niger Delta, there were allegations that these operations had contaminated the environment and caused health problems among the Ogoni people. In this context, the Commission assumes that the government has an obligation to conduct an environmental and social impact assessments, based on the *peoples’ right* to a “general satisfactory environment favorable to their development” (Art. 24 Banjul Charter) and the *individual human right* to health (Art. 16 Banjul Charter).⁶⁴³ In a decision concerning the state of Surinam, the Inter-American Court of Human Rights ordered that the state had to consult with the Saramanka People in relation with prior environmental and social impact studies.⁶⁴⁴

⁶⁴¹ Dieter Grimm, ‘Entscheidungsfolgen als Rechtsgründe: Zur Argumentation des deutschen Bundesverfassungsgerichts’, in: Gunther Teubner (ed.), *Entscheidungsfolgen als Rechtsgründe*, pp. 139–159.

⁶⁴² ECtHR, Application No. 59909/00, *Giacomelli vs. Italy* (2006), para 83; ECtHR, Application No. 36022/97, *Hatton and others vs. United Kingdom* (2003), para 128.

⁶⁴³ African Commission on Human and Peoples’ Rights, Comm. No. 155/96 (2001).

⁶⁴⁴ IACtHR, *Caso del Pueblo Saramaka vs. Surinam: Interpretación de la Sentencia de Excepciones Preliminares* (2008), para 16; see also: IACtHR, *Caso del Pueblo Saramaka Vs. Surinam: Excepciones Preliminares* (2007), para 194: “[...] the State must carry out the following measures: [...]e ensure that environmental and social impact assessments are conducted by independent and technically competent entities, prior to awarding a concession for any development or investment project within traditional Saramaka territory, and implement adequate safeguards and mechanisms in order to minimize the

This link between human rights obligations and factual consequences poses challenging questions. Teubner has defined the role factual impacts play for the interpretation and implementation as a paradox: Legal practice would today be unthinkable without the consideration of a decision's real-life impact; however, lawyers are often institutionally and methodologically not well equipped to assess these impacts adequately.⁶⁴⁵ The obligation to assess human rights impacts is primarily a task of non-judicial authorities, such as legislatures or administrative agencies. Unlike courts, they in principle have the institutional capacity to analyze real-life impacts. However, the methodological obstacle remains. This is most obvious once a legislator's or agency's assessment of human rights impacts is being challenged in court as being inadequate: in that case, courts must determine the applicable scope of judicial review in an area where law, political discretion and scientific expertise meet. This will be a recurring theme in the following chapters.

The duty to assess real-life impacts is arguably based on the obligation to respect and to protect human rights. A fundamental function of human rights is the protection of individuals - and increasingly also of communities - against the arbitrary exercise of public authority: Duty-bearers must refrain from acts that violate human rights.⁶⁴⁶ So to what extent does such a duty to respect contain an obligation to analyze the human rights impacts of planned interventions? Modern human rights law is not limited to preventing only intended and direct violations, such as torture or other forms of police power abuse. It also deals with indirect and unintended impacts. Thus, human rights also guide the exercise of public authority when it comes to the design of economic projects and policies. These areas are often complex, and unintended human rights consequences are often hard to predict. However, considering the goal that human rights should enhance personal freedom and capabilities, it does not make a significant difference whether the interference with individual rights was intentional and direct or not. Consequently, national and international courts and tribunals also take unintended and indirect impacts into account.

This can be illustrated inter alia by reference to German constitutional case law. Regarding the obligation to respect, the Federal Constitutional Court has broadened the definition of "encroachment" or "infringement": The traditional concept of infringement ("Eingriff") was designed for a liberal, "night-watchman-state" to prevent police abuse or other forms of arbitrary but *intentional* governmental infringements into the sphere of protection.⁶⁴⁷ Due to the evolving role of the state in regulating social interactions, it became obvious that *unintended* consequences of *factual* interventions, such as side-effects of public warnings, could affect the enjoyment of human rights often as much as legal acts, namely prohibitions or penalties.⁶⁴⁸ Therefore, the concept of infringement shifted from an *act*-focused to an *impact*-focused understanding, covering all limitations of the sphere of protection, be they "intended or not, direct or indirect, legal or factual, enforced or not", as long as they are attributable to a public authority and of some rele-

damaging effects such projects may have upon the social, economic and cultural survival of the Saramaka people".

⁶⁴⁵ Gunther Teubner, 'Folgenorientierung', in: Gunther Teubner (ed.), *Entscheidungsfolgen als Rechtsgründe*, pp. 9–16, p. 9. For a nuanced analysis of the consideration of facts and the social reality in the case of the Federal Constitutional Court: Bryde, 'Tatsachenfeststellungen und soziale Wirklichkeit in der Rechtsprechung des Bundesverfassungsgerichts' (above, n. 349).

⁶⁴⁶ Dann, *The Law of Development Cooperation* (above, n. 4), p. 274.

⁶⁴⁷ Werner Heun, *The Constitution of Germany* (Oxford, Portland, Or: Hart Pub., 2011), p. 194.

⁶⁴⁸ Ibid.

vance.⁶⁴⁹ Consequently, the scope of the duty to respect human rights becomes more difficult to define. At least to the extent that “unintended” also means “unknowingly”, taking the duty to respect human rights serious means that public authorities have to take reasonable effort to assess, in advance, foreseeable real-life impacts of their planned initiatives.⁶⁵⁰ Based on a broader understanding of human rights infringements, there is a duty to assess, ex-ante, whether human rights impacts are likely to occur (the degree and form of such an ex-ante assessment remains still quite discretionary at this point).

The proportionality test establishes a second link between human rights doctrine and the need to identify a decision’s factual consequences.⁶⁵¹ In spite of doctrinal differences when it comes to details, proportionality is an essential part of human rights jurisprudence in many jurisdictions, even though especially in the US more often named differently, such as “balancing tests”.⁶⁵² The justification of an interference with a protected human right essentially requires that the (1) interfering measure be appropriate/suitable to support/fulfill a legitimate aim and (2) does not go beyond what is necessary to achieve that aim.⁶⁵³ In some cases, balancing between conflicting rights or between the right and a public interest is required, either instead of or in addition to the necessity test.⁶⁵⁴ In any case, all elements of the proportionality test require the consideration of real-life consequences: It is impossible to define whether the interfering act is an appropriate/suitable means to achieve a pre-defined legitimate aim without taking the decision’s factual consequences into account.⁶⁵⁵ The same is true for the necessity-test, which requires a comparison between different options in order to, first, identify which are equally effective, and which of these is the least restrictive (“*folgenorientierte Alternativprüfung*”⁶⁵⁶). These questions cannot be answered without analyzing the potential real-life impacts.⁶⁵⁷ The German Federal Constitutional Court also held that, after enacting a new policy, the legislator has a duty to con-

⁶⁴⁹ Ibid.

⁶⁵⁰ For a comprehensive overview of different legal sources for and instruments of impact assessments: Windoffer, *Verfahren der Folgenabschätzung als Instrument zur rechtlichen Sicherung von Nachhaltigkeit* (above, n. 357).

⁶⁵¹ Bryde, ‘Tatsachenfeststellungen und soziale Wirklichkeit in der Rechtsprechung des Bundesverfassungsgerichts’ (above, n. 349), p. 555.

⁶⁵² Bernhard Schlink, ‘Proportionality in Constitutional Law: Why Everywhere But Here?’, *Duke Journal of Comparative and International Law*, 22 (2012), pp. 291–302.

⁶⁵³ Olivier de Schutter, *International Human Rights Law* (Cambridge: Cambridge University Press, 2010), p. 313.

⁶⁵⁴ An example for the latter is the jurisprudence of the Federal Republic of Germany: Heun, *The Constitution of Germany* (above, n. 647), p. 196 (“Angemessenheit”).

⁶⁵⁵ Grimm, ‘Entscheidungsfolgen als Rechtsgründe: Zur Argumentation des deutschen Bundesverfassungsgerichts’ (above, n. 641), p. 152.

⁶⁵⁶ Windoffer, *Verfahren der Folgenabschätzung als Instrument zur rechtlichen Sicherung von Nachhaltigkeit* (above, n. 357), p. 134 with further references.

⁶⁵⁷ One evident example is the German Federal Constitutional Court’s Pharmacy Case. The state of Bavaria restricted the number of pharmacies licensed in each community. The *Apothecaries Act* stated that additional licenses could only be issued if the new pharmacies would be commercially viable and would cause no economic harm to nearby competitors. The aim was to protect public health by avoiding fierce competition. In consequence, the necessity test require that the legislator – and, when reviewing the statute, the courts – analyze whether “the absence of this restriction on the establishment of new pharmacies would ... in all probability disrupt the orderly supply of drugs in such a way as to endanger public health”: BVerfG, Judgment of 11 June 1958, *Apotheken*, 1 BvR 596/56, para 97 (juris), translation in: Kommers and Miller, *The Constitutional Jurisprudence of the Federal Republic of Germany* (above, n. 358), p. 670; Windoffer, *Verfahren der Folgenabschätzung als Instrument zur rechtlichen Sicherung von Nachhaltigkeit* (above, n. 357), 134 f.

sider the real-life “negative impacts” of its policies both before and after the implementation of the policy.⁶⁵⁸

The same is true for the obligation to protect human rights, namely to prevent the violation of human rights by third parties:⁶⁵⁹ In order to identify when a threat to human rights is so significant that the state must intervene (“duty to protect”), it is unavoidable to analyze the factual circumstances that impose such a risk.⁶⁶⁰ Without going into detail, it is important to note that courts usually grant a broad margin of appreciation: international human rights jurisprudence recognizes a wide margin of appreciation for states. The German Federal Constitutional Court recognizes a wide parliamentary discretion to determine *when* the duty to protect is triggered and *which options* to choose.⁶⁶¹ This is especially relevant where conflicting human rights claims must be balanced, or where human rights impacts are yet uncertain. However, this discretion is not unlimited, and certain procedural principles and standards must be met. This is desirable, as the alternative of unfettered discretion could render the duty to protect irrelevant. With regard to risks of major relevance to human rights, such as threats to the physical integrity and the right to life, the Federal Constitutional Court has made clear that the legislature shall, if negative impacts are possible, due to the continuously progressing developments in natural and social sciences, make full use of all available sources to be able to assess the impacts as reliably as possible.⁶⁶² This obligation to assess human rights impacts is based on substantive human rights obligations, a development that shows certain similarities with the development of EIA-law described above, and consequently HR impact assessments can be one tool to comply with such an obligation.

In particular for decisions under uncertainty, it is impossible to completely separate the procedural side from substantive requirements. Rather, substantive requirements can only be implemented through certain procedures, including the involvement of experts and the public alike. In domestic settings, individuals arguably can have a right that certain organizational and procedural norms are enacted and respected,⁶⁶³ which has been addressed above as human rights protection through organization and procedure.⁶⁶⁴ Procedure and organization can compensate for the lack of clear substantive standards, in particular due to factual uncertainty. Dealing with uncertain (human rights) consequences is, from a rule of law perspective, more acceptable if a formalized, non-discriminatory and participatory procedure exists which guaran-

⁶⁵⁸ This includes an ex-post duty to monitor and, if necessary, take corrective action („*Beobachtungs- und Nachbesserungspflicht*“): BVerfG, Judgment of 28 May 1993, *Abortion-II*, 2 BvF 2/90, 4 to 5/92, para 202 (juris); BVerfG, Judgment of 15 December 1983, *Volkszählung*, 1 BvR 209/83, para 179 (juris).

⁶⁵⁹ The Maastricht Guidelines on Violation of Economic, Social, and Cultural Rights (1997), para 6; UN Committee on Economic, Social and Cultural Rights, *General Comment No. 12 - The Right to Adequate Food (Art. 11)* (above, n. 105), para 15; BVerfG, Judgment of 25 February 1975, *Abortion I*, 1 BvF 1 to 6/74, para 153 et seq. (juris); Kommers and Miller, *The Constitutional Jurisprudence of the Federal Republic of Germany* (above, n. 358), p. 419.

⁶⁶⁰ Windoffer, *Verfahren der Folgenabschätzung als Instrument zur rechtlichen Sicherung von Nachhaltigkeit* (above, n. 357), p. 137.

⁶⁶¹ On the degree of constitutional review see section 9.2.3.2.

⁶⁶² *Ibid.*, p. 135; BVerfG, *Volkszählung* (above, n. 658), para 179 (juris); BVerfG, Judgment of 1 March 1979, *Codetermination*, 1 BvR 532/77, para 113 (juris).

⁶⁶³ Alexy and Rivers, *A Theory of Constitutional Rights* (above, n. 344), p. 329.

⁶⁶⁴ Alexy talks about constitutionally-required organization and constitutionally-required procedure. From the perspective of the scientific community: National Academy of Sciences et. al., *Responsible science* (Washington, D.C: National Academy Press, 1992), p. 117.

tees that all essential factors for the decision are exposed early on. In consequence, human rights impact assessments can, if properly institutionalized, fulfill such a human rights compensation function: As a clear-cut determination of human rights compatibility is often impossible as the human rights impacts of economic policies are often highly uncertain, clearly defined procedures and the application of certain instruments and standards compensates for lack of substantive review⁶⁶⁵. In the international arena, IA-procedures can also compensate for the lack of a democratic decision-making process and administrative agencies embedded in a legal framework based on principles such as human rights, the rule of law and reviewability. International impact assessments can, as will be discussed below, designed in a way that they contribute to increase human rights protection beyond the state and under conditions of uncertainty.

In particular in international law, there is a strong focus on the human rights impacts of specific investment projects, and HRIAs were first mainly developed and applied to project finance. The obligation to assess human rights impacts is not limited to human rights effects caused by specific projects but also to general-abstract legislative and regulatory policies. The ECtHR in *Giacomelli vs. Italy* found a duty to prepare, within a “governmental decision-making process concerning complex issues of [...] economic policy [...] appropriate investigations and studies” on the effects that might “infringe individuals’ rights”⁶⁶⁶. Pushing the ECtHR a bit further, there is no generalizable justification to exclude abstract, not environment-related policies (such as agricultural subsidies, trade policies, etc.) from the duty to assess human rights impacts. If human rights require that the potential future impacts of an initiative be assessed in order to enable decision-makers to avoid or at least mitigate potential harm, the type of initiative – whether it is a specific project or an abstract policy – is, from a normative perspective, irrelevant (even though, from a practical perspective, the methods and scope of human rights assessments can differ significantly, and the scope of judicial review would vary; this will be addressed in the final chapters).

Over the last years, an increasing number of Concluding Observations and other formally non-binding instruments confirmed that states are required to assess potential human rights impacts of their international and national policies. This conclusion is also based on substantive human rights commitments. The UN Committee on Economic, Social and Cultural Rights, for example, “strongly urges” Ecuador to conduct an assessment of the effects of international trade rules on the right to health,⁶⁶⁷ and the Committee on the Rights of the Child recommends to “conduct an assessment of the impact of international intellectual property rights agreements on the accessibility of affordable generic medicines”.⁶⁶⁸ In the following time, different human rights bodies have emphasized the importance of structural, indicator-based and participatory impact assessments as one instrument to discharge human rights obligations.⁶⁶⁹ A similar language is

⁶⁶⁵ On the compensating function of formalized procedures under German constitutional law: Windoffer, *Verfahren der Folgenabschätzung als Instrument zur rechtlichen Sicherung von Nachhaltigkeit* (above, n. 357), p. 143; BVerfG, Order of 3 March 2004, *Zollkriminalamt*, 1 BvF 3/92, para 101 (juris); BVerfG, Judgment of 27 July 2005, *Telekommunikationsüberwachung*, 1 BvR 668/04, para 120 (juris).

⁶⁶⁶ ECtHR, *Giacomelli vs. Italy* (above, n. 642), para 83.

⁶⁶⁷ UN Committee on Economic, Social and Cultural Rights, *Concluding Observations regarding Ecuador* (above, n. 1) para 55.

⁶⁶⁸ UN Committee on the Rights of the Child (above, n. 22) para 48.

⁶⁶⁹ UN Committee on the Elimination of Discrimination against Women (above, n. 22); UN Human Rights Council, *Report of the Special Rapporteur on the right to food, Olivier De Schutter - Addendum: Mission to the*

found in the Guiding Principles on HRIA of Trade and Investment Agreements and the first principle entitled “duty to prepare human rights impact assessments.”⁶⁷⁰ As will be seen below, it is in line with these doctrinal developments that EU constitutional law also recognizes a duty to assess human rights impacts externally and internally, i.e. occurring within and outside the EU territory.

4.7.2 International Human Rights Law and Extraterritoriality

This section addresses extraterritorial obligations under international law. This does not only serve to outline related general debates but is directly relevant to EU law insofar as international law also binds EU decision-making. The introductory cases have exemplified that economic policy-making can have significant social and human rights impacts in different countries, and most severely felt in developing countries where states are less able to provide social safety nets or enact protective measures. While it has so far been argued that substantive human rights law implies an obligation to assess the human rights impacts of policy-making, it is now time to examine whether this also applies to impacts regardless of where they occur.

International human rights are based on the concept of the equal moral worth of all human beings⁶⁷¹, and at least the core human rights are universally accepted under customary international law and enacted in many international treaties.⁶⁷² It is on this fundamental assumption that the moral claim could be turned into a legal argument, namely that human rights duty-bearers must refrain from activities that harm these core human rights irrespective of where the harm occurs. The principle of sovereignty may shield states from such an obligation towards distant strangers on the assumption that human rights are best protected if each state assumes full responsibility for the realization of human rights on its own territory. In an increasingly interconnected world, this assumption is increasingly being challenged. Nevertheless, human rights obligations still seem closely linked with a duty-bearer’s own state territory. The extraterritorial application of human rights seems, so far, rather an exception to that rule.⁶⁷³ This

World Trade Organization (25 June 2008), A/HRC/10/5/Add.2, para 37–38; UN Economic and Social Council, E/C.12/KEN/CO/1, *Concluding Observations regarding Kenya* (2008), para 11.

⁶⁷⁰ However, the subtitle uses terminology (“should”) that seems less straightforward. The Guiding Principles start from the assumption that “there is a duty to identify any potential inconsistency between preexisting human rights treaties and subsequent trade or investment agreements, and to refrain from entering into such agreements where such inconsistencies are found to exist”. This is an obligation under international human rights law – which states are “addressing” by preparing HRIAs: Human Rights Council, *Guiding Principles on Human Rights Impact Assessments of Trade and Investment Agreements, Report of the Special Rapporteur on the right to food, Olivier de Schutter* [2011] at Appendix I.1.1. As discussed above, formalized HRIAs are thus one important (but not necessarily the only) instrument to comply with substantive human rights obligations.

⁶⁷¹ Benvenisti, ‘Sovereigns as Trustees of Humanity: On the Accountability of States to Foreign Stakeholders’ (above, n. 2), pp. 306–307 with further references.

⁶⁷² Dann, *The Law of Development Cooperation* (above, n. 4), p. 269; Nickel, *Making Sense of Human Rights* (above, n. 517), p. 46; Benvenisti, ‘Sovereigns as Trustees of Humanity: On the Accountability of States to Foreign Stakeholders’ (above, n. 2), p. 307.

⁶⁷³ F. Coomans, ‘The Extraterritorial Scope of the International Covenant on Economic, Social and Cultural Rights in the Work of the United Nations Committee on Economic, Social and Cultural Rights’, *Human Rights Law Review*, 11 (2011), pp. 1–35, p. 5 Fn. 10; Article 2 (1) of the ICCPR (*International Covenant on*

traditional concept is still reflected in many international human rights treaties. Art. 2 (1) of the International Covenant on Civil and Political Rights (ICCPR) makes clear that a state party is bound only „within its territory and subject to its jurisdiction”⁶⁷⁴. Following the ECtHR’s judgments in *Bankovic, Al-Skeini and Al-Jedda*⁶⁷⁵, it is now widely recognized that states must at least respect human rights insofar as they exercise authority and effective control over a foreign territory or about people abroad (e.g. individuals in a military detention facility abroad); this implies an extension from territorial to personal models of jurisdiction.⁶⁷⁶

As will be seen in the following, an underlying theoretical debate is whether human rights apply extraterritorially only insofar as a duty-bearer claims authority over foreign persons or territories (normative theories)⁶⁷⁷, or whether distant strangers can also claim human rights vis-à-vis third states (or the EU) if an act merely produces factual effects that adversely restrict their ability to enjoy human rights (effet doctrine or *factualist* theories).⁶⁷⁸ Under normative theories, farmers in the Global South would *per se* not be able to raise human rights claims against US or EU agricultural subsidies that merely affect their interests but do not govern, regulate or otherwise change their legal situation.⁶⁷⁹ Under the factual effects doctrine, such a claim would at least not be excluded right away, even though difficult questions of attribution would arise. These different approaches will be addressed in the following sections with regard to international human rights law, the case of law of the ECtHR and EU constitutional law. The following subsections will now analyze how extraterritorial obligations beyond authority and effective control are increasingly recognized. One line of argument concerns treaties without a jurisdiction clause, another is based on the concept of complicity. Afterwards, I will analyze to what extent the EU would be bound by these extraterritorial human rights obligations.

4.7.2.1 Treaties With and Without a Jurisdiction Clause

A justification for human rights duty-bearers to disregard extraterritorial human rights impacts can be based on territorial jurisdiction clauses in international human rights treaties. For exam-

Civil and Political Rights) contains an explicit territorial jurisdiction clause. The ECtHR has interpreted the jurisdiction clause in Art. 1 of the ECHR also largely in a territorial sense, as will be discussed below.

⁶⁷⁴ Art. 2 (1) of the ICCPR.

⁶⁷⁵ See section 4.7.3.

⁶⁷⁶ Milanovic, ‘Extraterritorial Application of Human Rights Treaties’ (above, n. 12), 181 et seq.; Michał Gondek, ‘The reach of human rights in a globalizing world’ (Univ, 2009). Insofar as the extraterritorial application of domestic constitutional rights is concerned, in particular US law seems to apply a relatively restrictive approach, even though the Supreme Court rarely decides such cases. In a recently published article, Chapman challenges the originalist objection against the extraterritorial application of constitutional rights, namely that the “Founding Fathers” did not intend to grant due process rights to aliens abroad: Nathan Chapman, ‘Due Process Abroad’, *Northwestern University Law Review* (112), pp. 377–452.

⁶⁷⁷ In this sense: Ganesh, ‘The European Union’s Human Rights Obligations Towards Distant Strangers’ (above, n. 49), Besson, ‘The Extraterritoriality of the European Convention on Human Rights: Why Human Rights Depend on Jurisdiction and What Jurisdiction Amounts to’ (above, n. 428).

⁶⁷⁸ In this sense: Peters, ‘Global Constitutionalism: The Social Dimension’ (above, n. 189), p. 304; Maastricht Principle 9 (b): “A State has obligations to respect, protect and fulfil economic, social and cultural rights in any of the following: [...]b) situations over which State acts or omissions bring about foreseeable effects on the enjoyment of economic, social and cultural rights, whether within or outside its territory”: Schutter and et. al, ‘Commentary to the Maastricht Principles on Extraterritorial Obligations of States in the Area of Economic, Social and Cultural Rights’ (above, n. 201), p. 1104.

⁶⁷⁹ Peters, ‘Global Constitutionalism: The Social Dimension’ (above, n. 189), p. 303; Ganesh, ‘The European Union’s Human Rights Obligations Towards Distant Strangers’ (above, n. 49), p. 536.

ple, Art. 2 (1) of the International Covenant on Civil and Political Rights (“ICCPR”) reads: “Each State Party to the present Covenant undertakes to respect and to ensure to all individuals *within its territory and subject to its jurisdiction* the rights recognized in the present Covenant” (emphasis added).

Such territorial jurisdiction clauses speak against an extraterritorial obligation to respect, protect and fulfill human rights as rights unless public authorities have effective control over a territory or persons abroad. Some authors have suggested interpreting the characteristic of effective control broadly so that it might be applied at least to the international funding of projects. For example, if a state provides funding for a large-scale infrastructure project that results in illegal involuntary resettlements, the recipient state might violate its human rights obligations. One might argue, however, that a donor state might also have “effective control” over the territory on which the project is realized or over the affected people. *Coomans* cautiously suggests that it depends on the facts whether an impact on human rights rights of project-affected people “can be qualified as exercising effective control over people or territory abroad”⁶⁸⁰, but also admits that it is very hard to think of cases or situations apart from military occupation where such a degree of control has been reached, even considering the strong actual influence many donors might have due to their financial and technical expertise.⁶⁸¹

The effective control criterion can be criticized for being too strict and not adequate for an increasingly interconnecting world, and for being in conflict with what *Skogly* and *Gibney* defined as the moral and legal reason for extraterritorial human rights obligations: to take “responsibility for one’s own actions or omissions”,⁶⁸² even though it remains, from a legal perspective, open what exactly taking responsibility means.⁶⁸³ In defense of the effective control criterion, it has been argued that it imposes human rights obligations towards individuals whose human rights a state is able to violate.⁶⁸⁴ The effective control criterion operationalizes this assumption, but is, in an interconnected world, under-inclusive. As demonstrated above, human rights can be severely affected even without effective control. However, jurisdiction clauses like the one cited above would only speak against extraterritorial obligations for rights as individual *rights*. Arguably, public authorities at least have an obligation to not prevent other states from respecting, protecting and fulfilling human rights on their territories. Jurisdiction clauses could not be used as shields against such an obligation of non-obstruction: states must “abstain from harmful ac-

⁶⁸⁰ Coomans, ‘The Extraterritorial Scope of the International Covenant on Economic, Social and Cultural Rights in the Work of the United Nations Committee on Economic, Social and Cultural Rights’ (above, n. 673), p. 6.

⁶⁸¹ See also: Dann, *The Law of Development Cooperation* (above, n. 4), p. 265; On the donors’ influence: Andrea Kämpf and Anna Würth, ‘Mehr Menschenrechte in die Entwicklungspolitik!’, p. 6.

⁶⁸² Skogly and Gibney, ‘Economic Rights and Extraterritorial Obligations’ (above, n. 12), p. 268.

⁶⁸³ Coomans, ‘The Extraterritorial Scope of the International Covenant on Economic, Social and Cultural Rights in the Work of the United Nations Committee on Economic, Social and Cultural Rights’ (above, n. 12), p. 7; Vassilis Tzevelekos, ‘Reconstructing the Effective Control Criterion in Extraterritorial Human Rights Breaches: Direct Attribution of Wrongfulness, Due Diligence, and Concurrent Responsibility’, *Michigan Journal of International Law*, 36 (2014).

⁶⁸⁴ Cedric Ryngaert, ‘Clarifying the Extraterritorial Application of the European Convention on Human Rights’, *Merkourios - International and European Security Law*, 28 (2012), 57-60, p. 60.

tion that prevents other states from fulfilling their obligations [...] under international human rights law”⁶⁸⁵.

Some human rights treaties do not have a comparable jurisdiction clause, such as the ICESCR.⁶⁸⁶ At least three different conclusions can be drawn from the lack of a jurisdiction clause⁶⁸⁷ - a discussion that will also be relevant later considering that the EU’s CFR does not contain a comparable territorial jurisdiction clause either.

First, one could still read the treaty obligations as limited to territory or effective control. Given the universality of human rights based on the equal moral worth of all human beings, the absence of a jurisdiction clause would make it unconvincing to justify such a standpoint.⁶⁸⁸ This is in line with the reconstruction of sovereignty in light of the principle of affectedness: the exclusion of others must be justified. In other words: a jurisdiction clause justifies a purely territorial application of human rights. Absent such a jurisdiction clause, there is a general – but probably rebuttable – presumption that duty-bearers are responsible vis-à-vis all human rights holders. An application of the jurisdiction clause to the ICESCR against its wording would also be difficult if one takes the history of the treaty into account: the ICCPR and the ICESCR were negotiated at the same time. While the former explicitly limits the territorial scope, the latter does not.

The other extreme interpretation would take the wording seriously and argue that territorial borders do not matter at all. In the *Bosnian Genocide* case the ICJ held that the obligation to prevent genocide was not limited by territory⁶⁸⁹ and requires states to “employ all means reasonably available to them, so as to prevent genocide as far as possible”.⁶⁹⁰ Supporters of such a rather broad approach largely refer to the wording of Art. 2 (1) ICESCR, which states that each State Party to the ICESCR undertakes to take steps, individually and *through international assistance and co-operation*, especially economic and technical, to the maximum of its available resources, with a view to achieving progressively the full realization of the rights recognized in the present Covenant by all appropriate means, including particularly the adoption of legislative measures. Some states and scholars have claimed that this even implies a positive obligation to, for example, provide foreign aid.⁶⁹¹ However, in particular the majority of Western states and scholars

⁶⁸⁵ Asbjørn Eide, ‘Adequate Standard of Living’, in: Daniel Moeckli, Sangeeta Shah, David Harris et al. (eds.), *International Human Rights Law*, pp. 195–216, p. 197

⁶⁸⁶ Many of these economic, social and cultural rights are important in the context of trade and development cooperation due to their substantive overlap with central development goals, such as poverty alleviation and the other objectives laid down in the MDG. Generally on the relationship between human rights and development Alston, ‘Ships passing in the night: The current state of human rights and development debate seen through the lens of the Millennium Development Goals’ (above, n. 564); Pogge, *World Poverty and Human rights* (above, n. 255); Sen, *Development as Freedom* (above, n. 564).

⁶⁸⁷ For a good overview: Milanovic, ‘Extraterritorial Application of Human Rights Treaties’ (above, n. 12).

⁶⁸⁸ Ibid., p. 227.

⁶⁸⁹ ICJ, *Bosnia and Herzegovina v. Serbia and Montenegro (Application of Genocide Convention)* (2007), para 183: The obligations to prevent genocide „apply to a State wherever it may be acting or may be able to act in ways appropriate to meeting the obligations in question.”

⁶⁹⁰ Ibid., para 430; Milanovic, ‘Extraterritorial Application of Human Rights Treaties’ (above, n. 12), p. 227. However, the ICJ also states that its decision focuses on the Genocide Convention and is not intended to “establish a general jurisprudence applicable to all cases where a treaty instrument, or other binding legal norm, includes an obligation for States to prevent certain acts”: ICJ, *Bosnia and Herzegovina v. Serbia and Montenegro (Application of Genocide Convention)* (above, n. 689), para 429.

⁶⁹¹ See, e.g., the statement by Mr. M’Baye of Senegal, now a Judge of the International Court of Justice, at the thirty-third session of the U.N. Commission on Human Rights, 33 U.N. ESCOR C.4 (1391st mtg.) para

rejected such a positive obligation to provide assistance. This is in line with the fact that Western states always emphasize the *voluntary* nature of the 0.7% goal.⁶⁹² Consequently, the cooperation and assistance clause in Article 2 (1) ICESCR principle should be seen as a principle that guides legal interpretation and political decision-making, but does not allow for a clear verdict of illegality. However, even if one negates a positive duty to actively provide foreign assistance, the provisions at least contain a minimum obligation to refrain from acts that *harm* the realization of these human rights. Without at least such a minimum obligation, the normative content of this provision – which was discussed in detail and not adopted by mistake⁶⁹³ – would be meaningless.

The third approach to treaties without a jurisdiction-clause is a sort of middle-path; it does not “throw together” all human rights obligations and dimensions, but rather asks specifically which human rights apply to what extent extraterritorially. Even though slightly simplistic, Milanovic suggests that positive obligations generally require effective control over a territory, whereas negative obligations (“duty to respect”) would not be territorially limited.⁶⁹⁴ For example, soldiers engaging in military action on a foreign territory are under an obligation to “engage in no act or practice of racial discrimination” pursuant to Art. 2 (1) (a) CERD, but are not obliged – absent territorial control – to prohibit and bring to an end, by all appropriate means, including legislation, racial discrimination as required under Art. 2 (1) (d) CERD.⁶⁹⁵ Such a differentiated approach focusing on the specific right and the specific dimension seems more appropriate and reflective of social realities than attempts to apply a “one-size-fits-all” approach to *all* socio-economic rights just for the formalistic reason that they are codified in one single legal document.

While the duty to conduct HRIAs requires taking action, it nevertheless largely stems from the negative dimension of human rights, namely to not enact economic or other policies that cause

18, U.N. Doc. E/CN.4/SR.1391 (1978); 17 U.N. GAOR C.3 (1203d mtg.) para 21, U.N. Doc. A/C.3/SR.1203 (1962) (Mr. Afnan, Iraq); similar: UN Committee on Economic, Social and Cultural Rights, *General Comment No 3 - The nature of States parties obligations (Art. 2, para 1)* (above, n. 400) at para 8.

⁶⁹² This point has been made based on the negotiation history of the ICESCR by Philip Alston and Gerard Quinn, ‘The Nature and Scope of States Parties’ Obligations under the International Covenant on Economic, Social and Cultural Rights’, *Human rights quarterly*, Vol. 9 (1987), pp. 156-229, pp. 186-192. A more pragmatic objection would be that such an obligation might not be desirable, at least as long as the impact of foreign aid is controversial, see by way of example: William Russell Easterly, *The White Man’s Burden* (Oxford: Oxford Univ. Press, 2006); Dambisa Moyo, *Dead Aid* (Berlin: Haffmans & Tolkemitt, 2014).

⁶⁹³ For more on the negotiation history: Alston and Quinn, ‘The Nature and Scope of States Parties’ Obligations under the International Covenant on Economic, Social and Cultural Rights’ (above, n. 692).

⁶⁹⁴ Milanovic, ‘Extraterritorial Application of Human Rights Treaties’ (above, n. 12), p. 228. In its General Comment No. 14, the ICESCR Committee clearly pointed out that states are required to refrain from imposing economic sanctions or similar measures restricting the supply of another state with adequate medicine: UN Committee on Economic, Social and Cultural Rights, E/C.12/2000/4, *General Comment No. 14 - The Right to the Highest Attainable Standard of Health (Art. 12)* (2000), para 41. This duty prevails in spite of the fact that the sanctions are authorized by the Security Council in response to a violation of international law committed by the state’s government against which the sanctions are targeted: The Committee emphasizes that the “lawlessness of one kind should not be met by lawlessness of another kind”: UN Committee on Economic, Social and Cultural Rights, E/C.12/1997/8, *General Comment No. 8 - The relationship between economic sanctions and respect for economic, social and cultural rights* (1997), para 16. Ganesh is critical of this distinction and suggests that, under EU human rights law, both positive and negative extraterritorial obligations apply, but only if an initiative produces a legal effect abroad: Ganesh, ‘The European Union’s Human Rights Obligations Towards Distant Strangers’ (above, n. 49).

⁶⁹⁵ Milanovic, ‘Extraterritorial Application of Human Rights Treaties’ (above, n. 12), p. 228.

significant harm to people living in third countries.⁶⁹⁶ HRIAs mainly investigate whether a policy would have these impacts and whether, consequently, negative human rights obligations would make such an option illegal or (politically) undesirable. As discussed above, HRIAs are, in this sense, an exercise of *self-restraint*.⁶⁹⁷ To take the case of the EU: the HRIAs assess whether, for example, an EU trade policy has human rights impacts in third countries. Consequently, the EU must assess whether its own policies constitute an act that results in or contributes to human rights infringements. This is essentially a consequence of the EU's negative human rights obligations. The HRIA regime does not intend to bring an end to other human rights violations in third countries.

4.7.2.2 The Complicity Approach

States (or international organizations) can also be responsible for human rights violations occurring in a third state under the complicity approach. This would result in a joint responsibility for human rights violations, and would, insofar, overcome the debate about effective control. The complicity approach offers a pragmatic doctrinal concept relevant to areas of international *co-operation*. The starting point is the observation that jurisdiction and responsibility must be clearly separated: Jurisdiction is about the "entitlements to act", while "state responsibility is about obligations incurred when a state does or does not act".⁶⁹⁸ Jurisdiction clauses would therefore not exclude states' responsibility for acts or omissions that are felt in third countries: States can be jointly responsible in the sense of Article 16 of the Draft Articles on the Responsibility of States for Internationally Wrongful Acts (ASR), promulgated by the International Law Commission in 2001.⁶⁹⁹ The ICJ described Art. 16 ASR in *Bosnia v. Serbia* as "reflecting a customary rule".⁷⁰⁰ The same arguably applies to International Organizations.⁷⁰¹

There are four requirements to be held responsible for complicity. First, the partner state must have violated international law, in this case international human rights law. Second, complicity requires that the accomplice "aids or assists" the other state. In its commentary, the International Law Commission gives as an example the financing of the illegal activity in question.⁷⁰² Third, the aiding or assisting state must have knowledge of the circumstances that constitute the violation. The fourth and final element is that the act would also be internationally wrongful if committed by the accomplice.

⁶⁹⁶ In this sense: Pogge, *World Poverty and Human rights* (above, n. 255), pp. 18–26.

⁶⁹⁷ On the difference between a self-restraint and enforcement constellation: see section 4.3.3.

⁶⁹⁸ Coomans, 'The Extraterritorial Scope of the International Covenant on Economic, Social and Cultural Rights in the Work of the United Nations Committee on Economic, Social and Cultural Rights' (above, n. 673), 5 f.

⁶⁹⁹ This approach has so far mainly been evoked in environmental law and applied to development cooperation by Dann, *The Law of Development Cooperation* (above, n. 4), 265 ff.

⁷⁰⁰ ICJ, *Bosnia and Herzegovina v. Serbia and Montenegro (Application of Genocide Convention)* (above, n. 689), para 420.

⁷⁰¹ See: Articles 14 – 16 RIO: International Law Commission, *Draft Articles on the responsibility of international organizations, with commentaries* (2011). As the ILC clearly points out, there is no good reason to not apply the concept of complicity to IOs aiding or abetting states in a breach of international law: *Ibid.*, Chapter IV Com (1).

⁷⁰² International Law Commission, *Draft Articles on Responsibility of States for Internationally Wrongful Acts, with commentaries* (2001), Art. 16 Com. (1).

In particular the third criterion - knowledge of the relevant circumstances - might be difficult to prove. It also poses complex normative questions, for example under what conditions the knowledge a single staff member is attributable to the concerned organization or state. However, these details are not relevant here. It suffices to point out that this criterion is where a decisive link exists between HRIAs and the substantive obligation to refrain from certain initiatives that would contribute to a human rights violation. As participation is an essential part to impact assessments, third parties – affected people, civil society groups, or international organizations – can feed the relevant information into the HRIA procedure and thus rebut a state’s defense of lack of knowledge. Providing information about illegal activities thus enables the public to ensure that the relevant actors have the “knowledge of the circumstances” as required under the complicity approach to state responsibility. From that moment on, a substantive duty to refrain from an act that would aid or assist a human rights violation could arise under the complicity model.

In conclusion, the concept of complicity establishes global human rights responsibilities without stretching the criteria for jurisdiction too much, or without the need for more elaborated approaches to extraterritorial human rights duties.⁷⁰³ It draws a clear line to determine when an accomplice, for example a donor state, has to take full responsibility for his contribution. Consequently, a substantive responsibility to refrain from aiding or assisting human rights violations committed by another state exists. As explained above, a responsibility to assess ex-ante potential human rights impacts also follows from such substantive human rights obligation.

4.7.2.3 The EU’s Extraterritorial Human Rights Obligations under International Law

This sub-section will look at the relevance the aforementioned extraterritorial obligations under international law has for the EU. While the EU has not ratified the major human rights treaties, it is discussed to what extent the international human rights obligations of EU Member States, e.g. the ICESCR, also bind the EU. While Member States remain responsible under international human rights law even if they transfer competencies to international organizations or the EU,⁷⁰⁴ it is less clear when the EU itself succeeds into their international obligations.⁷⁰⁵

However, this debate should not be reproduced here as it does not add much to the question of how EU law reflects the principle of affectedness. It suffices to say that, even though often unnoticed, the EU has reaffirmed its commitment to respect international human rights in binding international agreements. Many of the EU’s trade and development cooperation agreements

⁷⁰³ Dann, *The Law of Development Cooperation* (above, n. 4), p. 267.

⁷⁰⁴ ECtHR, Application no. 24833/94, *Matthews vs UK* (1999), para 32; Tawhida Ahmed and Israel de Jesus Butler, ‘The European Union and Human Rights: An International Law Perspective’, *European Journal of International Law*, 17 (2006), pp. 771–801, p. 782; UN Committee on Economic, Social and Cultural Rights, E/C.12/1/Add.79, *Concluding Observations - United Kingdom* (2002), para 26; UN Committee on Economic, Social and Cultural Rights, E/C.12/1/Add.77, *Concluding Observations - Ireland* (2002), para 37.

⁷⁰⁵ Jan Wouters, Jed Odermatt, and Thomas Ramopoulos, ‘Worlds Apart? Comparing the Approaches of the European Court of Justice and the EU Legislature to International Law’, Leuven Centre for Global Governance Studies, in: Working Paper No. 96, August 2012, p. 10; implicit also in ECtHR, *Matthews vs UK* (above, n. 704), para 32. For a more detailed analysis cf Ahmed and Jesus Butler, ‘The European Union and Human Rights: An International Law Perspective’ (above, n. 704), p. 789.

contain human rights clauses,⁷⁰⁶ and while it appears that they are addressed mainly at developing countries with weak democratic and human rights institutions, they nevertheless bind all parties, including the EU:

“Respect for democratic principles and human rights, as laid down in the Universal Declaration of Human Rights and other relevant international human rights instruments, as well as for the principle of the rule of law, underpins the internal and international policies of both Parties and constitutes an essential element of this Agreement”⁷⁰⁷

Even though the EU might have insisted on human rights clauses rather with the often problematic situation in its partner countries in mind, the clauses are clearly formulated in a reciprocal way, binding all parties to the agreement. This commitment would also include respect for the extraterritorial application of international human rights as analyzed above. As Bartels points out, the EU seems to have accepted this extraterritorial scope when it made use of such a clause in the Cotonou agreement with Liberia due to Liberia’s support for the RUF in Sierra Leone – irrespective of the fact that the effects of Liberia’s activities were felt extraterritorially, namely in Sierra Leone.⁷⁰⁸

In addition, international human rights bind the EU as far as human rights are recognized under customary international law. While the ECJ had first referred to international law only to “fill gaps” in existing legislation or as a source of interpretation,⁷⁰⁹ it was in the *Wood Pulp* judgment that it first relied on customary international law to review the legality of a Community act⁷¹⁰. In *Poulsen*, the Court confirmed that “the European Community must respect international law in the exercise of its powers and that, consequently [...] [*the challenged Regulation*] must be interpreted, and its scope limited, in the light of the relevant rules of the international law of the sea”.⁷¹¹ These “rules of customary international law [...] are binding upon the Community institutions and form part of the Community legal order.”⁷¹² The Court in *Racke* and later in *ATAA* made clear that, under certain circumstances, individuals can also invoke principles of customary international law to challenge the legality of EU secondary law incidentally.⁷¹³ This implies

⁷⁰⁶ Bartels, ‘The EU’s Human Rights Obligations in Relation to Policies with Extraterritorial Effects’ (above, n. 12), p. 1079.

⁷⁰⁷ *EU–Iraq Partnership and Cooperation Agreement*, Art. 2.

⁷⁰⁸ Bartels, ‘The EU’s Human Rights Obligations in Relation to Policies with Extraterritorial Effects’ (above, n. 12), p. 1080.

⁷⁰⁹ Jan Wouters and Dries van Eeckhoutte, ‘Giving Effect to Customary International law Through European Community Law’, Institute for International Law of the K.U. Leuven, in: Institute for International Law, Working Paper, 25, June 2002, p. 11.

⁷¹⁰ ECJ, Judgment of 27 September 1988, Joined cases 89, 114, 116, 117 and 125 to 129/85, *Wood Pulp*, para 18.

⁷¹¹ ECJ, Judgment of 24 November 1992, C-286/90, *Poulsen*, para 9.

⁷¹² ECJ, Judgment of 16 June 1998, C-162/96, *Racke*, para 46.

⁷¹³ *Ibid.*, para 51; ECJ, Judgment of 21 December 2011, Case C-366/10, *ATAA*, 107 et seq. In *ATAA*, the Court names the two requirements under which individuals can invoke customary international law: “The principles of customary international law mentioned in paragraph 103 of the present judgment may be relied upon by an individual for the purpose of the Court’s examination of the validity of an act of the European Union in so far as, first, those principles are capable of calling into question the competence of the European Union to adopt that act [...] and, second, the act in question is liable to affect rights which the individual derives from European Union law or to create obligations under European Union law in his regard”: *Ibid.*, para 107.

the primacy of customary international law over secondary EU law. In consequence, secondary law would be invalid if it violates international human rights law. If international human rights law – for example under the complicity approach – applies extraterritorially, failure to adequately consider (procedural) and avoid or mitigate (substantive) negative human rights impacts materializing in third states may render an EU act illegal.

The principles of international law invoked before the Court so far often concerned state sovereignty⁷¹⁴ or principles of international treaty law,⁷¹⁵ and it is therefore consistent to also include customary human rights norms.⁷¹⁶ To the contrary, especially Article 3 (5) TEU makes clear that insofar as human rights norms are part of international customary law, the EU is strictly bound by these norms: “Under Article 3(5) TEU, the European Union is to contribute to the strict observance and the development of international law. Consequently, when it adopts an act, it is bound to observe international law in its entirety, including customary international law, which is binding upon the institutions of the European Union.”⁷¹⁷

4.7.3 European Convention on Human Rights and Extraterritorial Obligations

The case law of the European Court of Human Rights (“ECtHR”) as to the extraterritorial application of human rights under the European Convention on Human Rights (“ECHR”) ⁷¹⁸ is ambiguous and conflicting. Nevertheless, it can be relevant for the principle of affectedness in general and for the EU’s obligation to assess human rights impacts occurring in third countries in particular. The ECtHR’s case law influences the interpretation of EU fundamental rights. In addition, the EU Charter of Fundamental Rights (“CFR”) recognizes that the interpretation of the CFR shall not restrict or adversely affect human rights as recognized, inter alia, in the ECHR (Art. 53 CFR). This arguably indicates that the extraterritorial scope of EU human rights should not be more restrictive than recognized under the ECHR. At the same time, however, the (extra-)territorial application of EU fundamental rights could be broader and grant “more” rights to distant strangers than they would have under the ECHR. This will be discussed in the next section.

So far, the ECtHR recognizes extraterritoriality only as a rare exception to the territorial scope of the Convention: Acts performed or producing an effect outside the territory of the Contracting state’s jurisdiction may only exceptionally constitute an exercise of jurisdiction in the sense of

⁷¹⁴ Ibid., para 103.

⁷¹⁵ ECJ, *Racke* (above, n. 712), para 46 et seq.

⁷¹⁶ In the *Front Polisario* case, Advocate General Wathelet based his Opinion also on the extraterritorial application of *jus cogens* and *erga omnes* human rights norms: Opinion of Advocate General Wathelet of 13 September 2016, Case C-104/16 P, *Front Polisario*, para 257. In its first (and later reversed) *Kadi* judgment, the (then) Court of First Instance also based its judgment on *jus cogens* under international human rights law: CFI, T-315/01, *Kadi* (2005), para 226. While the *Kadi* judgments are obviously essential for the relationship between international and EU human rights law, the constellation addressed there is different from those addressed here. The *Kadi* cases concern decisions affecting property in the EU of persons located abroad based on UN sanctions. A closer analysis is therefore not necessary here. Similar: Bartels, ‘The EU’s Human Rights Obligations in Relation to Policies with Extraterritorial Effects’ (above, n. 12), p. 1072.

⁷¹⁷ ECJ, *ATAA* (above, n. 713), para 101; ECJ, Case C-286/90, *Poulsen* (1992), para 9–10; ECJ, Case C-162/96, *Racke* (1998), para 27.

⁷¹⁸ Convention for the Protection of Human Rights and Fundamental Freedoms (European Convention on Human Rights, as amended).

Article 1 ECHR.⁷¹⁹ So far, the Court has most prominently recognized extraterritorial jurisdiction in the case of military occupation – such as the UK involvement in Iraq – where the Contracting state or its agents exercise authority and control over an area or a person outside the legal space of the Convention.⁷²⁰ In contrast, the Court denied jurisdiction where victims were killed by air-strikes but absent military occupation and thus absent effective territorial control.⁷²¹ By these standards alone, extraterritorial jurisdiction would hardly apply where the extraterritorial effects of economic policies – as illustrated in the introduction – are at stake. Still, extraterritorial jurisdiction seems not limited to military occupation, even though the Court does little to clarify this.⁷²² For example, in *Kovačič*, the ECtHR had to assess the conventionality of Slovenian legislation which prevented Croatians from withdrawing money from the Croatian office of a Slovenian bank. The Court simply states that “the acts of the Slovenian authorities continue to produce effects, albeit outside Slovenian territory, such that Slovenia's responsibility under the Convention could be engaged.”⁷²³ In this case, the Court applied human rights to a situation where the effects of an economic policy – the freezing of bank accounts – were felt abroad. In *Ben El Mahi*, on the other hand, the ECtHR dismissed an action as inadmissible because the effects of a decision were felt abroad. The applicants, in particular Moroccan nationals living in Morocco, challenged a decision by Denmark to not intervene in the controversy about the publication of a caricature of the prophet Mohammed which caused an uproar in many Muslim countries. The applicants claimed a violation of their human rights. The ECtHR dismissed the action as inadmissible as it found no jurisdictional link between them and the state of Denmark.⁷²⁴ The judgments in *Kovačič* and *El Mahi* appear contradictory and would require further clarification.⁷²⁵

The restricted exception to the territorial principle has been justified in light of normative theories according to which human rights require a legal relationship that is being established if a duty-bearer claims authority over foreign persons or a territory.⁷²⁶ The difference between normative and factual effects theories will be discussed in more detail below. Now, it should merely be pointed out that the Court's case law so far leads to paradoxical results. For example, the Convention applies where a state exercises, through the “consent, invitation or acquiescence of the Government of that territory, [...] all or some of the public powers normally to be exer-

⁷¹⁹ ECtHR, *Al-Skeini and Others v United Kingdom* (above, n. 428), para 131.

⁷²⁰ Ibid., para 133–143; ECtHR, Application no. 27021/08, *Case of Al-Jedda v. The United Kingdom* (2011).

⁷²¹ ECtHR, *Banković and Others v Belgium and Others* (above, n. 428), 70, 80.

⁷²² Bartels, ‘The EU's Human Rights Obligations in Relation to Policies with Extraterritorial Effects’ (above, n. 12), p. 1077; similar: Ryngaert, ‘EU Trade Agreements and Human Rights: From Extraterritorial to Territorial Obligations’ (above, n. 429), p. 380.

⁷²³ ECtHR, Application nos 44574/98, 45133/98 and 48316/99, *Kovačič and others vs Slovenia* (2003), p. 55.

⁷²⁴ ECtHR, App. no. 5853/06, *Ben El Mahi v. Denmark* (2006).

⁷²⁵ Bartels, ‘The EU's Human Rights Obligations in Relation to Policies with Extraterritorial Effects’ (above, n. 12), p. 1078. Ganesh argues that all cases since *Banković* can be reconciled on the bases of normative theories of extraterritorial jurisdiction: In *Kovacic*, Ganesh argued, Slovenia claimed authority to regulate the rights of Croatian bank account holders. Therefore, the Slovenian act produced legal effects abroad. In contrast, the adverse extraterritorial effects in *El Mahi* were merely factual. Ganesh therefore recognizes extraterritorial jurisdiction where legal effects are at stake: Ganesh, ‘The European Union's Human Rights Obligations Towards Distant Strangers’ (above, n. 49), 528 et seq. The difference between these normative and factual approaches will be discussed in more detail below, see section 4.7.4.4.

⁷²⁶ In this sense: Ibid.; Besson, ‘The Extraterritoriality of the European Convention on Human Rights: Why Human Rights Depend on Jurisdiction and What Jurisdiction Amounts to’ (above, n. 428).

cised by that Government”.⁷²⁷ When a state commits similar acts *without* the third state’s consent or invitation, or without a normative claim to exercise authority, the restrictions imposed by human rights would not apply. In other words: states would not be bound if they exercised raw powers abroad. In defense, scholars have argued that the authority and control test limits state obligations under the Convention towards those individuals whose human rights a state is able to violate.⁷²⁸ This “ability-to-violate” argument, however, is circular and could also be understood in the light of the principle of affectedness: states can violate human rights by acts that produce legal and by those that produce actual effects. In both cases, the ability to violate should trigger the duty to respect human rights. In particular the facts in *Bankovic* clearly demonstrate that states can perform similar acts, e.g. killing civilians during military action, both with and without effective control. They are therefore *able* to perform the same acts and produce the same results and are therefore equally able to violate human rights. The ability to violate human rights can therefore not convincingly justify to restrict the scope of the Convention to effects that materialize in areas where a state has effective control.

In conclusion, the ECtHR case law is not a strong expression of the principle of affectedness. Still, it is important to remember that the narrow interpretation of the territorial jurisdiction clause is but one possible interpretation of Article 1 ECHR. First of all, the Court in *Kovačič* showed some sympathy for the factual-effects doctrine. Second, even where the Court requires “effective control” or “authority and control”, like in *Bankovic*, *Al-Skeini*, or *Al-Jedda*, the scope of such criteria is still not fully clarified.⁷²⁹ In light of this ambiguity, some scholars have argued for the reconstruction of the “effective control criterion”.⁷³⁰ Accordingly, the Convention should not only apply to situations where the acting state exercises effective control over a territory or authority over foreign persons; instead, the focus should also be whether a government controls a situation (governmental acts or omissions) that have clearly attributable effects on human rights. This would be the case if a government act produces foreseeable extraterritorial effects that directly and severely affect human rights abroad.⁷³¹ As all acts can have some extraterritorial ef-

⁷²⁷ ECtHR, *Al-Skeini and Others v United Kingdom* (above, n. 428), para 135.

⁷²⁸ For further reference: Ryngaert, ‘Clarifying the Extraterritorial Application of the European Convention on Human Rights’ (above, n. 684), p. 60.

⁷²⁹ Peter Vedel Kessing, ‘Transnational Operations Carried Out from a State’s Own Territory’, in: Thomas Gammeltoft-Hansen and Jens Vedsted-Hansen (eds.), *Human Rights and the Dark Side of Globalisation*, pp. 81–98, p. 84.

⁷³⁰ For example, Tzevelekos proposes a concept of attribution that also recognizes shared responsibilities and thus brings it closer to the concept of state responsibility. In addition to effective control as exercised in cases of or similar to military occupation, Tzevelekos suggests a “due diligence” obligation to attribute indirect effects: “when a state is effectively linked to a situation necessitating diligence it shall have a legal obligation to be proactive and protective, that is, to demonstrate due diligence”: Tzevelekos, ‘Reconstructing the Effective Control Criterion in Extraterritorial Human Rights Breaches: Direct Attribution of Wrongfulness, Due Diligence, and Concurrent Responsibility’ (above, n. 683), p. 135. State responsibility was already discussed above in the context of the „complicity approach“.

⁷³¹ According to Yuval Shany, an exercise of authority would „qualify as encompassing affected individuals within its jurisdiction if the potential impact of the act or policy in question is direct, significant and foreseeable”: Yuval Shany, *Bad Cases Make Bad Law, But Good Law Books!* EJIL:Talk!, 1 December 2011, with further reference. For an emphasis on conduct to „territorialize” extraterritorial effects, in the case of EU trade policies: Ryngaert, ‘EU Trade Agreements and Human Rights: From Extraterritorial to Territorial Obligations’ (above, n. 429). This is comparable with one of the applicants’ arguments in *Bankovic*: they argued that “the impugned act was, in fact, the extra-territorial effect of prior decisions, to strike RTS and to launch the missile, which decisions had been taken on the territory of the respondent State or States”: ECtHR, *Bankovic and Others v Belgium and Others* (above, n. 428), para 53. The applicants based this ar-

fect, it would be necessary to require, as suggested, a *direct* link between the cause and effect, and that the effect be *foreseeable*.⁷³² This is closer to the approach the EU courts have adopted in cases like *Zaoui*, which will be discussed in the following. Under such an attribution approach, it would not *per se* be impossible that a decision by, for example, the German government to adopt an economic policy that predictably infringes human rights of foreigners abroad would fall under the jurisdiction of the ECHR.

4.7.4 European Union Law and Extraterritoriality

As the introductory examples illustrated, EU economic policies can have tremendous social impacts in partner countries and might even violate human rights, such as the right to life, health, food and an adequate standard of living. The previous section focused on extraterritorial obligations under international law in general. This section will identify the (territorial) scope of human rights obligations under EU constitutional law, and outline what that implies for HRIAs in light of the principle of affectedness.

The obligation to collect information and examine potential consequences of a decision is based on a duty of care or a duty of diligent and impartial examination.⁷³³ However, the main question addressed here is to what extent such an obligation also applies with regard to potential human rights impacts in third countries. The debate about extraterritorial human rights obligations in EU law is multifaceted, but can be classified according to the enforcement and the self-restraint approach (see section 4.3.3). The first dimension regards the distribution of human rights responsibilities. In many cases, the EU uses legal instruments – such as human rights clauses or GSP+ schemes – to influence or “enforce” human rights in third states. Increasingly, however, self-restraint instruments such as impact assessments are applied to increase the EU’s own accountability and make sure that the EU itself designs projects or policies in a way that they ideally do not cause harm in third countries. This is of interest not only to political debates but also legal scholarship.⁷³⁴ It is this second approach that is of relevance here.

Here again a second distinction can be made between different policy dimensions. The first one regards the extraterritorial effect of the EU’s *external* policies, such as the human rights conse-

gument *inter alia* on extradition cases like in the *Soering* judgment, where the decision to extradite someone is taken within the Convention’s *espace juridique*, while the effect that gives rise to an issue under the Convention (e.g. execution of the death penalty) would occur extraterritorially. The ECtHR, however, rejects this argument mainly on the (rather formalistic) ground that “liability is incurred in such cases by an action of the respondent State concerning a person while he or she is on its territory, clearly within its jurisdiction, and that such cases do not concern the actual exercise of a State’s competence or jurisdiction abroad” (emphasis added) *Ibid.*, 68, 77.

⁷³² Kessing, ‘Transnational Operations Carried Out from a State’s Own Territory’ (above, n. 729), p. 92.

⁷³³ Herwig Hofmann, Gerard C. Rowe, and Alexander Türk, *Administrative Law and Policy of the European Union* (Oxford: Oxford Univ. Press, 2011), p. 446 et seq.; ECJ, Judgment of 21 November 1991, *Technische Universität München*, C-269/90, ECR I-05469, para 14 (in the context of administrative proceedings). Similarly, the General Court confirmed the duty also in the context of external relations law: General Court, *Front Polisario*, T-512/12, para 228. For further references and a more detailed analysis in this regard: Vivian Kube, *EU Human Rights, International Investment Law and Participation* (Springer, 2019), pp. 248 et seq.

⁷³⁴ A good overview of the EU’s own human rights accountability: Simma, Aschenbrenner and Schulte, ‘Human rights considerations in development cooperation activities of the European Community’ (above, n. 4).

quences of trade and development agreements or projects funded in developing countries.⁷³⁵ The second one comprises the extraterritorial effects of the EU's *internal* policies,⁷³⁶ such as the Common Agricultural Policy (CAP), or trade-affecting regulation with repercussions felt in developing countries. I will argue that the EU is under an obligation to consider, at least as policy objectives, the human rights impacts of both types of initiatives. This reflects the principle of affectedness and is a firm legal basis for EU human rights impact assessments. In addition, I will argue that EU fundamental rights can also apply extraterritorially as entitlements.

4.7.4.1 Extraterritorial Obligations under Art. 3 (5), 21 TEU

Extraterritorial obligations exist under EU constitutional law and guide EU policy making. This is most clearly addressed in Art. 3 (5) and 21 TEU. According to Article 3 (5) TEU, the Union “shall contribute to [...]the eradication of poverty and the protection of human rights, in particular the rights of the child, as well as to the strict observance and the development of international law, including respect for the principles of the United Nations Charter.” Article 21 (1) TEU (read in conjunction with Art. 207 (1) TFEU) explicitly recognizes the “universality and indivisibility of all human rights”, which means that civil, political, economic, cultural and social rights must all be promoted.⁷³⁷ Article 3 (5) TEU therefore contains an obligation to contribute to human rights protection.

It remains, at first sight, unclear whether the commitment to support and advance human rights also imposes duties on the EU to respect human rights itself. The wording might indicate that the EU shall “promote” human rights elsewhere, but is not bound itself, in its external relations, to respect human rights. One objection against the binding extraterritorial effect of these primary and secondary norms might be that they nowhere identify individuals in third countries as right-holders. However, obligations do not necessarily require that individual right-holders can be identified⁷³⁸, and it would be paradoxical and contrary to the principle of good faith if the EU required respect for human rights from third countries but implemented itself projects or poli-

⁷³⁵ Dann, *The Law of Development Cooperation* (above, n. 4); Nicolas Hachez and Jan Wouters, ‘A responsible lender? The European Investment Bank’s Environmental, Social and Human Rights Accountability’, Leuven Centre for Global Governance Studies, in: Working Paper, No. 72, September 2011; Kirsten Schmalenbach, ‘Accountability: Who is judging the European Development Cooperation?’, *EuR* (2008), 162 et seq.

⁷³⁶ Bartels, ‘The EU’s Human Rights Obligations in Relation to Policies with Extraterritorial Effects’ (above, n. 12).

⁷³⁷ Vienna Declaration and Program of Action, adopted by the World Conference on Human Rights in Vienna on 25 June 1993 at para 5. The Lisbon Treaty states that the EU is committed to human rights in its external relations, even though the exact scope of the commitment remains at first sight unclear. The uncertainty about the applicable sources of EU human rights obligations has, to a certain extent, been moderated by the fact that the Lisbon Treaty officially raised the Charter of Fundamental Rights to a source of EU constitutional law (Article 6 TEU); the Charter “brings together rights scattered throughout many different sources such as the ECHR, and United Nations (UN) and International Labour Organisation (ILO) agreements”: S. Douglas-Scott, ‘The European Union and Human Rights after the Treaty of Lisbon’, *Human Rights Law Review*, 11 (2011), pp. 645–682, p. 651.

⁷³⁸ Schutter and et. al, ‘Commentary to the Maastricht Principles on Extraterritorial Obligations of States in the Area of Economic, Social and Cultural Rights’ (above, n. 201), p. 1102.

cies that violate said human rights.⁷³⁹ As a minimum, this constitutional policy objective requires to assess and consider predictable human rights impacts of the EU's own actions. Failure to adequately take human rights impacts into account arguably qualifies as an abuse of discretion, as will be discussed below. HRIAs help to operationalize this obligation in day-to-day decision-making.

It also requires clarification whether the extraterritorial human rights commitment only applies to external policies – for example the conclusion of a trade or development agreement with third states – or also to domestic EU policies with an external effect. With reference to the introductory examples: would the EU only have to consider the human rights impacts on small farmers when concluding a trade agreement liberalizing food trade (external policies)? Or must the EU also consider the effects on farmers in developing countries when granting agricultural subsidies to EU farmers (internal policies)? It is in this context that Article 21 (3) TEU becomes relevant, which states that the “Union shall respect the principles and pursue the objectives set out in paragraphs 1 and 2 in the development and implementation of the different areas of the Union's external action covered by this Title and by Part Five of the Treaty on the Functioning of the European Union, *and of the external aspects of its other policies*” (emphasis added). This means that external human rights consequences are not only relevant for those initiatives that are based on the external action competence, but also all other EU policies with “external aspects”.⁷⁴⁰

Still, how to comply with this broad obligation is not further specified in the Treaty.⁷⁴¹ The Treaty, but also secondary law and international agreements, generally avoid more precise language such as “respect” or “fulfill” but use broader terms such as “shall be guided” by or “seeks to advance” and “supports” human rights.⁷⁴² Insofar, these legal policy objectives reflect the principle of affectedness and contain a commitment to take human rights impacts on distant strangers into account. The exact scope of such a human rights commitment, as well as the question to what extent distant strangers can also claim human rights as entitlements vis-à-vis the EU requires further analysis. This will be addressed in the following and, again, mainly in the final two chapters on enforcement and judicial review.

⁷³⁹ Dann, *The Law of Development Cooperation* (above, n. 4), p. 273; Bartels, ‘The EU's Human Rights Obligations in Relation to Policies with Extraterritorial Effects’ (above, n. 12), p. 1072. Similarly, the ICJ in the *Bosnian Genocide* judgment addressed the question whether the Parties to the Genocide Convention are also under an obligation “not to commit genocide themselves”. The ICJ observes that, under Article I, states are bound to *prevent* acts of genocide being committed, but that the “Article does not *expressis verbis* require States to refrain from themselves committing genocide”. However, the ICJ straightforwardly rejected such a distinction: “It would be paradoxical if States were thus under an obligation to prevent, so far as within their power, commission of genocide by persons over whom they have a certain influence, but were not forbidden to commit such acts through their own organs [...]”. ICJ, *Bosnia and Herzegovina v. Serbia and Montenegro (Application of Genocide Convention)* (above, n. 689), para 166.

⁷⁴⁰ Bartels, ‘The EU's Human Rights Obligations in Relation to Policies with Extraterritorial Effects’ (above, n. 12), p. 1074. In the human rights clauses mentioned above, no distinction is made between internal and external human rights impacts, nor between “international effects of international policies” and “international effects of national policies”. Especially as the line between those is extremely thin – considering the fact that most areas of political, economic and social life are already regulated at least to a certain extent by international law – it does not make sense to draw legal consequences from this distinction.

⁷⁴¹ *Ibid.*, p. 1075.

⁷⁴² Art. 9 (I) Cotonou-Agreement; Regulation 1889/2006: further reference: Dann, *The Law of Development Cooperation* (above, n. 4), p. 273.

The duty to assess human rights impacts, however, does not mean that institutionalized impact assessments – involving formalized screening, scoping, analysis and monitoring stages – are the only or even the best instrument to discharge this human rights obligation. Therefore, while Art. 3 (5), 21 TEU contain a legal basis for the conduct of HRIAs, the failure to conduct an HRIA does not, at least not directly,⁷⁴³ violate Article 21 TEU if the EU has used different instruments to take human rights impacts into account. However, failure to assess the human rights impacts *at all* would constitute an abuse of discretion and therefore render the respective act illegal.⁷⁴⁴ In addition, Article 21 TEU arguably shifts the burden of proof: If the European Commission has installed an impact assessment regime but fails to consider extraterritorial human rights impacts when conducting an impact assessment, the Commission would have to demonstrate that there was no reason to do so, for example because no significant human rights impacts were expected. The role of judicial review when the Commission fails to conduct an (adequate) impact assessment are discussed in the final chapter.

4.7.4.2 The Scope of Extraterritorial Human Rights and the *Front Polisario* cases

I have argued above that Art. 3 (5), 21 TEU establish a clear legal basis to assess and take into account internal and external human rights impacts of, in principle, all types of policies. However, this does not clarify *which* human rights are to be considered, and to what extent. In particular, it is controversial whether *all* fundamental rights laid down in the CFR apply both internally and extraterritorially, or whether only those human rights that are recognized as *jus cogens* and *erga omnes* obligations under international law apply extraterritorially.

A European Commission statement seems to reflect a broad approach. In recognizing that the EU has to comply with human rights in its external actions, it stated that “EU external action has to comply with the rights contained in the EU Charter of Fundamental Rights which became binding EU law under the Lisbon Treaty, as well as with the rights guaranteed by the European Convention on Human Rights.”⁷⁴⁵ This is a broad approach, which has been largely confirmed by the General Court in *Front Polisario*, according to which EU institutions must, before concluding a trade agreement, examine extraterritorial impacts on, in principle, all fundamental rights laid down in the CFR.⁷⁴⁶ In contrast, the Advocate General applied a narrower approach, while the Court of Justice avoided addressing that issue at all. It is therefore worth having a closer look at the facts and legal arguments of the *Front Polisario* case. This is also because the General Court has established basic legal standards defining when and how to conduct HRIAs (this will be addressed more closely in part IV).

In 2015, the General Court annulled a Council Decision to approve an amendment to the Association Agreement between the European Union and the Kingdom of Morocco (“Association

⁷⁴³ On the consequences of the failure to conduct HRIAs for indirect judicial review and review by the European Ombudsman see chapter 10.

⁷⁴⁴ This will be discussed in the final chapter in the context of judicial review.

⁷⁴⁵ European Commission and High Representative of the European Union for Foreign Affairs and Security Policy, *Human Rights and Democracy at the Heart of EU External Action – Towards a More Effective Approach* (2011), COM(2011) 886 final, p. 7.

⁷⁴⁶ General Court of the European Union, Judgment of 10 December 2015, T-512/12, *Front Polisario*, para 228.

Agreement”) and an agreement providing for mutual liberalization (“Liberalisation Agreement”). The dispute concerned the applicability of the agreements to the disputed territory of Western Sahara, which under international law counts as a non-self-governing territory in accordance with Art. 73 of the UN Charter,⁷⁴⁷ which is still largely controlled by Morocco. Front Polisario, an organization seeking independence for Western Sahara, brought an action for annulment against the Council decision arguing, inter alia, that the EU failed to consider that Morocco exploits the natural resources of the territory of Western Sahara and infringes the human rights of people living there. These effects would be exacerbated by the Liberalisation Agreement if it applied to Western Sahara. In substance, Front Polisario claims that the Liberalization Agreement encourages economic domination by Morocco. This would undermine the realization of the right to self-determination. The EU would therefore infringe EU fundamental rights, the EU’s general objectives and principles of international law.⁷⁴⁸

On the merits, the General Court relied on settled case law and confirmed that the Council enjoys wide discretion in the field of external relations. In order to determine whether it has committed a manifest error of assessment, the Courts of the European Union must “verify whether it has examined carefully and impartially all the relevant facts of the individual case, facts which support the conclusions reached”.⁷⁴⁹ Impacts on interests protected by human rights would be “relevant facts” in this sense. The General Court found that the Council had failed to take the human rights situation in Western Sahara adequately into account and to assess the potential human rights impacts of the Agreement for people living on that territory. The Court held that the protection of fundamental rights of the population of Western Sahara – and thus a territory outside the EU – is “of particular importance and [...], therefore, a question that the Council must examine before the approval of such an agreement.”⁷⁵⁰

The General Court also makes clear that it does not matter, as the Council had argued, that Morocco would be responsible for compliance with international and human rights obligations concerning the territory of Western Sahara. While Morocco bears the primary responsibility, it does not release the EU from its own human rights obligations. The General Court established – and this resembles the complicity approach outlined above – a co-responsibility of EU institutions:

“That argument is correct, but it ignores the fact that, if the European Union allows the export to its Member States of products originating in that other country which have been produced or obtained in conditions which do not respect the fundamental rights of the population of the territory from which they originate, it may indirectly encourage such infringements or profit from them”.⁷⁵¹

Consequently, the obligation to assess human rights impacts emerges not only if the EU initiative directly causes human rights impacts, but also if it – indirectly – “encourages” or “profits from”

⁷⁴⁷ International Court of Justice, *Advisory Opinion of 16 October 1975 on Western Sahara*.

⁷⁴⁸ General Court, *Front Polisario* (above, n. 746), 228 et seq.; Vivian Kube, *The Polisario case: Do EU fundamental rights matter for EU trade policies?*, in: EJIL: Talk!, available at:

<https://www.ejiltalk.org/the-polisario-case-do-eu-fundamental-rights-matter-for-eu-trade-policies/>.

⁷⁴⁹ General Court, *Front Polisario* (above, n. 746), para 225.

⁷⁵⁰ *Ibid.*, para 227.

⁷⁵¹ *Ibid.*, para 231.

infringements. This reflects the “aid or assist” requirement under the complicity approach illustrated above⁷⁵².

It is against this background that the General Court identifies an obligation to assess the extra-territorial and factual human rights impacts of the contested Decision. Here, the General Court declares that, in principle, all fundamental rights laid down in the CFR could apply extraterritorially and must be assessed:

“In particular, as regards an agreement to facilitate, inter alia, the export to the European Union of various products originating in the territory concerned, the Council must examine, carefully and impartially, all the relevant facts in order to ensure that the production of goods for export is not conducted to the detriment of the population of the territory concerned, or entails infringements of fundamental rights, including, in particular, the rights to human dignity, to life and to the integrity of the person (Articles 1 to 3 of the Charter of Fundamental Rights), the prohibition of slavery and forced labour (Article 5 of the Charter of Fundamental Rights), the freedom to choose an occupation and right to engage in work (Article 15 of the Charter of Fundamental Rights), the freedom to conduct a business (Article 16 of the Charter of Fundamental Rights), the right to property (Article 17 of the Charter of Fundamental Rights), the right to fair and just working conditions and the prohibition of child labour and protection of young people at work (Articles 31 and 32 of the Charter of Fundamental Rights).”⁷⁵³

The General Court concluded that “[i]t does not follow either from the Council’s arguments or from the evidence that it attached to the file that it carried out [such] an examination”.⁷⁵⁴ The General Court consequently partially annulled the contested decision. This judgment is based on an abuse of discretion as the General Court cites the standards of review generally applicable to cases where EU institutions enjoy wide discretion: “in order to verify whether it has committed a manifest error of assessment, the Courts of the European Union must verify whether it has examined carefully and impartially all the relevant facts of the individual case, facts which support the conclusions reached”.⁷⁵⁵ The General Court therefore did not have to continue and assess whether and to what extent the contested Decision would entail or contribute to specific infringements of human rights (as entitlements) in Western Sahara.⁷⁵⁶

The General Court quite directly declares all fundamental rights applicable even though the extra-territorial applicability of fundamental and human rights is a controversial issue.⁷⁵⁷ Advocate General Wathelet in *Front Polisario* rejects this broad extra-territorial application of the CFR. Rather, he adopts the ECtHR’s doctrine of effective control and states that “fundamental rights may, in some circumstances, produce extra-territorial effects. That is certainly the case where an activity is governed by EU law and carried out under the effective control of the EU and/or its Member States but outside their territory”.⁷⁵⁸ The Advocate General does not deny the obligation to examine human rights impacts in third countries and, in particular, “to study the impact which

⁷⁵² See section 4.7.2.2.

⁷⁵³ *Ibid.*, para 228.

⁷⁵⁴ *Ibid.*, para 244.

⁷⁵⁵ *Ibid.*, para 225.

⁷⁵⁶ Opinion of Advocate General Wathelet, *Front Polisario* (above, n. 716), para 234

⁷⁵⁷ Kube, “The Polisario case: Do EU fundamental rights matter for EU trade policies?” (above, n. 748).

⁷⁵⁸ Opinion of Advocate General Wathelet, *Front Polisario* (above, n. 716), para 270.

that agreement could have on human rights“ – however, instead of referring to all rights of the CFR, the EU must rather “respect peremptory norms of international law (*jus cogens*) and *erga omnes* obligations”⁷⁵⁹ which include “principles and rules concerning the basic rights of the human person”.⁷⁶⁰ The exact scope of human rights qualifying as *jus cogens* and *erga omnes* obligations is not being addressed in much more detail. So far, only the most important core human rights are generally recognized as *jus cogens*, such as the prohibition of genocide or systematic racial discrimination.⁷⁶¹ The relevance for HRIAs of economic policies would then be limited. However, a broader list of *jus cogens* norms seems at least possible. For example, the (then) Court of First Instance in *Kadi-I* held that *jus cogens* could also include the prohibition of the arbitrary deprivation of the right to property.⁷⁶² However, this seems not decisive if one refers to *erga omnes* obligations instead. AG Wathelet seems to – convincingly – assume that the scope of human rights *erga omnes* obligations is broader than the short list of *jus cogens* norms. In particular, he indicates that, in order to determine the scope of *erga omnes* obligations, “[r]ecourse could be had here to the rights recognised and protected by the International Covenant on Civil and Political Rights”.⁷⁶³ Considering that EU law recognizes the indivisibility of human rights, reference should then also be made to the rights laid down in the ICESCR.

Against this background, there might not be a major practical difference between the General Court’s and the Advocate General’s approach. Relying on *erga omnes* obligations under international law has the advantage that the EU examines extraterritorial human rights impacts based on legal sources applicable to both the EU and to third states. Still, it is not compelling to apply the ECtHR’s restrictive interpretation of the territorial jurisdiction clause in the Convention to the CFR – as the CFR does not contain a comparable clause.⁷⁶⁴ In particular Article 51 of the CFR only contains a jurisdiction clause *ratione materiae*, not *ratione loci*. A more convincing interpretation would therefore focus on the exercise of EU powers as such: “where the EU exercises its

⁷⁵⁹ Ibid., para 257.

⁷⁶⁰ Ibid., para 276 et seq., referencing inter alia: ICJ, *Barcelona Traction, Light and Power Company, Limited, Judgment*, I.C.J. Reports 1970, p. 3. (1970), para 34.

⁷⁶¹ Dann, *The Law of Development Cooperation* (above, n. 4), p. 269; Bryde, ‘Konstitutionalisierung des Völkerrechts und Internationalisierung des Verfassungsrechts’ (above, n. 203), p. 66.

⁷⁶² CFI, *Kadi* (above, n. 716), para 242. The ECJ later set aside the judgment. Instead, the ECJ reviewed the respective EU acts in light of EU fundamental rights: ECJ, Joined Cases C-402/05 P and C-415/05 P, *Kadi and Al Barakat International Foundation* (2008). The ECJ therefore did not further address the scope of *jus cogens*.

⁷⁶³ Opinion of Advocate General Wathelet, *Front Polisario* (above, n. 716), para 276 footnote 131. Considering that EU law recognizes the indivisibility of human rights, reference should then also be made to the rights laid down in the ICESCR. The relationship between *jus cogens* and *erga omnes* obligations may require further analysis. In line with the abovementioned interpretation, Bryde has explained why the scope of *jus cogens* and *erga omnes* obligations should not be identical, concluding that *erga omnes* obligations include human rights beyond the narrow *jus cogens* catalogue: Bryde, ‘Verpflichtungen Erga omnes aus Menschenrechten’ (above, n. 501), p. 169. In the context of the *Front Polisario* cases, it would have been desirable had AG Wathelet been more explicit in this regard. Critics might refer to footnote 121, where he states that “[t]he norms recognised as peremptory norms of general international law coincide with those recognised as *erga omnes* obligations”. This is indeed a slightly ambiguous wording. However, considering the aforementioned reference to the ICCPR as an interpretive source for *erga omnes* obligations, the statement in footnote 121 could only mean that all peremptory norms are also *erga omnes* obligations, whereas other human rights recognized in the ICCPR are “only” *erga omnes* obligations but not *jus cogens*.

⁷⁶⁴ Antal Berkes, ‘The extraterritorial human rights obligations of the EU in its external trade and investment policies’, *Europe and the World: A law review*, 2 (1) (2018), pp. 1–21, p. 6; Ryngaert, ‘EU Trade Agreements and Human Rights: From Extraterritorial to Territorial Obligations’ (above, n. 429), p. 379.

powers, it owes human rights obligations to persons affected by such exercise of power, irrespective of the location of those persons”.⁷⁶⁵ Indeed, Article 52 (3) sentence 2 makes clear that the EU is not prevented from providing more extensive protection than the ECHR.⁷⁶⁶

The Court of Justice did not address the scope of applicable human and fundamental rights. The General Court had granted standing to Front Polisario,⁷⁶⁷ holding that Front Polisario was directly and individually affected by the challenged decision because the Agreement between the European Union and Morocco would also apply to Western Sahara.⁷⁶⁸ The ECJ disagreed with this latter conclusion. Unlike the General Court, it found that the Liberalisation Agreement does not apply to the disputed territory of Western Sahara because it may not apply there due to, *inter alia*, the principle of relative effect of treaties.⁷⁶⁹ This procedural aspect of the ECJ judgment will be addressed in the final chapter of this book in the context of the judicial review of HRIAs. For now, it is sufficient to note that the ECJ did not reverse the General Court’s judgment on the merits: neither the ECJ nor the Advocate General⁷⁷⁰ denied the obligation of EU institutions to examine the extraterritorial human rights impacts of EU decisions.

In conclusion, the General Court’s *Front Polisario* judgment refined the normative framework for HRIAs of international agreements.⁷⁷¹ It concerns different dimensions that will again be discussed in the following chapters. First, the Court determines what triggers the obligation to conduct an HRIA.⁷⁷² This is essentially the case if facts are “likely to give rise to doubt”⁷⁷³ that the

⁷⁶⁵ Ibid., p. 380; similar: Peters, ‘Global Constitutionalism: The Social Dimension’ (above, n. 189), p. 304. Ryngaert even challenges the underlying distinction between territorial and extraterritorial human rights jurisdiction, at least insofar as the human rights impacts of EU decisions implementing international agreements are concerned. He states that human rights obligations which the EU might have vis-à-vis distant strangers in this context need not be characterized as ‘extraterritorial’ at all. Instead, he argues that the EU’s human rights obligations in the context of such agreements should be based on “due diligence” requirements and duties of care, i.e. on obligations that have a territorial character because the relevant decisions are taken within the EU territory. He therefore suggest “territorializing” human rights obligations towards distant strangers: Ryngaert, ‘EU Trade Agreements and Human Rights: From Extraterritorial to Territorial Obligations’ (above, n. 429), 383 et seq.

⁷⁶⁶ Ibid., p. 379.

⁷⁶⁷ It considered Front Polisario a “legal person” in the sense of Article 263 (4) TFEU. The legal status of Front Polisario is complex, however this is not relevant for the point addressed here. It suffices to say that the General Court avoided to address controversial issues, for example to what extent Front Polisario would be a legal person because it is a “national liberation movement”. Instead, it applied case law which granted the status of a “legal person” in the sense of Article 263 TFEU even to those associations that are not formally recognized as legal persons under corporate law. This is the case if the EU institutions treat an association “as being a distinct person”, and if it has “constituting documents and an internal structure giving it the independence necessary to act as a responsible body in legal matters”, see: General Court, *Front Polisario* (above, n. 746), para 52–53.

⁷⁶⁸ Ibid., p. 116.

⁷⁶⁹ ECJ, Judgment of 21 December 2016, C-104/16 P, *Front Polisario*, para 100 et seq.

⁷⁷⁰ Opinion of Advocate General Wathelet, *Front Polisario* (above, n. 716).

⁷⁷¹ One might interpret the *Front Polisario* judgment narrowly as only covering situations where extraterritorial human rights effects occur in disputed territories like Western Sahara. However, such a narrow reading should be rejected as it would render “the inhabitants of a ‘disputed’ territory better off than the inhabitants of a non-disputed territory, who may be equally adversely affected by an EU trade agreement. This distinction between individuals, only based on the status of a particular territory, flies in the face of the universal application of human rights.” Ryngaert, ‘EU Trade Agreements and Human Rights: From Extraterritorial to Territorial Obligations’ (above, n. 429), p. 392.

⁷⁷² See chapter 6.

⁷⁷³ General Court, *Front Polisario* (above, n. 746), para 235 ff.

agreement may have negative human rights impacts or impacts on the right to self-determination. To determine whether facts give rise to doubt, the General Court reviews different sources of information, including an NGO report about the human rights situation in Western Sahara. It is therefore important how much publicity an issue has gained.⁷⁷⁴ This indirectly strengthens the role of, inter alia, UN and civil society human rights reporting: the more public attention a human rights issue gains, the more likely it is that the EU institutions must examine these issues before approving an international agreement. The General Court and the Advocate General also define the scope of the extraterritorial duties which include human rights as *policy objectives* and, to a certain extent, arguably also as *entitlements*: as policy objectives, EU institutions must, first of all, exercise their discretion properly and take human rights impacts carefully and impartially into account.⁷⁷⁵ In addition, EU institutions must “before concluding international agreements, [...] *ensure compliance*” (emphasis added)”⁷⁷⁶ with *jus cogens* and *erga omnes* obligations, which include “*the principles and rules concerning the basic rights of the human person*”.⁷⁷⁷ As the EU institutions already failed to comply with the first requirement, the General Court did not have to address rights as entitlements in more detail.

4.7.4.3 *Mugraby, Zaoui, and the Inuit Tapiriit Kanatami Cases*

While most prominently addressed in the Front Polisario cases, other judgments rendered by the EU courts have confirmed extraterritorial human rights obligations as entitlements, even though judicial action brought by distant strangers for alleged human rights violations often failed for other reasons. This is, however, mainly due to the high obstacles under EU court procedure law and the broad discretion of EU institutions – not because the European courts rejected the extraterritorial application of human rights as such.

In the *Mugraby* case, the applicant claimed human rights violations suffered in Lebanon because neither the Council nor the Commission adopted “appropriate measures” (e.g. suspension of EU aid programs) under the human rights clause in the Association Agreement between the EU and Lebanon. The claim mainly failed because the competent EU organs had broad discretion under the agreement to take action in case of human rights violation: the human rights clause authorizes but does not oblige the EU institutions to adopt specific measures. The applicant did not prove that the Commission or the Council have “manifestly and gravely disregarded the limits of the broad discretion that they have with regard to a possible suspension of the Association Agreement”.⁷⁷⁸ The appeal was dismissed: not because the Court denies that the EU had obligations towards the appellant,⁷⁷⁹ but because the appellant did not identify “specifically the error of law that allegedly vitiates the order under appeal”.⁷⁸⁰ The Court therefore does not call into

⁷⁷⁴ Ibid., para 245.

⁷⁷⁵ This addresses indeed a so-far largely unresolved question, see most recently: Peters, ‘Global Constitutionalism: The Social Dimension’ (above, n. 189), p. 305.

⁷⁷⁶ Opinion of Advocate General Wathelet, *Front Polisario* (above, n. 716), para 259.

⁷⁷⁷ Ibid.

⁷⁷⁸ General Court, Order of 6 September 2011, T-292/09, *Mugraby v Council and Commission* (2011), para 60.

⁷⁷⁹ ECJ, Order of 12 July 2012, C-581/11 P, *Mugraby*, para 52 et seq.

⁷⁸⁰ Ibid., para 53.

question that the EU can, in general, be held responsible for acts or omissions resulting in human rights violations in third countries.⁷⁸¹

In *Zaoui*, the applicant brought an action against the EU for non-contractual liability. His wife was killed in a Hamas terrorist attack, and he found the cause in the Palestinian educational system in general and the manuals and school books which in particular incited racial hatred. The applicant is convinced of the EU's liability because it provides, since 1994, funds to the Palestinian Authority which in part serve for the education system. The action was dismissed because the applicant could not prove, to the satisfaction of the European Courts, the causality between the funding of the Palestinian education system and the specific attack.⁷⁸² Still, it did again not deny that the EU has, in principle, human rights obligations towards residents in third countries,⁷⁸³ and that these distant strangers can raise human rights claims vis-à-vis the EU.

The *Inuit Tapiriit Kanatami* decisions concern a series of cases decided by the General Court and the Court of Justice which are of particular relevance for judicial review of decisions that affect human rights extraterritorially. The WTO dispute settlement bodies also dealt with this subject matter. Therefore, it is worth to have a closer look not only at the findings but also at the underlying facts of these Inuit cases.

In 2009, the EU restricted the trade in seal products.⁷⁸⁴ The placing of seal products on the EU market "shall be allowed only where the seal products result from hunts traditionally conducted by Inuit and other indigenous communities and contribute to their subsistence."⁷⁸⁵ Two other exceptions for import regard cases where "it is of an occasional nature and consists exclusively of goods for the personal use of travelers or their families" and "where the seal products result from by-products of hunting that is regulated by national law and conducted for the sole purpose of the sustainable management of marine resources."⁷⁸⁶ This Basic Regulation was implemented by Commission Regulation (EU) No 737/2010 (both Regulations are referred to as the "EU seal regime"). This Commission Regulation further concretized the Inuit-exemption and defined the relevant conditions that must be met.⁷⁸⁷ This restriction was basically criticized by the applicants as not striking a fair balance between animal welfare and the protection of indigenous rights, and as violating the applicants' fundamental and human rights. Inter alia, they

⁷⁸¹ Bartels, 'The EU's Human Rights Obligations in Relation to Policies with Extraterritorial Effects' (above, n. 12), p. 1076.

⁷⁸² ECJ, Order of 14 October 2004, C-288/03 P, *Zaoui* (2004), para 14.

⁷⁸³ Bartels, 'The EU's Human Rights Obligations in Relation to Policies with Extraterritorial Effects' (above, n. 12), p. 1076.

⁷⁸⁴ European Union, *Regulation (EC) No 1007/2009 of the European Parliament and of the Council on Trade in Seal Products*.

⁷⁸⁵ Ibid., Art. 3 (1).

⁷⁸⁶ Ibid., Art. 3 (2).

⁷⁸⁷ These conditions are: (a) seal hunts conducted by Inuit or other indigenous communities which have a tradition of seal hunting in the community and in the geographical region; (b) seal hunts the products of which are at least partly used, consumed or processed within the communities according to their traditions, and (c) seal hunts which contribute to the subsistence of the community. European Commission, *Regulation (EU) 737/2010 laying down detailed rules for the implementation of Regulation (EC) No 1007/2009 of the European Parliament and of the Council on Trade in Seal Products*, Art. 3 (1).

complained that, instead of establishing an effective exemption for the Inuits, the Commission blocked any placing of seal products on the Union market.⁷⁸⁸

A Canadian NGO, Inuit Tapiriit Kanatami, and other applicants established or residing mainly in Canada and Norway, brought first an action for annulment against the Basic Regulation (in the following: *Inuit-I*). The General Court and the ECJ held that the Basic Regulation is a legislative and thus not a “regulatory act” under Art. 263(4) 3rd limb TFEU. As the applicants were either not directly or not individually concerned, the action was dismissed with legal effect. The applicants later brought another action against the Implementing Commission Regulation (in the following: *Inuit-II*)⁷⁸⁹. While both actions and the respective appeals were dismissed, the EU courts nevertheless made important statements on standing (mainly in *Inuit-I*, see section 10.2.3.1.2) and on potentially relevant grounds for review in the context of extraterritorial human rights impacts (mainly in *Inuit-II*). This section focuses on these judgments and reasons in the *Inuit-II* cases.

The decisions of the General Court and the ECJ, at least implicitly, confirm that distant strangers are holders of human rights which they can assert against the EU.⁷⁹⁰ However, in the particular case, the courts did not conclude that the applicants’ fundamental or human rights were actually violated by the Commission Regulation. In *Inuit-II*, the General Court did not rule on the admissibility as it regarded the claims to be wholly unfounded.⁷⁹¹ The applicants claimed a breach of their rights to property and their right to be heard during the preparation of the two Regulations. The first claim was rejected as the “guarantees accorded by the right to property cannot be extended to protect mere commercial interests or opportunities, the uncertainties of which are part of the very essence of economic activity”.⁷⁹² The General Court also rejected the applicants’ claim that their right to be heard was violated: First, insofar as such a right exists as a procedural safeguard against unjustified infringements of the right to property, this does not apply here as property rights are not at stake. Second, such a right cannot stem directly from Article 19 of the United Nations Declaration on the Rights of Indigenous Peoples (UNDRIP) as this is merely a declaration and not binding under international law. Third, other consultation requirements only exist insofar as they are established under the Treaty.⁷⁹³ The General Court also remarked that “the Union legislature did take account of the particular situation of Inuit communities as referred to in the United Nations Declaration on the Rights of Indigenous Peoples”.⁷⁹⁴ It remains

⁷⁸⁸ General Court, Judgment of 25 April 2013, T-526/10, *Inuit Tapiriit Kanatami II*, para 120 et seq.; ECJ, Judgment of 3 September 2015, C-398/13 P, *Inuit Tapiriit Kanatami II*.

⁷⁸⁹ Similarly, different states brought actions against the EU to the WTO dispute settlement mechanisms; due to the different constellations, the WTO case, which also demonstrates the relevance of impact assessments, will be discussed later at a different stage (see chapters 9 and 10.2).

⁷⁹⁰ This is in line with the abovementioned case-law. A different question is whether distant strangers can, under court procedure law, also bring an *action for annulment* if their human rights are infringed. This is, as will be discussed in chapter 10, usually difficult due to the “concern” requirement in Article 264 (4) TFEU: under established EU case law, applicants must show that the challenged act affects the applicants’ legal and not only the factual situation: General Court, Order of 6 September 2011, T-18/10, *Inuit Tapiriit Kanatami I*, para 75; appeal: ECJ, Judgment of 3 October 2013, C-583/11 P, *Inuit Tapiriit Kanatami I*.

⁷⁹¹ General Court, *Inuit Tapiriit Kanatami II*, T-526/10 (above, n. 788), para 21.

⁷⁹² *Ibid.*, para 109.

⁷⁹³ *Ibid.*, para 110–113. To be on the safe side, the Court remarks that the Commission actually did consult Inuit communities “broadly and repeatedly” in preparation of both Regulations: *Ibid.*, para 114.

⁷⁹⁴ *Ibid.*, para 115. At the same time, the General Court pointed out that the “Inuit communities were broadly and repeatedly consulted in preparation for both the basic regulation”.

a little unclear whether this is purely an auxiliary argument, or whether the Court would have, like the General Court did in *Front Polisario* (see above), invalidated the contested regulation for abuse of discretion had the Union legislature failed to consider these impacts.

The judgment was appealed on different grounds. Regarding the alleged human rights violations, the appellants argued that not only the right to property but also the right to conduct business is protected under EU law, and that the applicants have economic interests protected accordingly.⁷⁹⁵ Second, they complain that the General Court erred in its evaluation of Article 19 UNDRIP: while the Declaration itself was not binding, Article 19 UNDRIP lays down a rule of customary international law – namely the obligation to consult and strive for prior consent of indigenous communities – which is as such binding on the EU.⁷⁹⁶

The ECJ rejected both claims: the appellants did not plead before the General Court “either any breach of the freedom to conduct a business laid down in Article 16 of the Charter or any breach of a rule of customary international law resulting from Article 19 of the UNDRIP”.⁷⁹⁷ Moreover, the ECJ confirmed the General Court’s judgment insofar as it found no breach of the right to property as it does not protect mere commercial interests or opportunities.⁷⁹⁸ The ECJ thus used an easy-exit strategy: it dismissed the easily rejectable claim on the merits (an alleged violation of property rights) and the more complicated claims as inadmissible at the appeal stage – the violation of the right to conduct business and of a customary international law obligation to consult indigenous peoples. However, the judgements are relevant for what they did *not* say: neither the General Court nor the ECJ doubted that EU fundamental and human rights apply, in general, extraterritorially, and that distant strangers residing in third states can, in general, invoke a violation of fundamental or human rights in cases where impacts of a trade policy are felt abroad.

4.7.4.4 EU Case Law, Theories of Extraterritorial Applications and the Consequences for the Principle of Affectedness

The previous case law indicates that the European courts recognize the extraterritorial application of human rights as rights. How does this case law relate to the underlying theories of the extraterritorial application? As mentioned above, scholars⁷⁹⁹ generally distinguish between normative and facticist theories. For normative approaches, human rights apply extraterritorially where a duty-bearer exercises effective control and claims authority over foreign persons or a territory (like in *Al-Skeini* and *Al-Jedda*), or otherwise adopts acts that produce *legal* effects abroad.⁸⁰⁰ In contrast, the effects doctrine - or facticist theories - would assume that distant

⁷⁹⁵ ECJ, Judgment of 3 September 2015, C-398/13 P, *Inuit Tapiriit Kanatami II* (2015), para 49.

⁷⁹⁶ *Ibid.*, para 50.

⁷⁹⁷ *Ibid.*, para 56–58.

⁷⁹⁸ *Ibid.*, para 60.

⁷⁹⁹ It is neither possible nor necessary, for the scope of this thesis which adopts a macro-perspective on the institutionalization of HRIAs, to give a comprehensive account of the discourse on the extraterritorial application of EU human rights. Instead, the main lines of arguments should briefly be illustrated.

⁸⁰⁰ Ganesh, ‘The European Union’s Human Rights Obligations Towards Distant Strangers’ (above, n. 49), Besson, ‘The Extraterritoriality of the European Convention on Human Rights: Why Human Rights Depend on Jurisdiction and What Jurisdiction Amounts to’ (above, n. 428).

strangers could additionally, under certain conditions, claim human rights vis-à-vis the EU even if EU policies merely produce factual effects.⁸⁰¹

Under the normative approach, EU human rights would apply extraterritorially where the EU exercises authority and control over territory and/or individuals on foreign soil. This would concern mainly military occupation or similar situations. In a similar vein, normative theorists also held that human rights should apply extraterritorially where the EU exercises its authority to prescribe laws governing conduct abroad, regardless of (physical) control. Human rights obligations arise where a legal relationship of authority and obedience exists between the duty-bearer and the right-holder.⁸⁰² Such a criterion would generally not cover situations where economic policies only have a factual effect on distant strangers, no matter how devastating. To refer to the introductory examples, even the most harmful effects of agricultural subsidies on small farmers in the Global South would not constitute control or an exercise of normative authority over them.⁸⁰³ This would arguably be different in the second introductory example regarding the effects of EU food control regulation affecting the livelihood of farmers in developing countries: in all cases where farmers are exporting their products to the EU and are placing their products on the EU market, they are obligated to comply with the binding EU standards on food quality or may not continue to ship their products to the EU. In this sense, the EU exercises its authority to produce *legal* effects that *directly concern* those farmers who can consequently, if the measure is not justified, claim a violation of their human rights vis-à-vis the EU. This reasoning is supported by Advocate General Kokott's arguments in *Inuit-II* discussed above.⁸⁰⁴

⁸⁰¹ In this sense probably: Peters, 'Global Constitutionalism: The Social Dimension' (above, n. 189), p. 304; arguing that, if one assumes that human rights are universal, adverse factual effects should have the same relevance as legal effects: Silja Vönekey, 'Espionage, Security Interests and Human Rights', in: Russell A. Miller (ed.), *Privacy and Power*, pp. 492–507, p. 502; see also: Principle 9 (b) of Schutter and et. al, 'Commentary to the Maastricht Principles on Extraterritorial Obligations of States in the Area of Economic, Social and Cultural Rights' (above, n. 201), p. 1104: "A State has obligations to respect, protect and fulfil economic, social and cultural rights in any of the following: [...]b) situations over which State acts or omissions bring about foreseeable effects on the enjoyment of economic, social and cultural rights, whether within or outside its territory". The recent judgment of the German Federal Constitutional Court on surveillance powers of the Federal Intelligence Service regarding foreign telecommunications supports the effects theory for the extraterritorial application of German fundamental rights: BVerfG, Judgment of 19 May 2020, 1 BvR 2835/17, para 90.

⁸⁰² In this sense: Ganesh, 'The European Union's Human Rights Obligations Towards Distant Strangers' (above, n. 49) with detailed references from international and EU law.

⁸⁰³ Similar: Peters, 'Global Constitutionalism: The Social Dimension' (above, n. 189), p. 303.

⁸⁰⁴ AG Kokott argued, in *Inuit-II*, that the EU seals regime is of "direct concern" to the (non-EU) applicants who themselves market seal products and sell them in the EU. Such an EU act – in the particular case the EU Commission implementing regulation – would therefore produce a legal effect that constitutes "concern" in the sense of Article 263 (4) TFEU, see: Opinion of Advocate General Kokott of 19 March 2015, Case C-398/13 P, *Inuit Tapiriit Kanatami II*, para 26. Similarly, in *ATAA*, the ECJ held that the (then) Emissions Trading Directive was valid. A major objection was that the Directive required non-EU aircraft operators departing from or arriving at EU airports to surrender emission allowances calculated based on the whole international flight, including the distance performed on non-EU territory: ECJ, *ATAA* (above, n. 713). This is arguably an extraterritorial exercise of normative authority over foreign airline operators, even though this obligation would only apply when starting/landing at an EU airport. Consequently, under normative theories, foreign airline operators should be regarded as right-holders, even though they could have avoided becoming subject of EU authority by not entering EU territory: Ganesh, 'The European Union's Human Rights Obligations Towards Distant Strangers' (above, n. 49), p. 499. Similarly, EU laws regulating food production abroad and restricting entry of food not produced in compliance with these stand-

What remains controversial then is whether and to what extent acts that do not produce extra-territorial legal but only factual effects could trigger the extraterritorial application of human rights. This would probably concern the vast majority of cases where EU economic policies affect the interests of distant strangers. As mentioned, the European Court of Human Rights has largely rejected this factual effects-doctrine since *Bankovic*, even though certain ambiguities remain.⁸⁰⁵ The unfortunate consequence of normative theories would be that human rights would only apply where a state claims normative authority, but not in cases of raw power.

However, even if one accepts this nowadays well-established ECtHR case law on territorial jurisdiction as a given fact, it would not be convincing to apply this restrictive criterion to the territorial scope of EU fundamental rights. The most striking difference is that the CFR does not contain a *territorial* jurisdiction clause comparable to the one in the European Convention on Human Rights.⁸⁰⁶ The General Court in the aforementioned *Front Polisario* judgment therefore correctly assumed that all rights enshrined in the CFR can, potentially, apply extraterritorially.⁸⁰⁷ As argued above, there is indeed no need to apply the ECtHR's restrictive interpretation absent a specific territorial jurisdiction clause in the CFR.⁸⁰⁸

The *facticist* or effects-doctrine has met significant opposition though. This includes practical objections – that such a broad application would make effective political decision-making impossible – and theoretical concerns. I will address the theoretical concerns first. Scholars have claimed that such an approach would be difficult to reconcile with democratic and self-determination principles: Instead of establishing a human rights relationship between a state and those subjected to its authority, such an extraterritorial human rights obligation would create a legal relationship between the duty-bearer (here: the EU) and the duty-holder living on a foreign territory. Based on democratic theories and the right to self-determination, normative theorists argue that extraterritorial human rights jurisdiction should be limited to situations where a public authority exercises effective normative power and control over distant strangers.⁸⁰⁹ Besson argues that human rights and democracy are inextricably linked, referenc-

ards would be an act of normative authority requiring compliance from distant strangers, even though they could avoid becoming subject of EU authority by not exporting to the EU market.

⁸⁰⁵ ECtHR, *Bankovic and Others v Belgium and Others* (above, n. 428); ECtHR, *Al-Skeini and Others v United Kingdom* (above, n. 428). For a closer analysis see section 4.7.3.

⁸⁰⁶ Ryngaert, 'EU Trade Agreements and Human Rights: From Extraterritorial to Territorial Obligations' (above, n. 429), p. 379.

⁸⁰⁷ General Court, *Front Polisario* (above, n. 746), para 228. As discussed in the previous sub-section: On appeal, the Court of Justice did not address this issue but reversed the judgment on different grounds. In his Opinion in *Front Polisario*, the General Advocate argued that the CFR would not apply extraterritorially unless an activity is carried "under the effective control of the EU and/or its Member States but outside their territory" (Opinion of Advocate General Wathelet, *Front Polisario* (above, n. 716), 270 et seq.).

⁸⁰⁸ Berkes, 'The extraterritorial human rights obligations of the EU in its external trade and investment policies' (above, n. 764), p. 6.

⁸⁰⁹ Besson, 'The Extraterritoriality of the European Convention on Human Rights: Why Human Rights Depend on Jurisdiction and What Jurisdiction Amounts to' (above, n. 428), p. 884; Ganesh, 'The European Union's Human Rights Obligations Towards Distant Strangers' (above, n. 49), p. 503. For a critical analysis see: Ryngaert, 'EU Trade Agreements and Human Rights: From Extraterritorial to Territorial Obligations' (above, n. 429), p. 382

ing the requirement “necessity in a democratic society” in Art. 8 (2) ECHR⁸¹⁰. Similar requirements exist under Art. 4 ICESCR.

The democratic objections are not compelling, at least not for the type of human rights impacts discussed here. Regarding the right to self-determination of distant strangers and their state, it is important to recall that HRIAs do not operate in the context of an enforcement constellation (e.g. where states use economic policy tools to enforce human rights abroad, or justify military interventions in the name of human rights). HRIAs do thus not restrict the collective autonomy of third states or the individual autonomy of distant strangers. Instead, HRIAs concern situations of self-restraint. As regards democratic legitimacy concerns from an EU perspective, reference can be made to the democratic theory underpinning the principle of affectedness as opposed to state-based democratic theories. It has been argued above that post-national democratic theories require to take foreseeable and significant impacts on distant strangers into account. Similarly, the extraterritorial extension of human rights impacts would not be incompatible with democratic political-legal relationships: under the principle of affectedness, there would be a (limited) legal-political relationship between the acting public authority and the factually affected distant strangers.

Second, critics point out that human rights are not the only way to protect the interests of harmed individuals. Supporters of (more restrictive) normative theories refer to the fact that, in “situations where only power [*add*: and not normative authority] is asserted extraterritorially, the European Union’s legal obligations will be tortious and contractual.”⁸¹¹ However, this “division of labor” between human rights claims, tort/contract and criminal law – all of which can be used to react against harm – may work within states respecting the rule of law, but hardly in transnational settings.⁸¹²

One may, finally, object that such a broad interpretation of extraterritorial jurisdiction would make political decision-making practically impossible. While such an approach poses indeed many complicated follow-up questions,⁸¹³ in particular regarding the attribution of effects, it is not per se barred for practical reasons if necessary modifications are made. Just like distant strangers would, under the principle of affectedness, not have the same democratic participation rights as citizens (e.g. voting rights), it would also not be necessary to apply all human rights in all their dimensions to all affected individuals. Instead, it would be necessary to further develop doctrinal criteria that allow to determine when an extraterritorial factual effect amounts to an *infringement* of distant strangers’ human rights. Some authors have argued that extraterritorial obligations would, in any case, only cover negative duties, i.e. the duty to respect human rights, and not the positive obligation to protect and fulfill.⁸¹⁴ In addition, the extraterritorial application would not be excessive because an infringement would generally require a direct link be-

⁸¹⁰ Besson, ‘The Extraterritoriality of the European Convention on Human Rights: Why Human Rights Depend on Jurisdiction and What Jurisdiction Amounts to’ (above, n. 428), p. 866

⁸¹¹ Ganesh, ‘The European Union’s Human Rights Obligations Towards Distant Strangers’ (above, n. 49), p. 536.

⁸¹² Peters, ‘Global Constitutionalism: The Social Dimension’ (above, n. 189), p. 304.

⁸¹³ Ibid., p. 305.

⁸¹⁴ Bartels, ‘The EU’s Human Rights Obligations in Relation to Policies with Extraterritorial Effects’ (above, n. 12), p. 1090.

tween the cause and effect.⁸¹⁵ As seen in the *Zaoui* judgment, this is often not the case. In contrast, it would not be an excessive restriction of political discretion to hold decision-makers accountable for foreseeable impacts where a direct link between the EU decision and the extraterritorial human rights effect exists. It seems also possible, considering in particular the often complex factual and normative uncertainties regarding extraterritorial human rights effects, to grant decision-makers a broader scope of discretion to determine whether an EU act actually infringes the rights of distant strangers.⁸¹⁶ Similarly, one could also hold that only “serious” human rights effects could be covered.⁸¹⁷ Regarding in particular economic, social and cultural rights, this could be EU acts that foreseeably and directly obstruct the realization of “minimal core obligations”⁸¹⁸.

4.8 Interim Conclusion and Outlook: Obligations Towards Humanity

In this chapter, I have examined the legal basis for the institutionalization of HRIAs, drawing in particular on a legal principle of affectedness. This concerns, in particular, the question to what extent public authorities must take into account human rights impacts, regardless of where they occur. I have, in particular, addressed two objections that could be raised: that such an obligation would conflict with the acting state’s sovereignty and with the affected states sovereignty – the latter in particular because such an HRIA also requires a politically sensitive analysis of human rights compliance in that state. I have argued that these objections are unfounded insofar as the HRIA remains an exercise of self-restraint. Indeed, the assessment of human rights impacts of one’s own initiative is an expression of an emerging legal principle of affectedness. This states that all those who are affected by an act of (public) authority shall also be involved or at least be enabled to be involved in its creation. This principle is not in conflict with sovereignty but rather a modification thereof. This reconstruction of sovereignty – and its justification in the light of humanity – was addressed in the first part of this chapter. I have then analyzed rules and principles of environmental, development, trade and human rights law which contain obligations to consider impacts occurring in far-away countries. These rules and principle support the thesis that there is a *legal* principle of affectedness. In particular with regard to human rights, I have addressed the different functions of human rights as optimization principles guiding policy-making and as individual (justiciable) rights or entitlements. Insofar as law requires public authorities – in particular: the European Union under Art. 3 (5) TEU – to promote human rights, potential human rights impacts of an initiative must be assessed – for example in the form of an ex-ante HRIA – and the human rights effects must be considered in the “balancing calculus.”⁸¹⁹ In this sense, human rights mainly serve as optimization principles. However, it has also been shown that human rights can, extraterritorially, apply *as rights*. In spite of the many controversies, I have argued that this should be the case (a) for negative human rights obligations under customary international law and for treaty-based rights of treaties without a territorial jurisdic-

⁸¹⁵ Kessing, ‘Transnational Operations Carried Out from a State’s Own Territory’ (above, n. 729), p. 92; Yuval Shany, *Bad Cases Make Bad Law, But Good Law Books!* EJIL:Talk!, 1 December 2011.

⁸¹⁶ In this sense, even though with regard to the alleged indeterminacy of customary international law: ECJ, *ATAA* (above, n. 713), para 110.

⁸¹⁷ In this sense probably: Ryngaert, ‘EU Trade Agreements and Human Rights: From Extraterritorial to Territorial Obligations’ (above, n. 429), p. 391.

⁸¹⁸ *Ibid.*

⁸¹⁹ Benvenisti, ‘Sovereigns as Trustees of Humanity: On the Accountability of States to Foreign Stakeholders’ (above, n. 2), p. 314.

tion clause, (b) if the requirements for complicity are fulfilled, and (c) under EU constitutional law. Consequently, where human rights apply extraterritorially and grant rights to distant strangers, they function as entitlements and boundary markers. Compliance with these rights must therefore, as will be seen in the following chapters, also be reviewed during the impact assessment process, and options that would violate human rights would have to be discarded.

Nevertheless, in real life, cases where HRIAs could identify a clear *violation* of human rights are rare, in particular in an international context⁸²⁰. Instead, most HRIAs assess impacts on the *enjoyment* of human rights (remaining, for example, below an infringement threshold) which does not allow to clearly identify an option as legal or illegal. Balancing and optimization will therefore become unavoidable. This is largely the case because the very reason for why HRIAs are conducted is that they shall inform decision-makers in situations of factual and normative uncertainty. This will be addressed in the following chapter.

Such a principle of affectedness – and the obligation to assess human rights impacts regardless where they occur – raises many follow-up questions regarding the implementation into institutional, procedural and substantive law:⁸²¹ how can such a principle be translated into a technical and legal framework to actually guide decision-making of public authorities? When are potential impacts on humanity so significant that they should be taken into account – and who decides what counts as “significant”? How – by whom, in what procedure, in which form – should impacts be assessed, and how should one deal with residual risks? And what is the relevance of norms requiring and guiding the conduct of impact assessments? How can these HRIA norms be enforced so that HRIAs become effective? This latter question regards again two different levels: First, the obligation to conduct IAs at all and in compliance with procedural requirements, and second, the obligation to take the findings meaningfully into account.

These follow-up questions will be addressed in the next chapters from a legal – largely administrative law – perspective, namely analyzing the role legal rules and principle do or could play in this regard. Many of these challenges and follow-up questions are, as I argue, a consequence of factual and normative uncertainty: we often do not know, on the factual side, how likely and significant particular impacts are going to be, and even where we can predict them, we are often not sure how to evaluate these effects normatively and how to take the “right” decision. It is therefore impossible to establish precise command-and-control rules. How public law and in particular administrative law deals with these types of uncertainty in public decision making will therefore be a recurring theme throughout the following analysis. It is therefore important to first consider what uncertainty and related concepts such as risk, ignorance and knowledge-generation mean, and what role law can play in this regard.

⁸²⁰ Zerk, ‘Human Rights Impact Assessment of Trade Agreements’ (above, n. 30), p. 17

⁸²¹ On these follow-up questions see also: Benvenisti, ‘Sovereigns as Trustees of Humanity: On the Accountability of States to Foreign Stakeholders’ (above, n. 2).

**PART IV: HOW TO CONDUCT HUMAN RIGHTS IMPACT ASSESSMENTS: HOW LAW
GUIDES THE PROCESS AND METHODS OF IMPACT ASSESSMENTS**

5 CHAPTER 5: LAW GUIDES THE GENERATION OF KNOWLEDGE ABOUT HUMAN RIGHTS IMPACTS UNDER UNCERTAINTY

5.1 Introduction

In the previous part, I argued that there is an emerging legal principle of affectedness, namely an obligation for public authorities to take impacts on human rights and interests into account irrespective of where they occur. However, such a principle raises many follow-up questions.⁸²² Many of them concern the operationalization of such a principle in every-day decision-making: When are potential impacts so significant that they should be taken into account? Who should assess human rights impacts, in what procedure, and in what form? What methodologies should be used to predict impacts? The UN Special Rapporteur's Guiding Principles on Human Rights Impact Assessments of Trade and Investment Agreements (hereinafter: "UN Guiding Principles on HRIA of Trade and Investment Agreements") identified several factors that render the prediction and analysis of impacts based on an explicit human rights framework into a complex endeavor (challenges which also exist in other policy areas). These include "(a) the difficulties of establishing causality between human rights outcomes and specific trade/investment reforms or initiatives; (b) the paucity of data, especially in least-developed countries; and (c) the limitations of quantitative and qualitative methods in capturing dynamic effects of trade/investment reforms."⁸²³ So one of the cross-cutting issues underlying the institutionalization of HRIAs is what to do if human rights impacts remain uncertain.

This part will address these questions from a legal perspective, namely analyzing the role legal rules and principles play or could play in this regard. For that reason, I will look at administrative law and theory regarding knowledge generation and decision-making under uncertainty. A comparison with EIA law – which is a legal response to environmental risk management – is particularly useful to understand how law, impact assessments and decision-making under uncertainty interact. Most of the aforementioned follow-up questions are a consequence of factual and normative uncertainty: We may not know, on the factual side, how likely and significant particular impacts are going to be, and even where we can predict them, it is often difficult to evaluate these effects legally: when does a negative effect on small-scale farmers constitute an infringement of his or her human right to an adequate standard of living, and if so, under what circumstances can the infringement be justified? How public law deals with factual and normative uncertainty in public decision making will be a recurring theme throughout the following analysis.

It is therefore important to first consider what uncertainty and related concepts such as risk, ignorance and knowledge-generation mean and how individuals and institutions tend to make decisions under uncertainty. This chapter will first present different definitions of uncertainty and risk. Drawing on insights from risk law and theory, rules and principles governing the conduct of IAs can be interpreted in the light of three different risk paradigms. Each paradigm re-

⁸²² See above sec. 4.8.

⁸²³ United Nations Human Rights Council, Report of the Special Rapporteur on the right to food, Olivier De Schutter: Addendum: *Guiding principles on human rights impact assessments of trade and investment agreements (A/HRC/19/59/Add.5)*, 19 Dec. 2011, IV.4.2.

flects a different understanding how risks should ideally be dealt with. As will be elaborated below, they differ in particular due to the role of scientific experts and the degree of confidence we should have in expert judgment as opposed to popular assessment. Each of these risk paradigms corresponds to an ideal-type model as to how IAs can and should function. The next section of this chapter will identify causes for uncertainty, distinguishing between normative and factual uncertainty. The ensuing section provides an overview of empirical risk research: while normative/prescriptive risk research asks how risks *should* be dealt with, empirical/descriptive risk research asks how humans *actually* take decisions under risk. This section identifies several heuristic biases that, as modern psychology suggests, distort decision-making. Consequently, it must be asked how HRIA norms should be conducted in order to reduce or avoid these biases. This is one edge where HRIA norms and cognitive psychology meet. Finally, taking decisions under uncertainty requires also to use available knowledge sources. Therefore, the remainder of this chapter will address how public law can guide the generation of knowledge and how this is relevant to institutionalized HRIAs.

5.2 Definitions of Uncertainty and Risk

The understanding of “risk” widely varies between lay-persons and scientists, but even among different scientific disciplines. It is therefore necessary to briefly sketch different approaches – not to develop new insights into risk theory, but to be able to understand the different meanings assigned to risk and uncertainty. Risk is a concept that evolves around human beings and human activities; there seems to be broad consensus that risk only exists “when the uncertainty involves some feature of the world, whether in natural events or in human activities, that affects human reality in some way”.⁸²⁴ More controversial though is the scope of risk, especially which factors must be known to qualify as risk.

In the broadest sense, risk is described as a situation in which it is “possible but not certain” that a negative event occurs; in other words, risk refers to, roughly speaking, a threat to outcomes that we value.⁸²⁵ This corresponds to what one could call a qualitative sense of risk, which is more commonly used in plain language as meaning either an “unwanted *event* which may or may not occur” – e. g. getting lung cancer - or the “*cause* of such an unwanted event that may or may not occur” – smoking as the cause of lung cancer.⁸²⁶ An essential element is the lack of knowledge about potential negative events in the future. The juxtaposition between harm and risk helps to clarify further what risk means: Harm is the event that actually occurs (e.g. getting cancer), whereas risk is the impending harm.⁸²⁷

⁸²⁴ Anthony Giddens, ‘Risk and Responsibility’, *The Modern Law Review*, 62 (1999), pp. 1–10, p. 3; Rosa, Renn and McCright, *The Risk Society Revisited* (above, n. 425), p. 21; Julian Nida-Rümelin, Johann Schulenburg, and Benjamin Rath, *Risikoethik* (Berlin: de Gruyter, 2012), 1. Aufl, p. 7.

⁸²⁵ Rosa, Renn and McCright, *The Risk Society Revisited* (above, n. 425), p. 1; Baruch Fischhoff and John Kadvany, *Risk* (Oxford: Oxford Univ. Press, 2011), p. 22.

⁸²⁶ Sven Ove Hansson, ‘Risk’, *The Stanford Encyclopedia of Philosophy*.

⁸²⁷ Beck, in: Rosa, Renn and McCright, *The Risk Society Revisited* (above, n. 425), xviii.

Probability is a constitutive element of risk,⁸²⁸ and – to varying degrees – risk constitutes a combination of probabilities and magnitudes of potential harm. As such, risk is not only a descriptive concept, but rather a concept that shall help to inform decision-making: If uncertainty prevails, but if we know (or believe to know) the probability and magnitude of a decision's consequences, we can assess the risk by balancing costs and benefits. Thus, risk concepts are tools for rational decision-making, which also explains its success in administrative law: both the probability of an event and its magnitude are important to exclude very unlikely or insignificant impacts and to be able to focus on issues that matter most.⁸²⁹ The same seems true with regard to potential human rights impacts: Considering *all* potential impacts, irrespective of probability and magnitude, would make decision-making impossible.

For a quantitative approach to risk, an essential element of risk would be knowledge about probabilities. In Knight's words, risk is about *known*, uncertainty about *unknown* probabilities.⁸³⁰ Many modern risk and decision theories largely acknowledge these ideal-type distinctions, but sometimes use different terminology. Often, uncertainty is used as an umbrella term that captures both pure risk (*known* probabilities = quantifiable uncertainty) and ignorance (*unknown* probabilities = unquantifiable uncertainty).⁸³¹

This distinction has not been without criticism. While it might make sense for theoretical approaches and models in risk and decision-theory, it is epistemologically doubtful. Apart from text-book cases such as coin-flipping or dice games, it is difficult to imagine situations where the probabilities of future events can ever be predicted with full certainty. Therefore, very few – if any – cases would be decisions under pure risk and instead decisions under ignorance.⁸³² In particular for sociological and legal studies, the quantitative interpretation of risk would be too nar-

⁸²⁸ An overview on and critical reflection of narrow technical concepts focusing on probability and magnitude: Jeanne X. Kasperson and Roger E. Kasperson, *Publics, Risk Communication and the Social Amplification of Risk* (London: Earthscan, 2005), 11 et seq.; pointing out that the investigation of risk is "a scientific activity and an expression of culture": Ibid., p. 99. On risk in the social sciences Hossein Mahoudi, Ortwin Renn, Frank Vanclay et al., 'A framework for combining social impact assessment and risk assessment', *Environmental Impact Assessment Review*, 43 (2013), pp. 1–8, p. 2.

⁸²⁹ This is true for domestic fields such as police law where the police may only encroach individuals' rights if such encroachment is justified in relation to the prevention of a sufficiently likely and severe harm.

⁸³⁰ In his still very influential book "Risk, uncertainty and profit", Knight defines risk as a situation where decision-makers know the probabilities that an unwanted event may occur and clearly distinguishes risk from uncertainty: "Uncertainty must be taken in a sense radically distinct from the familiar notion of Risk, from which it has never been properly separated [...] The essential fact is that 'risk' means in some cases a quantity susceptible of measurement, while at other times it is something distinctly not of this character; and there are far-reaching and crucial differences in the bearings of the phenomenon depending on which of the two is really present and operating [...] It will appear that a measurable uncertainty, or 'risk' proper, as we shall use the term, is so far different from an unmeasurable one that it is not in effect an uncertainty at all. We shall accordingly restrict the term "uncertainty" to cases of the non-quantitative type.": Frank Knight, *Risk, Uncertainty and Profit* (New York, 1964 (reprint)), 19 et seq.

⁸³¹ Martin Peterson, *An Introduction to Decision Theory* (Cambridge, UK, New York: Cambridge University Press, 2009), p. 6.

⁸³² Nida-Rümelin, Schulenburg and Rath, *Risikoethik* (above, n. 824), p. 9; Klaus Steigleder, 'Risk and Rights: Towards a Rights-based Risk Ethics: Working Paper, December 2012', p. 4.

row: In order to be meaningful, risk must be understood in context, for example risk and acceptance, risk and legitimacy, or risk and distribution.⁸³³

For this purpose, it is more reflective of the realities of decision-making to understand uncertainty and risk as a continuum between two ideal type situations. On the one extreme, there is a situation where all options, probabilities and magnitudes are known: while it is ex-ante not clear which impact will occur, the probabilities and magnitudes are nevertheless quantifiable ("pure risk"). The other extreme comprises situations of ignorance, either because probabilities cannot be determined, or because not even (all) possible outcomes of an option are clear.⁸³⁴ In the present thesis, all these situations where decision-makers are faced with uncertainty about potentially negative impacts are defined as risk in the broad sense; only where a clear distinction is necessary will I qualify the term uncertainty and risk according to the aforementioned ideal types.

Before this background, another distinction will become relevant. Where not even all potential outcomes are known, it is possible to distinguish between situations of *open ignorance*, where a decision-maker is aware that unforeseen impacts are possible, and *closed ignorance*, where this is not the case and where an event literally comes as a surprise.⁸³⁵ This distinction can help to identify the functions of impact assessments: While it would often be senseless to strive for certainty and full knowledge, partial steps into that directions can make a decisive difference, for example the shift from closed to open ignorance. Closed ignorance means that decision-makers are unable to respond to risks at all. While open ignorance does not allow for risk evaluation in the quantitative sense, it at least enables decision-makers to include sufficiently flexible clauses into the respective legal acts (e.g. the trade agreements) or safeguard clauses in order to better respond ex-post to unforeseen impacts (see chapter 9).

5.3 Concepts of Uncertainty: Three Paradigms and their Relevance for Impact Assessment Models

Impact assessments can provide knowledge and might reduce uncertainty. However, new information can generate new uncertainties, both factually and normatively. Additional information can increase subjective uncertainty, as more information about potential impacts makes it difficult to decide what option to select. Knowledge about uncertainty and risk can make decisions more complicated by bringing difficult trade-offs into sharp relief.⁸³⁶ How public authorities deal or should deal with remaining uncertainties is of interest to risk research in different disciplines.⁸³⁷ Three approaches, which were briefly mentioned in the introduction, can be distinguished based on the extent to which one trusts in the good faith of elites or the value of

⁸³³ Di Fabio, *Risikoentscheidungen im Rechtsstaat* (above, n. 345), 54 ff.; Ulrich Beck, *Risikogesellschaft* (Frankfurt am Main: suhrkamp, 2012), 21. Aufl., pp. 25 ff.

⁸³⁴ Nida-Rümelin, Schulenburg and Rath, *Risikoethik* (above, n. 824), p. 9.

⁸³⁵ Malte Faber, Reiner Manstetten, and John Proops, 'Humankind and Environment: An Anatomy of Surprise and Ignorance', *Environmental Values*, 1 (1992), pp. 217–241.

⁸³⁶ Fischhoff and Kadvany, *Risk* (above, n. 825), p. 147.

⁸³⁷ Rosa, Renn and McCright, *The Risk Society Revisited* (above, n. 425), p. 6.

popular opinion.⁸³⁸ Essentially, three paradigms prevail in risk and decision theory, and I will argue that they can also be applied to evaluate how HRIAs address human rights risks. I will use these risk paradigms to construct three ideal-type IA models: The objective-managerial risk paradigm corresponds with the information model, the subjective-pluralistic paradigm with a preference-accumulation IA-model, and finally the analytic-deliberative risk paradigm with the transformation IA-model. These models can be used to evaluate the norms guiding HRIAs.

5.3.1 Objective-Managerial (OM) Risk Paradigm and the Information Model

It is a truism that the future is uncertain, and that human beings are only to a limited extent able to predict it. This has not changed since humans began to think about the limits of knowledge. What has changed, however, is how humans confront and deal with uncertainty. In many pre-modern societies, transcendental powers determined the course of life.⁸³⁹ This is also true for the most part of Europe during the first millennium of Christianity, where God as an ultimate authority had revealed his standards and intention, and where it was thus possible to make predictions about the future and about the afterlife by studying the Scripture.⁸⁴⁰ Different factors explain how the future was then seen as something that humans could influence. Reformation eliminated the concept of confession, and humans now had to “take responsibility for the consequences of their decisions”.⁸⁴¹ Science and philosophy increasingly emancipated from religious determination. The use of Arabic numbers made complex calculations possible, and scholars discovered the mathematical concepts of probability and risk.⁸⁴² Especially since the 18th century, empirical methods of observation and data analysis emerged, and the idea that the environment is something that can be measured and cultivated if only one possessed all the relevant information increasingly emerged. Divine determinism was superseded by scientific determinism.⁸⁴³ The assessment of future impacts of one’s decisions therefore requires to understand not the rules of god, but the rules of nature. Measurement became an important instrument for (scientific) progress. It is in this sense that Lord Kelvin allegedly remarked “when you can measure what you are speaking about and express it in numbers you know something about it; but when you cannot measure it in numbers, your knowledge is of a meagre and unsatisfactory kind”.⁸⁴⁴ While such an almost unconditional trust in numbers has generally declined, what has not is the idea that statistics, measurement and scientific experiments can be trusted more than people’s intuition and perception when assessing the consequences of one’s action.

What does an objective-managerial approach to risk and uncertainty imply for IA-models? IAs are seen as a technical and apolitical process, purely instrumental in order to provide objective information and rational assessments of potential consequences in order to enable decision-

⁸³⁸ Benhabib, ‘Twilight of Sovereignty or the Emergence of Cosmopolitan Norms? Rethinking Citizenship in Volatile Times’ (above, n. 296), p. 30.

⁸³⁹ Many philosophers in Ancient Greece were already free from intellectual limits imposed on them by transcendental doctrine and enforced by priesthood. Bernstein assumes that a reason why they have not “discovered” probability is due the fact that they worked with a numbering system based on the alphabet which, unlike the Arabic system, makes calculations extremely difficult, Peter L. Bernstein, *Against the gods* (New York, NY: Wiley, 1998), XXXI.

⁸⁴⁰ Ibid., p. 19.

⁸⁴¹ Ibid., p. 20.

⁸⁴² For an extensive overview: Ibid.

⁸⁴³ Holder, *Environmental Assessment* (above, n. 27), p. 77.

⁸⁴⁴ Quoted in: Theodore M. Porter, *Trust in numbers* (Princeton, N.J.: Princeton University Press, 1995), p. 72.

makers to make informed decisions, which ideally – even though not necessarily – lead to *better* decisions.⁸⁴⁵ The main actors are natural and social scientists or experts, and consultation is instrumental, i.e. mainly serves as a source of information.⁸⁴⁶ This paradigm is based on the assumption that objectivity can and should be achieved in the (preferably scientific) assessment of risks and impacts,⁸⁴⁷ and decision-makers would ideally base their decisions on objective information and expert knowledge.⁸⁴⁸ Legal norms reflecting such a paradigm would consequently refer to the “state of the art in science and technology” - and thus promise a high degree of apolitical objectivity.⁸⁴⁹ The underlying perception is a modernist view, where scientific accuracy and the predictability of risks are possible if only a professional and expert-based risk assessment was conducted.⁸⁵⁰ It would, pushed to the extreme, thus be better if an impact assessment was “quantitative and wrong than qualitative and untestable”.⁸⁵¹ Consequently, some authors call these types of IAs “information” or “comprehensive rationality” models.⁸⁵² The Supreme Court regards the provision of information as essential to EIAs when it holds that “[o]ther statutes may impose substantive environmental obligations on federal agencies, but NEPA merely prohibits uninformed - rather than unwise - agency action.”⁸⁵³ Similarly, the Vice-President of the French *Conseil d’Etat* Jean-Marc Sauvé stated, impact assessment reports are aimed at providing “better and more objective information”.⁸⁵⁴ Even though public participation is an important part even of information models, it is an instrumental source of information and has no intrinsic, human rights or quasi-democratic value. In sum, what matters is objective information and facts, not subjective preferences and opinion.

From a legitimacy perspective, the main argument is that objective and expert-based decisions result in better risk regulation; decision-making based on an objective risk paradigm therefore increases the output-legitimacy⁸⁵⁵. This strong emphasis on output-legitimacy is a logical consequence of the distrust against popular impact and risk assessment, which is often said to be guided by temporary irrational fear. Supporters of rational information models point out that public risk perception is often distorted by salient recent events which motivate actions without considering the full consequences.⁸⁵⁶ Pushed a little further, it would be irresponsible for decision-makers to base their decisions on popular instead of expert-based, rational information on

⁸⁴⁵ Craik, *The International Law of Environmental Impact Assessment* (above, n. 59), p. 38.

⁸⁴⁶ Ibid.

⁸⁴⁷ Holder, *Environmental Assessment* (above, n. 27), p. 95.

⁸⁴⁸ Sheila Jasanoff, *Science and Public Reason* (London, New York: Routledge, 2012), esp. 133 ff.

⁸⁴⁹ Critical: Bryde, ‘Recht der Risikogesellschaft’ (above, n. 2), p. 82, stating that this reference promises more than it can deliver.

⁸⁵⁰ Holder, *Environmental Assessment* (above, n. 27), p. 94.

⁸⁵¹ Title borrowed from: Peter Duinker, ‘Forecasting environmental impacts: better quantitative and wrong than qualitative and untestable!’, in: Barry Sadler (ed.), *Audit and evaluation in environmental assessment and management*.

⁸⁵² Bradley Karkkainen, ‘Toward a Smarter NEPA: Monitoring and Managing Government’s Environmental Performance’, *Columbia Law Review*, 102 (2002), pp. 903–972, 911 f.; Craik, *The International Law of Environmental Impact Assessment* (above, n. 59); Holder, *Environmental Assessment* (above, n. 27), p. 23 et seq.

⁸⁵³ US Supreme Court, 490 U.S. 332 (1989), *Robertson v. Methow Valley Citizens Council*.

⁸⁵⁴ Jean-Marc Sauvé, paraphrased in: J.-P. Duprat, ‘The Judicial Review of Ex Ante Impact Assessment in France: An Attempt to Fuse the Principles of Legal Certainty and Institutional Balance’, *Legisprudence*, 6 (2012), pp. 379–396, p. 391.

⁸⁵⁵ On the distinction between output and input legitimacy see section 3.2.1.1.

⁸⁵⁶ Cass Sunstein and Timur Kuran, ‘Availability Cascades and Risk Regulation’, *Stanford Law Review*, 51, pp. 683–768.

risk: supporters refer to empirical studies that show how expert and popular risk judgments often differ and how much money is spent to prevent highly feared but relatively unlikely risks and vice-versa.⁸⁵⁷ They argue that popular risk perceptions are biased or badly informed, for manifold reasons, ranging from simple ignorance of relevant facts via bad risk communication to the biased influence of media and interest groups.⁸⁵⁸ In the context of US risk regulation, Stephen Breyer and others argue that, as public intuition is so often wrong and as there is “little reason to hope for better risk communication over time”,⁸⁵⁹ it is necessary to “insulate regulators from the usual political pressures”.⁸⁶⁰ Otherwise, they would willingly respond to public fears and spend money not in a way that saves most lives but that responds to the predominant public concerns. However, other authors have made less paternalistic arguments that would support the prominent role of science in public risk evaluation. For example, people – individuals, companies or public agencies – are often incentivized to “neglect the harms they impose on others (externalities)”, so that structured methods to overcome these limitations are necessary to ensure that “all important consequences are considered”⁸⁶¹.

How would IAs based on an objective-managerial paradigm affect policy- and decision-making? IAs can influence decision-making insofar as authorities are *not unwilling* but - due to a lack of relevant information - *unable* to adequately take non-financial consequences into account.⁸⁶² In addition, agencies often develop a tunnel vision that prevents decision-makers from taking considerations outside their “primary mission”⁸⁶³ into account. The major purpose of IAs is therefore to inform and provide a rational basis for their actions, not to be inclusive or participatory. The assumption is that informed decisions will lead to better decisions more compatible with environmental (or social and human rights) principles⁸⁶⁴. Especially during the origins of EIA law the information-processing aspects, based on a linear and rational model of decision-making, largely prevailed.⁸⁶⁵ This model has been conceptualized as “knowledge speaking to power”, whereby “(t)he information generated by this predictive process contributes (albeit in a variety of ways) to the environmental design of development proposals and the formulation of decisions on whether, and potentially on what terms, development consent should be granted”.⁸⁶⁶

⁸⁵⁷ Cass R. Sunstein, *Risk and Reason: Safety, Law, and the Environment* (Cambridge University Press, Cambridge, 2004), p. 30.

⁸⁵⁸ Stephen G. Breyer, *Breaking the vicious circle* (Cambridge, Mass.: Harvard University Press, 1993), 37 ff.; Sunstein, *Risk and Reason* (above, n. 857), 78 ff.

⁸⁵⁹ Breyer, *Breaking the vicious circle* (above, n. 858), p. 39.

⁸⁶⁰ Todd Zubler, ‘Book Note: Breaking the Vicious Circle: Toward Effective Risk Regulation’, *Harvard Journal of Law & Technology*, 8 (1994), 241-248, p. 245; Breyer, *Breaking the vicious circle* (above, n. 858).

⁸⁶¹ Wiener and Ribeiro, ‘Impact Assessment: Diffusion and Integration’ (above, n. 72), p. 161.

⁸⁶² Meuwese, *Impact Assessment in EU Lawmaking* (above, n. 267), 42 ff.

⁸⁶³ Kersten, ‘Rethinking Transboundary Environmental Impact Assessment’ (above, n. 117), p. 181.

⁸⁶⁴ Christopher Wood, *Environmental impact assessment* (Harlow [u.a.]: Prentice Hall, 2003), 2. ed., p. 180.

⁸⁶⁵ Richard K. Morgan, ‘Environmental impact assessment: the state of the art’, *Impact Assessment and Project Appraisal*, 30 (2012), pp. 5-14, p. 8.

⁸⁶⁶ Matthew Cashmore, Richard Gwilliam, Richard Morgan et al., ‘The interminable issue of effectiveness: substantive purposes, outcomes and research challenges in the advancement of environmental impact assessment theory’, *Impact Assessment and Project Appraisal*, 22 (2004), pp. 295-310, p. 296.

5.3.2 Subjective-Pluralistic (SP) Risk Paradigm and the Preference-Accumulation Model

The objective-managerial paradigm regards science and expertise as the cornerstone of modernity: the victory of reason over tradition and religion has created a somehow “optimistic feeling that everything of importance could be understood by the systematic application of rational thought”.⁸⁶⁷ It suggests that risk is mainly regarded as a necessary nuisance, namely the price to pay for innovation and development, but there is a “promise of controllability” of new risks according to the motto “[p]rovided time and money everything can be made safe and secure”.⁸⁶⁸ If nevertheless something goes wrong in spite of an expert-based risk assessment, reasons for why negative impacts such as accidents or disasters occur are usually found in some form of institutional failures, such as corruption, incapacity, political pressure, or lack of will.⁸⁶⁹ However, trust in these presumptions – scientific universality, neutrality and objectivity – has faded, and technical risk analysis increasingly faces “challenges of social legitimacy”.⁸⁷⁰ Critical perspectives emphasize that causes for uncertainty – such as phenomenological or epistemic causes (see section 5.4.1) – are fundamental and structurally challenge trust in scientific determinism.

Constructivist approaches emphasize that risk does not simply reflect “natural reality” but is a post-enlightenment phenomenon⁸⁷¹ still unfamiliar to some traditional communities.⁸⁷² The assumption that risk is a social construct attempts to rebut claims of objectivity and universality. In consequence, a universal, objective and neutral form of risk assessment appears even theoretically impossible.⁸⁷³ Less fundamental critics of an objective-managerial paradigm are unwilling to accept the dichotomy between the rational expert and the irrational layperson who is afraid of things that are statistically unlikely to happen (e.g. terrorist attacks), but willingly accepts situations with high risk (e.g. driving a car).⁸⁷⁴ However, labeling these differing risk perceptions as *irrational* is problematic. Even though constructivists do not deny that experts often get it right and that laypersons can be mistaken in their evaluation, the aforementioned examples do not compellingly prove that laypersons are irrational simply because their evaluation differs from statistics. If people are “particularly risk-averse, when the questioned uncertainties are imposed on them, appear as unknown or uncontrollable, and are connected to a potential of catastrophic loss”, a risk evaluation that differs from experts’ judgment might nevertheless be “a perfectly rational adjustment in the sense of ‘bounded rationality’”.⁸⁷⁵ Risk aversion as a consequence of fear should therefore be taken seriously from a human rights perspective. “Lay criteria” for risk and impact evaluation are often not explicit but embedded in “cultural values”, and

⁸⁶⁷ Philip S. Baringer, ‘Introduction: the “science wars”’, in: Keith M. Ashman and Philip S. Baringer (eds.), *After the Science Wars*, pp. 1–12, p. 4; this goes hand in hand with the assumption that a clear separation between science and politics is a paradigm of modernity: Jasanoff, *Science and Public Reason* (above, n. 848), p. 267.

⁸⁶⁸ Wolfgang Bonß, ‘Risk. Dealing with Uncertainty in Modern Times’, *Social Change Review*, 11 (2013), pp. 5–36, p. 30.

⁸⁶⁹ Jasanoff, *Science and Public Reason* (above, n. 848), p. 135.

⁸⁷⁰ Fischhoff and Kadvany, *Risk* (above, n. 825), p. 136.

⁸⁷¹ Jasanoff, *Science and Public Reason* (above, n. 848), p. 134; Bonß, ‘Risk. Dealing with Uncertainty in Modern Times’ (above, n. 868), p. 13.

⁸⁷² Ulrich Beck and Wolfgang Bonß, eds., *Die Modernisierung der Moderne*, p. 12.

⁸⁷³ Nida-Rümelin, Schulenburg and Rath, *Risikoethik* (above, n. 824), p. 61.

⁸⁷⁴ Examples can be found in: Sunstein, *Risk and Reason* (above, n. 857), p. 65.

⁸⁷⁵ Bonß, ‘Risk. Dealing with Uncertainty in Modern Times’ (above, n. 868), p. 25; on bounded rationality: Herbert Simon, ‘Theories of Bounded Rationality’, in: C. B. McGuire, Roy Radner, and Kenneth J. Arrow (eds.), *Decision and organization*, Jacob Marschak, pp. 161–176.

“lay evaluations of risk incorporate substantive and procedural democratic values, such as the acceptability of processes for making decisions, the ethics of the distribution of risk, and the capacity to control a source of risk in the community's interests.”⁸⁷⁶

This leads to the structuralist critique against the objective-managerial risk paradigm: IA-models which regard impact and risk assessments as a technical exercise best conducted by scientists and other experts can result in an epistemic empowerment of experts and consequently the (not total, but large) exclusion of the general public or affected individuals from effectively taking part in decision-making. These critical writers focus “on the ways in which the concept of risk mediates between knowledge and power”.⁸⁷⁷ Even though risk is a word frequently used in plain language, a risk-approach in public administration, however, tends to use a specialized language and set of practices that can channel power in societies.⁸⁷⁸ Ideas about risk may “encode tacit normative and political judgments”.⁸⁷⁹ This impression of “objectivity” means that a claim based on empirical data and quantitative methods can only be rejected if one proves that the method was flawed or the consequences drawn from the data and information gathered are incorrect.⁸⁸⁰ Conducting HRIAs in such way – using empirical and quantitative data, economic modelling etc. – might justify or at least would de-facto exclude laypersons and many civil society organizations.

In impact assessment law, which requires assessing likely and significant impacts, the “supposed objectivity jars with the subjective nature of the central concepts of likelihood and significance”.⁸⁸¹ As will be discussed more closely in the next chapter, the decisive criteria to determine whether an initiative requires an in-depth assessment mainly depends on the predicted likelihood of significant impacts. Therefore, the main goal of IAs under such a subjective-pluralistic paradigm, would be to facilitate bargaining between competing interests and values and to not search for neutral, objective and universally valid answers. It should identify decisions that “reflect public values” and “confer democratic legitimacy on the decision-making process”.⁸⁸² This is also of normative relevance for social and human rights impact assessments: expert-based impact and risk assessments, and especially quantitative analysis, may appear as authoritative sources of information which can result in an indirectly normatively effective objectivization of risk situations.⁸⁸³ From such a critical perspective, also the institutionalization of HRIAs in EU decision-making could be criticized if and insofar as it results in a scientization of human rights analysis. Anthropological research suggests that especially economists, who have a strong influence in international institutions such as the World Bank, might be more convinced if human rights issues are phrased in economic terms, quantitatively measured and summarized by indicators. This is probably the reason why the World Bank's Social Development Department developed instruments such as the Poverty and Social Impact Analysis (PSIA) in order to assess the social and poverty impacts of World Bank initiatives and/or policy

⁸⁷⁶ Daniel Fiorino, ‘Technical and Democratic Values in Risk Analysis’, *Risk Analysis*, 9 (1989), pp. 293–299, p. 296.

⁸⁷⁷ Jasanoff, *Science and Public Reason* (above, n. 848), p. 135.

⁸⁷⁸ Ibid.

⁸⁷⁹ Ibid., p. 138.

⁸⁸⁰ Goldmann, *Internationale öffentliche Gewalt* (above, n. 278), p. 540.

⁸⁸¹ Holder, *Environmental Assessment* (above, n. 27), p. 94.

⁸⁸² In the context of EIA law: Craik, *The International Law of Environmental Impact Assessment* (above, n. 59), p. 39.

⁸⁸³ Nida-Rümelin, Schulenburg and Rath, *Risikoethik* (above, n. 824), p. 64.

reform. The biggest challenge, as Sarfaty observes, in order to become a relevant tool all-over the Bank, would be semantic: one had to “bridge the communication gap with economists by measuring results and using indicators”⁸⁸⁴. In a similar vein, human rights NGOs frequently call international organizations or states to include human rights into impact assessments, and in some cases, the same NGOs developed methodologies for Human Rights Impact Assessments⁸⁸⁵ or contributed by an own Impact assessment, as in the case of the Right to Food Impact Assessment for the EU-India trade negotiations conducted by several NGOs including the Heinrich-Boell-Foundation and Misereor. However, here as well the risk of epistemic empowerment prevails. Assessing human rights risks and impacts through economic modelling and measuring them by using indicators tends to “economize” human rights law, which means that it will be more difficult for affected individuals or small human rights NGOs to make substantive contributions to human rights debates if they are unfamiliar with economics or do not have the resources and access to relevant data to conduct their own HRIA. At worst, an economized human rights discourse might lead to *institutional* empowerment of bureaucrats instead of *individual* empowerment of vulnerable groups of society.⁸⁸⁶ In consequence, impact assessments based on the subjective-pluralistic paradigm would focus more on participation, transparency and the involvement of affected individuals and communities. An example would be community-based human rights impact assessment tools.⁸⁸⁷

5.3.3 Analytic-Deliberative (AD) Risk Paradigm and the Transformation Model

There is one major problem with the subjective-participatory paradigm: it seems entirely indifferent to the outcome and would be non-directive: whether the IA process works and leads to more environmental-friendly (or human rights compatible) decisions would be pure luck and left to how the bargaining process and accumulation of preferences go.⁸⁸⁸ Applying such an approach to human rights impact assessments would run the risk of ignoring the role of rights and the counter-majoritarian difficulty. The very goal of impact assessments to advance broad substantive human rights objectives would be undermined. Insofar as the critical approach is based on skeptical theories, any analysis deduced from observation would be potentially irrelevant as “[b]y definition, the logic of skeptical argument defeats by definition any amount of evidence”,⁸⁸⁹ and even critics who argue that risks are socially constructed cannot convincingly deny that certain dangers exist in reality.⁸⁹⁰ Consequently, risk theories must face the challenge to connect socially mediated perceptions of the world which are subject to distorted and false interpretation on the one hand with the reality of danger in social life.⁸⁹¹ So a third model to deal

⁸⁸⁴ Sarfaty, *Values in Translation* (above, n. 13), p. 95.

⁸⁸⁵ On the contribution of NGOs to the design of HRIA see chapter 1.

⁸⁸⁶ Koskeniemi, ‘Human Rights Mainstreaming as a Strategy for Institutional Power’ (above, n. 202); AnnJanette Rosga and Margaret L. Satterthwaite, ‘The Trust in Indicators: Measuring Human Rights’, *Berkeley Journal of International Law*, 253, 27 (2009), 253-315, p. 305.

⁸⁸⁷ E.g.: Community-Based Human Rights Impact Assessment Initiative:

<https://policy-practice.oxfamamerica.org/work/private-sector-engagement/community-based-human-rights-impact-assessment-initiative/> (last visited: June 2020).

⁸⁸⁸ Craik, *The International Law of Environmental Impact Assessment* (above, n. 59), p. 40.

⁸⁸⁹ Harry Collins, ‘We cannot live by scepticism alone’, *Nature*, 458 (March 2009), pp. 30–31, p. 31.

⁸⁹⁰ Rosa, Renn and McCright, *The Risk Society Revisited* (above, n. 425), p. 16.

⁸⁹¹ *Ibid.*, p. 15.

with risk is based on the assumption that some “degree” of science, expertise and technical analysis is unavoidable – but so, too, are deliberation and discourse as claims to knowledge are always subjective and therefore fallible.⁸⁹² The analytic-deliberative paradigm therefore seeks to overcome the realist vs. constructivist or scientists vs. laypersons dichotomy and looks at how individuals and institutions can take decisions based on both technical analysis and participatory deliberation. In contrast with Kelvin to whom real knowledge without measurement appears impossible, Laurence Tribe warns that “measurement can anaesthetize moral feeling”.⁸⁹³ In risk theory, calls for “humility”⁸⁹⁴ and an “attitude of openness”⁸⁹⁵ in order to enable the consideration of non-scientific knowledge emerged in response to the science-based approach reflected in the objective-managerial paradigm. Risk is often multi-dimensional, and some potential impacts are not recognized by or recognizable for scientists, experts and decision-makers. So decision-makers might fail to consider other problems that, from an affected person’s perspective, should have been addressed.⁸⁹⁶ In consequence, broader and more integrated impact assessments become necessary.⁸⁹⁷ The role of science and expertise would be to inform discourse about risks and impacts by providing information about “the likely consequences of each decision option, the opportunity cost for choosing one option over the other, and the potential violations of interests and values connected to each decision option”,⁸⁹⁸ but at the same time such a model would recognize that knowledge which experts and regulators possess is vulnerable to deconstruction.⁸⁹⁹ To illustrate this point with regard to the analysis of human rights impacts of trade or investment agreements: due to the complexities of modern and global economies, it is often difficult to establish causal links between a trade agreement and the enjoyment of specific human rights. However, this observation is not per se true. Obligations to reduce customs duties will most likely affect a country’s budget and would result in spending cuts that can also affect the enjoyment of human rights. Similarly, new patent protection will most likely raise prices for medicines, at least in the near future.⁹⁰⁰ In other cases, where causal links cannot be clearly established, HRIAs nevertheless provide a platform for deliberation⁹⁰¹ and could, ideally, identify how to best respond to uncertainties and risks that might occur in the future.

New approaches to administrative law have equally shifted from a technocratic model that is aimed at identifying one single-best option based on a scientific assessment to a model that focuses on comprehensively informed decision-making, that recognizes that the idea to find a single-best solution is illusionary and that consequently provides for administrative discretion,

⁸⁹² Ibid., p. 17.

⁸⁹³ Tribe, ‘Policy Science: Analysis or Ideology?’ (above, n. 317), p. 97.

⁸⁹⁴ Faber, Manstetten and Proops, ‘Humankind and Environment: An Anatomy of Surprise and Ignorance’ (above, n. 835), p. 238.

⁸⁹⁵ Ibid., p. 239.

⁸⁹⁶ Fisher, *Risk Regulation and Administrative Constitutionalism* (above, n. 68), p. 10.

⁸⁹⁷ For a literature overview Wiener and Ribeiro, ‘Impact Assessment: Diffusion and Integration’ (above, n. 72).

⁸⁹⁸ Rosa, Renn and McCright, *The Risk Society Revisited* (above, n. 425), p. 177.

⁸⁹⁹ Jasanoff, *Science and Public Reason* (above, n. 848), p. 137.

⁹⁰⁰ Zerk, ‘Human Rights Impact Assessment of Trade Agreements’ (above, n. 30), p. 19; see also: ECORYS, ‘Trade Sustainability Impact Assessment in support of negotiations of a DCFTA between the EU and Jordan: Final Report’ (above, n. 3), p. 152.

⁹⁰¹ Zerk, ‘Human Rights Impact Assessment of Trade Agreements’ (above, n. 30), p. 21.

provided certain standards are respected.⁹⁰² Not only may inclusive impact assessments be better able to address all relevant impacts. In addition, critics of the objective-managerial paradigm also question the underlying assumption that scientific assessment and political or moral judgments can be clearly separated. Even scientific risk research is not free from value judgments which are inevitable when deciding “which outcomes to measure and how to measure them”.⁹⁰³ This also means that the apparently strict line between the “scientific” risk assessment and “political” risk management blurs.⁹⁰⁴ In line with the analytic-deliberative paradigm, normative elements may become part of the risk evaluation, including aspects such as “acceptable risk”, “fair risk distribution”, or the “adequate extent of precautionary measures”.⁹⁰⁵

Such an analytic-deliberative paradigm overcomes the assumption that layperson and experts are generally in opposition.⁹⁰⁶ It incorporates democratic principles and cultural values without denying the value of scientific knowledge: “Discourse without a systematic scientific basis is nothing but an empty vessel while, by contrast, a discourse that disregards the moral aspects of available options will aid and abet amoral actions”.⁹⁰⁷ Science and deliberation each have an important part to play in the decision-making process.⁹⁰⁸ Calling simply for “more” participation would reveal a simplified understanding of both democracy⁹⁰⁹ and the challenges of complex decisions under uncertainty and risk. Rather, participants in discourses often require to get expert judgments before making a decision⁹¹⁰, and the role for science is to provide systematic and reproducible knowledge,⁹¹¹ while deliberation can combine expert knowledge with “anecdotal and experiential knowledge that non-experts have accumulated over time”.⁹¹² Scientific and other types of knowledge are not per se in conflict with each other. While public discourse *can* be irrational, the analytic-deliberative paradigm does not presume an assumption of rationality for scientific knowledge. An important consequence for public decision-making is that, after a thorough examination of scientific results, it must be decided in political and legal discourse how many risks are appropriate.⁹¹³

One particular reason why scientists and other experts sometimes get things wrong roots in the way they work: “being an expert entails using schemas, selective attention, chunking information, automaticity and more reliance on top-down information, all of which allows experts to perform quickly and efficiently; however, these very mechanisms restrict flexibility and control, may cause the experts to miss and ignore important information, introduce tunnel vision and bias and can cause other effects that degrade performance. Such phenomena are apparent in a

⁹⁰² Fehling distinguishes between what he calls a technical „machine model“ and the „comprehensively informed“ model: Michael Fehling, *Verwaltung zwischen Unparteilichkeit und Gestaltungsaufgabe* (Tübingen: Mohr Siebeck, 2001), 150 ff.

⁹⁰³ Fischhoff and Kadvany, *Risk* (above, n. 825), p. 139.

⁹⁰⁴ Jasanoff, *Science and Public Reason* (above, n. 848), p. 133 argues that risk assessment is not the monopoly of technical experts. Similarly, the call for a “concern assessment” (see section 6.2.2.7) can equally be an attempt to make public concerns part of a scientific evaluation.

⁹⁰⁵ Rosa, Renn and McCright, *The Risk Society Revisited* (above, n. 425), p. 173.

⁹⁰⁶ Ibid., p. 170.

⁹⁰⁷ Ibid., p. 172.

⁹⁰⁸ Brownsword and Goodwin, *Law and the Technologies of the Twenty-First Century* (above, n. 56), p. 151.

⁹⁰⁹ Nida-Rümelin, Schulenburg and Rath, *Risikoethik* (above, n. 824), p. 57.

⁹¹⁰ Rosa, Renn and McCright, *The Risk Society Revisited* (above, n. 425), p. 171.

⁹¹¹ Ibid., p. 179.

⁹¹² Ibid.

⁹¹³ Bryde, ‘Recht der Risikogesellschaft’ (above, n. 2), p. 82.

wide range of expert domains, from medical professionals and forensic examiners, to military fighter pilots and financial traders.”⁹¹⁴ If this is true, then deliberative processes which include laypersons – many of whom are experts in other related areas though! – are important to compensate for these deficits.

Based on these considerations, it is necessary to ask what the legal implications are, in particular how laws enable both analysis and deliberation during the IA-process. Impact assessment would, in light of the analytic-deliberative paradigm, institutionalize the interplay between different actors.⁹¹⁵ The function of IAs would be different than in the previous model: not only to inform decision-makers about facts (“information model”), and not only to provide a platform for bargaining about individual preferences (“preference-accumulation model”). The goal would be to bring analytical and deliberative process together and thus, ideally, change the culture of decision-making⁹¹⁶ and transform the decision-making process accordingly. Opinions and interests are not fixed, but they can still change and develop during the IA-process.⁹¹⁷ Under English law, the objective of EIAs has been described as one that strongly reflects such a transformative model. According to the House of Lords, an EIA is “not merely a right to a fully informed decision on the substantive issue. It must have been adopted on an appropriate basis and that requires the inclusive and democratic procedure prescribed by the Directive in which the public, however misguided or wrongheaded its views may be, is given an opportunity to express its opinion on the environmental issues.”⁹¹⁸

In order to enable meaningful discourse, scientific assessments must be clear about the limits of knowledge, especially about secondary and tertiary impacts.⁹¹⁹ Impact assessments based on the analytic-deliberative paradigm may move beyond disciplines, move beyond the rather artificial separation between environmental, social and human rights impacts.⁹²⁰ The central challenges are to overcome the mutual mistrust between “experts/technocrats” and “lay-persons” and to meaningfully engage the broader public without sacrificing scientific accuracy.⁹²¹ Risk and impact assessments are based on the assumption that even the technical parts of the assessment are not value-free. This is in particular a major challenge for international impact assessments, as it is more difficult to recognize a foreign culture’s “sacred values” which can be different from what strategic planners would regard as “rational” values.⁹²²

The goal and function of the corresponding IA-model would be one that aims at the transformation of the decision-making process and the decision-making culture through scientific analy-

⁹¹⁴ Itiel Dror, ‘The paradox of human expertise: why experts get it wrong’, in: Narinder Kapur (ed.), *The paradoxical brain*, pp. 177–188, p. 177; Beutin, *Die Rationalität der Risikoentscheidung* (above, n. 345), p. 209.

⁹¹⁵ Lau and Bösch, ‘Möglichkeiten und Grenzen der Wissenschaftsfolgenabschätzung’ (above, n. 261), p. 128.

⁹¹⁶ Janette Hartz-Karp and Jenny Pope, ‘Enhancing effectiveness through deliberative democracy’, in: Frank Vanclay and Ana Maria Esteves (eds.), *New Directions in Social Impact Assessment*, pp. 253–272, 258 f.; Holder, *Environmental Assessment* (above, n. 27), p. 27.

⁹¹⁷ Craik, *The International Law of Environmental Impact Assessment* (above, n. 59), p. 175.

⁹¹⁸ House of Lords, *Berkeley vs. Secretary of State for the Environment and others* (2000).

⁹¹⁹ Rosa, Renn and McCright, *The Risk Society Revisited* (above, n. 425), p. 171.

⁹²⁰ Hartz-Karp and Pope, ‘Enhancing effectiveness through deliberative democracy’ (above, n. 916), p. 265.

⁹²¹ *Ibid.*, p. 266.

⁹²² Scott Atran, Robert Axelrod, and Richard Davis, ‘Sacred Barriers to Conflict Resolution’, *Science*, 317 (August 2007), pp. 1039–1040, p. 1039.

sis and informed rational deliberation.⁹²³ IA regimes would provide a platform that actually incorporates different knowledge-claims, ranging from systematic and scientific knowledge via experiential knowledge to local and folklore wisdom.⁹²⁴ IAs following such a model would structure discourse in order to arrive at universally accepted solutions, which is only possible if fair procedural rules and principles exist to get involved in rational discourse. Such a view can be found in the following evaluation of IAs:

“Impact assessments offer private actors the possibility to intervene very early in the decision-making process. They create a new arena for policy deliberation, where the power of the better argument might influence the shaping. Early consultation can improve the available knowledge, help to identify problems such as unintended side effects and thus strengthen the overall quality of regulation. But it can also change the character of policy-formulation within the European Commission from technocratic problem-solving of Commission officials to either political bargaining with Member States or argumentative deliberation with stakeholders.”⁹²⁵

In a best-case scenario, impact assessments could lead to individual empowerment: if they are transparent and follow a fair procedure, they could indeed empower marginalized groups to participate in the decision about a project or policy design and implementation.⁹²⁶ These functions of IAs and their ability to influence the decision-making process through information, participation or transformation will be resumed in the final chapters when discussing the relevance of HRIAs for decision-making.

5.3.4 Consequence: the Evaluation of IAs in Light of the Paradigms

The three paradigms reflect ideal-type models that allow to analyze rules and principles governing the conduct of HRIAs and to critically reflect the underlying assumptions upon which these regimes are built. They can help to clarify the role of human rights in impact assessments.

As explained above, it is generally assumed that an HRIA, by definition, would require that the assessment is based on human rights. This also means that the assessment process itself would have to respect human rights principles such as participation, transparency and accountability. However, all these principles can be interpreted in the light of an objective-managerial, analytic-deliberative or subjective-participatory paradigm. For example, the principles of participation and transparency play a role in all types of impact assessment procedures. While in particular participatory mechanisms in international law are often seen as supporting input-legitimacy or

⁹²³ On the element of “rationality” in deliberative democratic theories: Jürg Steiner, *The Foundations of Deliberative Democracy* (Cambridge: Cambridge University Press, 2012), 57 ff. On a “transformational model” in EIA law: Craik, *The International Law of Environmental Impact Assessment* (above, n. 59).

⁹²⁴ Rosa, Renn and McCright, *The Risk Society Revisited* (above, n. 425), p. 181.

⁹²⁵ Christian Hey, Klaus Jacob, and Axel Volkery, ‘Better regulation by new governance hybrids?: Governance models and the reform of European chemicals policy’, FFU Environmental Policy Research Center, 2006, p. 8.

⁹²⁶ Ciaran O’Faircheallaigh, ‘Effectiveness in social impact assessment: Aboriginal peoples and resource development in Australia’, *Impact Assessment and Project Appraisal*, 27 (2009), pp. 95–110 argues that, under certain conditions, SIAs could produce such an empowerment effect.

realizing human rights obligations, a closer look at different IA models demonstrates that this is not necessarily the case. The principle of participation – and consequently rules determining the participation procedure – can be applied in line with all three risk paradigms: As a tool for knowledge-generation, as a tool for quasi-democratic bargaining, or as a tool to enable discourse and deliberation to transform the decision-making process. This would not be without effect for, for example, judicial review: if participation has solely a knowledge-generation function, procedural errors are irrelevant if the agency can prove it had all relevant information so that the failure to consult did not influence its final decision (for example: Sec. 46 of the German Administrative Procedure Code).⁹²⁷ This would be different if the goal was to transform the decision-making process through deliberation and/or if the duty to consult also reflects an inherent value. In that case, failure to comply with procedural provisions would generally require the annulment of the final act; such an IA regime would be closer to the subjective-pluralistic or analytic-deliberative paradigm. Other principles can also be interpreted in light of these paradigms, for example the principle of transparency. Here, the default rule can make a decisive difference: If an access to information statute contains a positive list of accessible documents, this could be a reflection of the objective-managerial paradigm: only those information that the public authority deems relevant to enable informed input from individuals or organizations are published. If, on the other hand, such a law states, as a default rule, that everyone is entitled to inspect files unless non-disclosure is exceptionally justified due to compelling private or public interests, such a regime would be closer to an analytic-deliberative paradigm as it enables critical dialogue and empowers opposing views even where the authority does not immediately recognize a need to involve external actors. It is before this background that the role of public law in general and of legal principles in particular will be discussed in the following chapters. However, the next section will address causes of uncertainty first: Different causes of uncertainty can justify different designs of IA regimes.

5.4 Causes of Uncertainty and their Relevance for Impact Assessments

Uncertainty is a term “widely used but seldom defined”,⁹²⁸ so that there is uncertainty about uncertainty. It is not necessary to present all theoretical approaches to the concept. Rather, it is sufficient to focus on the main causes of uncertainty: understanding the variety of causes of uncertainty is helpful to better understand the challenges impact assessments must confront.

Uncertainty can have *normative* and *factual* causes. Broadly understood, factual uncertainty means “indeterminacy between cause and effect”⁹²⁹, and decisions under uncertainty thus refers to “states of the world where the circumstances are unknown or undeterminable, but decisions must be made”.⁹³⁰ Normative uncertainty, on the other hand, refers to the indeterminacy of norms, which can be moral or, in the case of HRIAs, legal norms. Obviously, the term indeterminacy is in itself indeterminate, which is why such a definition might seem circular. Some authors therefore prefer a subjective definition, which means that normative uncertainty exists when

⁹²⁷ Michael Fehling, ‘Comparative Administrative Law and Administrative Procedure: Annual Report - 2011 - Germany’, *Ius Publicum*, October 2011, p. 6.

⁹²⁸ Rosa, Renn and McCright, *The Risk Society Revisited* (above, n. 425), p. 21.

⁹²⁹ *Ibid.*

⁹³⁰ *Ibid.*, p. 1; similar Katja Sigel, Bernd Klauer, and Claudia Pahl-Wostl, ‘Conceptualising uncertainty in environmental decision-making: The example of the EU Water Framework Directive’, in: *UFZ Discussion Papers*, 8/2008, p. 11.

someone “lacks confidence about his/her knowledge regarding legal or regulatory demands”⁹³¹. At times, it is difficult to distinguish between normative and factual uncertainty, especially as normative uncertainty may be a consequence of factual uncertainty,⁹³² and in real life, decision-makers are generally faced with a combination of both factual and normative causes of uncertainty.⁹³³ It is often due to factual uncertainties that regulation has shifted from conditional programs to more open forms of legal regulation. So normative uncertainty is not per se negative or positive, but often an unavoidable consequence of modern complexities.⁹³⁴

Impact assessments respond to both causes for uncertainty: They can generate knowledge about real-life consequences and inform decision-makers or the public about potential negative effects so that decisions can be adapted accordingly. At the same time, they may concretize and give practical meaning to often vague and broad substantive norms. Indeed, one of the reasons for the proceduralization of environmental law and reliance on EIAs was that lawmakers were unable to enact precise substantive standards guiding business activities. The same is true for human rights in a globalized world: impact assessments may fill a normative gap in a complex world where actors might only agree on broad substantive standards which need to be implemented through a commonly agreed procedure. This is often the only practical solution,⁹³⁵ and can doctrinally be reconstructed, as stated above, as “human rights protection through organization and procedure”. The following section will illustrate several causes for uncertainty and point out what that could imply for the legal design of institutionalized HRIAs.

5.4.1 Phenomenological and epistemological causes of uncertainty

Broadly speaking, uncertainty can be based on phenomenological, epistemological⁹³⁶ or practical causes consisting mainly in the distribution of knowledge. Many causes of uncertainty are phenomenological. This means that the very nature of phenomena causes uncertainty, upon which it depends whether or not this type of uncertainty is (for the time being) reducible or not.⁹³⁷ This is, first, of major relevance in the case of novelty and innovation,⁹³⁸ be it technological (“regulation of risk”) or regulatory (“regulation as risk”) innovation. One legal technique to deal with this type of uncertainty would be the application of flexible instruments to adapt to new insights and experience gained over time. This would mean that ex-post HRIAs are conducted after a program or policy is implemented. If negative human rights impacts are identified, the policy can be adapted accordingly. The flexibility of legal agreements and acts is, from this perspective, desirable, even though at the expense of legal determinacy.

⁹³¹ Ibid., p. 12.

⁹³² Ibid., p. 13.

⁹³³ Allan Gibbard, *Wise Choices, Apt Feelings* (Oxford: Clarendon, 2002), p. 88.

⁹³⁴ Sigel, Klauer and Pahl-Wostl, ‘Conceptualising uncertainty in environmental decision-making: The example of the EU Water Framework Directive’ (above, n. 930), p. 12.

⁹³⁵ On the ability of decision-makers to agree on abstractions without agreeing on the particular meaning of those abstractions: Cass R. Sunstein, ‘Practical Reason and Incompletely Theorized Agreements’, *Current Legal Problems*, 51 (1998), pp. 267–298.

⁹³⁶ Sigel, Klauer and Pahl-Wostl, ‘Conceptualising uncertainty in environmental decision-making: The example of the EU Water Framework Directive’ (above, n. 930), p. 14; Faber, Manstetten and Proops, ‘Humankind and Environment: An Anatomy of Surprise and Ignorance’ (above, n. 835), p. 228.

⁹³⁷ Beutin, *Die Rationalität der Risikoentscheidung* (above, n. 345), 205 ff.; Faber, Manstetten and Proops, ‘Humankind and Environment: An Anatomy of Surprise and Ignorance’ (above, n. 835), p. 228.

⁹³⁸ Ibid., p. 288.

On a more general level, deterministic theories of science were increasingly challenged over the past century or so. This means that the ideal of objective predictability is challenged not only due to practical but due to limits inherent to scientific research. The most illustrative example is the evolution of chaos theory and the often-quoted “butterfly effect”, an irritant to deterministic natural scientific theories – and potentially also for command-and-control approaches to regulation. In chaotic systems, two identical activities can have different impacts at different times. Chaos does not mean randomness, but rather implies the lack of predictability because systems are highly sensitive to initial conditions.⁹³⁹ The consequences are apparent: If calculation was believed to be the instrument to predict future events, then highly sensitive initial conditions would make such a calculation difficult or impossible due to the infinite numbers of potential combinations. Consequently, even an increased accuracy of arithmetic operations would not lead to greater predictability.⁹⁴⁰ Arguably, not only natural systems such as the global climate or biodiversity, but also social systems can be so complex that predictability is not only practically but even theoretically impossible.⁹⁴¹ In this sense, committee meetings have been described through the lenses of chaos theory.⁹⁴² It would require further analysis, however it does not seem impossible that the assessment of human rights impacts of economic policies might also concern the assessment of impacts in a chaotic system so that predictions are insofar not possible. However, this does not mean that impact assessments would not make sense, as they can serve different purposes beyond the prediction of real-life consequences – namely to accumulate preferences or to transform decision-making.⁹⁴³

However, even outside chaos theory, inherent limits to scientific predictability exist. Often, natural and social scientists themselves disagree about methods and findings. Uncertainties in data collection or about the reliability of a method are among the different reasons for why that is the case. While natural scientists may argue about whether animal studies or epidemiology is the best method to assess cancer risks,⁹⁴⁴ social scientists may disagree about whether quantitative or qualitative methods produce more reliable results. Similar challenges exist with regard to modelling: it is hard to tell whether a model is a constructive or misleading simplification. What are the implications for impact assessment law? While deterministic theories would strongly support scientific and expert-based IAs to inform decision-makers (“information model”), in particular the phenomenological causes of uncertainty seem to indicate that such an exercise would be fruitless. In line with the more critical approaches, it would become necessary to focus on other functions of impact assessments, for example to foster deliberation, involve civil society or increase transparency.

⁹³⁹ This lack of predictability is what, in reference to the mathematician and meteorologist Edward N. Lorenz, became commonly known as the “butterfly effect”: Edward Lorenz, ‘Predictability: Does the Flap of a Butterfly’s wings in Brazil Set Off a Tornado in Texas?’, American Association for the Advancement of Science, 139th Meeting, 1972; Friedrich Cramer, *Chaos and Order* (Weinheim: VCH, 1993), p. 117; Faber, Manstetten and Proops, ‘Humankind and Environment: An Anatomy of Surprise and Ignorance’ (above, n. 835), p. 288.

⁹⁴⁰ Ibid., p. 230; Edward Lorenz, ‘Deterministic Nonperiodic Flow’, *Journal of the Atmospheric Sciences*, 20 (1963), pp. 130–141; James Gleick, *Chaos* (New York, N.Y.: Penguin Books, 2008), 20th anniversary ed.

⁹⁴¹ On the complexity and irrationality of history: Cramer, *Chaos and Order* (above, n. 939), 219 ff.

⁹⁴² James Arthur Anderson, *Communication Theory* (New York: Guilford Press, 1996), 35 ff.

⁹⁴³ See section 5.3.

⁹⁴⁴ Fisher, *Risk Regulation and Administrative Constitutionalism* (above, n. 68), 7 et seq.; National Research Council, ‘Science and Judgment in Risk Assessment’, National Academy Press, 1994, 58 ff.

Epistemological causes for uncertainty refer to the way we perceive certain phenomena.⁹⁴⁵ Kant has formulated an early epistemological critique that challenges the basic assumptions of scientific determinism. He stated that “the things that we intuit are not in themselves what we intuit them to be, nor are their relations so constituted in themselves as they appear to us; and that if we remove our own subject or even only the subjective constitution of the senses in general, then all the constitution, all relations of objects in space and time, indeed space and time themselves would disappear, and as appearances they cannot exist in themselves, but only in us”.⁹⁴⁶ In the Preface to the second edition of the *Critique of Pure Reason*, Kant reflects on the method of “those who study nature” and, based on examples of mathematics and science, argues that the “altered method of our way of thinking” means “that we can cognize of things a priori only what we ourselves have put into them”.⁹⁴⁷ The fundamental role of (subjective) perception queries the objectivity of statements or predictions about the future course of events. However, if cognition is an active reconstruction of reality depending on an individual’s perspective, one way to deal with this cognitive uncertainty would be to overcome the (limited) subjective perspectives and utilize or combine other perspectives in a process of structured reflection.⁹⁴⁸ In the area of institutionalized impact assessments, these structured processes could help to increase decision-makers’ awareness of human rights impacts. Pursuant to Justice Stewart’s reversed statement “I see it when I know it”⁹⁴⁹, participatory and inclusive IAs can make decision-makers see potential impacts and turn at least closed into open ignorance.⁹⁵⁰

Even with regard to empirical research, the theory of science has not left the idea of objective knowledge unscathed. Especially for Popper, falsifiability is a constitutive element of empirical research.⁹⁵¹ In other words: falsifiability and thus uncertainty about whether or not what is regarded as true today will still be valid tomorrow is not an indicator of imperfect science, but an inherent element of (at least) empirical science.⁹⁵²

These insights justify the shift towards more inclusive and deliberative impact assessments. Politics have recently given more “institutional form” to the “dialogical engagement” between laypersons and scientists,⁹⁵³ but also among scientists with different opinions. Involving different perceptions through deliberative procedures would be one rather practical response to deal with this form of epistemological uncertainty. This can therefore have important consequences

⁹⁴⁵ Faber, Manstetten and Proops, ‘Humankind and Environment: An Anatomy of Surprise and Ignorance’ (above, n. 835), p. 230.

⁹⁴⁶ Immanuel Kant, *Critique of Pure Reason* (Cambridge: Cambridge Univ. Press, 1998), Paul Guyer and Allen W. Wood, p. 168.

⁹⁴⁷ Ibid., p. 111.

⁹⁴⁸ Arno Scherzberg, ‘Wissen, Nichtwissen und Ungewißheit im Recht’, in: Christoph Engel, Jost Halfmann, and Martin Schulte (eds.), *Wissen - Nichtwissen - Unsicheres Wissen*, pp. 113–144, p. 115; James Surowiecki, *Die Weisheit der Vielen* (Kulmbach: Plassen Verlag, 2017).

⁹⁴⁹ Wolfgang Schulz, ‘Beurteilungsspielräume als Wissensproblem – am Beispiel Regulierungsverwaltung’, *RW Rechtswissenschaft*, Seite, 3 (2012), pp. 330–350, borrowing from Justice Stewart’s phrase “I know it when I see it” in his concurring opinion in: U.S. Supreme Court, *Jacobellis v. Ohio*.

⁹⁵⁰ On different types of ignorance see section 5.2.

⁹⁵¹ Karl R. Popper, *The Logic of Scientific Discovery* (London: Hutchinson, 1959).

⁹⁵² There are arguably also other inherent epistemic limits of science. For scientific assessments using mathematical models, the epistemic limits of science can, on a theoretical level, be traced back to Gödel’s incompleteness theorems, which demonstrate the “limits of provability in formal axiomatic theories”, Faber, Manstetten and Proops, ‘Humankind and Environment: An Anatomy of Surprise and Ignorance’ (above, n. 835), 231 f.

⁹⁵³ Giddens, ‘Risk and Responsibility’ (above, n. 824), p. 6.

for the design of impact assessment law as a deliberative and participatory process (see chapter 7 on different modalities of participation).

5.4.2 Practical causes of uncertainty

Besides these theoretical considerations, several practical reasons increase uncertainty and influence the nature and effectiveness of regulation. These causes are not stable, but have changed over time.⁹⁵⁴ On the one hand, modern forms of information and communication technology increase the availability and accessibility of data and information. At the same time, technological innovation, privatization and the increasing interconnectedness of the globalized world make it much more difficult for public authorities to obtain and manage relevant information and knowledge. Different regulatory techniques to gather information or incentivize other actors, such as private companies, to provide information and knowledge have emerged. This is true for domestic settings, but also – or maybe even more so – at the international scale where centralized top-down regulation never really existed. It is before this background that impact assessments become relevant tools of knowledge generation. At the same time, institutionalized impact assessments are conducted using an institution's internal and external knowledge sources (see section 5.5). Before the final section of this chapter addresses the way law guides knowledge generation, the next section will briefly present the main practical causes for uncertainty and describe how public authorities tend to respond to these challenges.

5.4.2.1 Uncertainty and Innovation

Innovation creates uncertainty, be it a technological, regulatory or organizational innovation. Whatever perspective one has on innovation – it refers to something “new”⁹⁵⁵, and therefore the result of innovation concerns a product, a process, an idea etc. the implications of which are yet empirically unknown.⁹⁵⁶ One function of law is therefore to prevent unacceptable risks, which starts with the adoption of adequate mechanisms to ensure compliance with legal requirements.⁹⁵⁷ Here again, the challenge is to deal with uncertainty, which is why risk assessment, risk management and ex-post monitoring become important to enable innovation and reduce risks at the same time.⁹⁵⁸

Innovation is mainly associated with new products or processes in the business world, and the role of public law is often regarded as one that should keep society open for innovation, prevent

⁹⁵⁴ Sigel, Klauer and Pahl-Wostl, ‘Conceptualising uncertainty in environmental decision-making: The example of the EU Water Framework Directive’ (above, n. 930), p. 15.

⁹⁵⁵ For an overview: Martin Eifert, ‘Innovationsfördernde Regulierung’, in: Martin Eifert and Wolfgang Hoffmann-Riem (eds.), *Innovation und Recht*, pp. 11–19; Hoffmann-Riem and Fritzsche, ‘Innovationsverantwortung – zur Einleitung’ (above, n. 195), 11 f.

⁹⁵⁶ This becomes most obvious with technological innovation for which no experience exists, and about which it is therefore impossible to satisfactorily predict future events: Fisher, *Risk Regulation and Administrative Constitutionalism* (above, n. 68), p. 7.

⁹⁵⁷ Examples for flexible regulatory instruments: Martin Eifert, ‘Innovationsverantwortung in der Zeit’, in: Martin Eifert and Wolfgang Hoffmann-Riem (eds.), *Innovationsverantwortung*, pp. 369–391.

⁹⁵⁸ Ivo Appel, ‘Aufgaben und Verfahren der Innovationsfolgenabschätzung’, in: Martin Eifert and Wolfgang Hoffmann-Riem (eds.), *Innovationsverantwortung*, pp. 147–182, p. 149.

unacceptable risk and help to instigate innovation to address specific problems. However, law and legal reforms can in themselves be regarded as innovation; these could be described as “legal innovations”.⁹⁵⁹ Like in the technological sphere, the consequences of these legal innovations can be predicted but not empirically tested in advance. This is therefore a good example where law does not regulate risk but law can be the cause of a risk (previously described as the “risk of regulation”). Consequently, one response would be to conduct impact assessments of regulatory or legislative initiatives, even though there might be a high level of temporarily irreducible uncertainty. Still, as will be seen below, impact assessment and risk law can play a role in dealing with this level of uncertainty: Different decision-rules can be applied even to this situation of genuine uncertainty, the precautionary principle may provide guidance, but most of all the procedural aspect of impact assessment can have a legitimizing effect insofar as it can grant human rights protection through procedure.

5.4.2.2 Uncertainty and Information Asymmetries

Information asymmetries produce subjective uncertainty, i.e. information is generally available but public authorities do not have that information even though they need it for informed decision-making. This concerns what could be called the de-centralization and outsourcing of knowledge. Often private companies or local authorities possess the relevant information and knowledge, or public authorities rely on independent experts who are consulted whenever their specific expertise is required. This type of subjective uncertainty is therefore different from innovation-related genuine uncertainty: relevant information exists, but it is dispersed and almost literally needs to be “gathered”. Information asymmetries have become a central challenge in regulatory settings,⁹⁶⁰ both domestically and internationally. This type of uncertainty may be overcome through different organizational measures, including participatory impact assessments that allow different external experts and stakeholders to contribute to the decision-making process and provide the type of information and knowledge that is needed.⁹⁶¹

5.4.2.3 Uncertainty and Time

Learning processes require time. Therefore, time can be a factor that reduces uncertainty by stimulating experiential knowledge. Monitoring and evaluation are also instruments to improve (institutional) learning. However, to what extent a learning-cycle actually works is unclear. This is partly the case because time also includes an element of instability: over time, an often inestimable number of single and individual decisions are taken whose cumulative impacts are ob-

⁹⁵⁹ Roberta Romano, ‘The States as a Laboratory: Legal Innovation and State Competition for Corporate Charters’, *Yale Journal on Regulation*, 23 (2006), pp. 209–247, p. 210; similarly calling for an open concept of innovation: Hoffmann-Riem and Fritzsche, ‘Innovationsverantwortung - zur Einleitung’ (above, n. 195), p. 12.

⁹⁶⁰ Hoffmann-Riem, ‘Regulierungswissen in der Regulierung’ (above, n. 262); Karsten Herzmann, *Konsultationen* (Tübingen: Mohr Siebeck, 2010), p. 46; Hermann Pünder, ‘Administrative Procedure - Mere Facilitator of Material Law versus Cooperative Realization of Common Welfare’, in: Hermann Pünder, Christian Calliess, and Pünder-Waldhoff (eds.), *Debates in German Public Law*, pp. 239–262, p. 245.

⁹⁶¹ This is a central function of, for example, different instruments and procedures in development cooperation law: Dann, *The Law of Development Cooperation* (above, n. 4), 363 et seq.

secure and increase instability.⁹⁶² In consequence, the value and relevance of experiential knowledge decrease. Especially the regulation of general policies, such as international trade, is aimed at a modification of market structures, which in turn creates new uncertainties.⁹⁶³ The same is true, maybe to a lesser extent, with regard to developmental projects: The financial, environmental and social risks especially of mega-projects or major legislative reforms are generally difficult to manage, even more so if the contexts in which projects are implemented vary: Different and often evolving legal, political, social and cultural contexts confront project-developers with new uncertainties. Due to these factors the acquisition of experiential knowledge becomes much more difficult. It would require that decision-makers are willing to interrupt routine in order to not only reproduce but also review frequently made decisions.⁹⁶⁴

One consequence is that monitoring, evaluation and ex-post impact assessments become more relevant in order to identify and adapt to new circumstances. Regulation must respond to changing and complex social structures, which permanently creates new uncertainties, so that coping with uncertainties and generating new regulation-specific knowledge remains an ongoing task.⁹⁶⁵ Legal provisions can either facilitate or obstruct these adaptive mechanisms, for example by using flexibility mechanisms in agreements and statutes⁹⁶⁶. Law can therefore play a decisive role in decision-making under time-related uncertainty.

The time-and-uncertainty aspect is also relevant for the institutional design of impact assessment law: If IAs are conducted too early, the contours of the planned project or policy are probably too vague for a meaningful assessment. If it is too late, the problem of path-dependency and the emergence of vested interests – including the efforts already put into a planned project or policy – might be too high for IAs to have a persuasive effect.⁹⁶⁷ While time might increase certainty both about the scope and type of potential impacts, the chance that the findings of IAs are taken into account might significantly decrease.⁹⁶⁸

5.4.2.4 Communication and Uncertainty

While communication is essential to organize all areas of social life, communication can at the same time be a source of uncertainty. This relationship between communication and uncertainty is two-dimensional. First, the communication of uncertainty⁹⁶⁹ is a means of dealing with uncertainty. It is necessary for informed decision-making to know the unknowns. It is also essential to assign responsibilities: consent given without the knowledge of objectively known risks cannot

⁹⁶² Hans-Heinrich Trute, 'Regulierung - am Beispiel des Telekommunikationsrechts', in: Carl-Eugen Eberle, Martin Ibler, and Dieter Lorenz (eds.), *Der Wandel des Staates vor den Herausforderungen der Gegenwart: Festschrift für Winfried Brohm zum 70. Geburtstag*, pp. 169–189, pp. 171–172; Herzmann, *Konsultationen* (above, n. 960), p. 47.

⁹⁶³ See, even though for a different regulatory area: Ibid.

⁹⁶⁴ Eifert, 'Innovationsverantwortung in der Zeit' (above, n. 957), p. 375.

⁹⁶⁵ Herzmann, *Konsultationen* (above, n. 960), p. 48.

⁹⁶⁶ See section 9.1.2.1.5.

⁹⁶⁷ Lau and Bösch, 'Möglichkeiten und Grenzen der Wissenschaftsfolgenabschätzung' (above, n. 261), p. 127.

⁹⁶⁸ Ibid.

⁹⁶⁹ Penny Kloprogge, van der Sluijs, Jeroen, and Arjan Wardekker, 'Uncertainty communication: Issues and good practice', Utrecht University.

be regarded as *informed* consent. However, communication can also cause or exacerbate uncertainty. Especially where complex structures of decision-making exist – be it a domestic bureaucracy or an international financial institution – knowledge needs to be made explicit, i.e. conscious and verbalized,⁹⁷⁰ in order to be processed. Implicit knowledge and its transmission through nonverbal communication (gesture, intonation, facial expression, etc.) can, as communication studies suggest,⁹⁷¹ easily get „lost in transcription“. This might be relevant for the transcription of findings made during consultation, especially where consultation ideally involves different stakeholders and affected individuals and communities, many of whom often have a social and cultural background very different from those in charge of conducting HRIAs who are working for a public institution, like the European Commission.

Another aspect where communication can exacerbate uncertainty regards the discourse between experts and laypersons. No matter whether science primarily uses numerical or verbal reasoning, quantitative or qualitative methods, at a certain point it has to use words of common language⁹⁷², at least if it is supposed to inform political decision-making and legal reasoning like in the case of institutionalized impact assessments. Whether or not textual ambiguity is avoidable⁹⁷³ in natural and/or formal language is not relevant here: ambiguities actually exist and therefore are a source of uncertainty. A study commissioned by the EU has found that there is a vast majority (in this case: 90 %) of the interviewed scientists who felt that there was a mismatch between what scientists want to be covered and what the media found to be newsworthy.⁹⁷⁴ The reasons are manifold.⁹⁷⁵ One is that people tend to exaggerate how well they understood what the speaker said.⁹⁷⁶ This is a particular problem if scientific terms are used. And if scientists use colloquial terms, they often use them in a technical way, probably not realizing that laypersons would understand them differently. Due to different professional and cultural backgrounds, people may also be wrong about what is self-evident for their communication partners and would therefore not require further explanation.⁹⁷⁷ Another attribution error is that many people tend to assume that messages communicated with a high level of confidence are more likely to be correct.⁹⁷⁸

It is challenging for law to minimize uncertainty rooted in communication. In contract law, different mechanisms exist to force participants to be clear and transparent about rights and obligations. For example, under German law, there is a principle that doubts regarding the interpre-

⁹⁷⁰ Scherzberg, 'Wissen, Nichtwissen und Ungewißheit im Recht' (above, n. 948), p. 118.

⁹⁷¹ Paul Watzlawick, Janet Beavin, and Don Jackson, *Menschliche Kommunikation* (Bern, Göttingen, Toronto, Seattle: Verlag Hans Huber, 2000), 10., unveränderte Auflage, 51 ff.

⁹⁷² Faber, Manstetten and Proops, 'Humankind and Environment: An Anatomy of Surprise and Ignorance' (above, n. 835), p. 230.

⁹⁷³ Ludwig Wittgenstein, *Philosophische Untersuchungen* (Frankfurt am Main: suhrkamp, 1971), 1. Aufl., for example: para 155 et seq. on meaning and context.

⁹⁷⁴ Michel Claessens, 'European Trends in Science Communication', in: Donghong Cheng, Michel Claessens, Toss Gascoigne et al. (eds.), *Communicating science in social contexts*, 33 et seq.

⁹⁷⁵ For a good overview of the following: National Research Council, *Intelligence analysis for tomorrow*, p. 74.

⁹⁷⁶ Baruch Fischhoff, 'Communicating About Analysis', in: Baruch Fischhoff and Cherie Chauvin (eds.), *Intelligence Analysis: Behavioral and Social Scientific Foundations*, pp. 227–248, p. 245.

⁹⁷⁷ Norbert Schwarz, 'Self-Report: How the Questions Shape the Answers', *American Psychologist*, 54 (1999), pp. 93–105.

⁹⁷⁸ Hal Arkes and James Kajdasz, 'Intuitive Theories of Behavior', in: Baruch Fischhoff and Cherie Chauvin (eds.), *Intelligence Analysis: Behavioral and Social Scientific Foundations*, pp. 143–168, p. 147.

tation of unilaterally imposed general terms and conditions shall be at the expense of the person who imposed these terms.⁹⁷⁹ This means that, in case of textual ambiguities, the interpretation that is more favorable to the other party shall prevail. Such an interpretive guideline could probably not easily be applied to areas beyond contract law. However, what public law can do is require that information provided to the public must be in a clear, accessible and transparent manner. In this sense, impact assessment law and guidelines often require that information is provided to the public in an accessible and comprehensible manner in order to reduce misunderstandings. This does not, however, release the institution from the responsibility to particularly pay attention when receiving input from laypersons and be sensitive to avoid communication-induced uncertainty.

5.4.3 Normative Uncertainty

A central challenge in particular to HRIAs is normative uncertainty: the content of human rights is often contested, and it is therefore often not clear to define when a policy proposal would infringe human rights.⁹⁸⁰ However, the reasons for normative uncertainty go deeper and are not restricted to human rights law. Normative or legal uncertainty⁹⁸¹ has always been a phenomenon of major interest. Aristotle assumed that the impossibility of achieving certainty in the law was an inherent limitation of lawmaking.⁹⁸² Blackstone came to a similar conclusion: "Whatever instances therefore of contradiction or uncertainty may have been gleaned from our records, or reports, must be imputed to the defects of human laws in general, and are not owing to any particular ill construction of the English system".⁹⁸³ So it appears that normative uncertainty follows, in part, from epistemic or other causes for uncertainty that influence how humans can make laws. One additional reason for normative uncertainty can be the ambiguity of legal language itself.⁹⁸⁴ Especially legal positivism therefore emphasizes the importance of (state) institutions such as legislators or courts that have the authority to specify what the law is. It is this legal and institutional system – including rules of recognition and agencies empowered to clarify

⁹⁷⁹ Sec. 305c of the German Civil Code.

⁹⁸⁰ On normative uncertainty in the context of HRIA: Körtvélyesi, 'Inconsistency and Criticism: Mapping Inconsistency Arguments Regarding Human Rights Promotion in EU External Relations' (above, n. 496), 239 ff.

⁹⁸¹ In academic literature on legal uncertainty, uncertainty is often measured as the ability or inability to predict ex-ante how the law will be applied by courts ex-post: Giuseppe Dari-Mattiacci and Bruno Deffains, 'Uncertainty of Law and the Legal Process', George Mason University Law and Economics Research Paper Series, p. 5; Anthony D'Amato, 'Legal Uncertainty', *California Law Review*, 71 (1983), pp. 1–55, p. 2. What does it mean for international law where courts only play a minor role? First, review is not limited to courts, and in international economic law, review increasingly takes place in quasi-judicial or administrative settings, e.g. the Inspection Panel or an Evaluation Group. Second, uncertainty is not defined by ex-post judicial review; rather, this describes one constellation where legal uncertainty becomes relevant, namely in a situation where a lawyer must give legal advice to a client whether or not to file a lawsuit. As discussed above, legal uncertainty does not vanish because there is no access to judicial review – to the contrary: the absence of detailed case-law can increase legal uncertainty, cf: Jack Goldsmith and Daryl Levinson, 'Law for States: International Law, Constitutional Law, Public Law', *Harvard Law Review*, 122 (2009), pp. 1791–1868, 1792 et seq.

⁹⁸² Dari-Mattiacci and Deffains, 'Uncertainty of Law and the Legal Process' (above, n. 981), p. 4.

⁹⁸³ William Blackstone, *Commentaries on the Laws of England* (Oxford: Clarendon Press, 1768), p. 328.

⁹⁸⁴ Dari-Mattiacci and Deffains, 'Uncertainty of Law and the Legal Process' (above, n. 981), 5 et seq. On linguistic ambiguity already: Wittgenstein, *Philosophische Untersuchungen* (above n. 973), para 155 et seq.

authoritatively whether a rule has been violated - that provides institutions and procedures to resolve what counts as law.⁹⁸⁵ As courts play only a minor role in international law, the legal system insofar can do little to reduce uncertainty in the sense envisaged by positivists.⁹⁸⁶ Similarly, domestic courts have so far not established specific standards on extraterritorial human rights obligations.

Another reason is that unforeseen or at times unforeseeable contingencies make it de facto impossible for legislators to adequately regulate ex-ante and on a general-abstract level all future situations. It is increasingly impossible to regulate complex economic interactions and behavior by legislative statutes in the form of conditional programs.⁹⁸⁷ Complexity in international settings is exacerbated by different factors, such as often very dynamic interactions and a broad range of economic, social and political factors that influence how actors behave globally. Therefore, regulators, domestically and internationally, increasingly use goal programs ("*Finalprogramme*") and principles that must be balanced and implemented on a case-by-case basis.⁹⁸⁸ However, while there is a tendency to regard uncertainty as a "problem" and legal certainty as desirable, such a generalization is too simplistic. While there are areas such as criminal law where a high degree of certainty is constitutionally required, uncertainty in general regulation can also have advantages⁹⁸⁹. The use of general principles and objectives enables a reference to non-legal rationalities⁹⁹⁰, such as technological, economic, social, ecological or traditional knowledge. It also allows to adapt to changing circumstances, absorb new information and better knowledge and to respond to these circumstances adequately. In the case of international economic law, the obligation to respect and protect human rights is such a situation where normative uncertainty prevails. It is, on a general level, very difficult to identify when the protection of patents on lifesaving drugs violates the human rights to health of those who cannot afford these drugs. The same is true for the social and economic rights of people whose government cuts social spending on health and education as part of an internationally "prescribed" austerity measure. It is in every single case that the real-life impacts of these measures must be identified, assessed and legally evaluated and potentially re-evaluated once factual circumstances change or new knowledge about the impacts has been gained. Impact assessments can, if they are based

⁹⁸⁵ Hart, *The Concept of Law* (above, n. 366), 92 ff.: Societies that live by primary rules alone would suffer from different defects of normative uncertainty, in particular uncertainty about whether a rule exists or whether a specific behavior violates an existing rule. Different remedies exist, for example, rules of recognition determine the (non-)existence of a rule, and agencies with interpretational authority may determine whether or not a rule is violated. For a summary of the positivist approach to legal certainty see: Goldsmith and Levinson, 'Law for States: International Law, Constitutional Law, Public Law' (above, n. 981), p. 1802.

⁹⁸⁶ This does not mean, however, that domestic law is necessarily „less uncertain“. Goldsmith and Levinson have argued that international law and constitutional law bear great similarities with regard to the degree of legal uncertainty: Ibid.

⁹⁸⁷ Hans Christian Röhl, '§ 30 Ausgewählte Verwaltungsverfahren', in: Wolfgang Hoffmann-Riem, Eberhard Schmidt-Aßmann, and Andreas Voßkuhle (eds.), *Grundlagen des Verwaltungsrechts Band II*, pp. 731–798, para 38; Herzmann, *Konsultationen* (above, n. 960), p. 44.

⁹⁸⁸ An illustrative example is international development law, which contains many procedural provisions, but is substantively structured and guided by broad objectives and principles such as poverty alleviation and development-orientation, collective autonomy and ownership, individual autonomy and human rights, or coherence and efficiency. In detail: Dann, *The Law of Development Cooperation* (above, n. 4), 219 ff.

⁹⁸⁹ Yuval Feldman, 'Behind the Veil of Legal Uncertainty', *Law and contemporary problems*, 74 (2011), pp. 133–174.

⁹⁹⁰ Herzmann, *Konsultationen* (above, n. 960), p. 44.

on a substantive normative framework, concretize broad principles and thus reduce normative uncertainties for the case at hand.

In other situations, uncertainty and discretion might not only be a second-best option but even be desirable: lawmakers should not always regulate all details because these might better be left to processes of cooperation and negotiation at the implementation level. This is also true in the international arena: For example, in the case of development cooperation law, huge differences exist between projects in different countries. Specific and detailed one-size-fits-all provisions on the content of financing agreements would be problematic and might limit the ability of recipient states (principle of collective autonomy) or affected individuals (principle of individual autonomy) to effectively take part in the concrete design of the respective project. Instead, being able to participate in the assessment of the impacts of a particular project means to be able to introduce local knowledge or express preferences. This may better contribute to the realization of human rights than a pre-determined and specific substantive normative framework to be applied to all financing agreements. While legal determinacy is often praised as essential to the rule of law and human rights (and with regard to IAs, in particular organizational and procedural norms can indeed be quite concrete), the effective realization of individual autonomy might require, to the contrary, a certain degree of indeterminacy and flexibility, at least with regard to substantive law.

5.4.4 Risk Biases and the Quest for Legal Responses

Ex-ante impact assessments unavoidably are confronted with uncertainty and risk.⁹⁹¹ An advantage of a structured risk and impact assessment is that it can bring order into a number of facts and values and is therefore a “disciplined form of practical reasoning”.⁹⁹² At the same time, risk and impact assessments face the challenge of complexity. Deciding what impacts are likely to be significant requires, theoretically, the evaluation of potentially unlimited information, even though individuals and institutions only have limited capacities to process different information at the same time. So parties involved in HRIAs – both those in charge of conducting the impact analysis and those involved as participants during consultation – must take decisions under (remaining) uncertainty. “Decision” in this sense is not limited to the authority to enact a law or conclude a contract. It also includes the decision of individuals or organizations to informally object and resist against a project or policy during the consultation period. How humans perceive risks and how they make decisions under uncertainty can therefore be one factor to evaluate the prospect of success of HRIAs. As will be outlined below, psychological research found that cognitive biases often distort the quality of our perception of risks and opportunities. This is important to the institutionalization of impact assessments: the design of impact assessment law can help to cushion the effect of these biases as will be illustrated in the following.

Many of these cognitive biases are heuristic biases. Heuristics are generally defined as rules or procedures that enable more efficient decision-making by converting complex problems into

⁹⁹¹ On the differing use of the terms „uncertainty“ and „risk“ in different disciplines see section 5.2.

⁹⁹² Fischhoff and Kadvany, *Risk* (above, n. 825), p. 149.

simpler ones.⁹⁹³ Heuristics are tools used in science,⁹⁹⁴ every-day decision-making – and in law: as argued above, structural principles have a heuristic function⁹⁹⁵ and thus help to make legal decisions. The importance of heuristics can therefore hardly be overestimated. Arguably, people conducting HRIAs – both as “analysts” in charge and as consulted participants – use heuristic tools to assess the consequences of an initiative.

However, as is the case with all tools, the effect they produce depends on how they are used. One of the most relevant *heuristic biases* for risk decision-making is the so-called availability heuristic. People often rely on an event’s *availability* when assessing its *probability*: Availability means the “ease with which relevant instances come to mind”⁹⁹⁶. While availability and frequency often correlate, other factors also determine how available certain information is, such as how often a topic is discussed in the media. Consequently, availability heuristic can lead to a structural bias.⁹⁹⁷ In consequence, certain “risks” might be over-, other less “available” risks might be underestimated – and in consequence be over- or under-regulated. People tend to rate the probability of an event higher if they have experienced or learned about such an event before. A related bias concerns *simulation heuristic*: people tend to judge an event as likely if it is easy to imagine it happening.⁹⁹⁸ This would help to explain why it is so difficult to adequately assess many risks in decision-making with potentially transnational effects, namely if those who assess potential risks of an initiative do not know the social and political context of the places where the harm might realize. Many potential impacts may therefore be hard to imagine for people not familiar with the culture of an affected community: These risks might not easily “come to mind”. Conducting impact assessments in an inclusive manner involving different departments of an institution as well as different external actors would allow introducing different viewpoints and different types of experience. In consequence, more “relevant instances” might come to a decision-maker’s mind which would, in turn, reduce the misleading effect of the availability and simulation heuristic biases. Rules on participation and transparency, as well as broad-based consultation requirements can, before this background, make sense.

In particular, Kahnemann and Tversky analyzed how people actually manage and deal with risk and found different explanations for why people make apparently irrational choices. The rational choice axiom often fails to describe human behavior because it ignores basic psychological principles, in particular the fact that people often make decisions based on how gains and losses are perceived and evaluated.⁹⁹⁹ A first observation is what has been called the *default-rule*. Often, people fear change more than the potential results. Therefore, whether an initiative will be successful often depends on the context and how it is framed. For example, studies suggest that

⁹⁹³ Spencer Phillips Hey, ‘Heuristics and Meta-heuristics in Scientific Judgement’, *British Journal for the Philosophy of Science*, 62 (2016), pp. 471–495; Beutin, *Die Rationalität der Risikoentscheidung* (above, n. 345), p. 210.

⁹⁹⁴ Hey, ‘Heuristics and Meta-heuristics in Scientific Judgement’ (above, n. 993); Peter Winker, *Optimization Heuristics in Econometrics* (Chichester, New York: Wiley, 2001).

⁹⁹⁵ See section 3.2.2.3.

⁹⁹⁶ Amos Tversky and Daniel Kahneman, ‘Availability: A Heuristic for Judging Frequency and Probability’, *Cognitive Psychology*, 5 (1973), pp. 207–232, p. 207.

⁹⁹⁷ Ibid.; Sunstein and Kuran, ‘Availability Cascades and Risk Regulation’ (above, n. 856).

⁹⁹⁸ Fischhoff and Kadvany, *Risk* (above, n. 825), p. 101.

⁹⁹⁹ Daniel Kahneman and Amos Tversky, ‘Prospect Theory: An Analysis of Decision under Risk’, *Econometrica*, 47 (1979), pp. 263–291, p. 289.

fewer people would “forbid” an activity than they would “not allow” it.¹⁰⁰⁰ Consequently, how questions are phrased during the consultation period of an HRIA can influence the answers.

Another factor is the *optimism* or *overconfidence bias*: People often over-estimate their own abilities. This is often the case when experts rely only on their discipline even where a broader perspective would be required.¹⁰⁰¹ Applied to HRIAs, it means that those in charge of conducting the IA may tend to overestimate their ability to calculate and predict potential impacts. At the same time, they may tend to believe that they understand the initiative and its (human rights) impacts better than they actually do. The overconfidence bias often results in so-called planning fallacy. If people – as individuals or as part of an organization – plan projects, they estimate how much time they need to complete it. Psychological research suggests that many of these predictions are unrealistic because planners tend to be optimistic and rely on their best-case scenario even though similar projects in the past have normally run late.¹⁰⁰² Similarly, those in charge of conducting an HRIA may overestimate their ability to design a policy or install mitigation measures that would, in a timely manner, effectively avoid or mitigate negative effects. This has consequences for individual planners and the institutional design of impact assessments: If planners are aware of these biases, they might better be able to adjust their predictions accordingly. This would require adequate training. However, law could react to this bias and require, for example, that an IA report explicitly identifies a worst-case scenario, no matter how unlikely it appears at that time.

Another particularity is the observation that people are generally good at explaining away inconvenient evidence.¹⁰⁰³ This is naturally true for all sides of a disputed initiative, and a potential obstacle to finding a compromise. While participatory impact assessments allow producing different types of evidence, so that it is harder for decision-makers to withhold inconvenient information, it is nevertheless a problem insofar as decision-makers in the end will have to evaluate the respective evidence. It is at this stage that the tendency to explain away inconvenient evidence can become problematic.

An additional challenge is what has been called the *outcome bias*: Often, people confuse the quality of a risk evaluation with the quality of the outcome. It means that people tend to judge the quality of a risk decision ex-post in light of the actual outcome and not based on the information that was available at the time when the risk decision was made. The outcome bias is therefore a cognitive error made to evaluate the risk decision as such if the result of the decision is already known (it is therefore closely related to the *hindsight bias*).¹⁰⁰⁴ This can be counterproductive

¹⁰⁰⁰ Fischhoff and Kadvany, *Risk* (above, n. 825), p. 74. Also, people often place extra value on *certain* outcomes, e.g. going from a chance of 90% to 100% means more than going from 45% – 50%: Kahneman and Tversky, ‘Prospect Theory: An Analysis of Decision under Risk’ (above, n. 999), p. 265.

¹⁰⁰¹ Fischhoff and Kadvany, *Risk* (above, n. 825), p. 62.

¹⁰⁰² Roger Buehler, Dale Griffin, and Michael Ross, ‘Inside the Planning Fallacy: The Causes and Consequences of Optimistic Time Predictions’, in: Thomas Gilovich, Dale W. Griffin, and Daniel Kahneman (eds.), *Heuristics and biases*, pp. 250–270

¹⁰⁰³ Fischhoff and Kadvany, *Risk* (above, n. 825), p. 16.

¹⁰⁰⁴ Jonathan Baron and John Hershey, ‘Outcome Bias in Decision Evaluation’, *Journal of Personality and Social Psychology*, 54 (1988), pp. 459–579; Francesca Gino, Don A. Moore, and Max H. Bazerman, ‘No harm, no foul: The outcome bias in ethical judgments’, Harvard Business School, in: Working Paper, 08-080. The *hindsight bias* was identified in experimental work and means that “people consistently exaggerate what could have been anticipated in foresight”: Fischhoff, Slovic and Lichtenstein, *Lay foibles and expert fables in*

insofar as the fact that an event did occur does not mean that the prognosis of a low probability was wrong, or the other way round. It is therefore a bias that can make it difficult to learn lessons during ex-post impact assessments. In order to avoid this bias, it is necessary to evaluate a risk decision without being influenced by a favorable or disadvantageous outcome as such.

Another and - in particular for policy-making - problematic aspect is the *sunk-cost-bias*.¹⁰⁰⁵ People often “throw good money after bad” so as to avoid acknowledging losses or bad decisions. This is extremely relevant for international development law insofar as it indicates that once a decision has been taken it is less likely that it will be corrected: a dam construction rarely stops after it has begun, regardless of the number of problems that are encountered. This appears particularly important to evaluate the chance of ex-post impact assessments to correct an initiative with negative human rights consequences. If such an assessment identifies significant human rights impacts, the sunk-cost-bias would nevertheless reduce the chances that the project or policy is changed. While the sunk-cost-bias might intuitively only be applied to projects, at least a similar logic also applies to abstract policies. Legislation, regulation or, even more so, international agreements are often enacted in long and time-consuming procedures. Unless the respective legal document has installed some fast-track flexibility mechanisms¹⁰⁰⁶, most actors have an incentive not to re-start a complex and demanding negotiation process.

An “emotional” heuristic tool are so-called *affect-heuristics*¹⁰⁰⁷ which relate to the role of emotions in decision-making and risk-evaluation. Like other types of heuristics, it can help or hinder. In the context of international economic law, emotions can play a major role. One example is that individuals often blame their problems on other persons or institutions (such as the World Bank) rather than on situations (corruption, mismanagement). However, affect heuristics does not only influence how laypersons make decisions, but can also explain expert decisions, at least insofar as they go beyond the analysis of hard data: scientific research is not only value-laden, but at times also guided by emotions. Other – often emotional - challenges concern differing risk perceptions, in particular if distributive aspects are involved. This is to a certain extent guided by individual interests and the unwillingness to accept impacts because oneself is affected. Often derogatory described as a NIMBY attitude (“not in my backyard”),¹⁰⁰⁸ the reaction is not always selfish. Rather, this reaction touches upon the fundamental conflict between individual and community interests. At the same time, it is a question of distributional justice: often risks in society are unequally shared, and people who are financially better-off can usually evade negative impacts (e.g. by moving to more expensive districts less affected by industrial emissions) or because they can adapt to change and gain benefits from legislative and regulatory reform (e.g. from the liberalization of markets). In consequence, it is an important challenge for the assessment of impacts and risks to determine which objections are based on pure self-interest and which ones can normatively be justified.

judgment about risk, in: Baruch Fischhoff (ed.), *Risk Analysis and Human Behavior* (Abingdon: Earthscan 2012), p. 199.

¹⁰⁰⁵ Hal R. Arkes and Catherine Blumer, ‘The psychology of sunk cost’, *Organizational Behavior and Human Decision Processes*, Vol. 35 Issue 1 (1985), pp. 124-140; Fischhoff and Kadvany, *Risk* (above, n. 825), p. 77.

¹⁰⁰⁶ On the link between flexibility mechanisms and the effectiveness of HRIAs see section 9.1.2.1.5.

¹⁰⁰⁷ Paul Slovic, Melissa Finucane, Ellen Peters et al., ‘The Affect Heuristic’, in: Thomas Gilovich, Dale W. Griffin, and Daniel Kahneman (eds.), *Heuristics and biases*, pp. 397–420.

¹⁰⁰⁸ Peter D. Kinder, *Not in My Backyard Phenomenon*, in: Encyclopædia Britannica (9 Oct. 2019), available at: <https://www.britannica.com/topic/Not-in-My-Backyard-Phenomenon>.

It is unrealistic to completely avoid the aforementioned biases. Social risk scholars have pointed out that decision-makers can only to a certain extent take rational decisions. In other words, decisions in real life are generally taken within “bounded rationality”.¹⁰⁰⁹ A realistic goal of rational behavior under uncertainty would therefore not be optimization in the strict sense of the word – which would require that an investigation must continue until the best option is found – but “approximate optimization”¹⁰¹⁰, which means that enough elements of a decision can and must be ignored in order to think systematically about those that remain.¹⁰¹¹ In the context of decisions under uncertainty and risk, it may still be rational - in the sense of “bounded rationality” - to apply “the same rule to many hazards, while ignoring differences among them”.¹⁰¹² Similarly, institutionalized ex-ante impact assessments may not be able to identify optimized but only satisficing options. This inherent limit to rational decision-making should be borne in mind when evaluating the quality of an HRIA. Expectations should not be unrealistically high.

5.4.5 Interim conclusion

So far, this chapter has analyzed concepts and causes of uncertainty and three risk paradigms on how to make decisions under uncertainty. In a nutshell, the paradigms vary depending on the level of trust in expert as opposed to layperson judgment. It has been argued above that impact assessment law is also a legal response to risk assessment and risk management. The institutionalization of IA law can therefore be analyzed through the lenses of these three risk paradigms.

The objective-managerial paradigm emphasizes the strength of objective scientific evidence and expertise. Ideally, an impact assessment should therefore provide facts and inform decision-makers (“information model”). Consequently, procedural requirements such as consultation or the participation of affected individuals would not be an essential procedural requirement: failure to consult would be irrelevant if the institution nevertheless obtained all necessary information and would not have taken a different decision. The subjective-pluralistic paradigm is at the other end of the spectrum and reflects deep skepticism against science and expertise. The main purpose of impact assessments based on this paradigm would be to increase the transparency of decision-making processes and enable people to participate in the IA-process and enable resistance where necessary. IAs should not attempt to provide objective information. Rather, the objective would be to identify individual preferences (“preference accumulation model”). However, such a model is rather critical than constructive, and while it might work for small-scale projects, gathering individual preferences would not be a viable option for large projects or policies with far-reaching consequences. Like the objective-managerial paradigm, such a model also assumes a strict and unrealistic separation between experts and laypersons. The analytic-deliberative paradigm therefore tries to overcome this binary code between experts and laypersons. It is analytical insofar as it recognizes that scientific analysis provides important infor-

¹⁰⁰⁹ Simon, ‘Theories of Bounded Rationality’ (above, n. 875).

¹⁰¹⁰ Simon observes that “organisms adapt well enough to ‘satisfice’; they do not, in general, ‘optimize.’” Herbert Simon, ‘Rational Choice and the Structure of the Environment’, *Psychological Review*, 63 (1956), pp. 129–138, p. 129.

¹⁰¹¹ Quoted in: Fischhoff and Kadvany, *Risk* (above, n. 825), p. 78.

¹⁰¹² *Ibid.*, p. 80.

mation. At the same time, it recognizes the limits of expert knowledge – as identified above – and supplements analytical with deliberative elements. Impact Assessments should therefore combine analytical with deliberative elements in a mutually reinforcing way: neither to simply inform decision-makers, nor to aggregate individual preferences in a pseudo-democratic manner. Instead, IAs should enable experts and laypersons to participate in informed discourse. In this sense, impact assessments can have a transformative function as they can transform preferences or opinions through an analytic-deliberative process (“transformation model”).

This chapter also examined some of the main causes of uncertainty and how they relate to impact assessments. Naturally, there will almost always be uncertainty about remaining risks, in particular because – as a colloquial phrase illustrates – “we don’t know what we don’t know”. Decision-makers therefore have to deal with irreducible uncertainty. However, one thing we can understand and learn is, at least to a certain extent, the nature of our ignorance. Understanding the nature of uncertainty – for example of potential impacts of an initiative – would already be an important added-value for institutionalized impact assessments: it enables decision-makers to take precautionary measures or preserve the right to take corrective steps in the future if unintended impacts occur. As will be discussed in the final chapters, policy decisions – legislative or non-legislative acts, international agreements, or financing contracts – can use flexibility mechanisms in order to respond, once a project or policy is being implemented, to unintended consequences. Understanding the nature and scope of uncertainty would support decision-makers to implement adequate flexibility mechanisms. While the focus of this chapter so far has been on uncertainty, the remainder of this chapter will now analyze how law in general and impact assessment law in particular guides knowledge generation.

5.5 Law Guides Knowledge Generation

HRIAs support decision-making under uncertainty. Impact Assessments are tools of knowledge generation: they can reduce *reducible* and identify *irreducible* uncertainty. They can identify risks that were formerly unknown and thus at least turn closed into open ignorance. In consequence, decision-makers can better respond to open ignorance, e.g. by applying safeguard or introducing legal flexibility mechanisms (on flexibility mechanisms see section 9.1.2.1.5). Consequently, it is necessary to gather and process information and use available resources of knowledge. This section will analyze how law determines how to produce this knowledge, in particular which sources can or must be used. This is an essential cross-cutting issue for the institutionalization of impact assessments: Institutionalized IAs are not conducted in an isolated setting, but in an institutional context where people and organizations already possess knowledge. The success of institutionalized impact assessments, therefore, will also depend on how well these knowledge resources are used and combined during the process, for example by involving different departments within an institution in order to rely on their expertise and knowledge. This might, as indicated before, also mitigate some of the cognitive biases. This section will therefore address the relationship between knowledge-generation and impact assessment law. Why is there an obligation to generate knowledge, and what are the main categories of knowledge sources used by public authorities to assess the impacts of its initiative?

5.5.1 The Obligation to Generate Knowledge

The added value of institutionalized IAs also depends on how public authorities collect data, process information and generate or integrate knowledge. As institutionalized IAs do not operate independently, but are embedded in the institutional context, they not only contribute to institutional knowledge generation, but are also dependent on other institutional mechanisms of knowledge generation. The institutionalization of impact assessments therefore requires taking two perspectives: First, to understand the institutional knowledge generation mechanisms that allow assessing impacts, and how knowledge produced during impact assessments enters into the institutional decision-making process.

In domestic constitutional and administrative law, the obligation to generate knowledge is not always explicitly required by law but often results from the obligation to achieve certain objectives in situations of a complex regulatory landscape.¹⁰¹³ In this sense, the obligation to take human rights impacts into account (as discussed in chapter 4) implies an obligation to generate knowledge about these (potential) impacts, and IAs are one such instrument to comply with this obligation. The limited availability of relevant data, information and knowledge¹⁰¹⁴ means that knowledge generation becomes an important task for public authorities. In domestic settings, one can increasingly observe that public authorities explicitly admit their knowledge-gaps and do not (primarily) generate information and knowledge through their own bureaucracy, but rely on different regulatory techniques to do so.

In the following, I will provide an overview of different mechanisms of knowledge generation as a prerequisite for an adequate assessment of human rights impacts. To do so, I will draw on categories from domestic public law where regulators use instruments that can be classified, according to the source of knowledge, as internal and external types of knowledge generation.¹⁰¹⁵ However, I will first briefly address how knowledge can be defined, and the difference between tacit and explicit knowledge, as far as this is useful to better understand the knowledge-generating potential of impact assessments.

5.5.2 Knowledge - Explicit and Implicit

Attempts to define knowledge often start by distinguishing knowledge from data and information. A concise distinction is not necessary for the present thesis. It is sufficient to mention that data is generally defined as an elementary and unprocessed representation of reality,¹⁰¹⁶ or “symbols that represent properties of objects, events and their environment”.¹⁰¹⁷ They

¹⁰¹³ Herzmann, *Konsultationen* (above, n. 960), p. 50; Röhl, ‘§ 30 Ausgewählte Verwaltungsverfahren’ (above, n. 987), para 28.

¹⁰¹⁴ Hoffmann-Riem, ‘Regulierungswissen in der Regulierung’ (above, n. 262); on the role of information and knowledge in administrative law see: Indra Spiecker gen. Döhm, ‘Staatliche Informationsgewinnung im Mehrebenensystem - ein Überblick’, in: Janbernd Oebbecke (ed.), *Nicht-normative Steuerung in dezentralen Systemen*, pp. 253–283.

¹⁰¹⁵ Herzmann, *Konsultationen* (above, n. 960), 51 et seq.

¹⁰¹⁶ David Riepl, *Knowledge-Based Decision Support for Integrated Water Resources Management with an application for Wadi Shueib, Jordan* (Karlsruhe, Hannover: KIT Scientific Publishing; Technische Informationsbibliothek u. Universitätsbibliothek, 2013), p. 42.

¹⁰¹⁷ Jennifer Rowley, ‘The wisdom hierarchy: representations of the DIKW hierarchy’, *Journal of Information Science*, 33 (2007), pp. 163–180, p. 166 (quoting Ackoff).

are the “the products of observation”¹⁰¹⁸ and more illustratively sometimes described as “raw facts” or “raw numbers”.¹⁰¹⁹ Having access to data is thus an important but insufficient basis for impact assessments. In order to be meaningful, we need at least information, which is processed, formatted, organized, or interpreted data.¹⁰²⁰ Unlike data, information “answers to questions that begin with such words as who, what, when and how many”.¹⁰²¹ In spite of different definitions, there is at least a broad consensus that information is “organized or structured data.”¹⁰²² Impact assessments can therefore produce information by organizing and structuring data and applying the thus-created information to a specific initiative.

More difficult than a negative definition – by contrasting knowledge with data and information – is a positive definition of knowledge. Different disciplines – ranging from philosophical to organizational epistemology – study the nature, limits and added-value of knowledge. Philosophers have for centuries worked to understand what knowledge is, an undertaking so complex that books with over 300 pages are published to offer an “introduction” to the theory of knowledge.¹⁰²³ More recently the topic also became of interest for practical approaches such as organizational epistemology and management studies.¹⁰²⁴ Especially knowledge management systems have been identified as a potential technique to better exploit available knowledge within an organization in order to gain a competitive advantage. However, different as the motivations to study knowledge are, defining knowledge is a common endeavor, either out of intrinsic interest or as a prerequisite to understand *what* should be managed and organized.¹⁰²⁵ At least a broad minimal consensus exists insofar that knowledge requires some form of rational justification or justified true belief.¹⁰²⁶ Knowledge is generally explained by reference to terms

¹⁰¹⁸ Ibid.

¹⁰¹⁹ Riepl, *Knowledge-Based Decision Support for Integrated Water Resources Management with an application for Wadi Shueib, Jordan* (above, n. 1016), p. 42.

¹⁰²⁰ For a comprehensive overview of information systems literature: Rowley, ‘The wisdom hierarchy: representations of the DIKW hierarchy’ (above, n. 1017), p. 171; Terry Robertson, ‘The Data/Information/Knowledge/Wisdom Hierarchy Goes to Seminary’, *Advances in the Study of Information and Religion*, 3 (2013), p. 2.

¹⁰²¹ Rowley, ‘The wisdom hierarchy: representations of the DIKW hierarchy’ (above, n. 1017), p. 166.

¹⁰²² Ibid., p. 174; Dirk Roux, Kevin Rogers, Harry Biggs et al., ‘Bridging the Science–Management Divide: Moving from Unidirectional Knowledge Transfer to Knowledge Interfacing and Sharing’, *Ecology and Society*, 11 (2006).

¹⁰²³ Robert Audi, *Epistemology: A Contemporary Introduction to the Theory of Knowledge* (London: Routledge, 2003), 2nd.

¹⁰²⁴ Haridimos Tsoukas, *Complex knowledge* (Oxford: Oxford Univ. Press, 2009), reprint. 2009; Rowley, ‘The wisdom hierarchy: representations of the DIKW hierarchy’ (above, n. 1017), p. 172; by way of example: Stuart Barnes, ed., *Knowledge management systems*, 1. ed.

¹⁰²⁵ While philosophical approaches are mainly interested in the nature of knowledge and therefore reflect on distinctions between belief and knowledge or the relevance of truth, organizational epistemology and Knowledge-Management (“KM”) literature appears to spend more time on the distinction between data, information and knowledge. As knowledge appears to be “more” than pure information, some authors have suggested a hierarchy according to which data, information and knowledge is topped by “wisdom”, the so-called “DIKW hierarchy” or pyramid: Rowley, ‘The wisdom hierarchy: representations of the DIKW hierarchy’ (above, n. 1017).

¹⁰²⁶ An (at least) provisional definition is that knowledge is “justified true belief”: Audi, *Epistemology* (above, n. 1023), p. 220. However, not surprisingly, each element – justification, truth, and belief – is in itself controversial and in need of further elaboration. Similar observations can be made in knowledge management literature: “There is still no consensus on the nature of knowledge except that it is based on perception that can provide a rational justification for it”: Ashok Jashapara, *Knowledge Management* (Harlow: Financial Times/Prentice Hall, 2004), p. 16.

such as “understanding”, “learning” or “experience”¹⁰²⁷. As one author puts it: knowledge is “justified personal belief that” – and this emphasizes the managerial aspect to knowledge – “increases an individual’s capacity to take effective action”.¹⁰²⁸ Thus, the specific human contribution¹⁰²⁹ – in the form of understanding, experiencing, learning – is a common denominator. This is not only true for knowledge management but also for philosophical epistemology, as philosopher Robert Audi illustrates when he states: “Knowledge arises in experience. It emerges from reflection. It develops through inference.”¹⁰³⁰

While several types of knowledge can be distinguished,¹⁰³¹ two distinctions appear most relevant to better understand the role of and challenges for impact assessments, namely that between tacit and explicit knowledge. Explicit knowledge can be described as “I know that...” and can be documented and transferred orally or in writing.¹⁰³² Tacit knowledge concerns things that can be described as “I know how...”¹⁰³³ and that cannot easily be transferred by means of writing or speaking as it has been gained through personal experience. In essence, tacit knowledge means that “we can know more than we can tell”.¹⁰³⁴ But it also regards knowledge that people possess without thinking consciously about it.¹⁰³⁵

What does it mean for the institutionalization of IAs? Unlike explicit knowledge, the tacit knowledge base is difficult to grasp and thus more difficult to challenge in open discourses, even

¹⁰²⁷ For example: Ibid., p. 49; “Knowledge is the combination of data and information, to which is added expert opinion, skills and experience, to result in a valuable asset which can be used to aid decision making”: European Committee for Standardization, ‘European Guide to good Practice in Knowledge Management: Part 1: Knowledge Management Framework’, March 2004, p. 6.

¹⁰²⁸ Maryam Alavi and Dorothy Leidner, ‘Knowledge management systems: issues, challenges and benefits’, in: Stuart Barnes (ed.), *Knowledge management systems*, pp. 15–35, p. 16.

¹⁰²⁹ “Knowledge builds on information that is extracted from data [...] While data is a property of things (size, prize, etc.), knowledge is a property of people that predisposes them to act in a particular way”: David Boddy, Albert Boonstra, and Graham Kennedy, *Managing Information Systems* (Harlow: Financial Times/Prentice Hall, 2005), 2. ed., p. 9. “Knowledge is information that is synthesized and contextualized to provide value. It is information with the most value. Knowledge consists of a mix of contextual information, values, experiences, and rules. For example, the mashup of locations and housing prices means one thing to a real estate agent, another thing to a potential buyer, and yet something else to an economist. It is richer and deeper than information and more valuable because someone thought deeply about that information and added his or her own unique experience, judgment, and wisdom. Knowledge also involves the synthesis of multiple sources of information over time”: Keri E. Pearlson and Carol S. Saunders, *Managing and using information systems* (Hoboken, NJ: Wiley, 2013), 3. ed., p. 16.

¹⁰³⁰ Audi, *Epistemology* (above, n. 1023), p. 220.

¹⁰³¹ Jeremy Fantl identifies four overlapping distinctions: between “Knowledge-how” and “knowledge that”; between *technê* and *episteme*; between practical and theoretical knowledge; and between procedural and declarative knowledge, see: Fantl, Jeremy, “Knowledge How”, *The Stanford Encyclopedia of Philosophy* (Fall 2014 Edition), Edward N. Zalta (ed.), URL = <http://plato.stanford.edu/archives/fall2014/entries/knowledge-how/>. Again, the distinctions need not be clear cut, and some authors assume that there is a “sliding scale” between different types of knowledge: Jashapara, *Knowledge Management* (above, n. 1026), p. 48.

¹⁰³² Whether knowledge actually has been documented is, for some authors, the decisive criterion to distinguish explicit from tacit knowledge: Kenneth C. Laudon and Jane Price Laudon, *Management information systems* (Boston, Mass.: Pearson, 2014), 13. ed., global ed., p. 450. This might make sense from a management perspective; however, from an analytical perspective, the suitable criterion would be whether a certain type of knowledge *can* be documented.

¹⁰³³ Jashapara, *Knowledge Management* (above, n. 1026), p. 17.

¹⁰³⁴ Michael Polanyi, *The tacit dimension* (Chicago, Ill.: Univ. of Chicago Press, 2009), p. 4.

¹⁰³⁵ Laura Lynne Kiesling, *Deregulation, innovation and market liberalization* (London, New York: Routledge, 2009), p. 43.

though it forms part of the basis upon which impact assessments are conducted. For example, the classification of certain impacts as more or less significant can depend on tacit knowledge and individual experience. This is a potential source for a biased application of knowledge: while it is possible to communicate about explicit knowledge, e.g. by informing stakeholders or affected individuals and communities about certain projects and potential impacts, and it is possible to respond, during consultations, to these remarks as long as they are based on explicit knowledge, the communication of tacit knowledge is by definition more difficult, either because know-how cannot easily be documented (objective obstacle), or because tacit knowledge is unconscious and therefore actors are not even aware of it in order to openly debate about it (subjective obstacle). These limitations inherent to mainly tacit knowledge are exacerbated in international settings with different cultural and social settings.

IA-law can respond to this challenge by applying instruments that enhance conceptual and propositional learning: Conceptually, decision-makers can learn about certain consequences that often occur in correlation with certain initiatives ("learning about..."); propositional learning means that, within a specific initiative, decision-makers can learn about formerly unknown impacts and risk ("learning that...").¹⁰³⁶ Guidelines, training and practice can improve conceptual learning, whereas the inclusion of diverse sources of knowledge can enhance propositional learning. As such, the circularity-problem mentioned previously is not limited to IAs, but is a fundamental challenge to knowledge and epistemology in general.¹⁰³⁷ Especially due to the cognitive limits of decision-makers and the observation that knowledge-acquisition works based on pre-existing knowledge ("I see it when I know it"¹⁰³⁸), participation and the presentation of new perspectives could serve as an "eye-opener". As it is difficult to transmit tacit knowledge in written form, IA law reforms as such would be of only limited use. However, IA law may provide for the organizational norms to make sure that tacit knowledge is better integrated into the IA-process, for example by regulating who is in charge of conducting the IA, who must be consulted during the process, and how staff must be trained. This brings us to the next part on impact assessment, knowledge generation and the role of law.

5.5.3 Impact Assessments, Knowledge Generation and the Role of Public Law

Law determines not only the structure of the IA process analyzed above, but also determines what information and whose knowledge counts as relevant and reliable. The EU guidelines on human rights impact assessment of trade agreements, for example, refer to a long list of relevant data and information to be used, including those from human rights dialogues, different EU as well as UN reports from Treaty-based or Charter-based procedures.¹⁰³⁹ While a reference to these sources as such should not be overrated, one effect, however, is that the respective sources are declared as legally relevant, and that it is not only legitimate but also required to align and orient the assessment and evaluation of impacts against these human rights standards. Similarly,

¹⁰³⁶ On conceptual and propositional learning: Audi, *Epistemology* (above, n. 1023), p. 143.

¹⁰³⁷ *Ibid.*, p. 322.

¹⁰³⁸ See section 5.4.1.

¹⁰³⁹ European Commission, *Guidelines on the analysis of human rights impacts in impact assessments for trade-related policy initiatives* (above, n. 42), 7 et seq. This is different at the World Bank, where at least the official safeguards neither make reference to human rights norms nor to the information and knowledge of human rights institutions.

facts identified by human rights organizations would also have to be considered. These HRIA norms thus authorize and oblige those in charge of the impact assessment to not only consider core human rights standards, but also the specification of these norms found in legally non-binding documents such as the Concluding Observations of the UN Human Rights Committees. This can be described as an *argumentative shift of the burden of proof*: An institution's staff does not have to justify human rights considerations in trade, investment or development policies, but rather the non-consideration becomes a justifiable exception.

Moreover, law also influences – intentionally or unintentionally – the organizational diffusion or concentration of knowledge. For example, law increasingly requires monitoring, a mechanism public authorities use to observe the market or other social activities (observation) and to reflect on their own role (self-reflection).¹⁰⁴⁰ Public institutions must generate and manage knowledge, internationally as well as domestically, and the competences these institutions have, as well as the internal structure and the applicable procedures are all regulated by law and affect the administration of knowledge. This regards the question how data, information and knowledge are generated: authorities can have own investigation powers or research facilities, but could also involve external actors either through the obligation to provide information (e.g. for project developers) or the possibility to take part in consultations. This means that questions of institutional competence, powers and consultation modalities in IAs also affect knowledge generation: who is in charge of conducting the IA and who is involved during the IA-process are two essential factors determining how knowledge is generated.

Closely related is how knowledge is administered and managed within an organization. This does not only refer to the existence of accessible databases, but also to the management of staff as bearers and creators of knowledge. An important issue of knowledge management with regard to the assessment of social and human rights impacts concerns the departmentalization in an organization (e.g. the European Commission). Different departments bring in different types of knowledge (and viewpoints) which may supplement but also compete against each other. The competence and influence of each department are largely determined by an organization's internal law and might affect whose knowledge matters most for the assessment process. Finally, knowledge is not an achievable “status quo”, and many organizations have installed institutionalized learning processes such as monitoring measures. This ideally allows organizations to take recourse to its own “knowledge stock”.¹⁰⁴¹ The following classification is not intended to be comprehensive, but rather demonstrates different overlapping perspectives on how knowledge in public institutions can be generated and managed.

5.5.3.1 Internal Knowledge Sources

The organization of an institution allows storing knowledge. Opening the “black-box” of an institution like the World Bank or the European Commission usually demonstrates that each institution is in itself divided into sometimes highly specialized departments where different *know-how*

¹⁰⁴⁰ Johannes Masing, *Soll das Recht der Regulierungsverwaltung übergreifend geregelt werden?* (München: Beck, 2006), p. 128.

¹⁰⁴¹ Herzmann, *Konsultationen* (above, n. 960), p. 56.

and *know-that* exists.¹⁰⁴² The goal to achieve more “informed” decisions can often be enhanced by involving different departments with different expertise. In domestic regulatory settings, an increasingly complex environment requires adequately adopted and differentiated organizational structures and procedures, where ideally specialization on the one hand and organizational cooperation on the other hand are adequately balanced.¹⁰⁴³ As will be seen, in particular the EU Impact Assessment regime requires the involvement of different services within the European Commission in order to fully exploit available internal knowledge.

The involvement of different departments within one institution can also have another advantage, namely to avoid the risk of expert “tunnel vision”. This means that administrators may become unable to correctly assess the overall importance of the goals their department pursues¹⁰⁴⁴ and lose sight of impacts falling into the competence of other departments. This makes it more difficult to fully assess potential impacts on human rights and interests.¹⁰⁴⁵

5.5.3.1.1 Personnel Resources

A fundamental source of knowledge is an institution’s own personnel. Indeed, in many situations the efficacy of institutions depends less on the scope of the mandate or the investigation rights it possesses on paper, but on how well it is staffed. This is true for business administration and for public institutions alike: “Every day, knowledge essential to your business walks out of the door, and much of it never comes back.”¹⁰⁴⁶ This suggests that it is important for an effective institutionalization of HRIAs that an institution’s staff has human rights knowledge in the sense of *know-that* and *know-how*.

From a human rights perspective, knowledge does not come without trade-offs. It can rather in itself be a powerful tool and uphold certain paradigms over others. Broad has argued, for example, that the World Bank in general and its research department in particular have managed to uphold a neoliberal paradigm of development – in part through certain recruitment structures that result in a bias towards neoliberal economists trained in US elite universities.¹⁰⁴⁷ This pow-

¹⁰⁴² For an analysis of the culture within these departments of one such agency see: Sarfaty, *Values in Translation* (above, n. 13).

¹⁰⁴³ Brun-Otto Bryde, ‘Die Einheit der Verwaltung als Rechtsproblem’, in: Wolfgang Graf Vitzthum and others (eds.), *Die Bedeutung gliedstaatlichen Verfassungsrechts in der Gegenwart. Die Einheit der Verwaltung als Rechtsproblem*, pp. 181–216; Herzmann, *Konsultationen* (above, n. 960), p. 52.

¹⁰⁴⁴ David H. Rosenbloom, Rosemary O’Leary, and Joshua Chanin, *Public administration and law* (Boca Raton, Fla.: CRC Press, 2010), 3. ed., p. 33.

¹⁰⁴⁵ Another problem can be the emergence of unhealthy competition. For example, Sarfaty has observed tensions between the World Bank’s Legal Department and the then Social Development Department over human rights-based approaches to development, which she argues was based in the fear of losing control over one’s agenda: Sarfaty, *Values in Translation* (above, n. 13), p. 45. Instead of starting a joint effort to enhance a human rights culture within the Bank, competition might result in a deadlock. Nevertheless, the World Bank Group has also gained knowledge – in the sense of “know-that” and “know-how” – with regard to social and environmental policies, which have influenced the institutional law of many regional development banks.

¹⁰⁴⁶ Saunders, quoted in: Andrew Greasley and Paul Bocij, *Business information systems* (Harlow: Financial Times Prentice Hall, 2006), 3. ed, p. 28.

¹⁰⁴⁷ Robin Broad, ‘Research, Knowledge, and the Art of “Paradigm Maintenance”: The World Bank’s Development Economics Vice-Presidency (DEC)’, *Review of International Political Economy*, 13 (2006), pp. 387–419, 400 et seq.

erful influence of knowledge has also been observed with suspicion by environmental organizations. The Bank has enacted not only social and environmental policies, but also conducted research on sustainable development and as such claims epistemological authority over these issues. Michael Goldman argues that the “Bank’s form of environmental knowledge production has rapidly become hegemonic, disarming and absorbing many of its critics, expanding its terrain of influence, and effectively enlarging the scope and power of its neoliberal agenda”.¹⁰⁴⁸ The ability of organizations to absorb the ideas of social movements and invest resources in knowledge generation to shape, define and implement agendas¹⁰⁴⁹ can conflict with the claims of bottom-up human rights approaches. It remains to be seen – subject to further research – if institutionalized HRIAs might also “absorb” critics.¹⁰⁵⁰

5.5.3.1.2 Official Instruments of Knowledge Generation

Even well-organized institutions with highly qualified personnel must permanently gather new data and information and generate knowledge to be able to respond to changing circumstances and, ideally, improve the quality of their activities. Knowledge generation can be individual (“case-specific”) as well as systematic.¹⁰⁵¹ An example of the former are investigative powers, such as the power to take statements,¹⁰⁵² to request information,¹⁰⁵³ and to conduct inspections in a particular case.¹⁰⁵⁴ Case-specific knowledge can lead to systematic knowledge, either because an agency’s staff gains relevant experience, or because case-specific information is further processed, for example in research departments or evaluation groups. The World Bank’s Independent Evaluation Group (IEG) or the EU’s Regulatory Scrutiny Body (RSB) review (among other things) different impact assessments and therefore gain an overview of different topics, methods, and challenges that are ideally used to not only control and improve the specific IA in question, but also inform the conduct of future IAs.¹⁰⁵⁵ This may again include *know-how* and *know-that*.

In international settings, investigative powers are comparatively limited. Particularly in international development law, donors need information about their funded projects, however, general international law evidently does not grant the authority to investigate against the will of a recipient state. The third parties’ obligation to provide information and the corresponding powers to

¹⁰⁴⁸ Michael Goldman, *Imperial nature* (New Haven, Conn, London: Yale University Press, 2005), p. 180.

¹⁰⁴⁹ Sarfaty, *Values in Translation* (above, n. 13), p. 34; Rajagopal, *International Law from Below* (above, n. 253), p. 126.

¹⁰⁵⁰ Critical, however without specific empirical evidence: Koskeniemi, ‘Human Rights Mainstreaming as a Strategy for Institutional Power’ (above, n. 202).

¹⁰⁵¹ On knowledge generation to respond to structural information deficits: Masing, *Soll das Recht der Regulierungsverwaltung übergreifend geregelt werden?* (above, n. 1040), p. 138.

¹⁰⁵² Example: European Union, *Council Regulation (EC) No 1/2003 on the implementation of the rules on competition laid down in Articles 81 and 82 of the Treaty* (2002), Art. 19.

¹⁰⁵³ Spiecker gen. Döhmman, ‘Staatliche Informationsgewinnung im Mehrebenensystem - ein Überblick’ (above, n. 1014), 260 ff. Examples: European Union, *Council Regulation (EC) No 1/2003 on the implementation of the rules on competition laid down in Articles 81 and 82 of the Treaty* (above, n. 1052), Art. 18; Council of the European Union, *Regulation (EC) No 139/2004 on the control of concentrations between undertakings (the EC Merger Regulation)* (2004), Art. 11; similar, § 59 GWB (“Behördliches Auskunftsverlangen”).

¹⁰⁵⁴ Example: Ibid., Art. 13; European Union, *Council Regulation (EC) No 1/2003 on the implementation of the rules on competition laid down in Articles 81 and 82 of the Treaty* (above, n. 1052), Art. 20.

¹⁰⁵⁵ For more these quality review mechanisms see section 10.5.2.

request such information or inspect the sites of a funded project are therefore established in specific international agreements, for example the financing agreement between the World Bank and the recipient.¹⁰⁵⁶ At other times, instruments of knowledge-generation are based on voluntary cooperation. For the preparation of EU Trade SIAs, the exchange of views with organizations in partner countries, for example in the form of common workshops, often informs the specific impact assessment.¹⁰⁵⁷

5.5.3.1.3 Institutionalization of Learning Cycles

Knowledge can be generated and tested through legally institutionalized learning-cycles.¹⁰⁵⁸ The institutionalization of learning mechanisms, such as monitoring, evaluation and ex-post IAs,¹⁰⁵⁹ can contribute to enhancing organizational learning, even though faced with different challenges. One central challenge is that human skills – many of which were learned early in life – are rewarded by culture, even if they prove to be counterproductive and producing ineffective and unintended consequences.¹⁰⁶⁰ This is especially relevant insofar as knowledge is actionable and directly influences decisions. Argyris describes actionable knowledge as formulated in an if-then-proposition that can be stored, retrieved and applied.¹⁰⁶¹ While administrative law shifted from a command-and-control paradigm to more reflexive regulatory techniques, it seems to be a different issue whether the corresponding knowledge-rules within an organization have taken a similar step towards open, self-reflective learning. While learning requires, in a first step, the generation of new knowledge to close the knowledge gap that exists, there is more to learning than the generation of *additional* knowledge: Even if a knowledge gap can be largely closed in one case, it is unlikely that the knowledge will produce the intended results in a different case: contexts are different and permanently changing, and people behave differently from what we assume.¹⁰⁶² Therefore, learning means reflection, and the monitoring of own and others' action¹⁰⁶³ is an essential instrument in organizational management. This is one of the goals of human rights impact assessments: Not only shall ex-post assessments inform about the actual impacts of the specific initiative. They should rather induce institutional learning in the sense that it raises organizational awareness of human rights (or environmental/social) issues.

However, obstacles to learning, such as “organizational defensive routine”¹⁰⁶⁴ or “defensive reasoning”¹⁰⁶⁵, can decrease the potential value of IAs. Defensive reasoning is often used by people

¹⁰⁵⁶ On the role of knowledge generation in development cooperation planning see: Dann, *The Law of Development Cooperation* (above, n. 4), p. 305.

¹⁰⁵⁷ For example: ‘EU-Andean Trade Sustainability Impact Assessment: Final Report’, pp. 186–187.

¹⁰⁵⁸ On “learning cycles”: David A. Kolb, *Experiential learning* (Upper Saddle River, NJ: Prentice-Hall, 1984), 21 ff.

¹⁰⁵⁹ World Bank Group: Independent Evaluation Group, ‘Impact Evaluations: Relevance and Effectiveness’ (above, n. 80), p. 8.

¹⁰⁶⁰ Chris Argyris, *Knowledge for Action* (San Francisco: Jossey-Bass, 1993), 1st ed, p. 2.

¹⁰⁶¹ *Ibid.*, p. 3.

¹⁰⁶² *Ibid.*

¹⁰⁶³ *Ibid.*

¹⁰⁶⁴ *Ibid.*, 15 et seq. with an extensive review of literature on defensive routine in public and private organizations.

¹⁰⁶⁵ Chris Argyris, ‘Initiating Change that Perseveres’, *Journal of Public Administration Research and Theory*, 4 (1994), pp. 343–355, p. 344.

to protect their own position: thus, they limit their “opportunities for learning in order to reinforce their existing beliefs, which are familiar and allow some measure of certainty, even if false”.¹⁰⁶⁶ Organizational learning therefore requires to “make previously undiscussable problems discussable” and “encourage inquiry and testing”.¹⁰⁶⁷ Closely related is the scope of potential feedback loops. The effect of institutionalized learning-cycles in many institutions is at best single-loop learning, i.e. does not question the underlying systemic structures. Double-loop learning which reviews the “underlying program, or master program”¹⁰⁶⁸ may occasionally occur, but this will also depend on other factors than monitoring and institutional learning cycles.¹⁰⁶⁹ Especially inner-institutional review bodies have generally no mandate to review the underlying systemic structure. For example, the World Bank Inspection Panel has a mandate to review compliance with the Bank’s internal safeguard policies, but no mandate to review the underlying assumption that development projects are good for development if conducted in a sustainable manner compatible with the respective guidelines.

This means that impact assessments may support single-loop learning. Whether or not they can also enhance double-loop-learning will depend on the context, for example external political pressure or internal changes due to the involvement of people who are willing to question underlying structures. Another challenge in international (development) law is the complexity of what should be learned. The easier failure or success can be measured, the easier it is to learn. It is therefore likely to improve learning if success is defined by the financial return of an investment project or the repayment of a development policy loan. In other words: It may be easier to learn how to increase financial returns than how to design human rights-compliant policies.

5.5.3.1.4 Institutional Law as a Source of Information and Knowledge

Law can regulate information: how agencies may obtain information, what information is protected (e.g. under data protection law) and how information may be used to influence behavior (“nudging” etc.). But law and information are also intertwined in a different way which one could call law as information: Legal rules contain “information” and can transmit knowledge.¹⁰⁷⁰ They codify knowledge, which can be used in order to deal with risks, especially to deal with those risks that can be mitigated by routine operations following simple rules. It might seem questionable to what extent rules can transmit knowledge, and to what extent that can influence IA law. However, rules as a source of information can be effective if properly applied. In particu-

¹⁰⁶⁶ Ibid., p. 349.

¹⁰⁶⁷ Ibid.

¹⁰⁶⁸ Argyris, *Knowledge for Action* (above, n. 1060), p. 50.

¹⁰⁶⁹ An example is the World Development Report 2015: Mind, Society, and Behavior. The declared goal of the Report is “to inspire and guide the researchers and practitioners who can help advance a new set of development approaches based on a fuller consideration of psychological and social influences”: World Bank, *World Development Report 2015* (Washington, D.C.: The World Bank, 2014), p. 2 – a claim made by researchers outside the World Bank for decades. Whether psychological and social influences matter in the assessment of projects and policies is such an underlying value that could be described as second-loop-learning.

¹⁰⁷⁰ On law as information/knowledge: Jean Nicolas Druey, *Information als Gegenstand des Rechts* (Baden-Baden: Nomos, 1995), p. 29; David Nelken, ‘Law and Knowledge/ Law as Knowledge’, *Social and Legal Studies* (2006), pp. 570–573; Sally Falk Moore, ‘Treating Law as Knowledge: Telling Colonial Officers What to Say to Africans about Running “Their Own” Native Courts’, *Law & Society Review*, 26 (1992), pp. 11–46.

lar, rules and guidelines can function as storage for important basic information. They can serve as “checklists” to ensure that decision-makers get at least the basic things right. For example, doctors or pilots – two professions where wrong decisions can be fatal – often use checklists: relying on rules in a checklist can free their capacities to focus on the more complex tasks that only they can do.¹⁰⁷¹ In the same way, IA norms can guide decision-makers and make them think about (or at least not forget) potential human rights impacts of their initiatives. They do not protect against willful infringement but against harm caused by negligent “forgetfulness”. The World Bank’s Safeguard Policies, for example, are often enacted after long-term consultation periods, where different stakeholders bring in their experience and knowledge. Consequently, these norms ideally document *know-that* knowledge about hazardous activities and adequate safeguards.

Beyond the check-list function, law also contains information at a more abstract level which I would call normative information. When assessing what impacts are regarded as significant and thus require a deeper analysis, law provides at least a basic framework. At a fundamental level, substantive law determines which impacts count as relevant at all, i.e. by defining what interests and goods are legally protected and would thus have to be considered during an IA. A few decades ago, NEPA declared that the human environment must be protected, and that the impacts of projects on the natural environment are therefore to be considered in impact assessments. Later, social impacts, including cultural impacts, increasingly became subject to legal protection, and some impact assessment regimes explicitly require the special consideration of impacts on indigenous communities. More recently, decision-makers are explicitly required to also assess the social costs of greenhouse gas emissions.¹⁰⁷² At a different level, law also contains guidance on how to deal with expected impacts. For example, law may contain decision rules, i.e. information on how to deal with uncertain impacts. These decision rules, such as the precautionary principle, will be addressed in more details in chapter 8. Law therefore intakes information and knowledge and is the result of institutionalized social practices.¹⁰⁷³ It can consequently serve as a source of documented information and knowledge: the advantage is that public institutions make information and knowledge which they regard to be relevant explicit, and it can be easily referred to in public discourse.

5.5.3.2 External Knowledge Sources

As public authorities are in constant need of new information, the involvement of external actors therefore comes as no surprise.¹⁰⁷⁴ While the necessity to involve different departments within an institution has been discussed above (internal participation), this part focuses on the involvement of actors external to the respective institution (external participation).¹⁰⁷⁵ External

¹⁰⁷¹ Atul Gawande, *The Checklist Manifesto* (New York: Metropolitan Books, 2010), 1st ed.; Fischhoff and Kadvany, *Risk* (above, n. 825), p. 80.

¹⁰⁷² US District Court for the District of Columbia, Civil Action No.: 16-1724 (RC), *Wildearth Guardians et al v. Zinke* (2019).

¹⁰⁷³ Michel Paroussis, *Theorie des juristischen Diskurses* (Berlin: Duncker & Humblot, 1995), p. 14.

¹⁰⁷⁴ Spiecker gen. Döhmman, ‘Staatliche Informationsgewinnung im Mehrebenensystem - ein Überblick’ (above, n. 1014), p. 267.

¹⁰⁷⁵ While the line might not always be easy to draw, the involvement of Member States of an International Organization or of a federal entity like the EU would, for the purposes of this thesis, not qualify as “exter-

participation can have two functions: to generate knowledge, and to increase input legitimacy. This section focuses on the knowledge generation function, while chapter 7 will focus on participation more generally.

5.5.3.2.1 Experts

The involvement of independent experts can be either on an ad-hoc basis, or consist in the permanent establishment of an expert committee. The role of experts in public decision-making has already been studied extensively¹⁰⁷⁶ and is of high importance for IA law. The European Commission conducts its integrated impact assessments internally, but hires independent consultants to conduct the Trade Sustainability Impact Assessments for EU trade and investment agreements. Similarly, the World Bank's safeguard policies require that the borrower commissions "independent EA experts not affiliated with the projects to carry out the EA".¹⁰⁷⁷ Beyond that, legislators and regulators increasingly establish expert committees to provide non-binding advice and recommendation. To be appointed as an expert, it is naturally required to have special knowledge and expertise in the respective sector.¹⁰⁷⁸ The ideal-type portrayed in norms on the composition of expert committees is often the neutral, independent and objective third party that brings in technical, non-political advice. However, several objections can be raised against the assumption that this ideal-type is in any way close to reality.¹⁰⁷⁹ First, as discussed above, the objectivity of scientific knowledge per se can be questioned. Second, the professionalization and socialization of experts do not occur in an interest-free environment. Often the very expertise that is a required qualification to become a member of the expert group has been gained through practical experience within private companies. Institutional rules can ensure that the involved experts are free from immediate interests or incentives, for example by requiring screening for conflicts of interests, e.g. if members are affiliated to a political party or an interested private organization.¹⁰⁸⁰ Nevertheless, the closeness of many experts to particular interests indicates an intellectual disposition that may be an obstacle to critically review the underlying paradigms of a regime, or – in Argyris' words – that prevents double-loop learning which would allow identifying and correct errors in the "underlying program".¹⁰⁸¹ This means that the decision of

nal" participation. For a similar distinction with regard to the WTO Bonzon, *Public Participation and Legitimacy in the WTO* (above, n. 280), p. 4.

¹⁰⁷⁶ By way of example: Martin Shapiro, "Deliberative," "Independent" Technocracy v. Democratic Politics: Will the Globe Echo the E.U.?, *Law and contemporary problems*, 68 (2005), pp. 341–356; Fehling, *Verwaltung zwischen Unparteilichkeit und Gestaltungsaufgabe* (above, n. 902); Andreas Voßkuhle, 'Sachverständige Beratung des Staates als Governanceproblem', in: Sebastian Botzem and et al. (eds.), *Governance als Prozess*, pp. 547–571; Brun-Otto Bryde, *Zentrale Wirtschaftspolitische Beratungsgremien in der Parlamentarischen Verfassungsordnung* (Frankfurt a. M.: Metzner, 1972); Åse Gornitzka and Ulf Sverdrup, 'Access of Experts: Information and EU Decision-making', *West European Politics*, 34 (2011), pp. 48–70; Mark Brown, *Science in Democracy* (Cambridge, Mass: MIT Press, 2009).

¹⁰⁷⁷ World Bank, OP 4.01 para 4 (revised 2013); similar: ESS1 para 33.

¹⁰⁷⁸ For example: European Commission, *Framework for the Commission Expert Groups: Horizontal Rules and Public Register* (2010), C(2010) 7649 final, Rule 9.

¹⁰⁷⁹ Herzmann, *Konsultationen* (above, n. 960), p. 67; Fehling, *Verwaltung zwischen Unparteilichkeit und Gestaltungsaufgabe* (above, n. 902), p. 155.

¹⁰⁸⁰ Justus Lentsch and Peter Weingart, 'Quality control in the advisory process: towards an institutional design for robust science advice', in: Justus Lentsch and Peter Weingart (eds.), *The politics of scientific advice*, pp. 353–374, p. 361.

¹⁰⁸¹ Argyris, *Knowledge for Action* (above, n. 1060), p. 50.

whom to select and involve as an expert is essential. In particular from the perspective of the participatory-pluralistic, but also the analytic-deliberative risk paradigm, diversity and the consideration of minority views would be important. It is the role of law to guarantee, through adequate organization and procedure, that the whole spectrum of expert-opinions is considered.¹⁰⁸² The following chapters will analyze to what extent that is the case.

For HRIAs, it is evident that those conducting the assessment should have knowledge about human rights analysis – as *know-how* and *know-that*. For the impact assessments of its trade agreements, for example, the European Commission largely relies on external consultants. Consultants are selected through a competitive tendering procedure, and the consultants must have “proven expertise and knowledge in economic, social, human rights and environmental impact analyses”.¹⁰⁸³ It has been criticized though that human rights expertise is not always sufficiently proven.¹⁰⁸⁴

5.5.3.2.2 Interest Groups

In spite of often counting as experts, there is a broad range of actors who can (also) be qualified as interest groups, including grass-roots community-based organizations, issue-motivated NGOs and labor organizations, consumer protection associations, advocacy networks and other lobby groups.¹⁰⁸⁵ The assumption is that more information and feedback from the public enables decision-makers to enact more effective and fitting regulation.¹⁰⁸⁶ If organizations representing affected parties participate in decision-making, it is more likely that the decision will be regarded as “appropriate and legitimate”¹⁰⁸⁷ and be accepted. While there is also evidence that broader participation can increase conflicts, a closer analysis of this concern would require empirical analysis that would go beyond the scope of this book.

The European Commission, in principle, distinguishes between independent experts, and individuals or organizations representing certain interests. In the latter case, a “balanced representation of relevant stakeholders” shall be ensured – at least “as far as possible”.¹⁰⁸⁸ While different distinctions are possible in order to determine what counts as “balanced representation”, an important distinction can be made between for-profit and not-for-profit groups. In particular disputes about the adequate role of for-profit interests in trade and development policy-making

¹⁰⁸² Fehling, *Verwaltung zwischen Unparteilichkeit und Gestaltungsaufgabe* (above, n. 902), p. 155.

¹⁰⁸³ European Commission, ‘Handbook for Trade Sustainability Impact Assessment’ (above, n. 212), p. 10

¹⁰⁸⁴ Walker, ‘Human Rights in the Trade and Sustainability Impact Assessment of the EU-Tunisia Free Trade Agreement’ (above, n. 57), p. 108. One solution Walker suggests would be to tender separately for human rights consultants, given the specific nature of the analysis: *Ibid.*, p. 120.

¹⁰⁸⁵ Tara Melish and Errol Meidinger, ‘Protect, Respect, Remedy and Participate: “New Governance” Lessons for the Ruggie Framework’, in: Radu Mares (ed.), *The UN Guiding Principles on Business and Human Rights*, pp. 303–336, p. 317.

¹⁰⁸⁶ *Ibid.*, p. 318; Jody Freeman, ‘Collaborative Governance in the Administrative State’, *UCLA Law Review*, 45 (1997), pp. 1–98.

¹⁰⁸⁷ Melish and Meidinger, ‘Protect, Respect, Remedy and Participate: “New Governance” Lessons for the Ruggie Framework’ (above, n. 1085), p. 318; Tom R. Tyler, *Why people obey the law* (Princeton, N.J.: Princeton University Press, 2006), 3 f.

¹⁰⁸⁸ European Commission, *Framework for the Commission Expert Groups: Horizontal Rules and Public Register* (above, n. 1078), Rule 9; similar, for consultations in the context of Trade SIAs: European Commission, ‘Handbook for Trade Sustainability Impact Assessment’ (above, n. 212), p. 26.

became subject to disputes before the European courts and the EU Ombudsman.¹⁰⁸⁹

For-profit interest-representation can be justified due to the special expertise these actors generally possess, which demonstrates again that the line between expert and interest-based representation is difficult to draw.¹⁰⁹⁰ These are market participants active in the specific sector and therefore might have relevant operational knowledge.¹⁰⁹¹ In the area of risk assessment and management, Kasperson and Kasperson held that corporations as those closest to the technologies and production processes would be in the best position to manage risks – “if only they could be trusted with the social mandate to protect the public and the environment.”¹⁰⁹² This shows why, also for HRIAs, the involvement of for-profit interest groups is a double-edged sword. On the one hand, their input is helpful to create regulation that protects human rights as they know where things can “go wrong”. They can provide important information and knowledge.¹⁰⁹³ On the other hand, business interests are not primarily targeted at human rights promotion, or may even conflict sharply. This is not to say that their interests are not legitimate or their expertise is not important, but stresses the importance to implement the principle of balanced representation effectively. This is not only a question of fairness but also of effectiveness as even during the early advisory or negotiation stage opposing interests might be (at least partly) conciliated.¹⁰⁹⁴

5.5.3.2.3 Participation of the Public

Public participation includes the involvement of actors without being formally appointed as experts in an advisory committee. The principle that individuals or communities whose rights and interests are likely to be affected have a right to participate is at the heart of the legal Principle of Affectedness and explicitly embedded in domestic/EU and international public law.¹⁰⁹⁵ But increasingly, decision-making procedures are open to the general public, i.e. even to individuals who do not have a particular right or special interest in the respective decision.

Three different functions can be assigned, even though to a different degree, to participation: First, it obviously serves as a source of knowledge, as external participants – even if they are not

¹⁰⁸⁹ See, by way of example: European Ombudsman, OI/7/2014/NF, *Composition of Civil Dialogue Groups* (2015); Decision of the European Ombudsman closing his inquiry into complaint 1151/2008/(DK)ANA against the European Commission, 09 July 2013, para 27 et seq.

¹⁰⁹⁰ Andreas Voßkuhle, ‘Sachverständige Beratung des Staates’, in: Josef Isensee and Paul Kirchhof (eds.), *Handbuch des Staatsrechts der Bundesrepublik Deutschland*, Ernst-Wolfgang Böckenförde, pp. 425–475, § 43 para 17–20.

¹⁰⁹¹ Martin Eifert, ‘Regulierungsstrategien’, in: Wolfgang Hoffmann-Riem, Eberhard Schmidt-Aßmann, and Andreas Voßkuhle (eds.), *Grundlagen des Verwaltungsrechts Band I*, pp. 1319–1394, 80 ff.; on external expertise in general: Burkard Wollenschläger, *Wissensgenerierung im Verfahren* (Tübingen: Mohr Siebeck, 2009), 19 ff.

¹⁰⁹² Kasperson and Kasperson, *Publics, Risk Communication and the Social Amplification of Risk* (above, n. 828), p. 5.

¹⁰⁹³ Hans-Georg Dederer, *Korporative Staatsgewalt* (Tübingen: Mohr Siebeck, 2004), p. 79.

¹⁰⁹⁴ Ibid.; Winfried Brohm, ‘§ 36: Sachverständige Beratung des Staates’, in: Josef Isensee and Paul Kirchhof (eds.), *Handbuch des Staatsrechts, Bd. 2: Demokratische Willensbildung - Staatsorgane des Bundes*, para 19.

¹⁰⁹⁵ Benedict Kingsbury, Nico Krisch, and Richard B. Stewart, ‘The Emergence of Global Administrative Law’, *Law and contemporary problems*, 68 (2005), pp. 15–61, p. 37.

formally appointed as “experts” – can provide important information relevant for informed decision-making. This function is clearly reflected in the objective-managerial paradigm. Participants can provide information about technical facts, but also information about people’s preferences and beliefs, all of which can be relevant for responsive public decision-making. Even in highly technical initiatives such as a planned trade agreement or a debt-restructuring program, public participation can be a valuable source of information. It would be wrong, as often appears to be the case, to equal the “public” with “laypersons”. In particular as the formal involvement of experts in advisory committees is necessarily limited to maintain a viable group-size, there are many experts among the “general public” who can make valuable contributions and, for example, help to identify potential errors in proposed initiatives or point the attention to certain unintended negative consequences. As such, participation in order to gain information and knowledge aims at increasing output-legitimacy.

Second, participation can also, and this will be addressed more closely in chapter 7, have an inherent value and be an expression of a (human and/or democratic) right to participation which can increase input legitimacy. Third, the function of participation can be to increase the acceptance of an initiative, which would refer to social or perceived legitimacy. However, this is a double-edged sword as institutionalized participation can also break down social movements or other forms of non-institutionalized collective action that might be necessary to induce positive change.¹⁰⁹⁶ These two aspects, which do not directly concern knowledge-generation, will be looked at in more detail below.

5.5.4 The Depth and Degree of Knowledge Generation

A cross-cutting question is how much information decision-makers must gather before taking decisions, and whether there are any legal “stopping rules”.¹⁰⁹⁷ In economics, it is suggested that actors should gather information up to the point where the marginal costs of collecting more information equal the expected marginal benefits further information would bring.¹⁰⁹⁸ However, this is generally not a viable approach for the institutionalization of HRIAs. Where decisions are made under high degrees of uncertainty, the marginal benefits of further information would also be uncertain. Pushing this consideration a little further, decision-makers would have to gather information about the added value of more information.¹⁰⁹⁹ Consequently, uncertainty about the expected impacts of an initiative would be coupled with uncertainty about the value of further information.

Nevertheless, public law contains certain stopping rules, even though they are often rather arbitrary. Time periods are one example:¹¹⁰⁰ In IA-law, consultation norms normally contain fixed

¹⁰⁹⁶ Rajagopal, *International Law from Below* (above, n. 253), 152 and 258 ff.

¹⁰⁹⁷ Spiecker gen. Döhmman, ‘Staatliche Informationsgewinnung im Mehrebenensystem - ein Überblick’ (above, n. 1014), p. 282; Adrian Vermeule, ‘Rationally Arbitrary Decisions (in Administrative Law)’, Harvard Law School, in: Public Law & Legal Theory Working Paper Series, Paper No. 13-24, p. 14.

¹⁰⁹⁸ George Stigler, ‘The Economics of Information’, *The Journal of Political Economy*, 69 (1961), pp. 213–225.

¹⁰⁹⁹ Jon Elster, ‘Excessive Ambitions’, *Capitalism and Society*, 4 (2009), pp. 1–30, p. 5; Vermeule, ‘Rationally Arbitrary Decisions (in Administrative Law)’ (above, n. 1097), p. 14.

¹¹⁰⁰ Spiecker gen. Döhmman, ‘Staatliche Informationsgewinnung im Mehrebenensystem - ein Überblick’ (above, n. 1014), p. 282.

periods, in the case of EU open consultations generally 12 weeks.¹¹⁰¹ As illustrated above, law generally requires that agencies take the comments provided during consultation into account and either adopt the proposal accordingly or give a reason for why they do not do so. Similarly, advisory committees generally have a certain period of time to debate issues, prepare drafts and recommendations, etc. These periods can become a useful stopping-rule to determine how much information must be gathered during the consultation. They are objective and precise, but somehow arbitrary: there is no guarantee that 12 weeks is always an adequate period of time to generate an adequate amount of information. In response, consultation periods can generally be extended at the agency's discretion.

In particular complex decisions require negotiations and further debate, and the amount of necessary information can only be determined during the assessment and decision-making process. The EU guidelines on impact assessments recognize flexibility and therefore establish the principle of proportionate analysis: Impact assessments should be "proportionate to the type of intervention or initiative, the importance of the problem or objective, and the magnitude of the expected or observed impacts."¹¹⁰² It is thus a flexible rule, and the proportionate level of analysis is – as will be seen later – determined during each IA-process. In the case of the European Commission, bodies like the Regulatory Scrutiny Board review the quality of draft IA-reports and thus also whether stopping-rules were adequately applied and whether the analysis is sufficiently thorough.

5.6 Interim Conclusion and Outlook

This chapter about uncertainty and knowledge generation has addressed a cross-cutting issue relevant to the following analysis. It also dealt with different approaches to risk, usually defined in terms of the likelihood and magnitude of potential harm. Before this background, chapter 6 looks at the role law plays in determining which initiatives require a full impact assessment – in general those where impacts are *likely* to be *significant*. This is an important step as it would be impossible for an institution to assess *all* possible human rights impacts of *all* initiatives. The prediction of likely significant impacts is largely a technical – i.e. scientific or empirical – exercise. However, drawing on domestic EIA law and the EU Impact Assessment regime, it is possible to identify legal rules and principles that provide guidance on how to determine the significance of impacts. This is one answer to the follow-up question raised above in the context of the Principle of Affectedness, namely how to determine which impacts on humanity should be taken into account. Afterwards, chapter 7 will examine the role of participation in impact assessments, again in administrative law in general and for EU decision-making in particular. Chapter 8 will focus on the role law plays in the choice of analytical methods to predict human rights impacts during the analysis stage of IAs. As both participation and the impact analysis are essential elements for all impact assessments, it seems justified to dedicate one chapter to each issue.

¹¹⁰¹ European Commission, *Better Regulation Toolbox* (above, n. 204), p. 7.

¹¹⁰² *Ibid.*, p. 8.

6 CHAPTER 6: THE NECESSITY AND SCOPE OF IMPACT ASSESSMENTS

The principle of affectedness – and in particular the obligation to assess the human rights impacts of an initiative irrespective of where they occur – raises many follow-up questions. This chapter will address one of them, namely how to decide which particular initiatives require an in-depth IA. In domestic EIA-law, this concerns mainly the screening and scoping process during the pre-assessment stage: Essentially, full EIAs are required if an initiative is *likely* to produce *significant* impacts on protected rights or interests. IA-law thus uses the risk-related elements of likelihood and significance¹¹⁰³ previously described to narrow down the initiatives and effects that require a closer analysis.

This chapter will focus on the role law plays in determining the necessity to conduct IAs in every-day decision-making. It might seem that the determination of likely significant impacts is a highly technical decision taken on a case-by-case basis. This chapter argues that this is only partially correct. While the margin of discretion is necessarily broad, it is limited procedurally and substantively: it is limited *procedurally* as there is an obligation to follow certain structured and participatory procedures in order to make informed policy proposals and decisions. Discretion can also be limited *substantively*. As EIA law indicates, the use of methodologies to evaluate which impacts are likely and significant is not completely discretionary but guided by substantive principles and criteria that can also be subject to (limited) judicial review. This is also the case for the EU's IA regime.

The first part of this chapter will provide an overview of the EU's impact assessment regime and illustrate which norms guide the conduct of HRIAs. The second part of this chapter will identify legal criteria and principles that must be applied during the pre-assessment stage; drawing mainly on a comparison with domestic EIA law, the comparison demonstrates that similar principles apply or could apply at EU level for policy HRIAs.

6.1 The Emergence of the EU Impact Assessment Regime

EU law increasingly requires the assessment of environmental, social and human rights impacts, irrespective of where they occur. While such an obligation exists, as has been argued above, under international and EU constitutional law (defined as an expression of the principle of affectedness), this chapter looks at the more specific norms determining under what circumstances a specific initiative requires an in-depth HRIA.¹¹⁰⁴

At the level of EU decision-making, two major types of impact assessments can be distinguished: First, the Trade Sustainability Impact Assessments (“Trade SIAs”) commissioned by DG Trade to evaluate also the external impacts of trade policies – i.e. the conclusion of trade and investment agreements. In addition, the general (or Integrated) Impact Assessments concern different types

¹¹⁰³ Holder, *Environmental Assessment* (above, n. 27), p. 101.

¹¹⁰⁴ This is important for two reasons: First, it demonstrates that HRIAs are increasingly accepted as “best practice”, and it may even be the case that this practice will – as illustrated above in the context of trans-national EIAs – contribute to the emergence of a customary HRIA law in the future. Second, it is important because these norms respond to many of the follow-up questions raised above, namely how to actually implement or operationalize the (idealistic) obligations established under the principle of affectedness in every-day decision-making.

of economic, social and environmental impacts covering all EU policy areas, and increasingly also explicitly their internal and external human rights impacts. While Trade SIAs and general IAs have different origins, they have increasingly merged, and in particular the Trade SIA guidelines refer extensively to the general IA guidelines. Similarly, both IA regimes increasingly recognize that certain EU policies can affect the human rights of individuals or communities within or outside the EU so that both internal and external effects should be considered.¹¹⁰⁵ The latter aspect is especially severe where economically and institutionally weaker countries are affected which are less able to set up broad and stable social safety nets to protect their citizens from the negative consequences of liberalization.

This section will provide a brief overview of the emergence of the EU Impact Assessment regime in general and the role of human rights impact assessments in particular. It will outline the development of the general integrated Impact Assessment regime and of the specific Trade SIA regime, and illustrate the underlying regulatory technique. As the IA regime is mainly built on guidelines, which are neither part of primary nor secondary law, the legal nature of these norms will be briefly explored.

6.1.1 The Commission's general Impact Assessments

The European Commission was using impact assessments even before adopting its integrated approach covering economic, environmental and social impacts in 2002. For example, the European Commission introduced Business Impact Assessments already in 1986, which was entirely focused on the costs of regulation to business, or has prepared other "impact notes". The European Parliament stated that these impact assessments provided "no information that has been helpful in assessing the consequences and costs of proposed European legislation".¹¹⁰⁶

In response, the Commission announced to prepare an agenda for simplified and better lawmaking,¹¹⁰⁷ and expressed its views in reports, communications or the White Paper on European Governance, which emphasizes the importance to "assess the potential economic, social and environmental impact, as well as the costs and benefits of that particular approach".¹¹⁰⁸

The institutionalization of impact assessments was officially endorsed by the European Council in Göteborg (June 2001) and Laeken (December 2001) with a focus on two major reform goals: First, to simplify and improve the European Union's regulatory environment, and second, to "consider the effects of proposals in their economic, social and environmental dimensions" and

¹¹⁰⁵ European Commission, *Guidelines on the analysis of human rights impacts in impact assessments for trade-related policy initiatives* (above, n. 42), p. 2; European Commission, *Better Regulation Toolbox* (above, n. 204), e.g. Tool #19, p. 130 with regard to core labor standards, and Tool #34, p. 264 with regard to human rights in developing countries.

¹¹⁰⁶ European Parliament, 'Report on assessment of the impact of Community legislation and the consultation procedures 2003/2079(INI)', Final A5-0221/2004, 24 March 2004, E. 1.

¹¹⁰⁷ European Commission, *Better Lawmaking 2001* (2001), 15181/01.

¹¹⁰⁸ European Commission, *European Governance* (2001), p. 20. This was in line with the recommendation of the Mandelkern Group Final Report, composed of Member State experts on better regulation and named after its chair, the French government official Dieudonné Mandelkern: Mandelkern Group on Better Regulation, 'Final Report', 2001; Meuwese, *Impact Assessment in EU Lawmaking* (above, n. 267), p. 2.

thus include sustainability considerations in all major policy proposals.¹¹⁰⁹ Even though primarily targeted at legislation and regulation in order to increase sustainable development and competitiveness within the European Union, the Conclusions at the Laeken-Council also welcomed the launch of the Doha Development Round based on an “approach balanced equally between liberalization and regulation, taking account of the interests of developing countries and promoting their capacity for development. The Union is determined to promote the social and environmental dimension of that round of negotiations.”¹¹¹⁰ While at first sight an altruistic sounding declaration, it is perfectly compatible with the strategy to increase the EU’s global competitiveness if the global economic order gets more aligned towards sustainable development as endorsed by the EU itself.

This integrated impact assessment system was first implemented in 2002¹¹¹¹ by a Communication from the Commission. The Commission was aware that the institutionalization of impact assessments was work-in-progress and established a working group with representatives from different Directorate-Generals (“DGs”) to thoroughly review the first set of IA-guidelines.¹¹¹² The working group received a mandate from the Directorates-General to propose a new and comprehensive set of guidelines, which were published in June 2005.¹¹¹³ The new guidelines in the legal form of a Commission Staff Working Document were published even though there was no specific legal obligation to do so.¹¹¹⁴ The Commission instructed the Commission services to apply the IA-guidelines.¹¹¹⁵ These norms can be qualified as administrative guidelines; they bind European Commission staff directly and can have, under certain conditions, an indirectly binding external effect.

While the Commission decided that Fundamental Rights have to be taken into account,¹¹¹⁶ the 2005 guidelines were still quite disappointing: not much more than sporadic reference was made to “sustainable development” and “fundamental rights”. The guidelines contained only a brief and vague reference to emphasize that “consideration should be given to whether the proposal will have an impact on [...] developing countries”.¹¹¹⁷ The importance to take fundamental

¹¹⁰⁹ Presidency Conclusions, European Council Meeting in Göteborg (2001): “The Commission will include in its action plan for better regulation to be presented to the Laeken European Council mechanisms to ensure that all major policy proposals include a sustainability impact assessment covering their potential economic, social and environmental consequences”; European Court of Auditors, Special Report No. 3/2010, *Impact Assessments in the EU Institutions: Do they support decision-making?* (2010), p. 8.

¹¹¹⁰ Presidency Conclusions, European Council Meeting in Laeken (2001) para 20.

¹¹¹¹ European Commission, *Communication from the Commission on Impact Assessment*, 5 June 2002, COM(2002)276 final; Meuwese, *Impact Assessment in EU Lawmaking* (above, n. 267), p. 56.

¹¹¹² Meuwese, *Impact Assessment in EU Lawmaking* (above, n. 267), p. 56.

¹¹¹³ European Commission, *Impact Assessment Guidelines*, 15 June 2005, SEC(2005) 791.

¹¹¹⁴ Meuwese, *Impact Assessment in EU Lawmaking* (above, n. 267), p. 56.

¹¹¹⁵ European Commission, *Impact Assessment Guidelines* (above, n. 1113) with reference to SEC(2005) 790.

¹¹¹⁶ Hachez and Lein, ‘Assessing EU Human Rights Impact Assessments’ (above, n. 507), p. 246; for an overview of the relationship between fundamental rights and impact assessments during the “early” years: Helen Toner, ‘Impact Assessments and Fundamental Rights Protection in EU Law’, *European Law Review*, 31 (2006), pp. 316–341.

¹¹¹⁷ European Commission, *Impact Assessment Guidelines* (above, n. 1113), p. 33. Even in the respective questionnaire, the obligation to consider impacts on developing countries is not further specified, *ibid.* p. 29: “Does it affect EU foreign policy and EU/EC development policy? Does the option affect third countries with which the EU has preferential trade arrangements? Does the option affect developing, least developed and middle income countries?”

rights into account was mentioned, as well as the fact that fundamental rights “may pose legal limits to the Union's right to take action on the problem”. For the rest, merely a footnote refers to the Commission document on “Compliance with the Charter of Fundamental Rights in Commission legislative proposals”.¹¹¹⁸

However, the IA-guidelines were still in an initial experimental phase, and the Commission instructed the Secretariat General to update them regularly.¹¹¹⁹ After an update in 2006 and several years of experience, the Commission revised and replaced the IA-guidelines in 2009¹¹²⁰ and again, most recently, in 2015/2017 when they were incorporated into the Better Regulation Guidelines.¹¹²¹ The 2009 reform already brought about first changes to better take note of potential effects on development and human rights: It contained a new section on assessing impacts on developing countries, supplemented by respective guidance in the annexes.¹¹²² While the IA-guidelines still focused mainly on impacts within the European Union and contained a stronger focus on business impacts than on human rights impacts, there is at least a slowly emerging trend to give more weight to social and human rights impacts inside and outside the EU. For example, unlike in the 2005 guidelines, social impacts in developing countries, especially on income distribution, shall be considered.¹¹²³ The Commission's Impact Assessments are therefore tools that could enhance Policy Coherence for Development at a very early stage of the decision-making cycle.¹¹²⁴ However, at least during the first two years after the reform for stronger development-orientation of IAs, only a few proposals with a potential impact on developing countries explicitly considered these consequences; in 2011, the Commission therefore declared to look at “ways of raising the profile and awareness of the PCD requirement in the IA Guidelines and strengthening analytical capacity for assessing development impacts of non-development policies”.¹¹²⁵

The human rights and development dimensions in impact assessments were further elaborated in additional Commission documents. During the revision process for the IA-guidelines especially the need for “greater visibility for fundamental rights within the Impact Assessment process” came up.¹¹²⁶ In 2010, the Commission published its “Strategy for the effective implementation of the Charter of Fundamental Rights by the European Union”, where it laid down the different stages in the IA-process as well as other instruments relevant for more effective implementation of fundamental rights in the Commission's decision-making process.¹¹²⁷ In consequence, the

¹¹¹⁸ European Commission, *Impact Assessment Guidelines* (above, n. 1113), Fn. 30, with reference to the Commission Communication on *Compliance with the Charter of Fundamental Rights in Commission legislative proposals: Methodology for systematic and rigorous monitoring*, COM(2005) 172 final.

¹¹¹⁹ European Commission, *Impact Assessment Guidelines* (above, n. 1113) with reference to SEC(2005) 790.

¹¹²⁰ European Commission, *Impact Assessment Guidelines* [2009].

¹¹²¹ European Commission, *Better Regulation for Better Results - An EU agenda* (2015), COM(2015) 215 final; European Commission, *Better Regulation Guidelines* (above, n. 199). See below for a closer analysis.

¹¹²² Especially: European Commission, *Impact Assessment Guidelines* [2009], 8.3.

¹¹²³ *Ibid.*, 8.2 Table 2.

¹¹²⁴ European Commission, ‘Commission Staff Working Document: EU 2013 Report on Policy Coherence for Development’ (above, n. 583), 4.2.

¹¹²⁵ *Ibid.*

¹¹²⁶ European Commission, *Report on the Practical Operation of the Methodology for a Systematic and Rigorous Monitoring of Compliance with the Charter of Fundamental Rights* (2009), COM(2009) 205 final, 3.1.

¹¹²⁷ European Commission, *Communication from the Commission: Strategy for the effective implementation of the Charter of Fundamental Rights by the European Union*, COM(2010)573 final.

Commission prepared a Commission Staff Working Paper in 2011 which contains more detailed and operational guidance on how to take account of fundamental rights during the impact assessment process.¹¹²⁸

The Commission makes clear that the inclusion of fundamental rights analysis cannot be a substitute for a legal control of fundamental rights compliance.¹¹²⁹ This makes sense insofar as IAs are ideally conducted at an early stage of the policy-making cycle so that a specific compliance assessment would be impossible. So the examination of the draft's compliance with fundamental rights is carried out at a later stage.¹¹³⁰ Nevertheless an "Impact Assessment can do some of the groundwork to prepare for the fundamental rights proofing of legislative proposals".¹¹³¹

This does not mean, however, that decision-makers are not required to analyze as good as possible the compatibility of different policy options with human rights as legal rights. Already the 2009 guidelines make clear, even though without detailed explanation or guidance, that there are fundamental rights which are absolute and that others can be limited only if they pass a necessity and proportionality test.¹¹³² It thus makes clear that certain options are not viable as they would not be in compliance with human rights. However, such a brief reference to the justification of fundamental rights infringements alone would probably, especially for Commission staff without legal training, not be too helpful.

The inclusion of human rights in the EU's impact assessment regime was most prominently endorsed by the Council of the European Union. In its 2012 Strategic Framework and Action Plan for Human Rights and Democracy, it called for the European Commission to incorporate human rights in all Impact Assessments.¹¹³³ In 2015, new "Better Regulation Guidelines"¹¹³⁴ were enacted by the Commission, which also incorporate the revised guidelines on impact assessments. The Better Regulation Guidelines are supplemented by a more detailed "Toolbox"¹¹³⁵ providing structured guidance on "better regulation" in general and different aspects of impact assessments in particular. Of particular relevance for HRIAs are Tool 28 on *Fundamental Rights & Human Rights* and, in its global dimension, Tool 34 on *Developing countries*. The provisions on competences, procedures and substantive standards contained in these IA guidelines will be analyzed in the following chapters. Recently, the European Parliament, the Council of the European Union and the European Commission also concluded, based on Article 295 TFEU, an inter-

¹¹²⁸ European Commission, *Operational Guidance on taking account of Fundamental Rights in Commission Impact Assessments*, SEC(2011) 567 final.

¹¹²⁹ European Commission, *Report on the Practical Operation of the Methodology for a Systematic and Rigorous Monitoring of Compliance with the Charter of Fundamental Rights* (above, n. 1126), p. 6.

¹¹³⁰ European Commission, *Communication from the Commission: Strategy for the effective implementation of the Charter of Fundamental Rights by the European Union* (above n. 1127), p. 6.

¹¹³¹ European Commission, *Report on the Practical Operation of the Methodology for a Systematic and Rigorous Monitoring of Compliance with the Charter of Fundamental Rights* (above, n. 1126), p. 6.

¹¹³² European Commission, *Impact Assessment Guidelines* [2009], 3.1; European Commission, *Report on the Practical Operation of the Methodology for a Systematic and Rigorous Monitoring of Compliance with the Charter of Fundamental Rights* (above, n. 1126), p. 6.

¹¹³³ Council of the European Union, *Human Rights and Democracy: EU Strategic Framework and EU Action Plan* (2012), 11855/12; Hachez and Lein, 'Assessing EU Human Rights Impact Assessments' (above, n. 507), p. 247; Walker, 'Human Rights in the Trade and Sustainability Impact Assessment of the EU-Tunisia Free Trade Agreement' (above, n. 57), p. 104.

¹¹³⁴ European Commission, *Better Regulation Guidelines*, SWD(2015) 111 final, updated in 2017 by: European Commission, *Better Regulation Guidelines* (above, n. 199).

¹¹³⁵ European Commission, *Better Regulation Toolbox* (above, n. 204).

institutional agreement an better law-making which contains a commitment to conduct impact assessments where fundamental rights “should” be fully respected.¹¹³⁶

The EU guidelines and toolbox use the term “impact assessment” in a narrow and technical sense in contrast with explanatory memoranda, evaluations or human rights screening. However, from the functional perspective taken here,¹¹³⁷ large overlaps exist. Still, it is important to briefly identify the related concepts to which the Better Regulation Guidelines and the Toolbox often refer. This regards first *explanatory memoranda*. While based on a long practice in EU lawmaking, the definition, purpose – namely to “explain the reasons for, and the context of, the Commission’s proposal” – and required content of explanatory memoranda are now laid down in the Better Regulation Guidelines and Toolbox.¹¹³⁸ Impact assessments and explanatory memoranda are closely related insofar as the result of impact assessment and stakeholder consultations should be reflected in explanatory memoranda. However, they serve, ideally, different functions: the IA has a guiding function mainly at the stage when the proposal is being developed, whereas the explanatory memorandum gives reasons for and justifies the actual proposal, for example vis-à-vis other EU institutions or the Member States.¹¹³⁹

The EU Better Regulation Guidelines also require *evaluations*; the difference between IAs in the technical sense and evaluation regards timing: Evaluations are essentially what was described above as ex-post impact assessment: “While IAs use evidence before decisions are taken to assess whether a specific intervention is justified and how it should work to achieve certain objectives, evaluations use evidence to assess whether an ongoing or past intervention was justified and whether it worked (or is working) as expected and achieved its objectives”.¹¹⁴⁰ Insofar, the terms evaluation and ex-post impact assessment can be used quite interchangeably. Evaluations thus not only identify what has happened, but also why it happened – and compare these findings with the predictions made in the IA. Ideally, evaluations take a wider perspective and ask whether there were unintended or unexpected effects not predicted in the IA.¹¹⁴¹ It shall thus generate knowledge about the actual effects of an initiative and enable decision-makers (if legally and politically viable) to respond to these new insights, and to potentially learn and improve IA-methodologies for future initiatives.

The Better Regulation Guidelines also require the use of a so-called “*Fitness Check (FC)*”, which is an exercise that not only covers individual initiatives but a group of measures “which have some relationship to each other (normally a common set of objectives) justifying a joint analysis.”¹¹⁴² Thus, an FC helps to identify synergies or inefficiencies, and better identify cumulative impacts. As such, evaluations and fitness-checks can be relevant for a better understanding of internal and external impacts of all kind, including social and human rights impacts. Therefore, in princi-

¹¹³⁶ European Union, *Interinstitutional Agreement on Better Law-Making* (2016), OJ L 123, para 12.

¹¹³⁷ See section 1.4.2.

¹¹³⁸ European Commission, *Better Regulation Toolbox* (above, n. 204), Tool #38, p. 287 et seq.; European Commission, *Better Regulation Guidelines* (above, n. 199), p. 38 et seq.

¹¹³⁹ Similar: Meuwese, *Impact Assessment in EU Lawmaking* (above, n. 267), p. 81.

¹¹⁴⁰ European Commission, ‘Commission Staff Working Document: EU 2013 Report on Policy Coherence for Development’ (above, n. 583), 4.5; European Commission, *Better Regulation Guidelines* (above n. 199), p. 50.

¹¹⁴¹ European Commission, *Better Regulation Toolbox* (above, n. 204), Tool # 43, p. 315.

¹¹⁴² *Ibid.*, p. 316.

ple, it can be an important tool to increase not only accountability, but also Policy Coherence for Development.¹¹⁴³

Both Evaluations and Fitness Checks are tools used to implement the “Regulatory Fitness and Performance Program” (REFIT). REFIT requires action to make EU law “simpler, lighter, more efficient and less costly, thus contributing to a clear, stable, least burdensome and most predictable regulatory framework supporting growth and jobs.”¹¹⁴⁴ REFIT is mainly a tool to increase the efficiency of regulation. While the ex-post evaluations can also be relevant for policies affecting human rights internationally, as the review of the EU dual-use export controls regulation demonstrates,¹¹⁴⁵ development-related and human rights impacts play so far only a marginal role: its main goal is to “ensure that EU law is ‘fit for purpose’” and to reduce regulatory burdens.”¹¹⁴⁶ It therefore runs the risk of becoming mainly a deregulation instrument.

6.1.2 Trade Sustainability Impact Assessments (Trade SIAs)

As seen before, especially the United States also considered international environmental impacts of its trade agreements. Unlike the EIAs in the United States and Canada, the EU has not enacted a binding regulation committing itself to conduct trade impact assessments. Nevertheless, the Commission developed a comprehensive tool to assess the economic, environmental and social consequences of trade agreements, the so-called Trade Sustainability Impact Assessment (Trade SIA). The initial methodology for these SIAs was developed in 1999 in preparation for the World Trade Organization (WTO) conference in Seattle building on the experience made with EIAs of trade policy in Canada and the United States.¹¹⁴⁷ The methodology was later critically reviewed, modified and applied to other sets of global and regional trade negotiations.¹¹⁴⁸ In 2006, the goals, principles and methods were first laid down in the Trade SIA Handbook,¹¹⁴⁹ which provides guidance on how to assess impacts of trade agreements. The handbook was revised recently and, after consultation on the draft handbook, the second edition has been finalized in 2016.¹¹⁵⁰ This handbook pays significant attention to human rights: it adds “human rights” as a fourth category to the formerly used three-part definition of sustainability (economic, environmental, social impacts). SIAs are independent ex-ante assessments carried out by external consultants.¹¹⁵¹ The consultants are selected in a competitive tendering procedure.¹¹⁵² Consultants must have “proven expertise and knowledge in economic, social, human rights and environmen-

¹¹⁴³ European Commission, ‘Commission Staff Working Document: EU 2013 Report on Policy Coherence for Development’ (above, n. 583), p. 23.

¹¹⁴⁴ European Commission, *Better Regulation Guidelines* (above, n. 199), p. 90.

¹¹⁴⁵ European Commission, *Regulatory Fitness and Performance Programme (REFIT): State of Play and Outlook* (2015), SWD(2015) 110 final, p. 148.

¹¹⁴⁶ European Commission, *Better Regulation Toolbox*, Tool #2, p. 9.

¹¹⁴⁷ Colin Kirkpatrick and Clive George, ‘Methodological issues in the impact assessment of trade policy: experience from the European Commission’s Sustainability Impact Assessment (SIA) programme’, *Impact Assessment and Project Appraisal*, 24 (2006), pp. 325–334, p. 326.

¹¹⁴⁸ *Ibid.*

¹¹⁴⁹ European Commission, *Handbook for Trade Sustainability Impact Assessment* [2006].

¹¹⁵⁰ European Commission, ‘Handbook for Trade Sustainability Impact Assessment’ (above, n. 212).

¹¹⁵¹ *Ibid.*, p. 5.

¹¹⁵² *Ibid.*, p. 10.

tal impact analyses” and in conducting stakeholder consultations, in order to “ensure the accuracy and quality of the SIA”.¹¹⁵³

The relationship between Trade SIAs and general IAs is best described as complimentary: The general IAs “are conducted before the European Commission proposes a new policy initiative, such as the opening of a trade negotiation”¹¹⁵⁴. IAs therefore accompany the decision of the College of Commissioners requesting authorization from the Council of the EU. The IA should, among other things, outline the preliminarily identified potential impacts a trade agreement could have.¹¹⁵⁵ Trade SIAs “are carried out in parallel with major bilateral and plurilateral trade negotiations.”¹¹⁵⁶ The “latter provides more detailed analysis of proposed trade agreements (including extensive stakeholder consultation), to be fed into negotiations once they have been launched.”¹¹⁵⁷ So the Trade SIA Handbook states that Trade SIAs must be launched soon after the Council of the European Union has formally authorized the Commission to enter into trade negotiations. They should, in general, not start later than 6 months after the start of negotiations in order to ensure that the analysis can still be usefully fed into the negotiating process.¹¹⁵⁸

The methodologies for the human rights analysis in general IAs and Trade SIAs are increasingly harmonized: principles and approaches regarding the assessment of human rights are, as the Commission itself makes clear, the same;¹¹⁵⁹ consequently the Trade HRIA Guidelines are explicitly based on – and supplement – the Better Regulation Guidelines.¹¹⁶⁰ The EU Ombudsman confirmed that the “Commission systematically includes an analysis of potential human rights impacts in at least three instances: impact assessments conducted in conjunction with the preparation of proposals for opening new trade negotiations; all sustainability impact assessments carried out during the trade negotiations; and all subsequent evaluations”.¹¹⁶¹

While social impacts were always part of the EU’s SIA-methodology, the role of human rights was, in the beginning, unclear at best. Overlaps exist between human rights and the social aspects mentioned in the handbook of 2006, including impacts on poverty, gender, health, educa-

¹¹⁵³ Ibid. Walker, however, critically pointed out that the standard to prove expertise in human rights impact analysis were not always very high: Walker, ‘Human Rights in the Trade and Sustainability Impact Assessment of the EU-Tunisia Free Trade Agreement’ (above, n. 57), p. 108.

¹¹⁵⁴ European Commission, *Guidelines on the analysis of human rights impacts in impact assessments for trade-related policy initiatives* (above, n. 42), p. 1; European Commission, ‘Commission Staff Working Document: EU 2013 Report on Policy Coherence for Development’ (above, n. 583), 4.3; see also: Hachez and Lein, ‘Assessing EU Human Rights Impact Assessments’ (above, n. 507), p. 249.

¹¹⁵⁵ European Commission, ‘Handbook for Trade Sustainability Impact Assessment’ (above, n. 212), p. 7.

¹¹⁵⁶ European Commission, *Guidelines on the analysis of human rights impacts in impact assessments for trade-related policy initiatives* (above, n. 42), p. 1; European Commission, ‘Commission Staff Working Document: EU 2013 Report on Policy Coherence for Development’ (above, n. 583), 4.3; see also: Hachez and Lein, ‘Assessing EU Human Rights Impact Assessments’ (above, n. 507), p. 249.

¹¹⁵⁷ European Commission, ‘Commission Staff Working Document: EU 2013 Report on Policy Coherence for Development’ (above, n. 583), 4.3; see also: Hachez and Lein, ‘Assessing EU Human Rights Impact Assessments’ (above, n. 507), p. 249.

¹¹⁵⁸ European Commission, ‘Handbook for Trade Sustainability Impact Assessment’ (above, n. 212), p. 11; Zerk, ‘Human Rights Impact Assessment of Trade Agreements’ (above, n. 30), p. 28.

¹¹⁵⁹ European Commission, *Guidelines on the analysis of human rights impacts in impact assessments for trade-related policy initiatives* (above, n. 42), p. 1.

¹¹⁶⁰ Ibid., p. 5.

¹¹⁶¹ European Ombudsman, *HRIA for the EU-Vietnam Free Trade Agreement* (above, n. 157).

tion, housing, labor or social protection.¹¹⁶² However, reference was only made to the MDGs and not human rights¹¹⁶³ - indeed, neither the term fundamental nor human right was mentioned at all. Not surprisingly, no systematic analysis of the human rights consequences was conducted. This has changed over time: while CSOs have urged the EU for quite some time to include human rights analysis, the Council and Commission only in 2012 officially declared the necessity for a full human rights analysis in IAs¹¹⁶⁴ These changes were, according to the Commission, one reason requiring a revision of the Trade SIA Handbook.¹¹⁶⁵

In 2010, the European Commission (DG Trade) laid down its plan for the future trade policy in a document called “Trade, Growth, and World Affairs”. Here, it explained that “[w]e will step up a gear in embedding impact assessments and evaluations in trade policymaking. This includes carrying out impact assessments on all new trade initiatives with a potentially significant economic, social or environmental impact on the EU and its trading partners, including developing countries. We will pay particular attention to wide consultation and involvement of civil society in the sustainability impact assessments that we carry out during trade negotiations. Once negotiations are concluded and before signature, we will prepare for the Parliament and Council an analysis of the consequences of the proposed deal for the EU. Finally, to help monitor the impacts of existing EU trade agreements, we will carry out ex-post evaluation on a more systematic basis.”¹¹⁶⁶

The Council of the European Union further endorsed the implementation of human rights. In the already mentioned Strategic Framework and Action Plan on Human Rights and Democracy of 25 June 2012 (“Action Plan 2012”), the Council calls upon the EU institutions to “[i]ncorporate human rights in all Impact Assessment [sic]”.¹¹⁶⁷ Consequently, in 2015, the European Commission has not only enacted the Better Regulation Toolbox which also contains information on how to assess human rights impacts within and outside the EU.¹¹⁶⁸ DG Trade has also enacted guidelines on the analysis of human rights impacts in impact assessments for trade-related policy initiatives (in the following: “Trade HRIA Guidelines”), i.e. not only trade agreements but also unilateral trade policies. Here, the Commission confirms that “[r]espect for the Charter of Fundamental Rights in Commission acts and initiatives is a binding legal requirement in relation to both internal policies and external action”.¹¹⁶⁹ It goes even further and holds that “when considering the impact of a trade-related initiative on human rights, CFR compliance will not be sufficient. The assessment must also examine the impact of the measures proposed on human rights obligations under international law.”¹¹⁷⁰ Irrespective of the extent to which the EU is bound by international human rights law – in particular considering that it has only ratified one internation-

¹¹⁶² European Commission, *Handbook for Trade Sustainability Impact Assessment* [2006], 53 et seq.

¹¹⁶³ Ibid.

¹¹⁶⁴ Council of the European Union, *EU Strategic Framework and Action Plan on Human Rights and Democracy* (above, n. 1133); European Commission, *Trade, Growth and Development* (2012), COM(2012) 22 final, p. 14.

¹¹⁶⁵ European Commission, ‘Handbook for Trade Sustainability Impact Assessment’ (above, n. 212), p. 3.

¹¹⁶⁶ European Commission, *Trade, Growth and World Affairs* (2010), COM(2010)612, p. 14.

¹¹⁶⁷ Council of the European Union, *EU Strategic Framework and Action Plan on Human Rights and Democracy* (above, n. 1133), point I/1.

¹¹⁶⁸ Now: European Commission, *Better Regulation Toolbox* (above, n. 204), Tool #28 and Tool #34.

¹¹⁶⁹ European Commission, *Guidelines on the analysis of human rights impacts in impact assessments for trade-related policy initiatives* (above, n. 42), p. 5.

¹¹⁷⁰ Ibid.

al human rights treaty – the Trade HRIA Guidelines contain a clear commitment to base the impact analysis on all human rights, including civil, political, economic, social, cultural and labor rights.¹¹⁷¹

One of the key principles of Trade SIAs is independence. They are – in contrast with the Commission’s Impact Assessments, but as recommended by the UN Guiding Principles on HRIA of Trade and Investment Agreements – carried out by “external consultants in a neutral and unbiased manner, under strict rules on the absence of conflicts of interest.”¹¹⁷² However, the external consultants must naturally comply with the Commission’s guidelines and requirements, in particular because consultancy contracts to conduct Trade SIAs are awarded through public tender. Also, the degree of independence is not unlimited for another reason. The Trade SIA Handbook identifies three main actors: the consultant, the stakeholders – and the Commission. The Commission forms an SIA inter-service steering group (ISG) to ensure systematic coordination between the consultants and the Commission services. The ISG should also mobilize the relevant expertise of Commission services. The ISG – which is set up at the beginning of the SIA – is involved in all key phases of the SIA process, among other things to ensure the “quality, impartiality and usefulness of the final product”.¹¹⁷³ The ISG is intended to be inclusive, and all interested Commission services and the European External Action Service (EEAS) are encouraged to participate. This encourages, as the Trade SIA Handbook explicitly states, a “pooling of knowledge and brings together a range of different perspectives”.¹¹⁷⁴ This is to be welcomed from the perspective of knowledge generation; involving a broad range of different perspectives can also be an effective instrument to deal with some of the risk biases identified above. This form of permanent exchange of information and insights can also, ideally, contribute to the transformative effect of the IA process as such. At the same time, though, some authors have questioned to what extent the strong involvement of the ISG would be compatible with the principle of independence.¹¹⁷⁵ In order to at least ensure a certain level of accountability and full transparency, consultants must, in the inception report, provide a list of the departments represented on the SIA ISG.¹¹⁷⁶

6.1.3 Necessity and Scope of Impact Assessments

The EU must consider human rights impacts of its initiatives: this is not only an obligation under primary law, but the EU has also endorsed this commitment in different declarations and action plans, but most explicitly in the new Better Regulation package.¹¹⁷⁷ Under the current IA regime,

¹¹⁷¹ Ibid.

¹¹⁷² European Commission, ‘Handbook for Trade Sustainability Impact Assessment’ (above, n. 212), p. 6. On the role of independent experts see: Human Rights Council, *Guiding Principles on Human Rights Impact Assessments of Trade and Investment Agreements*, Report of the Special Rapporteur on the right to food, Olivier de Schutter [2011], para 4.3.

¹¹⁷³ Ibid., p. 11.

¹¹⁷⁴ Ibid.

¹¹⁷⁵ Walker, ‘Human Rights in the Trade and Sustainability Impact Assessment of the EU-Tunisia Free Trade Agreement’ (above, n. 57), p. 108; Elisabeth Bürgi Bonanomi, ‘EU Trade Agreements and Their Impacts on Human Rights’, in: CDE Working Paper, 2014, p. 21.

¹¹⁷⁶ European Commission, ‘Handbook for Trade Sustainability Impact Assessment’ (above, n. 212), p. 11

¹¹⁷⁷ See section 6.1.1; see also: Council of the European Union, *EU Strategic Framework and Action Plan on Human Rights and Democracy* (above, n. 1133); European Commission, *Trade, Growth and Development* (above, n. 1164).

the details – namely how to adequately assess human rights impacts – are laid down in Commission Staff Working Documents and other sources of EU internal tertiary law. Under the present IA-regime, three levels of normative guidance can be distinguished. First level guidance on the central elements of “better regulation” in general and impact assessments, consultation and evaluation in particular is provided by the “Better Regulation Guidelines”¹¹⁷⁸, a Commission Staff Working Document of 90 pages. This is supplemented by second level guidance, mainly the “Better Regulation Toolbox”.¹¹⁷⁹ This contains, divided into 65 “tools”, additional information and support for the IA-process. From a human rights and development perspective, the tool about “Fundamental Rights and Human Rights” (Tool #28) which complements the Operational Guidance on taking account of Fundamental Rights in Commission Impact Assessments,¹¹⁸⁰ about “Impacts on Developing Countries” (Tool #34) and the “Stakeholder Consultation” Tools (Tools #53-56) provide important guidance complementing the already existing documents. The Better Regulation Guidelines and the “Toolbox” contain general principles, but also specific rules insofar as they assign competencies and define the IA procedure, as well as general information useful for those in charge of conducting the IAs. As the Better Regulation Guidelines state, the “aim is not to respect procedural requirements per se but to ensure that the Commission is equipped with relevant and timely information on which to base its decisions.”¹¹⁸¹ This appears to be a clear indication of the information model, but – as will be seen later – other sections in the guidelines reflect a more transformative or analytic-deliberative approach.

While the Better Regulation Guidelines and the “Toolbox” generally apply to all policy initiatives, third level guidance means that additional documents provide more information on specific policy areas, such as the guidance on the analysis of human rights impacts in impact assessments for trade-related policy initiatives (“Trade HRIA Guidelines”).¹¹⁸² These guidelines have been developed to inform how to assess human rights impacts of trade policies occurring inside and outside the EU territory.¹¹⁸³ I will use the term “IA regime” or “IA guidelines” to refer in general to all guidance levels.

Unlike in other states, the EU’s IA regime applies to legislative and non-legislative initiatives, including delegated acts and implementing measures, such as white papers, action expenditure programs, or negotiating guidelines for international agreements¹¹⁸⁴ - provided these are likely to have significant economic, environmental or social impacts. The interinstitutional agreement on better lawmaking contains a presumption, namely that the “initiatives included in the Commission Work Programme or in the joint declaration will, as a general rule, be accompanied by

¹¹⁷⁸ European Commission, *Better Regulation Guidelines* (above, n. 199); European Commission, *Better Regulation for Better Results - An EU agenda* (above, n. 1121). On this classification see, for example: European Commission, *Guidelines on the analysis of human rights impacts in impact assessments for trade-related policy initiatives* (above n. 42) p. 3.

¹¹⁷⁹ European Commission, *Better Regulation Toolbox* (above, n. 204).

¹¹⁸⁰ European Commission, *Operational Guidance on taking account of Fundamental Rights in Commission Impact Assessments* [2011].

¹¹⁸¹ European Commission, *Better Regulation Guidelines* (above, n. 199), p. 3.

¹¹⁸² European Commission, *Guidelines on the analysis of human rights impacts in impact assessments for trade-related policy initiatives* (above, n. 42).

¹¹⁸³ *Ibid.*, p. 4; see also: European Commission, *Trade for All: Towards a more responsible trade and investment policy*, COM/2015/0497 final.

¹¹⁸⁴ European Commission, *Better Regulation Guidelines* (above, n. 199), p. 17; European Union, *Interinstitutional Agreement on Better Law-Making* (above, n. 1136).

an impact assessment”.¹¹⁸⁵ The Commission’s “work programme sets out a plan of action for the next 12 months. It describes how political priorities will be turned into concrete actions”.¹¹⁸⁶ All legislative proposals require an explanatory memorandum and either an impact assessment or an explanation for why no impact assessment was conducted,¹¹⁸⁷ comparable to the “Finding of No Significant Impacts” under NEPA. This means that at least a pre-assessment or screening for all legislative initiatives must take place. Trade agreements are another category of legal acts that must generally, at least since 2012, be accompanied by an IA that includes a human rights analysis.¹¹⁸⁸

Similar to EIA law, an EU impact assessment “is required when the expected economic, environmental or social impacts of EU action are likely to be significant”, whereby the Better Regulation Guidelines and the Toolbox contain more detailed criteria to determine when that is the case.¹¹⁸⁹ This is comparable to EIA-law and in particular the regulatory techniques applied by the EU’s EIA Directive and SEA Directive. Section 6.2.1 therefore takes a comparative look at the determination of significance and likelihood under EU and US EIA law to carve out some of the principles that are or could also be relevant to the EU’s HRIA norms. Each lead DG is responsible for considering aspects such as “political importance and sensitivity, the magnitude of the expected impacts, relevant links with other policy areas” or if they are aware of “divergent or sensitive stakeholder views”.¹¹⁹⁰ The EU Better Regulation Guidelines contain, first, substantive criteria in order to determine what significance means (on the substantive element, see also section 6.2). Second, they determine the IA procedure which requires intra-institutional cooperation: the determination of likely significant impacts occurs in what could be called a cooperative and iterative process (procedural elements, see also section 6.2.3). First, however, this chapter will address the legal nature of the norms establishing the EU’s Impact Assessment regime.

6.1.4 The Legal Nature of EU Impact Assessment Norms

As illustrated above, different types of norms determine the obligation to consider human rights consequences in impact assessments. These can be primary or secondary law. The IA guidelines themselves could mainly be qualified as internal tertiary law¹¹⁹¹, namely norms that produce a certain legal effect but not – at least not directly - externally, unlike regulations or decisions (Art.

¹¹⁸⁵ Ibid., para 13.

¹¹⁸⁶ European Commission, Strategy documents, available at:

https://ec.europa.eu/info/strategy/strategy-documents_en <last visited: June 2020>.

¹¹⁸⁷ European Commission, *Better Regulation Guidelines* (above, n. 199), 37 f.

¹¹⁸⁸ European Commission, *Trade, Growth and Development* (above, n. 1164), pp. 13–14; European Commission, *Trade for All: Towards a more responsible trade and investment policy* (above, n. 1183); European Commission, ‘Handbook for Trade Sustainability Impact Assessment’ (above, n. 212); European Commission, *Guidelines on the analysis of human rights impacts in impact assessments for trade-related policy initiatives* (above, n. 42).

¹¹⁸⁹ European Commission, *Better Regulation Toolbox* (above n. 204), Tool #9, p. 48 et seq. and Tool #19, p. 122 et seq.; European Commission, *Better Regulation Guidelines* (above, n. 199), p. 15 et seq.

¹¹⁹⁰ European Commission, *Better Regulation Guidelines* (above, n. 199), p. 12.

¹¹⁹¹ Similar: Linda Senden, *Soft law in European Community law* (Oxford: Hart, 2004), p. 36. I have used the term *internal* tertiary law. In the EU context, the term “tertiary law” as such is generally used to describe those acts based on competences not directly authorized by the Treaties, but delegated by the legislative organs to the Commission, see: Christoph Möllers, *The three branches* (Oxford: Oxford Univ. Press, 2013), 1. ed., p. 176.

288 TFEU). Primary law contains broad principled obligations to assess the human rights effects of EU initiatives. Failure to do so can result in the invalidation of a legal act. Secondary law contains more explicit obligations. Obviously, the EIA Directive obliges the Member States to conduct EIAs for certain projects; however, the Directive does not directly bind the EU. Nevertheless, the EIA Directive could produce an indirect effect: one might argue that the legal standards established in the EU Directive can provide interpretative guidance when determining whether the EU *itself* respected the principles of impact assessments for its own initiatives.

At the primary law level, in particular Art. 3 (5), 21 TEU contain an obligation to assess and consider human rights impacts regardless of where they occur. Another important legal source for the EU's IA regime is an interinstitutional agreement where the EU institutions agree to conduct impact assessments for legislative and major non-legislative initiatives. The agreement obliges the Commission to conduct impact assessments of its "legislative and non-legislative initiatives, delegated acts and implementing measures which are expected to have significant economic, environmental or social impacts."¹¹⁹² The exact nature of interinstitutional agreements is not easy to define and probably not yet fully clarified.¹¹⁹³ What is undisputed is that they cannot modify primary or secondary law. On the other hand, these agreements can be binding and judicially enforceable.¹¹⁹⁴ However, the emphasis is on *can*, as Article 295 TFEU makes clear ("[...] which may be of a binding nature"). It is therefore necessary to interpret each inter-institutional agreement to determine whether the provisions therein are supposed to have a binding effect on the institutions and, if this is answered in the affirmative, also for third parties.¹¹⁹⁵ A central criterion is the intention of the institutions to conclude a binding agreement.¹¹⁹⁶ Concerning the commitment to conduct impact assessments, a textual interpretation of the interinstitutional agreement indicates that the institutions intended to establish a binding commitment, even though with different degrees of responsibility. It states that the Commission must conduct impact assessments if a significant economic, environmental or social impact of "legislative and non-legislative initiatives, delegated acts and implementing measures" is expected. The wording "the Commission *will carry out*"¹¹⁹⁷ [emphasis added] imposes arguably a binding obligation to conduct IAs if significant economic, social or environmental impacts are likely (even though the term "will" can be understood as less authoritative than the term "must").¹¹⁹⁸ This is in particu-

¹¹⁹² European Union, *Interinstitutional Agreement on Better Law-Making* (above, n. 1136), para 13.

¹¹⁹³ For a comprehensive analysis: Florian von Alemann, *Die Handlungsform der interinstitutionellen Vereinbarung* (Berlin, Heidelberg: Springer-Verlag Berlin Heidelberg, 2006); Meuwese, *Impact Assessment in EU Lawmaking* (above, n. 267), 95 ff.

¹¹⁹⁴ Isabella Eiselt and Peter Slominski, 'Sub-Constitutional Engineering: Negotiation, Content, and Legal Value of Interinstitutional Agreements in the EU', *European Law Journal*, 12 (2006), pp. 209–225, p. 212.

¹¹⁹⁵ ECJ, Judgment of 19 March 1996, C-25/94, *Commission v. Council*, para 49; Philipp Voet von Vormizeele, 'AEUV Art. 295', in: von der Groeben/Schwarze/Hatje (ed.), *Europäisches Unionsrecht*, para 6.

¹¹⁹⁶ Alemann, *Die Handlungsform der interinstitutionellen Vereinbarung* (above, n. 1193), 242 ff.

¹¹⁹⁷ European Union, *Interinstitutional Agreement on Better Law-Making* (above, n. 1136), para 13.

¹¹⁹⁸ In a recent Opinion, Advocate General Sharpston assumes that certain flexibility still exists. She states that "it does not necessarily follow [...] that the Interinstitutional Agreement introduces a binding obligation to conduct an impact assessment in each and every case": Opinion of Advocate General Sharpston of 11 April 2019, C-482/17, *Czech Republic v European Parliament and Council the European Union*, para 93. The ECJ in principle confirmed this view: ECJ, Judgment of 3 December 2019, *Czech Republic v European Parliament and Council the European Union*, C-482/17. As will be discussed later, Sharpston assumes that IAs are a normal step but that the EU may also, for example in urgent cases, adopt legislative proposals without a prior IA: *Ibid.*, 98 et seq. This would be a type of "elastic commitment" (see footnote 399). Rather critical with regard to a binding effect also: Rudolf Mögele, *Grundrechtswahrung im EU-*

lar supported by a systematic interpretation, namely considering that the same agreement states that the Commission “*may [...] complement its own impact assessment*”¹¹⁹⁹ [emphasis added] at a later stage. It therefore follows that the agreement obliges the Commission to conduct impact assessments. The European Parliament and Council are obliged to “take full account” of the IA. Moreover, they will “when they consider this to be appropriate and necessary for the legislative process, carry out impact assessments in relation to their substantial amendments”.¹²⁰⁰ Unlike the Commission, the EU legislature therefore has broader discretion to decide whether to conduct additional IAs on amendments. In consequence, the text obliges the Commission to conduct impact assessments under the aforementioned conditions whereas the EU legislature must take them into account. To what extent this also includes the obligation to include human rights is less clear though. In this context, the interinstitutional agreement leaves open what it means that fundamental rights “should” be fully respected in the impact assessment. As argued before, substantive human rights can contain an obligation to assess human rights impacts ex-ante, even though this does not mean that public authorities must necessarily conduct formalized impact assessments. One reason for this is that there are different ways to comply with human rights due diligence, and that the institutionalization of impact assessments requires time and resources. Against this background, however, the discretion is arguably reduced for institutions – like the European Commission – which already have established impact assessment regimes to consider environmental, economic and social impacts. In other words: While there is no duty to *establish* an impact assessment regime, human rights arguably require to *make use* of an existing IA regimes and to thus also include human rights in the overall assessment.

The most detailed rules and principles guiding the conduct of the HRIA as such are mainly laid down in internal tertiary law, e.g. the aforementioned IA guidelines. The terminology of the IA guidelines avoids the impression of providing any externally binding commitment or judicially enforceable rules. The Better Regulation agenda is based on a Communication from the Commission.¹²⁰¹ The Better Regulation Guidelines are contained in a Commission Staff Working Document.¹²⁰² They contain rules of conducts or commitments that aim at influencing behavior and that are, on the one hand, not externally binding, but on the other hand not without legal effect.¹²⁰³ EU soft law serves different purposes,¹²⁰⁴ the most prominent ones are probably interpretative and decisional instruments guiding the application of EU primary and secondary norms, for example concerning EU competition law.¹²⁰⁵ Impact assessment guidelines constitute what I would call a type of “organic soft-law”, which determines the manner in which the EU

Normsetzungsprozess, EuR 2020, pp. 18-19. However, some of the objections raised would be valid for IAs accompanying legislative proposals, but not for IAs accompanying non-legislative initiatives.

¹¹⁹⁹ European Union, *Interinstitutional Agreement on Better Law-Making* (above, n. 1136), para 16.

¹²⁰⁰ *Ibid.*, para 15.

¹²⁰¹ For example: European Commission, *Better Regulation for Better Results - An EU agenda* (above, n. 1121).

¹²⁰² European Commission, *Better Regulation Guidelines* (above, n. 199). The nature of the related “Toolbox” is not clearly specified; the document states that it “complements” the Better Regulation Guidelines: European Commission, *Better Regulation Toolbox* (above, n. 204), p. 2.

¹²⁰³ Linda Senden, ‘Soft law and its implications for institutional balance in the EC’, *Utrecht Law Review*, 1 (2005), pp. 79–99, p. 81; Francis Snyder, ‘The Effectiveness of European Community Law: Institutions, Processes, Tools and Techniques’, *The Modern Law Review*, 56 (1993), pp. 19–54, p. 32; Cannizzaro and Rebasti, ‘Soft law in the EU legal order’ (above, n. 379).

¹²⁰⁴ For a classification of different types of EU soft law: Senden, ‘Soft law and its implications for institutional balance in the EC’ (above, n. 1203), p. 81.

¹²⁰⁵ *Ibid.*

institutions take legislative and non-legislative decisions. This is what has been described above as meta-regulation. They are enacted by an institution (here: the European Commission) and addressed at the institution's staff. Many provisions in such guidelines, therefore, have an at least *internally binding* force, i.e. binding staff members and regulating how to prepare and make certain decisions¹²⁰⁶.

Whether or not norms of internal tertiary law are internally binding must be determined by interpretation. In this case, in particular the Better Regulation Guidelines set out "mandatory requirements and obligations". As regards the obligation to conduct IAs, the wording also clearly indicates a binding effect: "An IA is required for Commission initiatives that are likely to have significant economic, environmental or social impacts."¹²⁰⁷ This is contrasted with the provisions of the additional Toolbox which "provides additional guidance and advice which is not binding unless expressly stated to be so."¹²⁰⁸ Naturally, not all provisions in the Better Regulation Guidelines are binding – many are simply recommendations.

A remaining question, therefore, is whether and, if so, under what conditions internally binding rules can become *externally* binding – so that non-compliance could be subject to judicial review. The ECJ had to clarify the legal nature of recommendations and opinions (Article 288 (5) TFEU).¹²⁰⁹ However, IA guidelines are neither recommendations nor opinions in the sense of Article 288 (5) TFEU. They are in particular not addressed to EU member states but are acts of self-commitment. It is now established EU case law that "internal measures adopted by the administration" are *not rules of law* which the administration must always observe, but they

"nevertheless form rules of practice from which the administration may not depart in an individual case without giving reasons that are compatible with the principle of equal treatment. Such measures therefore constitute a general act and the officials and other staff concerned may invoke their illegality in support of an action against the individual measures taken on the basis of the

¹²⁰⁶ The legal nature of these internal (administrative) rules is controversially discussed. They bear some resemblance with domestic internal rules on rulemaking, such as the German *Verwaltungsvorschriften* (on *Verwaltungsvorschriften* see: Dirk Hanschel, 'Progress and the Precautionary Principle in Administrative Law: Country Report on Germany', in: Eibe Riedel and Rüdiger Wolfrum (eds.), *Recent Trends in German and European Constitutional Law*, p. 204). However, there is so far no standardized terminology or concept that could be relied on to structure EU internal law. Insofar critical of this comparison: Herwig Hofmann, Gerard C. Rowe, and Alexander Türk, *Administrative Law and Policy of the European Union* (Oxford: Oxford Univ. Press, 2011), p. 537. However, a typical criterion of internal (administrative) guidelines as *Verwaltungsvorschriften* is that they preserve a certain degree of flexibility: They are generally binding, due to the principle of equal protection, but in exceptional and justified cases, it may be impossible or not appropriate to follow each step in the guideline. In such a case, it can be justified to disregard a certain rule or principle. In this case, exceptions from the Guidelines can be requested: European Commission, *Better Regulation Guidelines* (above, n. 199), p. 3.

¹²⁰⁷ *Ibid.*, p. 15

¹²⁰⁸ *Ibid.*, p. 3.

¹²⁰⁹ The ECJ held that „even if recommendations are not intended to produce binding effects and are not capable of creating rights that individuals can rely on before a national court, they are not without any legal effect. The national courts are bound to take recommendations into consideration in order to decide disputes brought before them, in particular where such recommendations cast light on the interpretation of national measures adopted in order to implement them or where they are designed to supplement binding provisions of EU law": ECJ, Judgment of 18 March 2010, Joined Cases C-317/08, C-318/08, C-319/08 and C-320/08, *Allassini and others*, para 40; ECJ, Judgment of 11 September 2003, Case C-207/01, *Altair Chimica*, para 41; ECJ, Judgment of 13 December 1989, Case C-322/88, *Grimaldi*, para 16–18.

measures. [...] That case-law applies *a fortiori* to rules of conduct designed to produce external effects, as is the case of the Guidelines, which are aimed at traders.¹²¹⁰

The Court continues:

“In adopting such rules of conduct and announcing by publishing them that they will henceforth apply to the cases to which they relate, the institution in question imposes a limit on the exercise of its discretion and cannot depart from those rules under pain of being found, where appropriate, to be in breach of the general principles of law, such as equal treatment or the protection of legitimate expectations. It cannot therefore be precluded that, on certain conditions and depending on their content, such rules of conduct, which are of general application, may produce legal effects.”¹²¹¹

These considerations arguably also apply to the EU’s IA guidelines, even though the European Courts so far refused to recognize IA guidelines as producing an externally binding effect. And indeed, one might object that the constellation is different insofar as the Guidelines mentioned in the respective ECJ cases generally concretize the interpretation of binding provisions (e.g. the calculation of regulatory fines) and are guiding Commission decisions that directly affect individual right holders. However, this does not make a significant difference if one follows the arguments of the Court. First, IA-guidelines are rules of conduct: they define how the Commission should prepare legislative and non-legislative acts. Second, the European Commission publishes them and announces that it will apply them to the cases to which they relate, namely to the preparation of legislative and certain non-legislative proposals. Third, at least the basic principles of Human Rights Impact Assessments are also laid down in a Communication from the Commission to the European Parliament, the Council, the European Economic and Social Committee and the Committee of the Regions.¹²¹² It is therefore not a purely internal document. Thus, the European Commission arguably imposes a limit on the exercise of its discretion – namely how to draft legislative or other proposals – and cannot depart from those rules under pain of being found to be in breach of general principles of law.

It is therefore now to ask whether the breach of the promise to conduct IAs for a legislative or certain non-legislative policy proposals would constitute a violation of such a principle of law. The proposition to conduct transparent, non-discriminatory and participatory impact assessments constitutes a promise that may raise legitimate expectations.¹²¹³ However, most cases where the principle of legitimate expectations was accepted concern projects or policies which have a direct impact on individuals. If the European Commission therefore states to conduct HRIAs for all trade negotiations, it is questionable whether this raises legitimate expectations to the extent that other institutions or individuals may claim a breach of that principle. Some cases

¹²¹⁰ ECJ, Judgment of 28 June 2005, Joined Cases C-189/02 P, C-202/02 P, C-205/02 P TO C-208/02 P and C-213/02 P, *Dansk Rørindustri* (2005), para 209–210; ECJ, Judgment of 15 January 2002, C-171/00 P, *Libéros*, para 35; CFI, Judgment of 8 October 2008, T-73/04, *Carbone-Lorraine*, para 70.

¹²¹¹ ECJ, *Dansk Rørindustri* (above, n. 1210), para 211.

¹²¹² European Commission, *Better Regulation for Better Results - An EU agenda* (above, n. 1121).

¹²¹³ In this sense, even though on a more general level: Alberto Alemanno, ‘Courts and regulatory impact assessment’, in: Claire A. Dunlop and Claudio M. Radaelli (eds.), *Handbook of Regulatory Impact Assessment*, pp. 127–141.

indicate that a specific promise must be given to an individual. For example the General Court recently confirmed that a “person may not plead breach of the principle unless he has been given precise assurances by the administration”.¹²¹⁴ The HRIA guidelines do not give a precise assurance to directly affected individuals, and it could be for this reason that the European courts have so far not accepted an obligation to conduct impact assessments based on the principle of legitimate expectations. Still, it is possible to make the case that such a precise assurance by the Commission can be given to the other institutions – in particular: the European Parliament and Council. Also, one might ask whether such a promise to conduct HRIAs is given to all EU citizens; this would not be too far-fetched given that one goal of IAs is to increase the legitimacy of EU lawmaking. In other words: it could be a democratic promise made to the European people.¹²¹⁵ Case law suggests that a central requirement is that the assurance is sufficiently precise – but that such a promise could also be made to a broad circle of people. For example, in *Mugraby*, the applicant claimed that the European Union was obliged to take measures to respond to human rights violations in Lebanon and based his argument on the promise given in the Barcelona Declaration. The General Court rejected this argument, stating that “such assertions are, however, not precise enough to identify, firstly, the conduct complained of with any certainty and, secondly, its possible unlawfulness. In any event, the applicant does not establish how he could acquire a right from those expectations.”¹²¹⁶ The court did not, at least not explicitly, reject the argument because the circle of recipients of that promise was too broad (basically the population of Lebanon), but mainly because the promise made in the Barcelona Declaration was not precise enough. Unlike the human rights commitments in the Barcelona Declaration, the commitment to conduct HRIAs for certain initiatives is comparatively specific and unconditional. The promise to conduct HRIAs can therefore arguably raise legitimate expectations that decisions are, in general, prepared in compliance with the specific provisions laid down in the Better Regulation Guidelines if these provisions are clearly intended to protect third parties’s rights or the public’s legitimate interest in transparent law-making.

Another objection regards Parliamentary discretion and the concern that legitimate expectations could constrain future legislative decision-making. In *Northern Ireland Fish Producers’ Organisation Ltd (NIFPO)*, the Irish government had argued that the Council would be bound by legitimate expectations.¹²¹⁷ In the respective case, the Council had consistently acted in compliance with the Hague Resolution and thus, allegedly, produced certain expectations that it would continue to do so in the future. However, the ECJ emphasized that the Hague Resolution was a political document that “cannot produce legal effects capable of limiting the Council’s legislative powers”.¹²¹⁸ This does not speak against legitimate expectations concerning the commitment to conduct HRIAs. First, this judgment concerns what could be called a *substantive* limitation due to legitimate expectations, whereas a duty to conduct impact assessments before or during a legislative procedure would mainly modify the law-making *procedure* without substantively limiting the Council’s or Parliament’s legislative powers. Second, the EU organ which would be obliged

¹²¹⁴ General Court, *Front Polisario* (above, n. 746), para 177.

¹²¹⁵ This does not mean, however, that all EU citizens would have standing before the European courts: whether a commitment is binding and whether individuals may challenge a violation of such a commitment are two separate questions.

¹²¹⁶ General Court, *Mugraby* (above, n. 778), para 71.

¹²¹⁷ ECJ, Judgment of 19 February 1998, C-4/96, *Northern Ireland Fish Producers’ Organisation Ltd (NIFPO)*, para 28; Cannizzaro and Rebasti, ‘Soft law in the EU legal order’ (above, n. 379), p. 222.

¹²¹⁸ ECJ, *Northern Ireland Fish Producers’ Organisation Ltd (NIFPO)* (above, n. 1217), para 31.

under the principle of legitimate expectations to conduct HRIAs is the European Commission which is not a legislative but rather a gubernative or executive institution. Even when preparing impact assessments for legislative proposals, the Commission does not itself act in a legislative capacity (even though in the legislative context)¹²¹⁹. Applying the principle of legitimate expectations to the Commission's promise to conduct HRIAs for major legislative and non-legislative acts would therefore not restrict any form of "legislative" powers (to the contrary: in the inter-institutional agreement on better law-making, the Commission has arguably made a commitment to the EU legislator to conduct impact assessments in order to prepare legislative and non-legislative initiatives). This is different from the NIFPO judgment. Consequently, the principle of legitimate expectations can, arguably, restrict the European Commission's discretion to the extent that it is obliged to conduct HRIAs for all major policies. Here again two clarifications are necessary. Not all parts of IA-guidelines would become binding under the legitimate expectations principle, but only those where the aforementioned conditions are fulfilled, in particular where the assurance given is sufficiently precise. This includes the obligation to consider human rights impacts *at all*, or the requirement to conduct consultations for at least 12 weeks. Second, the Commission is not completely bound by its guidelines even where legitimate expectations are created, but simply may not disregard its legal effect. Where justified by important public interests, the Commission may deviate from its IA guidelines. It may also change them with ex-nunc effect for the future: legitimate expectations only create an "elastic commitment".¹²²⁰

6.2 The Determination of Likely and Significant Impacts

Due to time and budgetary limits, it would be impossible to conduct in-depth impact assessments for every single project, program or policy,¹²²¹ or for all potential impacts. Usually, full IAs are necessary if significant impacts on protected rights and interests are likely.¹²²² Limiting IAs to likely and significant impacts implies to sacrifice some less likely or less significant consequences which will almost necessarily leave some groups unsatisfied. However, such a concentration on some risks might be necessary not only to focus the technical analysis of impacts, but also to structure public discourse in a meaningful way as "thinking about many risks simultaneously means thinking about none of them thoroughly".¹²²³ Therefore, the pre-assessment stage – where it is determined whether a full IA is required – is decisive. However, the determination of likelihood and significance includes inherently subjective judgments. It may therefore be questioned whether the concept of significance is a legal concept and whether it can be subject to (quasi-)judicial review. My main argument is that law is relevant for two reasons: first, law gives a more objective and substantive meaning to the terms "significance" and "likelihood" (substantive element). Second, law determines who is involved in making judgments of likelihood and

¹²¹⁹ ECJ, Judgment of 4 September 2018, Case C-57/16 P, *ClientEarth*, para 85 et seq.

¹²²⁰ Quoted in: Danwitz, *Europäisches Verwaltungsrecht* (above, n. 399), p. 252.

¹²²¹ In an extensive study, Simon Walker conducted a Human Rights Impact Assessment of CAFTA which took him three months of full-time work, even though it was limited to the assessment of the impacts of intellectual property rights on health-related human rights in Costa Rica: Walker, *The Future of Human Rights Impact Assessments of Trade Agreements* (above, n. 28), p. 206.

¹²²² Similar: European Union, *EIA Directive 2011/92/EU*, Art. 1: "[...] assessment of the environmental effects of those public and private projects which are likely to have significant effects on the environment."

¹²²³ Fischhoff and Kadvany, *Risk* (above, n. 825), p. 33.

significance: it thus assigns responsibilities and determines how knowledge is generated and whose knowledge matters (procedural element).

Substantively, IA law can apply two approaches at the pre-assessment stage: a “mandatory” approach and a “screening” approach. In EU law, the EIA Directive contains a list of projects (Annex I) that are considered as per se having significant effects on the environment, and that are therefore always subject to a mandatory EIA. The “screening approach” concerns other initiatives (e.g.: those listed in Annex II of the EIA Directive). Here, a screening procedure is necessary to determine whether the project has significant environmental effects and thus requires a full EIA. This is usually done on a case-by-case basis (even though Member States can, for Annex II projects, establish own thresholds or criteria according to Art. 4 (2) lit b) of the EIA Directive. It is not necessary to address these details any further here). The EIA Directive contains certain criteria that Member States must take into account when determining the likely significant effects (Annex III). Directive 2001/42/EC on the assessment of the effects of certain plans and programs on the environment (“SEA Directive”) follows a similar logic.¹²²⁴

However, even the criteria laid down in Annex III to the EIA-Directive are rather broad. Neither domestic nor international sources of IA-law contain a precise definition of significance, even though international organizations have developed guidelines and principles on how to determine significance.¹²²⁵ It is therefore not surprising that the necessity to conduct IAs – based on a case-by-case evaluation due to the expected significant impacts – is often subject to judicial and political disputes. As a comparison with EIA law demonstrates, failure to properly apply the criteria to determine the significance of impacts can be subject to review: they are therefore not only technical but also legal criteria.

Procedurally, law can determine whose knowledge matters. This includes questions of competencies – who decides whether or not to conduct a full IA? – and process – must affected individuals or other agencies be consulted already during the pre-assessment stage? It also concerns the role of scientific experts and the scope of judicial review. In particular due to broad administrative discretion, courts in domestic EIA-law are often hesitant to review whether an administrative agency properly determined the (in-) significance of impacts; instead, courts are rather deferential as long as the administrative agency bases its decision on the judgment of experts (whatever that means) and as long as it is not arbitrary or clearly erroneous. This judicial self-restraint could be due to the difficulty to translate the significance of real-life impacts into a “legal test”.¹²²⁶ However, this was not always the case, for example in the early years after the enactment of NEPA: In interpreting Section 102 NEPA, the US Court of Appeals held that provisions

¹²²⁴ While it does not apply to policies, plans and programs are nevertheless more general than specific projects, which is why a comparison between the SEA Directive and policy IAs can be fruitful. An SEA is mandatory for plans and programs which are prepared for specifically defined sectors (e.g. agriculture, energy, telecommunications) and which sets the framework for future development consent of projects listed in the EIA Directive. In addition, SEAs are mandatory if explicitly determined under the Habitats Directive: European Union, *Directive 2001/42/EC of the European Parliament and of the Council of 27 June 2001 on the assessment of the effects of certain plans and programmes on the environment*, Art. 3 (2). For plans and programs not included, the Member States have to conduct a screening to determine whether the plans or programs are likely to have significant effects. Here again, the SEA Directive provides certain criteria upon which Member States must base the screening (Annex II): *Ibid.*, Art. 3 (4) and (5).

¹²²⁵ Craik, *The International Law of Environmental Impact Assessment* (above, n. 59), p. 94.

¹²²⁶ Holder, *Environmental Assessment* (above, n. 27), p. 14.

requiring the conduct of impact assessments are "not inherently flexible. They must be complied with to the fullest extent, unless there is a conflict of *statutory* authority. Considerations of administrative difficulty, delay or economic cost will not suffice to strip the section of its fundamental importance."¹²²⁷ And indeed, the fact that IA-law contains no satisfactory definition of significance does not mean that agencies necessarily have unlimited discretion, given that the determination of significance can be based on binding legal principles and often even relatively specific rules (see section 6.2.2.).

The role of public law, which is to establish a form of "public administration" that procedurally manages and substantively guides the process of impact and risk assessment, can design impact assessments in a more analytical or more deliberative form, reflecting the different risk paradigms identified above. It is able to introduce deliberative elements into scientific analyses and make sure that scientific analysis, on the other hand, informs public discourse. Public law can attribute legal meaning to which impacts are *relevant*; set criteria and standards to help determine which among these relevant impacts count as *significant*, and structure discourse between different institutional and external actors as well as between (institutional) decision-makers and (external) stakeholders. If, at the end of the pre-assessment stage, an authority finds that an in-depth IA is required, the necessary arrangements for participation and a close analysis of expected impacts must be taken. This will be discussed in chapters 7 (on "participation") and 8 (on "impact analysis"). If the authority comes to the conclusion that a relevant project is not likely to cause significant impacts, it must generally provide, after screening, a document briefly setting out the reasons for why, consequently, no full impact assessment is required. An example under US law is the document called "Finding of No Significant Impact ("FONSI").¹²²⁸

A comparison with EIA law demonstrates that the EU's impact assessment regime bears structural similarities: it contains not only procedural but also substantive criteria to be considered when determining the likelihood and significance of potential impacts. Like in the case of EIA law, these criteria are not purely technical but arguably also legally relevant and could be subject to judicial review. For example, the Better Regulation Guidelines and the "Toolbox" at least broadly define methodological standards on how to assess impacts. First, direct and indirect impacts are to be considered. Direct impacts are defined, a little circular, as those that are directly generated by a policy measure, and indirect impacts are those that arise as a result of the behavioral changes prompted by the direct impacts and that might affect third parties but which can nevertheless be as significant as direct impacts.¹²²⁹ The human rights impacts in the context of trade policy reforms mentioned in the introduction may be both direct and indirect: The decision to impose regulatory measures that make it impossible for farmers in developing countries to export their products to the EU are direct impacts; the decision to grant subsidies that allow EU farmers to export subsidized products to developing markets and thus drive farmers there out of business produces indirect human rights impacts. While it clearly depends on the facts of each case which indirect impacts are significant, failure to consider indirect impacts even though they are foreseeable can arguably be a (potentially justiciable) defect subject to (quasi-)judicial review by the European Courts or the European Ombudsman. Second, the impacts on different

¹²²⁷ US Court of Appeals (D.C. Cir.), 449 F.2d 1109, *Calvert Cliffs v. AEC* (1971), para 19.

¹²²⁸ 40 CFR § 1508.13.

¹²²⁹ European Commission, *Better Regulation Guidelines* (above, n. 199), p. 25.

parties should be analyzed¹²³⁰ which requires a higher level of detail. This is a particularly important aspect, as otherwise significant human rights impacts can easily be missed. The European Court of Justice has annulled a Council Regulation because it failed to adequately consider the impacts on all affected groups.¹²³¹ Third, the IA must consider whether the initiative has a long or short term, one-off or recurrent impact. The temporal scope is therefore comparatively broad. A fourth criterion is the importance of impacts for Commission horizontal objectives and policies.¹²³² Similarly, the Trade HRIA guidelines refer to several criteria, in particular the “nature, geographical scope, duration as well as potential cumulative effects of likely human rights impacts should be taken into account.”¹²³³ As will be seen below in the case of domestic EIA-law, compliance with these criteria and decision-rules can be subject to judicial review.

Compared with previous IA-guidelines, the criteria under the current IA regime are now more specific, in spite of the remaining ambiguities. In particular, they now resemble more the relatively long list of significance criteria in the SEA-Directive.¹²³⁴ In addition to these criteria, specific thresholds could increase the degree of determinacy. While it is not unthinkable to apply more specific thresholds in this regard, thresholds are generally more suitable at the project than at the policy level.¹²³⁵ The Better Regulation Toolbox further clarifies what significance means and when consequently an IA is necessary. The Toolbox also contains certain negative criteria where no IA is required, in particular where the Commission has little or no policy choice, for example when implementing previous policy decisions which were already subject to an IA.

The IA guidelines also contain procedural elements concerning the determination of likely significant impacts. They assign competencies and require the involvement of different actors, including from within the Commission, to ensure that all relevant knowledge enters the IA process.¹²³⁶ The determination of significance is thus a cooperative and iterative process. The guidelines also contain doctrinal guidance on how to identify human rights violations, including how to conduct a proportionality test. Whether such a “crash-course” in human rights law will have a real effect when applied by Commission staff without a legal or human rights training might be questioned. However, the added value of the Trade HRIA Guidelines and the Better Regulation Toolbox is that they raise awareness of human rights risks. In consequence, those in charge of the IA are encouraged to consult the Legal Service or DG Justice¹²³⁷ and to consider the recommendations and findings by different EU and international human rights bodies.¹²³⁸

¹²³⁰ Ibid.

¹²³¹ ECJ, Judgment of 7 September 2006, Case C-310/04, *Spain v. Council*.

¹²³² European Commission, *Better Regulation Guidelines* (above, n. 199), p. 25.

¹²³³ European Commission, *Guidelines on the analysis of human rights impacts in impact assessments for trade-related policy initiatives* (above, n. 42), p. 7.

¹²³⁴ Such an adaption was recommended by George, ‘Proportionate Impact Assessment: Discretion, Formalism, and the Undefined Responsibilities of European Decision-Makers’ (above, n. 78), p. 110.

¹²³⁵ Ibid., p. 112.

¹²³⁶ See section 6.2.3 and 10.5.1.

¹²³⁷ European Commission, *Better Regulation Toolbox* (above, n. 204), Tool #28, p. 210.

¹²³⁸ European Commission, *Guidelines on the analysis of human rights impacts in impact assessments for trade-related policy initiatives* (above, n. 42), p. 7.

6.2.1 Mandatory EIAs and Screening Approaches

A comparison with EIA law reveals that the institutionalization of HRIAs can choose between at least two broad approaches: the first one identifies certain initiatives as having per se significant impacts and as therefore always requiring a full IA (often so-called “mandatory IAs”). The second one is a screening approach, which requires that initiatives are examined on a case-by-case basis as to whether significant impacts are likely.

6.2.1.1 Classification of Initiatives

The mandatory approach, which sets up a list of initiatives that require per se a full impact assessment, is reflected in the Espoo Convention¹²³⁹ and in EU law in the EIA Directive. As mentioned, Annex I contains a list of specific projects that are assumed to generally cause significant environmental impacts and which therefore mandatorily require EIAs. The decisive first question is therefore whether the respective initiatives falls under one of the listed categories (e.g. those in Annex I of the EIA Directive). If this is the case, no screening is required and a full EIA must be conducted.

These classifications are often very specific, such as “[c]rude oil refineries [...] and installations for the gasification and liquefaction of 500 tons or more of coal or bituminous shale per day.”¹²⁴⁰ The price for specificity is, as always when legal acts produce typologies, a certain arbitrariness: the liquefaction of 500 tons requires a mandatory EIA, but 499 tons do not. Therefore, it is evident that such a list cannot be exclusive, and indeed, initiatives that do not fall under one of the categories listed in Annex I may nevertheless require an EIA if they are listed in Annex II and are likely to have significant impacts.

For screening approaches, authorities must also usually, in a first step, analyze whether the type of initiative in question may in principle require an IA (e.g. if it falls under one of the categories in Annex II of the EIA Directive). If this is the case, screening in the narrow sense is necessary in a second step, namely the determination of likely significant impacts. The significance of project-related impacts is generally based on one or more of different criteria specified (e.g. those in Annex III of the EIA Directive); these criteria concern, in particular, the characteristics of the project (size, design, etc), the location of the project, and the type and characteristics of the potential impact.¹²⁴¹ Nevertheless, the legal terms to define Annex II projects are at times broad. Moreover, the prediction of likely impacts is largely a technical (empirical/scientific) task. Finally, the determination of impacts as “significant” contains subjective elements. Clear legal rules are therefore missing. Given this “self-limitation exercise in law”,¹²⁴² the role of judicial review becomes important. While judicial review will mainly be addressed in the final chapters, it is nevertheless helpful to at least briefly address the two areas where disputes during the pre-assessment stage can mainly arise. First, parties can already disagree about whether an initiative falls under one of the categories listed in Annex I or II at all. Second, for non-mandatory EIAs (Annex II), where case-by-case screening is required, disputes generally arise with regard to the determination of “likely significant impacts”. Case law in the United Kingdom provides illustra-

¹²³⁹ UNECE, *Convention on Environmental Impact Assessment in a Transboundary Context* (above, n. 114).

¹²⁴⁰ European Union, *EIA Directive 2011/92/EU* [2011], Annex I.

¹²⁴¹ *Ibid.*, Annex III; UNECE, *Convention on Environmental Impact Assessment in a Transboundary Context* (above, n. 114).

¹²⁴² Holder, *Environmental Assessment* (above, n. 27), p. 106.

tive examples of the role of judicial review with regard to the classification of initiatives: it has developed from a fully deferential to a more nuanced approach. The Queen's Bench Division in *Swale* had to decide whether a project falls under one of the sensitive projects listed in the annex.¹²⁴³ The court held that the determination of whether a project is or is not set out in one of the annexes is a question to be decided by the planning authority: The classifications are per se "essentially questions of fact and degree, not of law",¹²⁴⁴ and therefore only subject to very restricted judicial review, namely the deferential reasonability test (*Wednesbury test*)¹²⁴⁵ which allows to only overturn arbitrary decisions.

This is indeed a potential objection against the institutionalization of HRIA law: even if one accepts that there is an obligation to conduct HRIAs for certain initiatives, compliance with this obligation may nevertheless hardly ever be subject to direct judicial review because the determination of whether or not a certain initiative actually requires an IA would be rather a question of fact and not of law. Not surprisingly, the reasoning in *Swale* did not remain without criticism. It is not convincing that the application of the definitions laid down in the annex to specific facts of a specific project should have *nothing* to do with law. As Grant remarked, it is, to the contrary, a "straight question of law", and even where issues of facts and degree are involved, there are broad underlying principles of law and interpretation.¹²⁴⁶

In the following, the holding in *Swale* was overturned in *R (Goodman) v London Borough of Lewisham*, where the respondent local planning authority had argued that the classification of a project was a question of fact and degree, and as such only subject to a reasonability test. The Court of Appeal (Buxton LJ) disagreed:

"However fact-sensitive such a determination may be, it is not simply a finding of fact, nor of discretionary judgement. Rather, it involves the application of the authority's understanding of the meaning in law of the expression used in the Regulation. If the authority reaches an understanding of those expressions that is wrong as a matter of law, then the court must correct that error: and in determining the meaning of the statutory expressions the concept of reasonable judgement as embodied in *Wednesbury* simply has no part to play."¹²⁴⁷

However, the Court continues that a more deferential standard of review is justified in two situations: first, if a legal term (e.g. in Annex II) is so "imprecise that in applying it to the facts, as opposed to determining what the meaning was in the first place, a range of different conclusions may be legitimately available", and second, if the authority decides that a project falls under Annex II and then goes on to determine whether it is "likely to have significant effects on the environment by virtue of factors such as its nature, size or location. That is an enquiry of a nature to

¹²⁴³ The Court had to rule on the respective English statute implementing the EIA Directive. The annexes of the EIA Directive were transposed into "schedules". To avoid unnecessary complexity, reference here will only be made to the underlying EIA Directive and the respective annexes.

¹²⁴⁴ Queen's Bench Division, *R v Swale Borough Council and Medway Ports Authority ex parte The Royal Society for the Protection of Birds* (above, n. 387).

¹²⁴⁵ *Ibid.*

¹²⁴⁶ Malcolm Grant, 'Development and the Protection of Birds: the Swale Decision', *Journal of Environmental Law*, 3 (1991), pp. 135–152, p. 151; Holder, *Environmental Assessment* (above, n. 27), p. 113.

¹²⁴⁷ Court of Appeal, *R (Goodman) v London Borough of Lewisham* (2003), para 10.

which the Wednesbury principle does apply”.¹²⁴⁸ This nuanced approach is convincing: it recognizes that EIA law (e.g. when it comes to the classification of certain initiatives) may be very specific, while in other cases only indefinite terms (“*unbestimmte Rechtsbegriffe*”) are used, thus suggesting more deferential standards of review.

6.2.1.2 Screening Approach: The Case-Specific Determination of Significant Impacts

Initiatives covered by the EIA Directive but not subject to mandatory EIAs (Annex II projects) usually require a case-by-case screening in order to determine whether they are likely to have significant effects on the environment. The appropriateness of this assessment is frequently subject to judicial and political disputes. The identification of appropriate assessments by choosing adequate measurement standards and procedures combine not only scientific expertise and values¹²⁴⁹ but also include questions of law.¹²⁵⁰

Different criteria, methodologies and techniques are applied to determine the significance of impacts. Some of these will be addressed in more detail below (see section 6.2.2). Here, the role of law shall be carved out more generally. First, law determines the relevance of impacts: it determines what goods and interests are legally protected. This is a prerequisite for significance: Some goods or interests are not protected by law and therefore a priori not part of an IA. In the early years after NEPA was introduced, mainly impacts on the human environment were regarded as relevant and therefore potentially significant. Increasingly, other impact assessment regimes also incorporated social, cultural and human rights considerations. Similarly, the relevance of human rights in the EU’s impact assessments has only developed over time. The EU Trade HRIA Guidelines describe how to screen trade policies for human rights impacts. It states that the screening procedure “aims at identifying (a) which particular trade measures under consideration have the potential for significant human rights impacts; (b) which specific human rights would be likely to be affected (and with respect to which population groups); (c) whether the rights in question are absolute rights, which cannot be limited or restricted under any circumstances.”¹²⁵¹ The role of rules and principles guiding the screening process can go beyond providing pure methodological guidance. They can frame the analysis and, for example, even draw attention to “new” human rights: A most recent change in this regard is the European

¹²⁴⁸ Ibid., para 10. The scope of review is not only relevant to judicial but also to quasi-judicial review, for example by the World Bank’s Inspection Panel and the Compliance Advisor/Ombudsman. These quasi-judicial organs must also decide disputes about the category of projects (e.g. the classification as a category A, B or C project), the resulting risk classification and, accordingly, the depth of a required impact assessment and the applicability of other safeguards. By way of example: CAO, CAO Ref: C-I-R9-Y12-F161, *Investment in Corporación Dinant S.A. de C.V., Honduras* (2013).

¹²⁴⁹ Fischhoff and Kadwany, *Risk* (above, n. 825), p. 35.

¹²⁵⁰ Courts and tribunals review the appropriateness of an assessment, even though it varies how deferential they are. For example: In the context of Article 6 (3) Habitats Directive, the ECJ applies the precautionary principle and finds that a plan or project is likely to have significant effects “if it cannot be excluded, on the basis of objective information, that it will have a significant effect on that site, either individually or in combination with other plans or projects”: ECJ, Judgment of 7 September 2004, Case C-127/02, *Waddenzee*, para 45, 49. However, the UK Supreme Court held that this standard applied in the context of the Habitat Directive cannot necessarily be applied to the assessment of impacts as prescribed by the EIA Directive: The Supreme Court (UK), UKSC 52, *R (Champion) v North Norfolk District Council and another* (2015). Other judicial disputes where the appropriateness of an assessment is subject to review concerns traditional health risks and the regulation of controversial chemicals, food or medicine; this will be discussed later in the context of the precautionary principle.

¹²⁵¹ European Commission, *Guidelines on the analysis of human rights impacts in impact assessments for trade-related policy initiatives* (above, n. 42), pp. 6–7.

Commission's Handbook on Trade Sustainability Impact Assessments which now explicitly mentions the "right to water" as a major SIA theme.¹²⁵²

Second, law can limit the discretion to determine significance by grading some impacts as particularly significant. An example from international development law concerns the World Bank safeguards for indigenous peoples: When a project affects indigenous peoples, the more stringent operational policies on indigenous peoples apply, including the obligation to conduct a special social assessment.¹²⁵³

Third, law can prescribe certain methodologies and certain rules on how impacts are to be assessed. Law can require, for example, that quantitative and qualitative methods are used wherever possible. It can also determine whether and to what extent cumulative impacts must be considered, or whether agencies must compare, when making decisions under uncertainty, the most pessimistic or the most optimistic potential outcomes of each alternative.¹²⁵⁴ These criteria which limit the scope of discretion when determining the significance of impacts will be addressed in the following section (in particular: 6.2.2) as well as again in chapter 8 which focuses on the analysis stage of in-depth impact assessments. The following sections will discuss legal criteria that were mainly developed under domestic EIA case law and that can, as I will argue, also be relevant for the screening of EU policy initiatives.

6.2.2 Substantive Criteria Determining the Scope of Discretion

The determination of "likely significant impacts" on a case-by-case screening basis generally leaves agencies with broad discretion. It is therefore questionable to what extent legal criteria can guide this determination, and to what extent the correct use of these criteria would be subject to judicial review. In some cases, courts held that the determination of likely significant impacts is only subject to a very deferential reasonableness test.¹²⁵⁵ However, the ECJ took a more precautionary approach.¹²⁵⁶ While emphasizing agency discretion¹²⁵⁷ the ECJ also held that "[i]t is for the national court to review whether, on the basis of the individual examination carried out by the national authorities which resulted in the exclusion of the specific project at issue [...] from the assessment procedure established by the Directive, those authorities correctly assessed, in accordance with the Directive, the significance of the effects of that project on the environment".¹²⁵⁸ The scope of judicial review in the context of EIA law is a complex question that

¹²⁵² European Commission, 'Handbook for Trade Sustainability Impact Assessment' (above, n. 212), p. 31.

¹²⁵³ See for the previous safeguard regime: OP 4.10 (Indigenous Peoples). Similarly: ESS7 para 12.

¹²⁵⁴ See, on these decision-making rules in IA law below chapter 8.

¹²⁵⁵ This is what the UK Court of Appeal held in *Jones* when distinguishing between the classification of a project, where heightened judicial scrutiny is required, and the determination of whether a specific project is likely to cause significant effects. The Court found that, in the latter case, the meaning of law would be so imprecise that an administrative decision may only be reviewed for arbitrariness based on a reasonableness test: Court of Appeal, *R (Jones) v Mansfield District Council* (2003), para 61; this would insofar be compatible with Court of Appeal, *R (Goodman) v London Borough of Lewisham* (above, n. 1247), para 10.

¹²⁵⁶ Holder, *Environmental Assessment* (above, n. 27), p. 127.

¹²⁵⁷ ECJ, Judgment of 24 October 1996, Case C-72/95, *Kraaijeveld* (1996) at para 59; for a closer analysis: Holder, *Environmental Assessment* (above, n. 27), p. 116.

¹²⁵⁸ ECJ, Judgment of 16 September 1999, Case C-435/97, *Bozen*, para 48.

could only be briefly addressed here.¹²⁵⁹ Instead, the objective of the following discussion is to demonstrate that law can and does establish certain justiciable criteria guiding the determination of likelihood and significance; some of these will be outlined in the following. This is relevant to the analysis of the Commission's HRIAs for two reasons: either to identify, by way of comparison, that similar criteria already exist *de lege lata* in the EU's IA regime, or to analyze whether similar rules and principles could and should apply *de lege ferenda*.

6.2.2.1 The Geographical and Temporal Scope

The results of a screening process may vary significantly depending on what impacts are regarded as relevant by the respective IA regime.¹²⁶⁰ As briefly mentioned above, one role of law is to determine what goods and interests are protected by law and therefore generally part of an IA. In addition, law can and must also determine the geographical and temporal scope of relevant impacts. In EIA-law, it is debatable whether – in order to require an impact assessment – initiatives must have more than only local significance.¹²⁶¹ A criterion that would regard purely local impacts as insignificant is difficult to reconcile with human rights principles, in particular the equal moral worth of all human beings. The fact that an impact only occurs locally and therefore only affects few people does not justify human rights infringements. Consequently, the EU guidelines on Impact Assessment recognize that even local impacts can be significant: a policy proposal can also be significant if it is likely to have a significant impact only on a particular sector, societal group or geographical area.¹²⁶²

Another question of the geographical scope would be to what extent impacts that occur extraterritorially must be considered to determine significance. In the first decades after the enactment of NEPA, impact assessment regimes mainly focused on impacts within the own territory. However, as seen in chapter 4, the emerging principle of affectedness reduces the relevance of borders: government agencies are increasingly obliged also to assess transnational environmental impacts¹²⁶³ and human rights impacts irrespective of where they occur. This broadened geographical scope can also change judgments of significance. For example, the European Commission did not conduct an Impact Assessment for the ACTA Agreement (which was later rejected by the European Parliament) and gave the following reasons:

“No impact assessment has been envisaged for the ACTA Agreement. The ACTA will be built on existing international rules and norms, specifically the TRIPS agreement which contains common standards applicable at international level and implemented in all Member States of the European Union. Furthermore, the ACTA Agreement will be in line with the current level of

¹²⁵⁹ For further reference see Áine Ryall, *Effective Judicial Protection and the Environmental Impact Assessment Directive in Ireland* (Oxford: Hart, 2009); Matthew J. Lindstrom and Zachary Alden Smith, *The National Environmental Policy Act* (College Station: Texas A & M University Press, 2001), 1st ed.; Kleesiek, *Zur Problematik der unterlassenen Umweltverträglichkeitsprüfung* (above, n. 350).

¹²⁶⁰ Similar, in the case of risk assessment: Fischhoff and Kadavy, *Risk* (above, n. 825), p. 81.

¹²⁶¹ Holder, *Environmental Assessment* (above, n. 27), p. 124.

¹²⁶² European Commission, *Better Regulation Toolbox* (above, n. 204), Tool # 9 p. 48.

¹²⁶³ Craik, *The International Law of Environmental Impact Assessment* (above, n. 59).

harmonisation of IPR enforcement since it will reflect the European *acquis* in the area of the enforcement of intellectual property rights.”¹²⁶⁴

The ACTA would “be built on” existing trade rules but would go beyond that. The proposed “Trips-Plus” provisions were criticized not only because of the alleged impacts in the EU but also because they might reduce access to generic medicine in developing countries.¹²⁶⁵ The reason given by the Commission does not demonstrate that this impact was considered at all. So while it might be in line with the European *acquis* (which was controversial though), it is arguably not in line with the existing regulation in many developing countries where access to generic medicine can be essential to realize the right to health. In conclusion, the consideration of impacts on developing countries might have changed the overall evaluation of significance. After the failure of ACTA, the European Commission emphasized the relevance of human rights and its willingness to consider human rights impacts internally and externally.

Besides the geographic scope, the temporal scope can change the results of an impact analysis from insignificant to significant. This regards, on a general level, the complex issue of inter-generational justice: must impacts on future generations be considered or not? The inclusion of the interests of future generations¹²⁶⁶ might, in some cases, render expected impacts from insignificant to significant. Climate change is an illustrative example. A deregulation policy for the emitting industries might have a positive impact for the next couple of years if it creates jobs and lifts people out of poverty. It is, on the other hand, very likely to have significant and irreversible impacts if the analysis considers the impacts that are likely to occur within the next decades.¹²⁶⁷ But the temporal element can also make a difference on a smaller level. For example, the short-term health impact of chlorination of water would be clearly positive if balanced only against the benefit to control microbial diseases in water. The mid- to long-term impacts appear more ambiguous if one also considers carcinogenic by-products (e.g. chloroform).¹²⁶⁸ IA-law can therefore establish normative guidance by determining which impacts are relevant and must be considered when determining significance, both temporarily and geographically.

6.2.2.2 Baseline Scenario and the Consideration of Mitigation Measures

Determining the baseline scenario against which potential impacts are measured is crucial. If impacts of an initiative are measured against the status quo, projects or policies that only reinforce a pre-existing situation, e.g. lack of access to basic services, are likely to be qualified as having an only insignificant impact. However, and this is where human rights can make a difference, if impacts are also measured against normative standards, such an initiative could or should be determined as significant if it further inhibits the progressive realization of human rights.¹²⁶⁹

¹²⁶⁴ European Commission, ‘Anti-Counterfeiting Trade Agreement (ACTA): Roadmap’.

¹²⁶⁵ Lore van den Putte, Ferdi de Ville, and Jan Orbie, ‘The European Parliament as an international actor in trade: From power to impact’, in: Stelios Stavridis and Daniela Irrera (eds.), *The European Parliament and its International Relations*, pp. 52–69, p. 64.

¹²⁶⁶ Hans Jonas, *The imperative of responsibility* (Chicago: Univ. of Chicago Press, 1984).

¹²⁶⁷ Recently, a US court therefore required to also adequately assess and quantify the social costs of GHG emissions: US District Court for the District of Columbia, *Wildearth Guardians et al v. Zinke* (above, n. 1072).

¹²⁶⁸ Fischhoff and Kadvany, *Risk* (above, n. 825), p. 81.

¹²⁶⁹ See also section 8.2.3.

Another factor that may influence the determination of significance concerns the consideration of mitigating measures. In project developments, investors often promise mitigating measures to reduce negative impacts. Whether or not potential impacts are significant will then depend on whether or not the (promised) mitigating measures are already considered in the equation during the early screening stage. If they may be considered, impacts will generally appear less significant, and in consequence no full IA may be necessary. It is therefore an important legal question to what extent mitigation measures may already be considered during the screening stage.

The UK High Court held that, generally, mitigation measures may not be considered at the screening stage: “the underlying purpose of the [...] [EIA] Directive is that the potentially significant impacts of a development are described together with a description of the measures envisaged to prevent, reduce and, where possible, offset any significant adverse effects on the environment. Thus the public is engaged in the process of assessing the efficacy of any mitigation measures.”¹²⁷⁰ In consequence, the mitigation measures must be made part of the IA process – and subject to public consultation and potential contestation: “It is not appropriate for a person charged with making a screening opinion to start from the premise that although there may be significant impacts, these can be reduced to insignificance as a result of the implementation of conditions of various kinds. The appropriate course in such a case is to require an environmental statement setting out the significant impacts and the measures which it is said will reduce their significance.”¹²⁷¹ Later, the UK Supreme Court seems to favor a more balanced approach, stating that “on the one hand, [...] there is nothing to rule out consideration of mitigating measures at the screening stage; but, on the other, that the EIA Directive and the Regulations expressly envisage that mitigation measures will where appropriate be included in the environmental statement. Application of the precautionary principle, which underlies the EIA Directive, implies that cases of material doubt should generally be resolved in favour of EIA.”¹²⁷² In the case before the UK Supreme Court, the mitigation measures were “not straightforward” and there were “significant doubts as to how they would be resolved.”¹²⁷³

To what extent mitigation measures may already be considered in the pre-assessment stage is not only relevant for projects, but also for abstract policies. This can be illustrated in a case recently reviewed by the European Ombudsman. In order to justify why apparently no HRIA was required, the Commission argued, *inter alia*, that the “upgrading of the bilateral relationship through the EU-Vietnam Partnership and Cooperation Agreement ('PCA') signed in June 2012 also includes closer cooperation on human rights.”¹²⁷⁴ Using “cooperation on human rights” as a mitigating measure during the pre-assessment stage to defend why no HRIA was necessary is problematic: it does not allow to identify the expected impacts that would occur without the mitigation measure and to assess, in consequence, whether the promised flanking measures are adequate.

¹²⁷⁰ High Court, *R (on the Application of Lebus) vs. South Cambridgeshire District Council*, para 45.

¹²⁷¹ *Ibid.*, para 46.

¹²⁷² The Supreme Court (UK), *R (Champion) v North Norfolk District Council and another* (above, n. 1250), para 51.

¹²⁷³ *Ibid.*, para 53.

¹²⁷⁴ European Ombudsman, *HRIA for the EU-Vietnam Free Trade Agreement* (above, n. 157), para 3.

6.2.2.3 Cumulative Impacts

IA law can prescribe the consideration of cumulative impacts. If an agency refuses to conduct an EIA due to a failure to consider cumulative impacts, this could be subject to judicial review. Cumulative impacts mean that the impacts of the project in question must be assessed in conjunction with impacts caused by other pre-existing conditions.¹²⁷⁵ In *Kleindienst*, the US Court of Appeals emphasized the importance of cumulative impacts, but makes clear that the scope should be broader. In order to determine significance in absence of Congressional or administrative interpretation, the agency in charge should consider both relative and absolute impacts, namely “(1) the extent to which the action will cause adverse environmental effects in excess of those created by existing uses in the area affected by it, and (2) the absolute quantitative adverse environmental effects of the action itself, including the cumulative harm that results from its contribution to existing adverse conditions or uses in the affected area.”¹²⁷⁶

Relative impacts mean that the existing use is taken into account, which in turn means that the effects will generally look less severe than in absolute terms. By way of example “one more highway in an area honeycombed with roads usually has less of an adverse impact than if it were constructed through a roadless public park”.¹²⁷⁷ Understandable as it might be in some cases, such a criterion is not unproblematic. In particular, it raises distributive questions, as it disadvantages those who already live in severely affected areas. Due to a pointed phrase attributed to Paracelsus, the dose makes the poison, and therefore the Court requires to consider both the relative and the absolute adverse effects: “even a slight increase in adverse conditions that form an existing environmental milieu may sometimes threaten harm that is significant. One more factory polluting air and water in an area zoned for industrial use may represent the straw that breaks the back of the environmental camel. Hence the absolute, as well as comparative, effects of a major federal action must be considered.”¹²⁷⁸ Not surprisingly, the consideration of cumulative impacts further complicates the necessary assessment, and SIA theorists and practitioners have criticized that cumulative effects practice is “under-developed”.¹²⁷⁹

The consideration of cumulative impacts in ex-ante IAs is important because often other remedies for collectively caused harm are not available. This is where IAs can have a compensating function. Under civil law as well as the law governing state responsibility, harm is often not attributable to individuals or states if caused cumulatively. This has recently been confirmed in a judgment by the German Regional Court Essen.¹²⁸⁰ The court dismissed a lawsuit against the German energy producer RWE. The claimant was a Peruvian farmer living in a village in the Andes which was threatened by a potential flood wave. The flood could be caused by a melting glacier: the risk of a flood wave had allegedly significantly increased due to climate change. The claimant was therefore seeking financial compensation from RWE, a major contributor to greenhouse gas emissions, for the construction of a dam. The Court dismissed the lawsuit mainly be-

¹²⁷⁵U.S. District Court for the Eastern District of North Carolina, 341 F. Supp. 356 (E.D.N.C. 1972), *Natural Resources Defense Council v. Grant (Chicod Creek)*.

¹²⁷⁶ US Court of Appeals, 471 F. 2d 823 (2nd Cir. 1972), *Hanly v. G Kleindienst*.

¹²⁷⁷ Ibid.

¹²⁷⁸ Ibid.

¹²⁷⁹ Pope et al., ‘Advancing the theory and practice of impact assessment: Setting the research agenda’ (above, n. 75), p. 5; Ana Maria Esteves, Daniel Franks, and Frank Vanclay, ‘Social impact assessment: The state of the art’, *Impact Assessment and Project Appraisal*, 30 (2012), pp. 34–42, p. 39.

¹²⁸⁰ Regional Court (*Landgericht*) Essen, 15 December 2016, file no.: 2 O 285/15.

cause of a lack of legal causality: assuming that climate change is cumulatively caused by many companies and individuals, the pending harm was not sufficiently attributable to RWE. In consequence, RWE was not legally responsible for providing financial compensation. The case has been appealed, and the Higher Regional Court has ordered the taking of evidence.¹²⁸¹ In the evidence order, the Higher Regional Court held that the claim is plausible: Even those who, like RWE, operate a plant lawfully must compensate for the resulting damage to the property of others. The Court must now take evidence to determine whether RWE actually contributed to the melting of the glaciers through its emissions, which would affect the plaintiff's property, and assess whether this contribution is attributable and triggers an obligation to provide for compensation.

6.2.2.4 Irreversible Impacts

Another criterion that might qualify potential impacts as significant concerns irreversibility. In an attempt to define significance, the ECJ states that impacts are significant if they cause “substantial or irreversible change”.¹²⁸² While the term substantial is hardly more specific than the term significant, the criterion of irreversibility is indeed helpful – and, as will be seen, also relevant in the context of human rights-related impact assessments. Irreversibility is thus another factor that determines the significance of impacts. One of the major underlying reasons justifying ex-ante impact assessments is to prevent harm.¹²⁸³ At least where an initiative grants rights and freedoms to individuals, such as the permission to proceed with a project, the principle of proportionality might require that permission be granted even if certain negative impacts might occur; however, should they occur, the holder of the permission would be required to eliminate the consequential effects. This would be a form of ex-post control. This option is obviously not viable for irreversible impacts. Therefore, irreversibility increases the significance of impacts, a fact that is explicitly recognized by different IA-norms.¹²⁸⁴ This is also reflected in World Bank law where irreversibility is one indicator to classify a project as “A” (subject to strict standards and a full impact assessment).¹²⁸⁵ The irreversibility criterion is also decisive for the application of the precautionary principle¹²⁸⁶ and to determine which options would substantively be illegal and therefore to be discarded.

6.2.2.5 Human Rights Infringements

Human rights as legal principles provide normative guidance to determine what impacts are significant or not. Reference to human rights norms, case law or non-binding recommendations by UN institutions can help to evaluate whether certain consequences are relevant and grave. However, human rights *impact* is not a doctrinally precise term. It includes effects on the *enjoyment* of human rights and is therefore, as said before, broader than the term human rights *infringement*. I therefore argue that every (predictable) impact that is a human rights infringement

¹²⁸¹ Higher Regional Court (*Oberlandesgericht*) Hamm, Order of 30 November 2017, file no. I 5 U 15/17.

¹²⁸² ECJ, Judgment of 21 September 1999, Case C-392/96, *Commission v. Ireland* (1999), para 67.

¹²⁸³ Arguably IAs are the procedural side of the precautionary principle, see section 2.4.

¹²⁸⁴ In the case of EU Impact Assessments, see by way of example: European Commission, *Better Regulation Toolbox* (above, n. 204), Tool # 13 p. 78.

¹²⁸⁵ For example: IFC, *Policy on Environmental and Social Sustainability* (above, n. 121), para 40.

¹²⁸⁶ See section 8.2.4.2.

which is not evidently justified would qualify as significant. Such an unjustified infringement would be a human rights violation, and it would be incompatible with human rights law to assume that some human rights violations are insignificant. It would, therefore, generally be necessary to conduct a full impact assessment to consider these impacts, identify less restrictive options and assess whether the infringement can be justified. In this case, the impact assessment procedure could constitute a form of human rights protection through procedure. This is also reflected in some provisions of international development law: the law of all development banks generally requires impact assessments for involuntary resettlement, as this would be a clear infringement of human rights that needs to be justified.

6.2.2.6 No or Conflicting Evidence: Factual Uncertainty during the Pre-Assessment Stage

It is possible to establish a decision rule according to which the lack of scientific evidence requires per se an impact assessment. This was at least the main line of argument brought forward by the applicants in a case before the UK Court of Appeal: Insofar as there is uncertainty about the potential environmental impacts of an initiative, one cannot conclude that these impacts were unlikely to have a significant effect¹²⁸⁷ so that an EIA was required. Such a view might be supported by the very purpose of Impact Assessments, namely to increase knowledge and appraise risks; absence of scientific evidence seems worrisome, so that an agency should at least “have a closer look” at potential impacts and mitigation measures and for that purpose conduct an in-depth impact assessment. Nevertheless, the argument was rejected in the first instance, and the Court of Appeal confirmed. The court held that whether a development is likely to have significant effect involves an exercise of judgment or opinion, in particular because significance is not a “hard-edged concept”. Consequently, the standard of review was the deferential reasonability test.¹²⁸⁸

Different from situations with no evidence are those where conflicting evidence exists. Scientific evidence is ambiguous if scientists come to a different conclusion about potentially significant impacts. Would such a situation of conflicting scientific evidence already be sufficient to require that an IA is conducted? The House of Lords held that “conflicting evidence on the potential effect on the river is enough in itself to show that it was likely to have significant effects on the environment. In those circumstances, individuals affected by the development had a directly enforceable right to have the need for an environmental assessment considered before the grant of the planning permission by the Secretary of State and not afterwards by a judge”.¹²⁸⁹ This holding reflects the analytic-deliberative risk paradigm as it emphasizes the relevance of deliberation during the decision-making process. At the same time, it is compatible with administrative discretion: while limited judicial review shall protect the freedom of decision-making in areas where an agency is in a better position to evaluate the facts of a case, this is different where conflicting scientific evidence exists. If even experts disagree, an agency would generally not be in a better position to make informed decisions than a court. Rather, the agency is equally dependent on external scientific advice. In line with the concept of human rights protection through organization and procedure, the high degree of uncertainty caused by conflicting scientific evidence can be compensated by establishing inclusive and participatory procedures. Con-

¹²⁸⁷ Holder, *Environmental Assessment* (above, n. 27), p. 125.

¹²⁸⁸ Court of Appeal, *R (Jones) v Mansfield District Council* (above, n. 1255).

¹²⁸⁹ House of Lords, *Berkeley vs. Secretary of State for the Environment and others* (above, n. 918).

sequently, cases “of material doubt should generally be resolved in favour of EIA”.¹²⁹⁰ Adopted to HRIAs, conflicting evidence may concern either differing expert opinions on the expected impacts or, in particular where extraterritorial human rights impacts are at stake, conflicting reports about the human rights situation in the countries where impacts are possible. This increases the relevance of human rights country reports and human rights research in general.

6.2.2.7 Politically sensitive issues: Concern Assessment and Normative Uncertainty

Another potential criterion to identify situations that require a full impact assessment would be the political sensitivity of an issue. While it is clearly difficult to define with the necessary precision what issues are politically sensitive, some authors working on risk governance have proposed a so-called concern assessment. This would be a scientific method that is *also* able to reflect concerns and values. It basically means that social scientists must “identify and analyze issues that individuals or society as a whole link to a certain risk”; for that purpose, different social science methods ranging from surveys and focus groups via econometric analysis to structured hearings with stakeholders can be used.¹²⁹¹ Such a concern assessment would be more than a mere platform for stakeholder participation or feedback; it is rather “a social science activity aimed at providing sound insights and a comprehensive diagnosis of concerns, expectations and worries that individuals, groups or different cultures may associate with the hazard or the cause of the hazard”.¹²⁹² Consequently, it should also be subject to the same methodological standards and peer review as other scientific activities would be.¹²⁹³ Such a concern assessment would perfectly reflect the analytic-deliberative paradigm. The idea of such a concern assessment is reflected in the EU’s Trade HRIA Guidelines which require that attention should be given to “politically sensitive human rights” issues during the screening stage in order to identify potentially significant impacts that require closer analysis.¹²⁹⁴ Similarly, the Trade SIA Handbook states that one of the main criteria to be considered during the screening process is the relevance – or “concern” – of an issue for specific stakeholders.¹²⁹⁵

6.2.3 Procedural Criteria: A Cooperative and Iterative Process to Determine Likelihood and Significance of Impacts

In addition to the criteria identified above, IA norms can also establish procedural requirements regulating who must be involved in the process of predicting and evaluating impacts at the screening stage. For example, coordination between different departments and services within the European Commission is important: for more coherent policy-making, but also to determine likely significant impacts. Knowledge – in the sense of know-how and know-that – is often dis-

¹²⁹⁰ The Supreme Court (UK), *R (Champion) v North Norfolk District Council and another* (above, n. 1250), para 51.

¹²⁹¹ Andreas Klinge and Ortwin Renn, ‘Risk Governance: Contemporary and Future Challenges’, in: Johan Eriksson, Michael Gilek, and Christina Rudén (eds.), *Regulating Chemical Risks*, pp. 9–27, p. 16.

¹²⁹² *Ibid.*, p. 25.

¹²⁹³ *Ibid.*

¹²⁹⁴ European Commission, *Guidelines on the analysis of human rights impacts in impact assessments for trade-related policy initiatives* (above, n. 42), pp. 6–7

¹²⁹⁵ European Commission, ‘Handbook for Trade Sustainability Impact Assessment’ (above, n. 212), p. 17.

persed among different organizational units within an institution. Cooperation during IAs is therefore a tool of internal knowledge-generation and can help to make sure that all predictable impacts are being considered. It may, among other things, respond to some of the risk biases described above, in particular availability heuristics.¹²⁹⁶ If different perspectives are involved at an early stage, it would be more likely to identify all potentially relevant impacts, and to predict – with more clarity – which of these impacts would likely be significant. In particular if one considers politically sensitive issues, or human rights infringements as per se significant, different perspectives can help to more clearly identify these concerns at an early stage of the decision-making process. This section will briefly outline the Commission's IA procedure in which the Commission should determine the likely and significant impacts.

The main rules on competence and procedure for IAs are laid down in the Better Regulation Guidelines,¹²⁹⁷ but do not radically differ from pre-existing practice. The IA is led by the DG(s) responsible for the respective policy.¹²⁹⁸ Differences exist due to different types of initiatives to be assessed – international agreements, legislative proposals, delegated acts, implementing measures or other Commission activities – and the different types of impacts to be assessed, so that no clearly-defined one-size-fits-all method and procedure applies. Nevertheless, the Better Regulation Guidelines, supplemented by the Better Regulation Toolbox, contain certain principles and prescribe the main steps usually to be followed.¹²⁹⁹

This process contains technical and political elements. Planning starts with the definition of the scope of the initiative and “political validation”. Political validation permits to proceed with further preparatory work.¹³⁰⁰ Responsibilities for the validation of initiatives depend on the type of initiative in question, including mainly the competent Commissioner, and, for a major initiative, Vice-President(s).¹³⁰¹ Major initiatives must be accompanied by a Roadmap/Inception Impact Assessment¹³⁰² and entered into Decide Planning¹³⁰³ as soon as the preparatory work starts.¹³⁰⁴ The IA guidelines contain a list of types of initiatives that are per se “major initiatives”.¹³⁰⁵

¹²⁹⁶ On cognitive biases: See section 5.4.4.

¹²⁹⁷ European Commission, *Better Regulation Guidelines* (above, n. 199).

¹²⁹⁸ *Ibid.*, p. 15.

¹²⁹⁹ European Commission, *Better Regulation Toolbox* (above, n. 204), in particular Tools # 8 et seq.

¹³⁰⁰ European Commission, *Better Regulation Guidelines* (above, n. 199), p. 6f.

¹³⁰¹ European Commission, *Better Regulation Toolbox* (above, n. 204), Tool #6.

¹³⁰² “A roadmap is a tool to substantiate the political validation of an initiative the Commission is preparing and, to inform stakeholders about planned consultation work, impact assessments, evaluations, Fitness Checks. It is published at an early stage by the Secretariat General on the Commission's web site and helps stakeholders prepare timely and effective inputs to the policy making process. A more developed roadmap is prepared for initiatives supported by impact assessments (an inception impact assessment).” *Ibid.*, p. 90.

¹³⁰³ „Decide is the Commission's tool for identifying, managing and tracking the most important initiatives which proceed to adoption by the College. Decide Planning is the first module which manages the political validation process of new initiatives. Once an envisaged initiative is validated in Planning, it follows its course to the other modules of Decide (Consultation and Decision). Decide entries provide information about the type of initiative, its timing and content, the adoption procedure and other procedural elements. They contain a link to roadmaps (where applicable) and indicate whether an impact assessment (IA) and/or implementation plan (IP) is being prepared. *Ibid.*, p. 88.

¹³⁰⁴ *Ibid.*, p. 7.

¹³⁰⁵ European Commission, *Better Regulation Toolbox* (above, n. 204), Tool #6.

Roadmaps are essential for the pre-impact assessment stage. They are tools to “substantiate the political validation of an initiative the Commission is preparing and, to inform stakeholders about planned consultation work, impact assessments, evaluations, Fitness Checks.”¹³⁰⁶ Based on the associated Roadmap, the competent DGs should determine at the earliest possible stage whether the respective policy requires a full IA. If the question is answered in the affirmative, the Roadmap should be further developed and presented/published as an Inception IA.¹³⁰⁷ The Secretariat-General is in charge of publishing approved Roadmaps and Inception IAs on the Commission website.¹³⁰⁸ The Inception IA-Report, which concludes the pre-assessment stage, already contains a first description of the problem and an overview of possible policy options, but also outlines the planned stages of the planning process, including the foreseen impact assessment work and stakeholder consultation.¹³⁰⁹ In consequence, stakeholders are informed about the Commission’s plan and “can provide initial feedback (including data and information they may possess) on all aspects of the intended initiative and where applicable its impact assessment.”¹³¹⁰ If the Commission does not expect likely significant impacts, the Roadmaps must justify the absence thereof;¹³¹¹ this is similar to the “Finding of No Significant Impact” (“FONSI”) required under NEPA. Roadmaps and Inception Impact Assessments are therefore important information tools for the Commission, other EU-Institutions and for external stakeholders. In the case where the Commission decides not to conduct an IA, the European Parliament or stakeholders can hold the Commission accountable. In this sense, the Better Regulation Guidelines respond to recommendations made by the Court of Auditors for transparency at an early stage.¹³¹²

The determination of significant impacts is a cooperative and iterative approach. It is iterative, because the determination of significant impacts is not limited to the pre-assessment stage when deciding whether IAs are necessary, but required during the whole assessment cycle: while the assessment proceeds, it is possible that apparently significant impacts turn out to be insignificant, or that new significant impacts become apparent. The cooperative nature of the IA process – and consequently also the collective determination of significance – is reflected in the institutional design of the IA regime.¹³¹³ At each stage, the (renewed) identification and evaluation of significant impacts play an important role. An Interservice Steering Group (ISG) will generally be set up to steer the IA process, and the IA-report shall be prepared collectively.¹³¹⁴ The establishment of the ISG is one instrument of internal knowledge generation¹³¹⁵ and policy coordina-

¹³⁰⁶ European Commission, *Better Regulation Guidelines* (above, n. 199), p. 90.

¹³⁰⁷ *Ibid.*, p. 7 and 90.

¹³⁰⁸ *Ibid.*, p. 15.

¹³⁰⁹ *Ibid.*, p. 15.

¹³¹⁰ *Ibid.*, p. 7.

¹³¹¹ *Ibid.*

¹³¹² European Court of Auditors, Special Report No. 3/2010, *Impact Assessments in the EU Institutions: Do they support decision-making?* (2010), p. 46.

¹³¹³ Cooperation and Coordination between Departments is also a principle laid down in Art. 23 of the *Rules of Procedures of the Commission*, (C(2000) 3614), OJ L 308, 8.12.2000, p.26.

¹³¹⁴ European Commission, *Better Regulation Guidelines* (above, n. 199), pp. 15 et seq.

¹³¹⁵ On different types of internal knowledge generation see section 5.5.

tion. The Better Regulation Toolbox more closely defines who should be able to participate in the ISG for a specific initiative.¹³¹⁶

The Inception Impact Assessment is finalized and published on the Commission's website, so that stakeholders are informed and able to provide feedback and evidence "in relation to the problem, possible policy options and their likely impacts and subsidiarity considerations".¹³¹⁷ Within the ISG, a consultation strategy shall be developed, including a mandatory (usually) 12-week internet-based open public consultation. This strategy should "ensure that stakeholders' views are sought on all key impact assessment questions".¹³¹⁸ Consequently, an external stakeholder can provide information, including information relevant to further refine the identification of significant impacts. Now is also the time for the "collection and analysis of all relevant evidence, including data, scientific advice, other expert views, stakeholder input, etc.". ¹³¹⁹ As the collection and analysis of data and consultation are two major (even though overlapping) elements of the impact assessment process, the Guidelines and Toolbox contain detailed rules on both consultation and analysis which will be discussed in the following two chapters. After consultation and analysis, the IA-Report is drafted by the lead DG with the members of the ISG.¹³²⁰ The draft IA will then be submitted to the Regulatory Scrutiny Board ("RSB") for quality review. The RSB is an independent and powerful quality review mechanisms within the Commission, and an IA-report requires a positive opinion by the RSB in order to proceed;¹³²¹ this is an important difference with regard to the competences of its predecessor, the Impact Assessment Board, which had no such veto-power.¹³²² The RSB can therefore require to broaden the scope of the analysis and may, for example, require that additional human rights impacts are being analyzed. The RSB is therefore competent, inter alia, to review whether all likely and significant impacts were adequately considered; if the draft IA-report fails to do so, it would be sent back for revision.¹³²³ Once the draft-IA report has received a positive opinion by the RSB, the draft-IA and the policy proposal – legislative or non-legislative - will be submitted to Inter-Service Consultation (ISC)¹³²⁴ in order to also receive feedback and input from those departments and services not attending the ISG. At any of these stages, the likelihood and significance of impacts can be reassessed. After the ISC, the draft and the proposal will be sent to the College of Commissioners for discussion and eventual approval.

¹³¹⁶ "All DGs with policies likely to be affected by the initiative or that will contribute to the objectives of the initiative should be invited to participate along with the relevant policy coordination unit of the SG and the Legal Service. In addition, DGs with core expertise in specific areas such as economic analysis (e.g. ECFIN), scientific research and analytical models (e.g. JRC), social impacts (e.g. EMPL), SMEs, competitiveness (e.g. GROW), environment (e.g. ENV), fundamental rights (JUST) [...] should also participate where appropriate to ensure that the IA calls upon all relevant expertise in the Commission services": European Commission, *Better Regulation Toolbox* (above, n. 204), pp. 43-44.

¹³¹⁷ European Commission, *Better Regulation Guidelines* (above, n. 199), p. 16.

¹³¹⁸ *Ibid.*

¹³¹⁹ *Ibid.*

¹³²⁰ *Ibid.*; European Commission, *Better Regulation Toolbox* (above, n. 204), p. 43.

¹³²¹ European Commission, *Better Regulation Guidelines* (above, n. 199), p. 16.

¹³²² For an overview of the competences of the IAB and a comparison with other review mechanisms such as the US-American Office of Regulatory Affairs see: Meuwese, *Impact Assessment in EU Lawmaking* (above, n. 267), 72 ff.

¹³²³ European Commission, *Better Regulation Guidelines* (above, n. 199), p. 16.

¹³²⁴ *Ibid.*, p. 9.

This overview demonstrates that different actors within and outside the Commission are involved in the IA-process and at different stages. It is thus a cooperative and iterative process. The Trade HRIA guidelines¹³²⁵ contain similar provisions that raise awareness of human rights risks and encourage intra-institutional cooperation, even though the Commission also involves external consultants to conduct the Trade SIA. Those in charge of the IA are, for example, encouraged to consult the Legal Service or DG Justice¹³²⁶ and to consider the recommendations and findings by different EU and international human rights bodies.¹³²⁷ The determination of likely and significant impacts is therefore not only guided by substantive principles but also by procedural law.

6.2.4 Conclusion and Outlook

The chapter has identified the role law plays in the determination of “significant impacts”. This is an essential step during the pre-assessment or screening-stage because it is decided whether a full IA is necessary and, if so, which impacts are considered during the assessment. Legal rules and principles apply when determining significance, they assign competencies and regulate the procedure at the pre-assessment stage. Rules on decision-making also require the production of certain documents – e.g. a Roadmap or an Inception IA-Report that obligates decision-makers to give reasons for their prediction of expected impacts.

In IA-law, different (legal) criteria and decision-rules can guide the determination of the significance of potential impacts in order to identify whether a full IA is necessary. This determination is a “mix between fact and law”: law determines, in the first place, what impacts are relevant for the IA at all, for example whether only environmental impacts, or also social, cultural and human rights impacts must be considered. Moreover, law can state that certain initiatives (e.g. the Annex-I cases of the EIA Directive) or certain impacts (e.g. on indigenous peoples) count *per se* as significant requiring a closer analysis in a full IA. Under EU law, for example, the conclusion of trade agreements must generally be accompanied by a full Trade SIA. In addition, law provides broad principle-based guidance on how to determine the significance of non-classified initiatives (e.g. the Annex-III list of the EIA Directive). Drawing largely on domestic EIA case law, the previous analysis has also identified several elements that are relevant to the identification of significant impacts. For example, law can prescribe how to define the relevant geographical scope, how to identify the correct baseline scenario, whether mitigating measures may already be considered during the pre-assessment stage, and how to deal with cumulative and irreversible impacts or conflicting scientific evidence. Law also provides a certain ranking of impacts. For example, an initiative that not only somehow affects but clearly *infringes* human rights should *per se* be qualified as having significant impacts and thus requiring an in-depth assessment.

The determination of significant impacts is also influenced by procedural provisions, namely by defining whose view, judgment and perception shall be considered when the significance of impacts is being predicted. The EU’s Impact Assessment regime requires the extensive use of in-

¹³²⁵ European Commission, *Guidelines on the analysis of human rights impacts in impact assessments for trade-related policy initiatives* (above, n. 42), p. 7.

¹³²⁶ European Commission, *Better Regulation Toolbox* (above, n. 204), Tool #28 p. 210.

¹³²⁷ European Commission, *Guidelines on the analysis of human rights impacts in impact assessments for trade-related policy initiatives* (above, n. 42), p. 7.

ternal knowledge sources by establishing, inter alia, an Interservice Steering Group. Also, the consultation of external stakeholders is generally required at an early stage. In addition, public law also determines which other external knowledge sources should be used for the impact assessment. Unlike at the World Bank, the European Commission explicitly encourages the consideration of international human rights sources.¹³²⁸ It means that this type of knowledge enters the IA procedure and must also be used to determine the significance of impacts. As already analyzed above (see section 4.7.4.2), the General Court reviewed some of these external human rights knowledge sources in *Front Polisario* to determine when the obligation to examine human rights impacts would be triggered. This is essentially the case if facts are “likely to give rise to doubt” that the agreement may have negative human rights impacts. The General Court considered, in this context, inter alia an NGO report about the human rights situation in Western Sahara.

This chapter has also briefly discussed the determination of significant impacts in light of the different risk paradigms, inter alia with regard to different concepts of judicial review. From the perspective of an objective-managerial paradigm, the role of judicial review would be mainly to (a) review compliance with the IA procedure and (b) distinguish “relevant” objective evidence from “irrelevant” subjective opinion. From an analytic-deliberative perspective, there would be no ex-ante assumption that certain opinions should per se be exempted. Rather, even a scientific analysis should be subject to critical deliberation. Courts or quasi-judicial bodies would, inter alia, have to review whether the authority also took conflicting scientific evidence into consideration. If conflicting evidence about the significance of impacts exists, it has been argued, then the impacts could not be regarded as insignificant, and a full IA would be necessary. However, it also becomes clear that it is a difficult task to improve the quality-control of IAs¹³²⁹, a task that cannot and should not be limited to judicial review. Other non-judicial review mechanisms will therefore be analyzed in the final chapters.

The next chapter will focus on the role of participation in impact assessments. It will not only concentrate on participation provisions contained in the IA regime itself. Rather, it will also analyze how external actors can participate in EU policy-making in general and how that affects the institutionalization of HRIAs. The first section of the next chapter contains general considerations about participation and impact assessments under (international) public law. It will in particular identify legal sources, goals, objects and modalities of participation. Through these lenses, the second half of the following chapter will analyze the role of participation in EU law and how it relates to the EU Impact Assessment regime.

¹³²⁸ By way of example: European Commission, *Guidelines on the analysis of human rights impacts in impact assessments for trade-related policy initiatives* (above, n. 42), p. 10. For further reference, see section 8.3. For the sake of completeness, it should be noted, though, that the World Bank’s recent Vision Statement, adopted in the context of the recent safeguard policy reforms, at least contains a non-binding commitment to human rights: World Bank, *Environmental and Social Framework, A Vision for Sustainable Development*, para 3.

¹³²⁹ Holder, *Environmental Assessment* (above, n. 27), p. 102.

7 CHAPTER 7: PARTICIPATION

7.1 Participation, Law and HRIAs

This chapter analyzes and evaluates the role of participation for HRIAs. Participation is not only widely regarded as an important element of impact assessments. It is also a broadly recognized principle of public law. However, participation as such is a vague term: participation can pursue different objectives, and the forms or modalities in which participation can take place are extremely diverse. The first part of this chapter will therefore provide a general overview of approaches to participation in public law, and identify different categories of participation. This is helpful to better analyze and evaluate the actual or potential role participation – and the rules and principles governing participation – play and could play for HRIAs. Having identified these categories, I will – in the second part of this chapter – use them to analyze and evaluate participation in the EU's Impact Assessment regime.

7.1.1 Legal Sources and Categories of Participation

Participation is important to impact assessments,¹³³⁰ and it has become a broadly recognized principle of public law, both internationally and in many domestic legal orders. Apart from sources of human rights law, participation is now – in some form - required in environmental law¹³³¹, development law¹³³², trade law¹³³³, and recently even, at least in part, for investment arbitration¹³³⁴. International organizations, such as the World Bank, or states, such as the People's Republic of China, which often avoid human rights language, recognize the value of participation in certain types of public decision-making and require participation during Environmental Impact Assessments.¹³³⁵ Participation is one of the central principles in international administrative law.¹³³⁶ Participation requirements are based on different normative principles and concepts, ranging from a human right to participation via participation as a democratic principle to a principle of “good administration” or “good governance”.¹³³⁷ Article 71 UN Charter authorizes

¹³³⁰ Pope et al., ‘Advancing the theory and practice of impact assessment: Setting the research agenda’ (above, n. 75), p. 5; Harrison and Goller, ‘Trade and Human Rights: What Does ‘Impact Assessment’ Have to Offer?’ (above, n. 36); on different perspectives on public participation: O’Faircheallaigh, ‘Effectiveness in social impact assessment: Aboriginal peoples and resource development in Australia’ (above, n. 926); see section 2.4.2.3

¹³³¹ Craik, ‘Deliberation and Legitimacy in Transnational Governance: The Case of Environmental Impact Assessments’ (above, n. 177).

¹³³² Dann, *The Law of Development Cooperation* (above, n. 4), 104 ff.

¹³³³ Bonzon, *Public Participation and Legitimacy in the WTO* (above, n. 280); Ioannidis, ‘A Procedural Approach to the Legitimacy of International Adjudication: Developing Standards of Participation in WTO Law’ (above, n. 67).

¹³³⁴ Amokura Kawharu, ‘Participation of Non-governmental Organizations in Investment Arbitration as Amici Curiae’, in: Michael Albert Waibel (ed.), *The backlash against investment arbitration*, pp. 275–296.

¹³³⁵ Jesse Moorman and Zhang Ge, ‘Promoting and Strengthening Public Participation in China’s Environmental Impact Assessment Process: Comparing China’s EIA Law and U.S. NEPA’, *Vermont Journal of Environmental Law*, 8 (2007), pp. 282–335, p. 299.

¹³³⁶ Kingsbury, Krisch and Stewart, ‘The Emergence of Global Administrative Law’ (above, n. 1095), p. 34.

¹³³⁷ Leslie-Anne Duvic-Paoli, ‘The Status of the Right to Public Participation in International Environmental Law: An Analysis of the Jurisprudence’, *Yearbook of International Environmental Law*, 23 (2012), pp.

es the United Nations Economic and Social Council to “make suitable arrangements for consultation with non-governmental organizations”, and Article 7 (6) UNFCCC even establishes a presumption in favor of external participation.¹³³⁸ Article 25 ICCPR defines participation as a human right, namely that “[e]very citizen shall have the right and the opportunity, without any of the distinctions mentioned in article 2 and without unreasonable restrictions: (a) To take part in the conduct of public affairs, directly or through freely chosen representatives [...]”.¹³³⁹

However, the understanding of what exactly participation means, and what it should achieve, greatly varies. This is also relevant to HRIA law. For information models, participation is mainly a tool to gather information and exploit different knowledge sources. For preference-accumulation models, it is the central element of IAs, namely to provide a platform for negotiation. For transformational models, participation is necessary to combine analytical and deliberative elements in a process that in itself is able to give specific meaning to broad substantive principles of law. Consequently, participation can take different forms, ranging from a mere online-consultation to citizen voting in rule-making committees. Therefore, this chapter wants to further refine the concept of participation and form categories that allow to analyze and evaluate to what extent the principle of participation is reflected in the norms that guide the conduct of HRIAs.

The first category concerns the goals of participation. Second, a distinction should be made between different objects, i.e. the type of initiative to which a particular participation procedure relates. The third category concerns the modalities of participation. The determination of suitable modalities of participation – which can range from an option to provide input to consent requirements – depends largely on the goal and the object of participation. Clearly, participation in trade policy-making faces different opportunities and challenges than participation in a specific infrastructure project. Having analyzed the potential goals, objects and modalities of participation, the focus will then be on the scope of participants: participation can be restricted to individuals whose rights are likely to be affected by the initiative in question on the one side of the spectrum to an open consultation where every individual can provide input. Determining the scope of participants will also, to a large extent, depend on the goal, objective and modalities of participation. Finally, as a cross-cutting issue, the role of transparency and access to information will be addressed: effective participation without adequate information is almost impossible.

80–105; Steiner, ‘Political Participation as a Human Right’ (above, n. 516); Fabienne Peter, ‘The Human Right to Political Participation’, *Journal of Ethics & Social Philosophy* VOL. 7, NO. 1, 7 (2013), pp. 1–16.

¹³³⁸ “[...] Anybody or agency, whether national or international, governmental or non-governmental, which is qualified in matters covered by the Convention, and which has informed the secretariat of its wish to be represented at a session of the Conference of the Parties as an observer, may be so admitted unless at least one third of the Parties present object.”

¹³³⁹ For an overview of the status of the right to participation in (international) public law with extensive reference to case law: Duvic-Paoli, ‘The Status of the Right to Public Participation in International Environmental Law: An Analysis of the Jurisprudence’ (above, n. 1337); see also: Bonzon, *Public Participation and Legitimacy in the WTO* (above, n. 280); Kawharu, ‘Participation of Non-governmental Organizations in Investment Arbitration as Amici Curiae’ (above, n. 1334); Anna-Karin Lindblom, *Non-governmental Organisations in International Law* (Cambridge: Cambridge Univ. Press, 2005); Steiner, ‘Political Participation as a Human Right’ (above, n. 516); Anton Vedder, ed., *NGO involvement in international governance and policy*.

Participation in public decision-making recognizes the importance of communication, which is not a one-dimensional process, but rather includes different communicative interactions: communication with other public institutions, with project developers or recipient governments, with interest groups and affected individuals.¹³⁴⁰ The focus of this chapter is on external participation, i.e. not the involvement of different departments within an IO, different ministries within one government, or different services within the European Commission.

7.1.2 Goals of Participation

Participation can serve different goals, which can roughly be categorized as having an instrumental (information and acceptance function) or inherent value (accountability and acceptability function).

First, participation can, as discussed above, be regarded mainly as a managerial tool to gather data, process information and generate knowledge (*information function*).¹³⁴¹ This can make decisions more efficient and effective:¹³⁴² ideally, informed policy-making will lead to better decisions. Second, participation can increase the acceptance of specific decisions, a rather instrumental justification (*acceptance function*).¹³⁴³ This is based on the assumption that the involvement of affected and otherwise interested members of the public increases the acceptance of a particular initiative and thus serves as a tool to reduce resistance and minimize the risk of social backlash.¹³⁴⁴

Third, participation can also serve to increase accountability and empower a “court of public opinion”¹³⁴⁵ to control the exercise of authority (*accountability function*). Participation can ensure that “unelected public officials account for public views and public [...] values”.¹³⁴⁶ Similarly, in US administrative law, public participation is justified, inter alia, due to its ability to frame the “discretionary powers of governmental entities”¹³⁴⁷, which is why the phrase of the “court of public opinion” appears justified. Especially where regulation has shifted from command-and-control to more flexible and cooperative forms of governance, the participation of public interest groups can help to prevent cooperative regulation from regulatory capture.¹³⁴⁸

¹³⁴⁰ In project-IAs, the project-developer provides information, generally charges independent consultants to conduct (parts of) the impact assessments and submits the results to the competent institution. Regulatory or legislative IAs on the other hand are often conducted by the respective institutions – ministries, departments, regulatory agencies or the Parliament – themselves. In the case of planned trade agreements, however, the EU generally engages consultants to conduct the Trade SIA. The EU Commission fixes the conditions in a Memorandum of Understanding, and retains some control through an SIA interservice steering group: European Commission, ‘Handbook for Trade Sustainability Impact Assessment’ (above, n. 212), p. 11.

¹³⁴¹ Bonzon, *Public Participation and Legitimacy in the WTO* (above, n. 280), p. 32.

¹³⁴² Markus W. Gehring, ‘Tools for More Sustainable Trade Treaties with Developing Countries’ (above, n. 62), p. 70.

¹³⁴³ Bonzon, *Public Participation and Legitimacy in the WTO* (above, n. 280), p. 32.

¹³⁴⁴ This would respond to the concept of “social legitimacy” or acceptance, see section 3.2.1.1.

¹³⁴⁵ Ariel Meyerstein, ‘Global Adversarial Legalism: Global Private Governance of FDI as a Species of Global Administrative Law’, 21 August 2012.

¹³⁴⁶ Craik, *The International Law of Environmental Impact Assessment* (above, n. 59), p. 36.

¹³⁴⁷ Bonzon, *Public Participation and Legitimacy in the WTO* (above, n. 280), p. 25.

¹³⁴⁸ Ian Ayres and John Braithwaite, ‘Regulatory Capture and Empowerment’, *Law & Social Inquiry*, 16 (1991), pp. 435–496.

Fourth, participation can serve to increase the acceptability of a decision (*acceptability function*) and increase the normative legitimacy of public decision-making if it ensures that people's interests are better considered in a decision that affects them.¹³⁴⁹ In domestic administrative law, participation compensates, to a certain extent, the delegation of rule-making power to administrative agencies.¹³⁵⁰ In particular in the context of economic policies, decision-making increasingly affects distant strangers who are traditionally not involved in the decision-making process (e.g. as voters). Therefore, opening up this process to better accommodate their interests through adequate modalities of participation (see section 7.1.4) can compensate for these legitimacy deficits.¹³⁵¹ This is legally reflected in democratic principles and human rights standards: Due to the lack of democratic institutions beyond the nation-state, participation is a glimmer of hope to increase democratic legitimacy in times of globalization.¹³⁵² The functions are not mutually exclusive, and it is not possible to draw a clear line between them. They are ideal-types, and the goals of participation implicate what modalities of participation are required and what consequences a violation of participation rules implies for the final decision.

While it may be possible to argue that participation should primarily serve an inherent or an instrumental goal, a more nuanced approach appears favorable. Broad-based popular participation might, in some cases, be practically impossible and normatively undesirable. So what are suitable factors to determine the goal of participation?

From a human rights perspective, participation would arguably have an inherent value whenever human rights and interests are affected. However, this is particularly difficult to assess where the human rights impacts of abstract policies are – for factual or normative reasons – uncertain. In the WTO context, Bonzon has therefore suggested a different distinction that could be generalized and applied to HRIAs of policy initiatives beyond trade law. The decisive criterion, according to Bonzon, is whether the respective decision is controversial or not: Participation in controversial decisions has an (also) inherent, participation in technical decisions a (primarily) instrumental value. This would have consequences for the modalities of participation and the scope of potential participants, as in the case of uncontroversial technical decision mainly experts' positions should be sought, whereas in controversial issues greater weight should be given to involving "widely representative interest groups".¹³⁵³ This distinction can indeed be useful especially for the assessment of impacts of general-abstract policies where it is difficult to identify a group of individually and directly affected people. Admittedly, it is not always easy to determine ex-ante which topics are political and controversial as opposed to purely technical. Therefore, what appears important is that, for example during a pre-assessment stage (or at least before the in-depth assessment starts), participatory mechanisms are already used with the main goal to identify potential impacts that are of concern to people so that the following IA-process can be designed accordingly. One method used could be the aforementioned "concern

¹³⁴⁹ Dahl, *Democracy and its critics* (above, n. 425), p. 129; Ioannidis, 'A Procedural Approach to the Legitimacy of International Adjudication: Developing Standards of Participation in WTO Law' (above, n. 67), p. 1176.

¹³⁵⁰ Ibid., p. 1192; Herzmann, *Konsultationen* (above, n. 960), p. 300.

¹³⁵¹ Similar, for the WTO context Ioannidis, 'A Procedural Approach to the Legitimacy of International Adjudication: Developing Standards of Participation in WTO Law' (above, n. 67), p. 1192; Craik, *The International Law of Environmental Impact Assessment* (above, n. 59), p. 270.

¹³⁵² Craik, 'Deliberation and Legitimacy in Transnational Governance: The Case of Environmental Impact Assessments' (above, n. 177).

¹³⁵³ Bonzon, *Public Participation and Legitimacy in the WTO* (above, n. 280), 32 et seq.

assessments”.¹³⁵⁴ Similar techniques to identify public concerns are also increasingly applied, for example in the form of citizens’ juries or consensus conferences.¹³⁵⁵ This does not mean that such a concern-assessment would always be able to produce clear results, in particular where impacts are unclear. On the other hand, some risks of *policy* decisions might be hidden because their causes or consequences cannot easily be identified. For example, escalating tariffs¹³⁵⁶ can have a negative impact on industrialization in developing countries. Even if this fact is known, it would require technical skill and patience to work through the 100s of pages of the annex of a trade agreement in order to compare the tariffs for primary or semi-processed (e.g. cocoa beans) with that for related processed goods (e.g. chocolate).

There is another caveat. Especially where the impacts of relatively complex initiatives are assessed, consultation during the pre-assessment stage might even produce counter-productive effects if the outreach is not representative. The consultation conducted for the initial impact assessment accompanying the recommendation for a Council Decision to open negotiations for the Transatlantic Trade and Investment Partnership (“TTIP”) did not reveal any of the issues that later became really controversial. For example, the IA-Report found that “stakeholders are generally highly supportive of a transatlantic initiative that would boost trade and investment and generate growth and jobs across the Atlantic”.¹³⁵⁷ Highly controversial topics debated at a later stage, such as regulatory cooperation,¹³⁵⁸ were described as highly welcomed, and investor-state dispute settlements were not even mentioned. Part of the problem might have been that the critical voices have not paid attention to TTIP at such an early stage, and that most inputs came from business representatives. Consequently, the first Impact Assessment Report prepared by the European Commission to inform the Council Decision authorizing the opening of TTIP negotiations was highly optimistic and, from an ex-post perspective, disappointing (admittedly, this judgment may be distorted by hindsight bias). It did not help to predict major public concerns expressed at a later stage of the trade negotiations.

7.1.3 Object of Participation

A second characteristic concerns the object of participation, namely the type of the planned initiative to which the participation procedure relates. For public authorities, it is necessary to identify an adequate level of participation: in order to be meaningful, participatory procedures require financial and personnel resources, and they almost necessarily delay the process of an initiative. In domestic law, the approval of projects often requires different forms of participation, ranging from the right of affected neighbors to submit statements, to everybody’s right to gain information and submit statements in the case of industrial installations with generally high

¹³⁵⁴ On “concern assessments” see section 6.2.2.7.

¹³⁵⁵ Holder, *Environmental Assessment* (above, n. 27), p. 40.

¹³⁵⁶ Trebilcock, *Understanding Trade Law* (above, n. 615), p. 104.

¹³⁵⁷ European Commission, ‘Impact Assessment Report on the future of EU-US trade relations accompanying the document Recommendation for a Council Decision authorising the opening of negotiations on a comprehensive trade and investment agreement, called the Transatlantic Trade and Investment Partnership, between the European Union and the United States of America’, SWD(2013) 68 final, p. 8.

¹³⁵⁸ *Ibid.*, p. 8.

risks of pollution.¹³⁵⁹ Not only projects, but also plans, programs and agency rule-making allow for or require participation. This is explicitly the case for strategic environmental assessments (SEAs).¹³⁶⁰

It might appear that external participation mainly plays an important role in investment projects. However, participation of non-state actors is also relevant to administrative, regulatory and in part also legislative rule-making. In the United States, agency rule-making can be open to participation. Agency rulemaking is defined as the “agency process for formulating, amending, or repealing a rule”.¹³⁶¹ The minimum requirements are regulated by the US Administrative Procedure Act (APA).¹³⁶² These include first a notice-requirement, according to which the agency must publish a notice of proposed rulemaking in the Federal Register to provide the public with essential information about the proceedings, the legal authority under which the rule is proposed and a brief description of the terms or substance of the proposed rule or a description of the subjects and issues involved. Notice is “sufficient if it affords interested parties a reasonable opportunity to participate in the rulemaking process”.¹³⁶³ This leads to the second requirement, namely the obligation to give the public the opportunity to participate, even though the agency has a wide discretion on the modalities, including the submission of “written data, views, or arguments with or without opportunity for oral presentation” (§ 553 (c) APA). Third, the agency must consider the comments made during participation and “incorporate in the rules adopted a concise general statement of their basis and purpose” (§ 553 (c) APA), which establishes a duty to give reasons. While these norms are minimum standards, stricter standards apply to formal or hybrid rulemaking when explicitly required by the respective statute;¹³⁶⁴ de-facto, however, rules are mainly promulgated through informal procedure, which arguably still imposes higher procedural standards ensuring effective participation than, for example, under German administrative law.¹³⁶⁵

Similar obligations exist under German public law and the principle of equality. Private persons increasingly participate in legislative and administrative decision-making, such as law-firms or NGOs advising on or even drafting legislative proposals, or individuals participating in expert committees to be consulted prior to the enactment of statutory orders or general administrative

¹³⁵⁹ European Union, *Directive 2010/75/EU on industrial emissions* [2010], Art. 24. In Germany, participation under the BImSchG is not limited to the affected public, see § 10 (3) of the German Federal Emission Control Act (“BImSchG”).

¹³⁶⁰ European Union, *Directive 2001/42/EC of the European Parliament and of the Council of 27 June 2001 on the assessment of the effects of certain plans and programmes on the environment*, Art. 6; UNECE, *Convention on Access to Information, Public Participation in Decision-Making and Access to Justice in Environmental Matters (“Aarhus Convention”)* (1998), 2161 U.N.T.S. 447.

¹³⁶¹ See 5 U.S.C. § 551 (5). A “rule” is defined as the whole or a part of an agency statement of general or particular applicability and future effect designed to implement, interpret, or prescribe law or policy: § 551 (4), 553 APA.

¹³⁶² The official text of the Administrative Procedure Act (“APA”) is codified in 5 U.S.C. Sec. 551-559.

¹³⁶³ E.g. United States Court of Appeals (D.C. Cir. 1977), 559 F.2d 774, *Forester v. Consumer Product Safety Commission* (1977), para 37.

¹³⁶⁴ Sec. 553 (c) APA refers to Sec. 556 and 557.

¹³⁶⁵ Vanessa Burrows and Todd Garvey, ‘A Brief Overview of Rulemaking and Judicial Review’, Congressional Research Service, 2011, p. 3; Fehling, *Verwaltung zwischen Unparteilichkeit und Gestaltungsaufgabe* (above, n. 902), p. 330. Besides *formal* rulemaking, Congress may also delegate for *hybrid* rule-making, requiring an agency to adopt more than the minimum requirements of informal rulemaking, but generally less strict than formal rulemaking: Burrows and Garvey, ‘A Brief Overview of Rulemaking and Judicial Review’ (above, n. 1365), p. 3.

guidelines.¹³⁶⁶ It is convincingly argued that the principle of equality requires that the transparency of the process and the balanced representation of the participants in the legislative or administrative procedure is guaranteed.¹³⁶⁷ An example from international trade and development law is a committee set up in Samoa when the government decided to apply for WTO membership.¹³⁶⁸

7.1.4 Modalities of Participation

The goal and object of participation determine the modalities of participation.¹³⁶⁹ It is important to evaluate whether the modalities of participation can promote the goal, and whether or not this is the case will often depend on the object (project, program, policy, etc.) of participation. To find the “right” modalities is important to determine whether participation efficiently informs decision-makers (instrumental function) and whether the participation process is fair, which is important to achieve increased acceptability (inherent function).¹³⁷⁰

The information approach mainly requires pragmatic solutions: the modalities of participation must be organized in a way that the most relevant information is selected. The challenges are mainly of an organizational and managerial nature. If, however, the goal is to achieve greater acceptability, strains between normative claims and practical limitations clearly emerge. Similarly, the object of participation affects the modalities at hand. It is, as has been observed, “easy to consult over a new road proposal, but more difficult to open general discussion on complex medical procedures”.¹³⁷¹ Consequently, the practical challenges for participation in project developments are different from those in policy design. The modalities can be classified according to *degree*, *timing* and *quality*.

Such a classification of participation modalities serves, first, to structure norms on participation. So this has first of all a pure order function. However, it is also legally relevant. I argue that such a classification of participation modalities allows to more effectively implement a human rights-based approach to participation. To briefly illustrate what this could imply: EU constitutional law recognizes a principle of openness, according to which EU institutions must conduct their work as openly as possible and as closely as possible to the citizens.¹³⁷² As will be seen, some of the modalities of participation described below are more inclusive than others – and thus more open and closer to citizens. The principle of openness would thus require, as far as possible, the most inclusive participation modality. This results in what I would call a “participation proportionality test”: There is a presumption that an institution must choose the most inclusive partici-

¹³⁶⁶ Sec. 7, 48, 51 of the Federal Immission Control Act (“BImSchG”).

¹³⁶⁷ Hans Uwe Erichsen, Dirk Ehlers, and Martin Burgi, *Allgemeines Verwaltungsrecht* (Berlin: Walter de Gruyter, 2010), 14.th ed., p. 102.

¹³⁶⁸ Participants of the workshop held in Nadi, Fiji Islands, ‘Trade, Trade Agreements and Non-Communicable Diseases: Intersections, Lessons Learned, Challenges and Way Forward’, 11 February 2013, p. 19.

¹³⁶⁹ Bonzon, *Public Participation and Legitimacy in the WTO* (above, n. 280), p. 35.

¹³⁷⁰ Ibid.; Gene Rowe and Lynn Frewer, ‘A Typology of Public Engagement Mechanisms’, *Science, Technology, & Human Values*, 30 (2005), pp. 251–290, p. 262.

¹³⁷¹ Patrick Bishop and Glyn Davis, ‘Mapping Public Participation in Policy Choices’, *Australian Journal of Public Administration*, 61 (2002), pp. 14–29, p. 18.

¹³⁷² Art. 1 TEU; ECJ, *ClientEarth v. Commission* (above, n. 1219), para 74 with further reference.

pation modality - unless the goal or object of participation justifies choosing a less inclusive participation modality.

7.1.4.1 Degree of Participation

Participation in public policy-making has been a long-standing interest of political scientists. It is not the goal to give a full account of the respective debate, but only to outline how typologies and models developed can be used for a legal reconstruction of participation in impact assessment law.

An influential typology developed over forty years ago is Arnstein's "ladder of citizen participation" in the context of community planning, classifying the degree to which citizens are enabled to realize their power vis-à-vis public authorities.¹³⁷³ She called the first two of the eight-step-ladder manipulation and therapy as they are used to "educate" participants. Interestingly, Arnstein describes these two types as non-participation.¹³⁷⁴ The next rungs – informing, consultation and placation – are degrees of "tokenism", as none of these modalities ensures that the views and opinions expressed by the participants will be heeded.¹³⁷⁵ In her view, real citizen power is only found at the top three rungs, which Arnstein names partnership, delegated power and citizen control.¹³⁷⁶ Arnstein's ladder or, as other authors have framed it, the continuum model of participation, is normative and regards individual empowerment as the main goal. This is not only illustrated by a strongly connoted terminology – "non-participation", "manipulation" or "tokenism" indicate that these rungs are regarded as somehow inferior and illegitimate¹³⁷⁷ - but also because the metaphor of a ladder indicates a hierarchy between "lower" and "higher" rungs. This resembles the preference-accumulation IA model which is highly skeptical of scientific expertise and assumes that IAs should mainly be a platform for effective public participation. This continuum model of participation can therefore, in principle, be applied where participation serves inherent functions.

Criticism of continuum models is expressed on two accounts. First, some authors reject the assumption that individual empowerment should "be the sole aim" of participation.¹³⁷⁸ For example, in technical areas such as health policies, participation may serve to introduce additional expertise and share professional experience.¹³⁷⁹ The argument is that the continuum model is not suitable where participation serves mainly instrumental functions. A second critique points out that a continuum model does not adequately take the respective institutional context into consideration. Bishop and Davis state that Arnstein took the perspective of "community activists" and saw "participation as demands on government rather than an opening of government

¹³⁷³ Sherry Arnstein, 'A Ladder of Citizen Participation', *Journal of the American Institute of Planners* (1969), 216 f.

¹³⁷⁴ *Ibid.*, p. 217.

¹³⁷⁵ *Ibid.*

¹³⁷⁶ *Ibid.*

¹³⁷⁷ Rikki Dean, 'Beyond Radicalism and Resignation: The Competing Logics for Public Participation in Policy Decisions', Paper No' CASE/184, December 2014, p. 6.

¹³⁷⁸ Jonathan Tritter and Alison McCallum, 'The snakes and ladders of user involvement: Moving beyond Arnstein', *Health Policy*, 76 (2006), pp. 156–168, p. 162.

¹³⁷⁹ *Ibid.*, p. 164.

to wider influences".¹³⁸⁰ In a nutshell, the continuum model would only work where the object of participation is a specific project rather than a general policy. Instead, Bishop and Davis argue, it is more important to consider the institutional context and decide what type of participation is adequate for the decision at stake. They suggest a discontinuous typology and identify five types of participation - consultation, partnership, standing, consumer choice, and control - each of which "has a public rationale, and a characteristic set of policy instruments".¹³⁸¹

Rowe and Frewer offer a model of engagement focusing on the flow of information. They distinguish three main categories: *communication*, which is the unidirectional flow from the sponsor of an initiative to the public, *consultation*, where information flows from the public to the sponsor, and - what they call - *participation*, where information flows are bidirectional.¹³⁸² Each of these three categories is differentiated further into four to six sub-categories. In a similar vein, multilateral development banks have adopted typologies, all of which are naturally simplifications but helpful for heuristic purposes. For example, the Asian Development Bank has in 2012 adopted the (similar) six participation-categories:¹³⁸³

- "Passive participation or information sharing in which the affected population is informed, but not heard (e.g. dissemination of documents or public briefings by officials)
- "Information transfer - affected populations supply information in response to questions but do not make decisions and do not influence the process. (This often takes the form of field visits and interviews.)"
- "Consultation - affected populations are asked to offer their opinions, suggestions, and perspectives but are not involved in decision-making or implementation of projects (and there is no guarantee that their views will influence the process.) Consultations can take multiple forms, including focus group discussions and interviews."
- "Collaboration - the affected population is directly involved in needs analysis and project implementation. They may also contribute to agency-led projects with labor and other skills (e.g. displaced persons supply labor for the construction of their new houses in an agency-sponsored project.)"
- "Decision making and control of resources - the affected populations are involved in project assessment, planning, evaluation and decision making. (This may involve, for example, a working group or joint-committee of agency and local leadership.)"
- "Local initiative and control - the affected populations take the initiative; the project is conceived and run by the community, potentially with the support of agencies (e.g. a community-based organization may organize professional training classes while receiving funding from another agency.)"¹³⁸⁴

Such a spectrum appears at first sight most suitable to specific project developments but less for general-abstract policies. However, with the necessary context-specific adoption, no fundamental difference exists with regard to the general modalities of participation for projects and poli-

¹³⁸⁰ Bishop and Davis, 'Mapping Public Participation in Policy Choices' (above, n. 1371), p. 26.

¹³⁸¹ Ibid.

¹³⁸² Rowe and Frewer, 'A Typology of Public Engagement Mechanisms' (above, n. 1370), p. 255.

¹³⁸³ Asian Development Bank, *Strengthening Participation for Development Results* (2012).

¹³⁸⁴ Ibid.

cies, and a similar spectrum can be used.¹³⁸⁵ An example for inclusive participation in abstract rulemaking can be found in US administrative law, namely negotiated rule-making (5 U.S.C. §§ 561 et seq.) through a rulemaking committee (5 U.S.C. § 562 (6)).¹³⁸⁶ The establishment of such a committee is admissible if the head of the agency determines that such a procedure would be in the public interest (5 U.S.C. § 563 (a)), and it should increase administrative efficiency and reduce opposition to a rule (acceptance function).¹³⁸⁷

What is the implication for institutionalized IA law? Irrespective of what goals participation pursues, it is necessary that the comments received are taken into consideration.¹³⁸⁸ The duty to respond to statements made and to give reasons for the (non-)consideration of recommendations is, from a formal perspective, a requirement to make sure that input was taken into account, but also to give feedback to participants and enhance public deliberation. The duty to give reasons¹³⁸⁹ is a legal (and judicially reviewable) requirement that increases accountability. In the context of participation, it arguably helps to ensure, at a minimum, that input obtained during participatory procedures is at least taken into consideration. If there is, under public law, a duty to give reasons, a participatory impact assessment that is only based on unilateral information flow from the public to the authority would be in conflict with such a principle.

Individual empowerment, as understood by Arnstein, coincides with a widely shared contemporary understanding of human rights.¹³⁹⁰ At the same time, broad-based participation is not an end in itself. In addition to the practical concerns against such a hierarchy in a continuum model, it would not even be desirable from a strict human rights perspective: For example, absolute citizen control could undermine minority rights. Against this background, a rights-based approach to participation would, in principle, require inclusive participation even though less exclusive modalities could be justified. “Inclusiveness” in this sense would combine the continuum model with the information flow model: participation is more inclusive if it is higher on the ladder of participation, and if information flows are bidirectional instead of unidirectional. This is how the participation-proportionality-test could be operationalized. An institution must choose the modality that is most inclusive, but less inclusive modalities of participation could be justified, for example if the object of participation concerns confidential proceedings. This would

¹³⁸⁵ Similar, with regard to national government policies: Rowe and Frewer, ‘A Typology of Public Engagement Mechanisms’ (above, n. 1370), p. 266.

¹³⁸⁶ Burrows and Garvey, ‘A Brief Overview of Rulemaking and Judicial Review’ (above, n. 1365), p. 4; Aaron Nielson, ‘In Defense of Formal Rulemaking’, *Ohio State Law Journal*, 75 (2014), pp. 237–292, 259 ff.

¹³⁸⁷ Burrows and Garvey, ‘A Brief Overview of Rulemaking and Judicial Review’ (above, n. 1365), p. 4; Philip Harter, ‘Negotiating Regulations: A Cure for Malaise’, *Georgetown Law Journal*, 71 (1982), pp. 1–118, p. 59. It is controversial whether that goal can actually be achieved. One obstacle is that highly inclusive participatory procedures may raise unrealistic expectations and create new conflicts: Cary Coglianese, ‘Assessing Consensus: The Promise and Performance of Negotiated Rulemaking’, *Duke Law Journal*, 46 (1997), pp. 1255–1349, p. 1335; Nielson, ‘In Defense of Formal Rulemaking’ (above, n. 1386), 259 ff. However, the effectiveness of formalized rulemaking is controversial, as demonstrated in the „debate“ between Coglianese and Harter: Philip Harter, ‘Assessing the Assessors: The Actual Performance of Negotiated Rulemaking’, *New York University Environmental Law Journal*, 9 (2000), p. 32 and Cary Coglianese, ‘Assessing the Advocacy of Negotiated Rulemaking: A Response to Philip Harter’, *New York University Environmental Law Journal*, 9 (2001), 386–447.

¹³⁸⁸ Bonzon, *Public Participation and Legitimacy in the WTO* (above, n. 280), p. 35.

¹³⁸⁹ Art. 296 TFEU; Paul P. Craig, *EU Administrative Law* (Oxford: Oxford Univ. Press, 2012), 2. ed., 340 et seq.; Kischel, *Die Begründung* (above, n. 45).

¹³⁹⁰ Peg Birmingham, *Hannah Arendt & human rights* (Bloomington: Indiana University Press, 2006), p. 47.

grant institutions discretion in choosing the most appropriate model of participation for each initiative. At the same time, they should also bear the burden of proof to justify their decision.

7.1.4.2 Timing of Participation

Law must determine time-frames for participation, in particular at what stage of the impact assessment process participation takes place, and for how long participants are involved. These time-frames can significantly influence the modalities¹³⁹¹ and thus effectiveness of participation: if participation takes place at an early stage when the contours of the initiative are not yet clear, few meaningful statements can be made; if it is too late, the decision is likely to be taken (at least *de facto*); due to path dependencies and a “sunk-cost-bias”, it is unlikely that participants’ statements will be able to significantly affect the outcome.¹³⁹² However, different modalities of participation can make sense at different stages: in the pre-assessment stage, the public might be invited to make statements about impacts they regard as relevant (e.g. in the sense of a concern-assessment¹³⁹³) and that must therefore be considered for the screening and scoping process. This would be a relatively non-inclusive and unidirectional form of participation. At a later stage, a first draft or, in the case of trade agreements, the planned mandate for trade negotiations can be subject to more specific and informed deliberation.

Timing can also imply whether or not initiatives are blocked right away, either by “social” resistance or effective business lobbying. In order to balance the legitimate public and private interests and allow for certain “reflection periods” on the one hand and the human right to participation and transparency on the other hand, procedural and institutional safeguard mechanisms are necessary. First, effective participation is only possible if the institution in charge is as transparent as possible about the scope of the participation approach, and informs the public when and where what issues will be discussed, which information is disclosed, etc.¹³⁹⁴ In addition, it appears possible to implement a “steering team” of stakeholders to “ensure the process is comprehensive and fair”.¹³⁹⁵ Therefore, IA norms regularly stipulate when the public is to be informed, what information must be disclosed, and how long consultation periods are.¹³⁹⁶ This is regularly subject to political and judicial disputes as will be seen in the case of EU Impact Assessments.

7.1.4.3 Quality of Participation

The modalities of participation vary according to the extent to which the quality of discourse is regulated, and whether there *are*, *may*, or *should* be certain quality-standards for comments made during participation. This varies depending on whether one regards participation as mainly instrumental or mainly inherent. If the goal is to inform decision-makers about the likely im-

¹³⁹¹ Bonzon, *Public Participation and Legitimacy in the WTO* (above, n. 280), p. 35.

¹³⁹² On the sunk-cost-bias see section 5.4.4; see also: *Ibid.*

¹³⁹³ See section 6.2.2.7.

¹³⁹⁴ Hartz-Karp and Pope, ‘Enhancing effectiveness through deliberative democracy’ (above, n. 916), p. 266.

¹³⁹⁵ *Ibid.*

¹³⁹⁶ For an overview: *Ibid.*, p. 265.

pacts of a decision, it would be important to distill that information which best allows making these predictions. If an “individuals’ right to participate in risk decisions affecting their welfare”¹³⁹⁷ is *the* or at least *one* inherent reason for participation, a “filtering” of individual comments made during a participatory procedure would require a different justification (e.g. evident irrelevance of a comment, etc.). IAs are “institutional arrangements” that “seek to structure dialogue” regarding environmental¹³⁹⁸ or, in the case of HRIAs, human rights norms, which immediately raises the question whether such a structured dialogue should also make specific requirements concerning the *quality* of the discourse and the *rationality* of arguments.

There is a vast amount of theories on rational discourse. In essence, rational arguments are generally understood as those that are (potentially) universal, generalizable or at least intersubjectively valid and not made-up out of self-interest.¹³⁹⁹ One might therefore argue that meaningful participation requires rational discourse. In contrast, individual experience¹⁴⁰⁰ (“anecdotes”) or self-interested¹⁴⁰¹ positions could be excluded as not rational. However, there are several concerns to equate meaningful participation with rational discourse. The first is that rationality is an unrealistic ideal, and one that downplays the importance of other types of discourses, such as story-telling, or sharing of personal experience.¹⁴⁰² Political activism is often cultivated if surrounded by like-minded people,¹⁴⁰³ and rational discourse such as, for example, the Habermasian “ideal speech situation” is “unlikely to be realized in naturally occurring social contexts”¹⁴⁰⁴. Still, the fact that the ideal speech situation might be unrealistic does not mean that it is useless; to the contrary: it is an ideal one could aim at when enacting and interpreting norms on participation. It might require some form of affirmative action to enable the most vulnerable groups in society to participate in a discourse that comes at least closer to an ideal speech situation. This is also a central objective of rights-based approaches to participation to guarantee the generally unreserved integration („vorbehaltlose[n] Integration“) also of those groups that would otherwise be excluded.¹⁴⁰⁵ It is through the participatory process itself that individual and general interests are identified: the institutional design governing participatory decision-making procedures should therefore make sure that individual interests are under the pressure of justification, and that self-interested positions can more clearly be identified. In the end, the success of participatory decision-making will also depend on the willingness of participants to change their perspective.¹⁴⁰⁶

However, broad-based participation as such does not necessarily result in individual empowerment. There are certain trade-offs to participation and transparency, namely the risk that actors with the greatest capabilities – money, expertise, rhetoric skills, networks, etc. – profit most from participation and transparency.¹⁴⁰⁷ This would be in conflict with an understanding of human rights as rights to protect especially vulnerable parties. Against this background, the

¹³⁹⁷ Fischhoff and Kadvany, *Risk* (above, n. 825), p. 113.

¹³⁹⁸ Craik, *The International Law of Environmental Impact Assessment* (above, n. 59), p. 278.

¹³⁹⁹ Steiner, *The Foundations of Deliberative Democracy* (above, n. 923), 57 et seq.; *Ibid.*, 88 et seq.

¹⁴⁰⁰ *Ibid.*, 57 et seq.

¹⁴⁰¹ *Ibid.*, 88 et seq.

¹⁴⁰² *Ibid.*, 57 et seq.

¹⁴⁰³ Diana Carole Mutz, *Hearing the other side* (Cambridge: Cambridge Univ. Press, 2006), p. 3.

¹⁴⁰⁴ *Ibid.*, p. 4.

¹⁴⁰⁵ Nida-Rümelin, Schulenburg and Rath, *Risikoethik* (above, n. 824), p. 67.

¹⁴⁰⁶ *Ibid.*

¹⁴⁰⁷ Bryde, *Das Verfassungsprinzip der Gleichheit* (above, n. 489), p. 18.

UN Guidelines on Human Rights Impact Assessment emphasize the importance of “*effective, free, active and meaningful participation of all stakeholders, including the poorest and most vulnerable segments of the population and women*”.¹⁴⁰⁸ This reflects the concern that the “poorest and most vulnerable” people and communities might de-facto be excluded. Indeed, it appears necessary to apply what one could call “participatory affirmative action” in order to actively involve those who would otherwise not be able to participate. In the international development context, multi-lateral development banks have started to experiment with more inclusive approaches to participatory development. For example, the World Bank has enacted a “Translation Framework”, and in order to decide in what languages documents are to be translated, the “institutions would take into account (a) the number of client countries that use a certain language as their official/national language, (b) the size of the audience/target population that uses the language, and (c) the illiteracy rate” – because, as the Translation Framework harshly adds, “translating documents into languages in which a large portion of the population is illiterate is a waste of resources, staff would plan different types of outreach for such populations”.¹⁴⁰⁹ While alternative communication channels that better inform illiterate people increase the chance of inclusive participation¹⁴¹⁰ and are endorsed by the Translation Framework, this is not specified any further nor included in the Information Disclosure Policy.¹⁴¹¹ Especially Civil Society Organizations have addressed the issue and emphasized the importance to provide information in a broadly accessible form, including information kiosks in the area of major projects¹⁴¹² or the provision of assistance to people who are unable to prepare a written request on their own.¹⁴¹³

The function of participation in impact assessments designed in light of an analytic-deliberative paradigm would be the mutual exchange of arguments where the status of participants is not relevant but where the relative weight of each argument is balanced in a transparent procedure.¹⁴¹⁴ In light of this paradigm and the corresponding transformative function of IAs, the inclusion of stakeholders and, where possible, affected parties may ideally lead to a joint learning experience and produce new insights and creative solutions.¹⁴¹⁵ While it would, in international settings, be close to impossible to achieve a unanimous consensus on projects or policies that have significant impacts, an IA can produce what might be called a tolerated consensus or, at the very least, identify the type and scope of dissent.¹⁴¹⁶ At the same time, it would be necessary to implement certain affirmative action mechanisms that mitigate the power-imbalances between different participants, as was attempted by the World Bank’s Translation Framework.

¹⁴⁰⁸ Human Rights Council, *Guiding Principles on Human Rights Impact Assessments of Trade and Investment Agreements*, Report of the Special Rapporteur on the right to food, Olivier de Schutter [2011], V.6.3.

¹⁴⁰⁹ World Bank Group, *A Document Translation Framework for the World Bank Group* (2003), p. 18.

¹⁴¹⁰ However, critics of bottom-up participatory approaches point out that power structures are not adequately considered and that these forms of participation might be “techniques” that may not lead to individual but rather organizational empowerment. For critical approaches (including Foucauldian critique) to participation strategies see for example: Bill Cooke and Uma Kothari, eds., *Participation: The new tyranny?* (London, New York: Zed Books, 2001).

¹⁴¹¹ Fujita, *The World Bank, Asian Development Bank and Human Rights* (above, n. 311), p. 134.

¹⁴¹² Global Transparency Initiative, ‘Model World Bank Policy on Disclosure of Information’, May 2009, para 17.

¹⁴¹³ *Ibid.*, para 28.

¹⁴¹⁴ Rosa, Renn and McCright, *The Risk Society Revisited* (above, n. 425), p. 181.

¹⁴¹⁵ *Ibid.*, p. 182.

¹⁴¹⁶ Sandra Wassermann, Marlen Schulz, and Dirk Scheer, ‘Linking Public Acceptance with Expert Knowledge on CO2 Storage: Outcomes of a Delphi Approach’, *Energy Procedia*, 4 (2011), p. 6356.

7.1.5 Scope of Participants

A crucial aspect is to determine the scope of potential participants.¹⁴¹⁷ Which participants should (normatively) and can (de facto) participate is closely related to the goals, object and modalities of participation. If the goal is to inform decision-making, the priority would be to involve experts who can provide the most relevant information; if the goal is to increase acceptance and acceptability, the underlying rationale would be to include those whose rights or interests are most significantly affected. The determination of the circle of participants generally appears easier for specific projects if the impacts are geographically limited. However, where to draw the line is often a controversial issue: a manufacturing plant might produce emissions that negatively affect the health of people living within a 5 km radius while the emission of greenhouse gas and its impact on climate change may be global. Even for specific projects, it is therefore often a highly controversial question to determine the scope of affected individuals, in particular if cumulative impacts are taken into consideration causing impacts in far-away countries. While the Regional Court in the RWE judgment¹⁴¹⁸ had rejected a lawsuit by a Peruvian farmer to provide compensation to mitigate climate-change induced risks, it is a totally different question whether Peruvian farmers should be entitled to participate, ex-ante, in the impact assessment procedure accompanying the approval of a coal-fired power station. In particular because ex-post remedies are often unavailable for cumulative impacts, it is particularly important to involve those affected ex-ante during decision-making. This is the aforementioned compensating function of HRIAs.

The modalities of participation are also closely interrelated with the scope of participants. Public participation through unilateral information exchange – either in the form of communication from a public authority to the public or from the public to the authority via consultation – allows to involve large or even “global publics”. Especially the use of online platforms to distribute information and receive input through online consultations allows to involve everyone, and no access requirements are necessary. The EU online consultation platform is used to consult citizens and other stakeholders, and allows “to give feedback.”¹⁴¹⁹ Consequently, the scope of potential participants is in principle unlimited, in particular where multiple-choice questionnaires are used.

In any case, the fundamental dilemma between inclusive and effective participation persists: While broad-based online consultations can include potentially everyone, they are less effective as they do not allow for an in-depth discussion; individual preferences can easily be ignored or regarded as inopportune. More intensive forms of cooperation in the development of a project or policy proposals can be highly effective - but the scope of participants is limited. This reflects the democratic dilemma described by Dahl: “In very small political systems a citizen may be able to participate extensively in decisions that do not matter much but cannot participate much in decisions that really matter a great deal; whereas very large systems may be able to cope with

¹⁴¹⁷ Bonzon, *Public Participation and Legitimacy in the WTO* (above, n. 280), p. 31.

¹⁴¹⁸ This was already illustrated above in the decision concerning the Regional Court in Essen: Regional Court (*Landgericht*) Essen, 15 December 2016, file no.: 2 O 285/15. The Regional Court has rejected the action as inadmissible. This judgment has been appealed, and the Higher Regional Court has ordered the taking of evidence: Higher Regional Court (*Oberlandesgericht*) Hamm, Order of 30 November 2017, file no. I 5 U 15/17. See section 6.2.2.3.

¹⁴¹⁹ See: <https://ec.europa.eu/info/law/better-regulation/have-your-say>.

problems that matter more to a citizen, the opportunities for the citizen to participate in and greatly influence decisions are vastly reduced.”¹⁴²⁰ It is before this background that the following sections will analyze different categories of participation relevant for the assessment of human rights impacts.

7.1.5.1 Participation of the Public: A Legal Classification

Generally, the scope of actors entitled to be involved in decision-making is legally determined by general administrative procedure law or by context-specific norms. Generally, these norms use similar concepts to determine the scope of (potential) participants, ranging from “the public” via “interested parties” to “the public concerned” or “affected individuals.” The narrowest category would be limited to persons who can plausibly claim that their own individual rights would be violated. The involvement of affected individuals and communities can have instrumental added-values – to gather information or to achieve political acceptance. At the same time, the participation of affected individuals or communities also serves an inherent value insofar as it aims at the effective protection of their rights and interests: Instead of an ex-post review, ex-ante participation allows for the better consideration of affected rights and ideally prevention of violations. This is a core element of human rights protection through organization and procedure.

A generally broader standard than the affectedness in individual rights or interests has emerged in EU environmental law where participation rights – in the administrative and also, as will be seen, the judicial review process – are granted to the “public concerned”. This is defined in the Aarhus Convention and the EIA-Directive as “the public affected or likely to be affected by, or having an interest in, the environmental decision-making procedures”.¹⁴²¹ Interest in this sense is explicitly extended to non-governmental organizations which promote environmental protection.¹⁴²² Therefore, it empowers NGOs as it allows for public interest litigation even though the rights of NGOs themselves are not potentially infringed.¹⁴²³ The broadest category addresses the “general public,” i.e. irrespective of whether or not rights are affected or particular interests involved. This can serve all functions of participation identified above – information, acceptance, acceptability and accountability. The Access to information laws in many states as well as in the EU, the increasing use of online consultation procedures¹⁴²⁴, but also the World Bank’s 2010 Access to Information Policy¹⁴²⁵ are all legal instruments to involve the general public.

¹⁴²⁰ Robert Dahl, ‘A democratic dilemma: System Effectiveness versus Citizen Participation’, *Political Science Quarterly*, 109 (1994), pp. 23–34, p. 28.

¹⁴²¹ Article 1 (2) (e) European Union, *EIA Directive 2011/92/EU* [2011].

¹⁴²² UNECE, *Convention on Access to Information, Public Participation in Decision-Making and Access to Justice in Environmental Matters (“Aarhus Convention”)* (above, n. 1360), Art. 2 (5); European Union, *EIA Directive 2011/92/EU* [2011], Art. 1.

¹⁴²³ Alan Boyle, ‘Human Rights and the Environment: Where Next?’, in: Ben Boer (ed.), *Environmental Law and Human Rights in the Asia-Pacific*, pp. 201–240, p. 217.

¹⁴²⁴ For example: European Commission, *Better Regulation Toolbox* (above, n. 204), Tool #54 p. 404.

¹⁴²⁵ Dann, *The Law of Development Cooperation* (above, n. 4), p. 458.

7.1.5.2 Advisory Committees

A formal type of participation is the establishment and involvement of external advisory committees.¹⁴²⁶ While the legal basis, scope, object and modality of committees vary, one could still differentiate between two ideal-types, namely expert-committees and (what one could call) stakeholder-committees. Traditionally, they have mainly been established in policy areas where great uncertainty exists and specialized knowledge and expertise is required, such as in areas of technological innovation or economic policies.¹⁴²⁷ However, over the past years, the scope of advisory committees seemed to have broadened: The European Commission is advised by about 1,000 expert groups.¹⁴²⁸ One explanation for this rise is that advisory committees are not only used to provide knowledge but also, for example, for political reasons (e.g. to substantiate positions with external support) or as a forum to build broader consensus.¹⁴²⁹ The composition of these committees can, accordingly, again reflect different paradigms, ranging from more representative stakeholder to rather technical expert committees. The role and function of advisory committees have already been discussed in the chapter on uncertainty and knowledge generation (see section 5.5.3).

7.1.5.3 The Involvement of NGOs

A cross-cutting issue ranging from ad-hoc participation to membership in stakeholder or expert committees concerns the function and legitimacy of NGO-participation. NGOs are defined here as non-state actors who are non-profit organizations that endeavor to influence the political process in a public interest. “Non-profit” in this sense means that they do not primarily and excessively work to increase the material interests of their members.¹⁴³⁰ Several arguments are generally made to justify NGO participation in public decision-making. First, NGOs – like other actors – can have knowledge valuable for policy-making and policy-implementation. Especially relevant for the assessment of impacts in far-away countries is that NGOs often have close ties with the local population in the area where a development project is planned or the effects of a trade agreement might be felt, to give but a few examples. They can thus provide important insights or serve as bridge-builders. The second argument brought forward is that NGOs could increase the democratic legitimacy as they represent the affected interests in or vis-à-vis public

¹⁴²⁶ By “external” I refer to those committees that are not composed of members of the respective institutions, such as a Parliamentary Committees.

¹⁴²⁷ On advisory committees for economic policies already: Bryde, *Zentrale Wirtschaftspolitische Beratungsgremien in der Parlamentarischen Verfassungsordnung* (above, n. 1076). On the advisory role of NGOs in international constitutionalism: Bryde, ‘International Democratic Constitutionalism’ (above, n. 2), p. 119.

¹⁴²⁸ Julia Metz, ‘Expert groups in the European Union: A sui generis phenomenon?’, *Policy and Society*, 32 (2013), pp. 267–278, p. 268.

¹⁴²⁹ Ibid., pp. 270–271; on the different motivations with regard to the establishment of an expert committee (*Sachverständigenrat*) in Germany: Bryde, *Zentrale Wirtschaftspolitische Beratungsgremien in der parlamentarischen Verfassungsordnung* (above, n. 1076), p. 84.

¹⁴³⁰ Michael Zürn, ‘Global Governance as an Emergent Political Order: The Role of Transnational Non-Governmental Organizations’, in: Gunnar Folke Schuppert (ed.), *Global Governance and the Role of Non-State Actors*, pp. 31–45, p. 31; Stephan Hobe, ‘Global Challenges to Statehood: The Increasingly Important Role of Nongovernmental Organizations’, *Indiana Journal of Global Legal Studies*, 5 (1997), pp. 191–209, p. 194.

authorities,¹⁴³¹ either by their ability to politicize and mobilize social and legal change¹⁴³², or - and this is more relevant for the present purpose - contribute, via formalized interest-representation within public institutions, to a more balanced pooling of information¹⁴³³ in committees otherwise dominated by for-profit interest representatives. The participation of public interest groups such as NGOs *can* increase democratic legitimacy globally.¹⁴³⁴

However, different objections can be raised.¹⁴³⁵ First, NGOs themselves are often not structured along with democratic principles, and often their financial sources are unclear. In particular supporters of representative democratic models would at least require that NGOs comply with certain minimum standards regarding their internal structure in terms of democratic accountability.¹⁴³⁶ A more deliberative model to legitimate lawmaking would take a slightly different position. The democratic principle in such a deliberative sense states that statutes can only claim legitimacy if they “meet with the assent (*Zustimmung*) of all possibly affected persons in a discursive process of legislation that in turn has been legally constituted”¹⁴³⁷. This remains as such an idealistic goal - even more so in a trans- or international context. However, without compromising on ideals, it would already be a step in the right direction if debates during international decision-making became *more* deliberative and comprehensive. The involvement of NGOs could therefore at least ensure that “diverse and conflicting information, opinions and concerns of different groups” would be present and participating in international fora¹⁴³⁸. From such a perspective, the participation of NGOs is desirable as it ensures a more balanced representation of

¹⁴³¹ Armin von Bogdandy, ‘The European Lesson for International Democracy: The Significance of Articles 9 to 12 EU Treaty for International Organizations’ (Jean Monnet Working Paper 01/11, 2011), p. 23; Zürn, ‘Global Governance as an Emergent Political Order: The Role of Transnational Non-Governmental Organizations’ (above, n. 1430), pp. 38–43; Rainer Schmalz-Bruns, ‘Deliberativer Supranationalismus: Demokratisches Regieren jenseits des Nationalstaats’, *Zeitschrift für Internationale Beziehungen*, 6 (1999), 185–244.

¹⁴³² Hauke Brunkhorst, ‘Globalising Democracy Without a State: Weak Public, Strong Public, Global Constitutionalism’, *Millennium: Journal of International Studies* (2002), 682 f.

¹⁴³³ Michael Dorf and Charles Sabel, ‘A Constitution of Democratic Experimentalism’, *Columbia Law Review*, 98 (1998); Schmalz-Bruns, ‘Deliberativer Supranationalismus: Demokratisches Regieren jenseits des Nationalstaats’ (above, n. 1431), p. 209.

¹⁴³⁴ On the (limits of the) legitimizing potential of NGOs in international investment arbitration see: Kawharu, ‘Participation of Non-governmental Organizations in Investment Arbitration as Amici Curiae’ (above, n. 1334), p. 285; Lindblom, *Non-governmental Organisations in International Law* (above, n. 1339); Sergey Ripinsky and Peter van den Bossche, *NGO involvement in international organizations* (London: British Institute of International and Comparative Law, 2007); Vedder (ed.), *NGO involvement in international governance and policy* (above, n. 1339); Pierre-Marie Dupuy and Luisa Vierucci, eds., *NGOs in international law*.

¹⁴³⁵ Jochen von Bernstorff, ‘Menschenrechte und Betroffenenrepräsentation: Entstehung und Inhalt eines UN-Antidiskriminierungsübereinkommens über die Rechte von behinderten Menschen’, *Heidelberg Journal of International Law (ZaöRV)*, 67 (2007), pp. 1041–1063, 1057 ff.; William Scheuerman, ‘Democratic Experimentalism or Capitalist Synchronization? Critical Reflections on Directly-Deliberative Polyarchy’, *Canadian Journal of Law & Jurisprudence*, 17 (2004), pp. 101–127.

¹⁴³⁶ The accountability deficit of NGOs is a widely discussed issue: Ruth Grant and Robert Keohane, ‘Accountability and Abuses of Power in World Politics’, *American Political Science Review*, 99 (2005), pp. 29–43; Steve Charnovitz, ‘Accountability of Non-Governmental Organizations in NGO Accountability: Politics, Principles and Innovations’, Lisa Jordan & Peter van Tuijl ed., Earthscan 2006, in: GW Law Faculty Publications & Other Works.

¹⁴³⁷ Habermas, *Between Facts and Norms* (above, n. 320), p. 110; Lindblom, *Non-governmental Organisations in International Law* (above, n. 1339), p. 27.

¹⁴³⁸ *Ibid.*, p. 34.

different interests. In this sense, the internal structure of NGOs is less relevant: what matters is the exchange of rational argument and the balanced representation of different interests.

In addition, the observation that NGOs are often not sufficiently transparent and have an undemocratic structure can hardly be denied, however, this is rather a challenge than an insurmountable obstacle. First, it would be possible to modify accreditation schemes¹⁴³⁹ for the admission of NGOs at IOs or international conferences and require minimum democratic internal structures. While for example financial reporting requirements can respond to some legitimacy challenges, especially where NGOs get official government support through subsidies or tax cuts,¹⁴⁴⁰ there is also the risk that public institutions increasingly control civil society organizations. The second counter-objection would point out that, generally, this debate slightly misses the point. The legitimacy of NGO participation is not intended to be comparable to the legitimizing potential of political parties. NGOs represent public interests, not voters. As such their task is to represent environmental or social interests and hold decision-makers to account by controlling proposals and engaging in discourses, by informing the public about their (divergent) views or scandalize deficiencies - this is their contribution to more democratic decision-making.¹⁴⁴¹ Consequently, the principle of balanced representation matters: many non-economic actors have a higher stake in identifying non-economic impacts on environmental and social conditions or human rights; NGOs therefore do not have to be representational to fulfill legitimate functions. For example they can still raise awareness to interests neglected by the public and by for-profit organizations, provide knowledge or keep the spotlight on necessary institutional reforms.¹⁴⁴² This goes without saying if representatives of for-profit organizations are formally or informally involved in public decision-making: it would be contradictory to require that NGOs have a democratic structure but not apply the same (in this case evidently unrealistic) standard to for-profit organizations involved in lobbying.

Beyond the concerns about democratic deficits, another critique against NGO involvement states that there is de-facto a bias towards Western NGOs¹⁴⁴³ as they are usually more powerful with stronger financial and human resources and possess the expertise required to be admitted by public institutions. Accordingly, NGO involvement might serve as a “tranquilizer”, leading to the perceived legitimacy of governance structures which would rather prevent controversial, politicized debates and forms of social resistance as a driver for change.¹⁴⁴⁴ However, there are still

¹⁴³⁹ For an overview of different “permanent accreditation schemes” cf Bonzon, *Public Participation and Legitimacy in the WTO* (above, n. 280), p. 199.

¹⁴⁴⁰ Peter Ellis, ‘The Ethics of Taking Sides’, in: Keith Horton (ed.), *Ethical questions and international NGO’s*, pp. 65–85, p. 78.

¹⁴⁴¹ Bernstorff, ‘Menschenrechte und Betroffenenrepräsentation: Entstehung und Inhalt eines UN-Antidiskriminierungsübereinkommens über die Rechte von behinderten Menschen’ (above, n. 1435), p. 1058; Brunkhorst, ‘Globalising Democracy Without a State: Weak Public, Strong Public, Global Constitutionalism’ (above, n. 1432), 682 f.

¹⁴⁴² Michael Edwards, ‘Have NGOs ‘Made a Difference’?: From Manchester to Birmingham with an Elephant in the Room’, in: Anthony Bebbington, Diana Mitlin, and Samuel Hickey (eds.), *Can NGOs make a difference?*, pp. 38–52, p. 46; Ellis, ‘The Ethics of Taking Sides’ (above, n. 1440), 78 f.

¹⁴⁴³ Bogdandy, ‘The European Lesson for International Democracy: The Significance of Articles 9 to 12 EU Treaty for International Organizations’ (above, n. 1431), p. 24; Bernstorff, ‘Menschenrechte und Betroffenenrepräsentation: Entstehung und Inhalt eines UN-Antidiskriminierungsübereinkommens über die Rechte von behinderten Menschen’ (above, n. 1435), p. 1057.

¹⁴⁴⁴ Scheuerman, ‘Democratic Experimentalism or Capitalist Synchronization? Critical Reflections on Directly-Deliberative Polyarchy’ (above, n. 1435).

diverse types of NGOs: Those who formally participate in advisory committees might be more “tamed”. Still, this does not prevent other external NGOs from pursuing their mandates as external advocates.

In sum, NGO participation might – in particular in post-national settings – respond to the democratic deficit but clearly cannot resolve it. It would not be reasonable to expect this either: democratic legitimacy at a post-national level should not be measured against an idealized form of domestic democracy.¹⁴⁴⁵ While NGO participation is still far from perfect, it leads to a pluralization of public decision-making¹⁴⁴⁶ and thus increases the probability that different voices and interests are taken into account. NGOs can thus have different roles for the institutionalization of HRIAs. They can provide input during participation, ranging from the provision of knowledge (information model) to the contestation of expert opinion (transformation model). NGOs can become members of advisory committees and in this role provide input on a permanent basis. They can also increase compliance with HRIA provisions: as will be seen in the two final chapters, they can bring lawsuits or complaints before quasi-judicial organs (e.g. the EU Ombudsman) to ensure that public authorities conduct HRIAs of certain initiatives. Finally, they can critically review and challenge the content of the HRIA, for example by providing an independent “shadow” HRIA.

7.1.5.4 The Involvement of International Organizations

Another type of external non-state actor participants would be the involvement of International Organizations, such as – in the area of economic and development law – those with human rights or human rights-related mandates, including the ILO, UNHCR, OHCHR, UNDP or UNCTAD. The sociology of international organizations suggests that civil servants “emancipate” soon after joining an IO and increasingly identify with the IO mandate;¹⁴⁴⁷ therefore, the civil servants of human rights organizations are more likely to become advocates of public interests and human rights if involved in impact assessment procedures.

One form of involvement is the use of another organization’s knowledge and recommendations. The EU guidelines on HRIAs of trade policies explicitly refer to UN human rights organizations as platforms – their information and knowledge should be used in order to prepare the human rights impact assessments of proposed trade agreements.¹⁴⁴⁸ In the *Front Polisario* case, the General Court, for example, also explicitly refers to an assessment of the UN Legal Counsel regarding the law and state practice regarding non-self-governing territories¹⁴⁴⁹ (which means

¹⁴⁴⁵ Concerning such an “unfair” comparison between domestic and international constitutionalism: Bryde, ‘International Democratic Constitutionalism’ (above, n. 2), pp. 104–105.

¹⁴⁴⁶ On NGOs and democratic institutions in international constitutionalism: Ibid., p. 119.

¹⁴⁴⁷ Ibid., p. 111. However, there is also an imbalance between different IOs, where organizations with economic mandates (and generally larger resources) are often much more influential than those with non-economic mandates such as environmental or social programs: Ibid., p. 112.

¹⁴⁴⁸ E.g. European Commission, *Guidelines on the analysis of human rights impacts in impact assessments for trade-related policy initiatives* (above, n. 42).

¹⁴⁴⁹ General Court, *Front Polisario* (above, n. 746), para 229; Opinion of Advocate General Wathelet, *Front Polisario* (above, n. 716), para 261. The judgment of the General Court was reversed by the European Court of Justice, however on different grounds, namely because it held that the Agreement in question did not apply to the territory of Western Sahara: ECJ, *Front Polisario* (above, n. 769).

that, ideally, the Council should have done the same when examining potential human rights impacts). Similarly, IO involvement can become relevant for ex-post IAs once a policy is implemented. Here, deference to IOs, including international courts, can be a flexibility mechanism to adequately deal with human rights impacts that occur after the policy is enacted. This is particularly important for multilateral trade and development agreements which are often difficult to amend formally: without formal or informal flexibility mechanisms, the findings of an ex-post IA that identifies negative human rights impacts once the treaty is in force cannot effectively be considered.¹⁴⁵⁰ In addition, the recommendations of the UN Human Rights Committees or the Special Rapporteurs can also help to specify otherwise vague human rights commitments and therefore became relevant for the legal evaluation of expected human rights impacts. These recommendations can help to reduce normative uncertainty.

7.1.6 Transparency and Access to Information

Transparency and participation are inseparably linked: meaningful participation is difficult without transparency, and transparency without the opportunity to participate would often be meaningless – and thus situated on the lower rungs of Arnstein’s ladder¹⁴⁵¹. But transparency can also further other human rights. The FAO, for example, assumes that access to information can be a first – and relatively costless – step to fulfill the human right to food as it allows people to get information about important food-related facts, such as global food prices: “These activities do not necessarily entail the provision of substantial financial resources and could imply simply ensuring access to information regarding opportunities to satisfy the right to food.”¹⁴⁵²

Transparency is not a mere procedural characteristic, but also a guarantee for the “equality of persons [...] before the law”.¹⁴⁵³ In international law, transparency in inter-state relations was endorsed in environmental, human rights and trade law. Inter-governmental transparency is legally required under international trade law and environmental law.¹⁴⁵⁴ The OECD has also encouraged states to provide for the timely involvement of other countries where environmental measures may have trade impacts or trade measures may have environmental impacts on these countries.¹⁴⁵⁵ The UN General Assembly already in 1946 recognized that “Freedom of Information is a fundamental human right and the touchstone for all freedoms to which the United Nations is consecrated”.¹⁴⁵⁶ This is again endorsed in Article 19 (2) ICCPR: Everyone shall have the right to freedom of expression; this right shall include freedom to seek, receive and impart information and ideas of all kinds, regardless of frontiers, either orally, in writing or in print, in the form of art, or through any other media of his choice.”

¹⁴⁵⁰ On these flexibility mechanisms see section 9.1.2.1.5.

¹⁴⁵¹ See section 7.1.4.1.

¹⁴⁵² FAO, ‘The Right to Food Guidelines: Information Papers and Case Studies’, 2006, p. 82.

¹⁴⁵³ Benhabib, ‘Twilight of Sovereignty or the Emergence of Cosmopolitan Norms? Rethinking Citizenship in Volatile Times’ (above, n. 296), p. 26.

¹⁴⁵⁴ UN General Assembly, *Co-operation between States in the field of the environment* (above, n. 534).

¹⁴⁵⁵ OECD, *Transparency and Consultation: OECD Procedural Guideline on Integrating Trade and Environment Policies* (1993), OCDE/GD(93)148, p. 4.

¹⁴⁵⁶ UN General Assembly, 14 Dec 1946, Calling of an International Conference on Freedom of Information, UNGA 87, A/RES/59(I).

Transparency regards two aspects: First, public institutions can publish on their own initiative information about particular initiatives;¹⁴⁵⁷ this is the objective dimension. Second, transparency can also refer to an individual right to have access to information. Increasingly, there is a shift towards such a right, both in international and domestic public law: Individuals increasingly can claim access to information, and exceptional non-disclosure must be justified.¹⁴⁵⁸ Similarly, the OECD Rules of Procedure are “based on the belief that information should be considered unclassified until an active decision is taken to classify it, and that in many instances the need to maintain a security classification is time-limited.”¹⁴⁵⁹ Today, access to information laws exist in many international organizations and in more than 100 countries worldwide (and in the EU).¹⁴⁶⁰ Such a default-rule in favor of access to documents reflects the analytic-deliberative paradigm: it enables stakeholders to review documents and challenge the information contained therein.

At first sight, it appears that more transparency *per se* implies individual empowerment and is thus a necessary prerequisite for the realization of human rights: Not only those who hold public office or those who represent business interests have access to decision-making processes, but everybody can review and challenge initiatives. Generally, human rights approaches emphasize the potential of transparency and participation for individual empowerment. However, even the contrary may be the case: If a “closed stage were not allowed and everything should be exposed, like working in a glass house, vested interests would ‘kill’ every initiative, whilst when the time has become ripe for change, transparent procedures can still follow to create legitimacy.”¹⁴⁶¹ The consequences depend on the goals of the initiative in question: If it is to improve environmental or social regulation, business interests might “kill” the proposal, whereas if the goal is deregulation and liberalization NGOs might do the same through targeted campaigns or strategic litigation.

Irrespective of the aforementioned strategic campaigns or strategic litigation, transparency does not *per se* lead to individual empowerment. Rather, gaining access to information and being able to participate in institutional decision-making effectively requires certain skills. Therefore, people who are illiterate, poor, have no or limited access to the media, or do not speak English or another international working language, are generally disadvantaged. Consequently, a human rights approach to transparency and participation might require certain types of affirmative action, such as the publication of information in a way understandable to illiterates,¹⁴⁶² or the translation of documents into the local language.

¹⁴⁵⁷ Council of Europe, *Convention on Access to Official Documents* (2008), Art. 10.

¹⁴⁵⁸ *Ibid.*, Art. 2 et seq.; Andreas Maurer, ‘Comparative study on access to documents (and confidentiality rules) in international trade negotiations: Study requested by the European Parliament’s Committee on International Trade’, p. 10. This approach is also reflected in the 2010 World Bank Policy on Access to Information (launched on 1 July 2010), which replaced the former positive list of accessible documents by a negative list of those documents that are not disclosed.

¹⁴⁵⁹ OECD, Rules of Procedure of the Organization, October 2013, Annex § 1.

¹⁴⁶⁰ UNESCO, World Trends in Freedom of Expression and Media Development: Global Report 2017/2018, p. 48.

¹⁴⁶¹ Sibout Nooteboom, ‘Impact assessment procedures for sustainable development: A complexity theory perspective’, *Environmental Impact Assessment Review*, 27 (2007), pp. 645–665, p. 662.

¹⁴⁶² Udit Bhatia, ‘Deliberative Democracy and Illiteracy: Exploring a Theoretical Gap’, *Journal of Public Deliberation*, 9 (2013).

7.1.7 Interim Conclusion and Outlook

Participation is widely regarded as a core element of impact assessments. It is at the same time also a principle recognized in different sources of domestic and international public law. In spite of this broad consensus in the abstract, significant disagreements about the adequate modalities of participation occur at the operational level. This chapter has argued that the goal and object largely determine the modalities of participation. It has discussed different participation models, in particular continuum models and information flow models. While in particular Arnstein's ladder of participation confronts difficulties if applied beyond local community projects, the concept as such should not be ignored. As will be seen in the following, it is useful to distinguish both between the level of participation and the flow of information. Before this background, I have argued to combine the continuum and information flow models and apply, based on human rights principles, a participation proportionality test for Impact Assessments. Recognizing the inherent value of participation, there would consequently be a presumption in favor of more inclusive participation. Nevertheless, less inclusive modalities of participation can be justified. Such a participation proportionality test therefore recognizes that public authorities need discretion in choosing an adequate participation model for each initiative at hand. At the same time, they would be obligated to justify their decision. Based on this categorization and general analysis, the remainder of this chapter looks at the role participation and transparency plays for EU impact assessments.

7.2 Participation and Impact Assessments in EU Law

Participation is an important element of impact assessments, even though for different purposes: to provide authorities with necessary information (information model), to negotiate about preferences (preference-accumulation model) or to assess impacts in a deliberative and reflective manner to thus transform decision-making (transformation model). This part of the chapter analyzes participation in EU law and its relevance for the institutionalization of HRIAs. The European Commission defines its Better Regulation approach as a “way of working to ensure that political decisions are prepared in an open, transparent manner, informed by the best available evidence and backed by the comprehensive involvement of stakeholders.”¹⁴⁶³ Transparency and participation are therefore important principles and objectives, even though it is controversial to what extent the Commission itself sufficiently respects them.

7.2.1 Legal Sources and their Relevance to HRIAs

Participation in EU decision-making has evolved over time, and these developments can be classified into at least three stages or dimensions. The European Court of Justice first developed participation rights as principles of general administrative law in disputes between the Commission and its civil servants. In this context, the Court already in 1963 recognized as a “generally accepted principle of administrative law” that administrative agencies must give their civil servants the “opportunity of replying to allegations before any disciplinary decision is taken concerning them”.¹⁴⁶⁴ Based on similar considerations, these hearing rights were extended to external natural and legal persons: if his “interests are perceptibly affected by a decision taken by a public authority [he] must be given the opportunity to make his point of view known”.¹⁴⁶⁵ This mainly concerns Commission acts under competition law, one of the few areas where the Commission could itself directly impose sanctions on individuals and companies.¹⁴⁶⁶ The ECJ refined the scope of participation rights, including a right to access to the evidence upon which the Commission relied¹⁴⁶⁷ as a necessary requirement for effective and meaningful participation. This obligation, based on the right to a fair hearing, was later extended from proceedings which “may result in the imposition of penalties, but also in investigative proceedings prior to the adoption of anti-dumping regulations which, despite their general scope, may directly and individually affect the undertakings concerned and entail adverse consequences for them.”¹⁴⁶⁸ Based on this case law, the Commission later enacted “guidelines” to better regulate participatory pro-

¹⁴⁶³ European Commission, *Better Regulation Guidelines* (above, n. 199), p. 4.

¹⁴⁶⁴ ECJ, Judgment of 4 July 1963, Case 32/62, *Alvis*.

¹⁴⁶⁵ ECJ, Judgment of 23 October 1974, Case 17/74, *Transocean Marine Paint* (1974), para 15; see also: ECJ, Judgment of 13 February 1979, Case 85/76, *Hoffmann-La Roche*, para 9.

¹⁴⁶⁶ Francesca Bignami, ‘Three Generations of Participation Rights Before the European Commission’, *Law and contemporary problems*, 68 (2004), pp. 61–83, p. 63; Bonzon, *Public Participation and Legitimacy in the WTO* (above, n. 280), p. 27.

¹⁴⁶⁷ ECJ, *Hoffmann-La Roche* (above, n. 1465), para 11; ECJ, Judgment of 15 July 1970, Case 41/69, *ACF Chemiefarma*, para 87–88; Bignami, ‘Three Generations of Participation Rights Before the European Commission’ (above, n. 1466), 64 ff.

¹⁴⁶⁸ ECJ, Judgment of 27 June 1991, Case C-49/88, *Al-Jubail Fertilizer Company (SAMAD)* (1991), para 15; CFI, Judgment of 21 November 2002, Case T-88/98, *Kundan and Tata*, para 132.

cedures in line with the ECJ's case law.¹⁴⁶⁹ This dimension is of relevance to mainly those initiatives where individual rights of a limited number of persons are directly affected; this right is now also laid down in Art. 41(2) of the CFR.

The second dimension regards not an individual right to be heard and participate (like in Art. 41 (2) of the CFR), but rather transparency rights beyond specific individual affectedness towards broader interest representation.¹⁴⁷⁰ The main objective, especially in the 1990s, was to make the EU institutions as open and transparent as possible in order to respond to the (perceived) legitimacy deficits.¹⁴⁷¹ At the Inter-institutional Conference in Luxembourg in 1993, the EU institutions expressed their commitment to transparency.¹⁴⁷² Only a few months later, the Commission and Council adopted Decisions that established a formalized procedure to apply for access to documents. While these Decisions contain rights to access to documents with relatively broad exceptions,¹⁴⁷³ the (then) Court of First Instance interpreted these exceptions narrowly: it required first a "genuine examination of the particular circumstances of the case."¹⁴⁷⁴ Second, it emphasized the democratic character of transparency rights and identified, in the Decision and related documents, a commitment to the widest access possible, so that the exceptions must be interpreted narrowly.¹⁴⁷⁵ Third, the principle of proportionality implies that the exception must be limited to what is necessary, so that the institutions must review whether at least partial access is possible;¹⁴⁷⁶ this means, in consequence, that access may not be declined document-wise but only based on a line-by-line redaction.¹⁴⁷⁷ The Access to Information Regulation took up this case law and confirms a general right to access to EU documents with limited exceptions. Finally, the transparency principle gained formal constitutional recognition in the Treaty of Lisbon in Article 11 and Article 1 (2) TEU and Article 15 TFEU, requiring that decisions are taken as openly as possible. This dimension is of major relevance to the institutionalization of HRIAs, in particular as it enables external actors to formally or informally participate during the assessment of initiatives: either because they get access to documents relevant to assess the impacts of an initiative, or because they get access to (draft) IA documents. The scope and limits of access to information in the context of HR impact assessments will be discussed below.¹⁴⁷⁸

¹⁴⁶⁹ European Commission, *Commission Regulation (EC) 773/2004 of 7 April 2004 relating to the conduct of proceedings by the Commission pursuant to Articles 81 and 82 of the EC Treaty* (2004).

¹⁴⁷⁰ Similar: Vivian Kube, *EU Human Rights, International Investment Law and Participation* (above n. 733), p. 253; Bonzon, *Public Participation and Legitimacy in the WTO* (above, n. 280), p. 27;

¹⁴⁷¹ Bignami, 'Three Generations of Participation Rights Before the European Commission' (above, n. 1466), p. 68.

¹⁴⁷² Interinstitutional Conference in Luxembourg, *Inter-institutional Declaration on Democracy, Transparency, and Subsidiarity* (1993).

¹⁴⁷³ European Union, *Council Decision on public access to Council documents* (1993), 93/731/EC, Art. 4 (1); European Commission, *Commission Decision on public access to Commission documents* (1994), 94/90/ECSC, EC, Euratom.

¹⁴⁷⁴ CFI, Judgment of 19 July 1999, Case T-14/98, *Hautala* (1999), para 67.

¹⁴⁷⁵ *Ibid.*, para 84.

¹⁴⁷⁶ *Ibid.*, para 87.

¹⁴⁷⁷ Bignami, 'Three Generations of Participation Rights Before the European Commission' (above, n. 1466), p. 68; CFI, Case T-14/98, *Hautala* (1999), para 87.

¹⁴⁷⁸ See section 7.2.6.

The third dimension concerns the formal involvement of non-state actors in EU law-making and rulemaking more generally.¹⁴⁷⁹ The European Commission vigorously supported the involvement of external non-state actors in decision-making, an approach now also reflected in Article 11 (3) TEU.¹⁴⁸⁰ The formalization of broad-based consultation in legislative and regulatory decision-making was endorsed by the White Paper on European Governance of June 2001¹⁴⁸¹ and concretized by the Commission's Communication *"Towards a reinforced culture of consultation and dialogue - General principles and minimum standards for consultation of interested parties by the Commission"* (in the following: "Minimum Standards for Consultation").¹⁴⁸² The Minimum Standards for Consultation have been re-affirmed ever-since, most recently by the Better Regulation Guidelines in 2015/2017,¹⁴⁸³ which illustrates their relevance for impact assessments. The European Commission further attempts to clarify the Minimum Standards by "including clearer operational criteria" and by strengthening "internal control and support mechanisms so that consultations better support all phases of the evaluation, impact assessment and decision-making processes".¹⁴⁸⁴ The goals, modalities and scope of consultation will be discussed in the following. Also the guidelines on HRIA for trade-policy initiatives explicitly refer to the Minimum Standards for Consultation.¹⁴⁸⁵ Similarly, the Trade SIA Handbook recognizes transparency and participation as key principles. Transparency means that SIAs should "contribute to the transparency of the analysis and of the ongoing trade negotiations by providing stakeholders with comprehensive information on the possible impacts of the agreement."¹⁴⁸⁶ SIAs should also be participatory, i.e. the SIA would "work as a platform for systematic dialogue between stakeholders and trade negotiators, through in-depth consultation in which all stakeholders are given an opportunity to participate."¹⁴⁸⁷ Interestingly, the Trade SIA Handbook states that Trade SIAs consist of two complementary components of equal importance: robust impact analysis and a wide consultation process.¹⁴⁸⁸ This greatly enhances the role of stakeholder consultations - how-

¹⁴⁷⁹ Bignami, 'Three Generations of Participation Rights Before the European Commission' (above, n. 1466), para 62.

¹⁴⁸⁰ Stijn Smismans, 'European Civil Society: Shaped by Discourses and Institutional Interests', *European Law Journal*, Vol. 9, No. 4, September 2003, pp., 9 (2003), pp. 482–504, 484 ff. ; Vivian Kube, *EU Human Rights, International Investment Law and Participation* (above n. 733), p. 253.

¹⁴⁸¹ European Commission, *European Governance* (above, n. 1108).

¹⁴⁸² European Commission, *Towards a reinforced culture of consultation and dialogue - General principles and minimum standards for consultation of interested parties by the Commission*, COM(2002) 704 final, complemented by European Commission, *EU Regulatory Fitness*, COM(2012) 746.

¹⁴⁸³ European Commission, *Better Regulation Guidelines* (above, n. 199), p. 69.

¹⁴⁸⁴ European Commission, *Stakeholder Consultation Guidelines 2014: Public Consultation Document*, p. 1.

¹⁴⁸⁵ European Commission, *Guidelines on the analysis of human rights impacts in impact assessments for trade-related policy initiatives* (above, n. 42), p. 11. As regards the extraterritorial dimensions, generally consultants carry out the SIA of a planned trade or investment agreement. The guidelines include provisions on how – in particular how inclusive – the consultations should be. They must ensure a "dynamic, far-reaching and open consultation of all relevant stakeholders in the EU and in partner country/ies; including social partners (workers' and employers' organizations), businesses, experts, NGOs, and other civil society organizations. To this end, a dedicated SIA website is set up where all the SIA reports produced are published, and where stakeholders are invited to provide feedback at any time during the entire process": Ibid.

¹⁴⁸⁶ European Commission, 'Handbook for Trade Sustainability Impact Assessment' (above, n. 212), p. 6.

¹⁴⁸⁷ Ibid.

¹⁴⁸⁸ Ibid., p. 9.

ever, as will be explained below, the goal of consultations in the context of Trade SIA is mainly on information gathering.¹⁴⁸⁹

The respective guidelines contain general principles and provide general guidance on consultation procedures. The details of each consultation are established by the Commission officials conducting the IA or the external consultants in charge of the Trade SIA. This includes a definition of consultation objectives, a mapping of stakeholders and identification of vulnerable groups that might be excluded from effective participation due to, for example, constraints on freedom of association, illiteracy or cultural obstacles.¹⁴⁹⁰

7.2.2 Goals of Participation

At a general level, the goals of participation can range from instrumental to inherent. The inherent value is most evident for the first and second dimension of participation rights as analyzed above: The right to be heard in proceedings affecting individual rights and interests, as developed by the ECJ, is clearly an expression of human rights and the rule of law. Granting broad access rights to information, described above as the second dimension, does not primarily serve instrumental purposes such as information-gathering but rather responds, *inter alia*, to the perceived democratic legitimacy deficits and enables external stakeholders to hold institutions accountable.

The classification as instrumental or inherent is more complicated with regard to the third dimension, namely the involvement of external participants in policy and decision-making. According to the Better Regulation Guidelines, stakeholder consultation can both provide additional evidence and increase the acceptance of a later decision.¹⁴⁹¹ The Better Regulation Guidelines grant a certain degree of flexibility to those in charge of conducting the consultation to identify the specific objectives of the consultation in question.¹⁴⁹² These objectives include, as the Guidelines illustrate, to “gather new ideas, collect views and opinions, gather factual information, data and knowledge; and test existing ideas and analysis”.¹⁴⁹³ This may be read as encouraging also a subjective-deliberative approach. Still, in an overall assessment, the goal of consultation is more instrumental than inherent. The Better Regulation Guidelines do not refer to democratic principles or to participation as a right. Even if the Guidelines state that “[a]ll stakeholders and the general public have a right to know what the EU has done and achieved”¹⁴⁹⁴ in the context of ex-post evaluations –it sounds less like a human right to participate in decision-making but more like a “right” to learn about how well the EU is doing its job. It would be the manipulation rung on Arnstein’s ladder. So the Better Regulation Guidelines mainly reflect the idea that the main goal is to gather information and knowledge, improve the results and increase social acceptance or social legitimacy – as opposed to normative acceptability/legitimacy¹⁴⁹⁵ - of policy interventions. The Better Regulation Guidelines for example emphasize that policy interventions will

¹⁴⁸⁹ Ibid., p. 22.

¹⁴⁹⁰ Ibid., p. 26.

¹⁴⁹¹ European Commission, *Better Regulation Guidelines* (above, n. 199), p. 68.

¹⁴⁹² Ibid., p. 72.

¹⁴⁹³ Ibid., p. 74.

¹⁴⁹⁴ Ibid., p. 53.

¹⁴⁹⁵ On social and normative legitimacy see section 3.2.1.1.

benefit from stakeholder input, that consultation will improve evidence-based decision-making and promote greater acceptance.¹⁴⁹⁶ This, again, demonstrates the rather instrumental and information-oriented design of the consultation regime. While the goal to collect views and opinions¹⁴⁹⁷ mentioned above might also have a quasi-democratic function, it is rather a top-down approach that does not necessarily lead to individual empowerment (as democratic and human rights principles would require) but could also lead to institutional empowerment: it enables the EU institutions to take more informed decision or, from a critical perspective, use their knowledge of people's views and opinion strategically, for example to be better prepared to defend unpopular initiatives. Nevertheless, as will be seen later, consultation is not legally irrelevant, and it can at least be indirectly relevant for judicial review whether these views and opinions were adequately taken into consideration.

An exception are the European Commission Trade HRIA Guidelines which emphasize that consultation also serves to realize the human right to transparency and participation. The HRIA Trade Guidelines state that participation serves both inherent and instrumental purposes.¹⁴⁹⁸ However, they also avoid the appearance of a specific legal right in this regard and – intentionally or not – often use non-legal language, such as that “consultations bolster the right to participate in the conduct of public affairs”.¹⁴⁹⁹ It remains unclear what “bolster” means; in any case, it does not create the impression of a legally enforceable right. This indicates that the European Commission wishes to preserve the broadest possible discretion in this regard and not commit to a rights-based approach to participation in this third dimension. This is not new: Already in the Communication on Minimum Standards for Consultation, the Commission did not implement stakeholders' claims for a legally binding consultation requirement. Instead, the Commission opted for a non-binding Communication. A central argument was that a legally-binding consultation requirement and, in consequence, the option to challenge alleged violations thereof before the European courts, could cause unacceptable delays.¹⁵⁰⁰

7.2.3 Object of Participation

The EU's general IA regime and its Trade SIAs accompany legislative and non-legislative initiatives, most of which are therefore general-abstract policies. In particular the second dimension – access to information – and the third dimension – the formal involvement of non-state actors in EU law-making and rulemaking¹⁵⁰¹ – are relevant.

Some initiatives are excluded from participation, or access to information rights are at least restricted. An exception most relevant to HRIAs of trade and development policies concerns international relations: here, access to information is restricted, as will be discussed below. This is, to

¹⁴⁹⁶ Ibid., p. 68.

¹⁴⁹⁷ Ibid., p. 74.

¹⁴⁹⁸ European Commission, *Guidelines on the analysis of human rights impacts in impact assessments for trade-related policy initiatives* (above, n. 42), pp. 10–11.

¹⁴⁹⁹ Ibid., p. 11.

¹⁵⁰⁰ European Commission, *General principles and minimum standards for consultation of interested parties by the Commission* (above, n. 1482), p. 10.

¹⁵⁰¹ Bignami, ‘Three Generations of Participation Rights Before the European Commission’ (above, n. 1466), para 62.

a certain extent, justified, in particular where stakeholders seek access to documents in the context of ongoing trade negotiations.¹⁵⁰² Revealing too much information can have a negative impact on one's bargaining position.

Similarly, the Better Regulation regime exempts certain initiatives from the consultation requirement, either because no significant impacts are to be expected, because the European Commission has no discretion at all, or because certain interests prevail. For the case of international development law, mainly the exception for delegated acts are relevant where no or only a limited margin of discretion exists, such as "[a]cts implementing an international standards [sic] into EU law without any (or limited) discretion"¹⁵⁰³ and budgetary procedures and measures, as well as program management decision, such as award decisions.¹⁵⁰⁴

Consultation under the consultation guidelines is closely linked with impact assessments. In particular, the Commission commits to conduct consultations for initiatives accompanied by IAs, Evaluations and Fitness Checks.¹⁵⁰⁵ Stakeholders must be consulted on all IA elements in the IA process,¹⁵⁰⁶ which means in particular the problem identification, the objectives of the policy, and the analysis of the potential impacts of the initiative.

7.2.4 Modalities of Participation

The modalities of participation (the guidelines use the term "consultation methods and tools")¹⁵⁰⁷ are largely determined by the goal and object of participation and can be distinguished, as previously illustrated, according to the degree of involvement, timing and quality requirements. This is clearly reflected in the Better Regulation Guidelines, which refer to the degree of interactivity needed, accessibility considerations and timing requirements.¹⁵⁰⁸ The scope of each consultation in the context of IAs is determined on a case-by-case basis by the lead service and the Inter-Service Group (ISG).¹⁵⁰⁹ The Better Regulation Guidelines reflect a participation proportionality test (even though, as discussed, avoiding the impression of a right to participation), stating that it is "important to consult as early and as widely as possible in order to maximise the usefulness of the consultation and to secure an inclusive approach where all interested parties have the opportunity to contribute to the timely development of effective policies."¹⁵¹⁰

7.2.4.1 Degree of Participation

As regards policy initiatives, certain modalities of participation as developed in the context of project- or community-based participatory models, are often not viable. This includes mainly the

¹⁵⁰² Zerk, 'Human Rights Impact Assessment of Trade Agreements' (above, n. 30), p. 27.

¹⁵⁰³ European Commission, *Better Regulation Toolbox* (above n. 204), p. 443.

¹⁵⁰⁴ *Ibid.*, p. 443 et seq.

¹⁵⁰⁵ European Commission, *Better Regulation Guidelines* (above n. 199), p. 70.

¹⁵⁰⁶ *Ibid.*, p. 75.

¹⁵⁰⁷ *Ibid.*, p. 75.

¹⁵⁰⁸ *Ibid.*, p. 79.

¹⁵⁰⁹ *Ibid.*, p. 67 et seq.

¹⁵¹⁰ *Ibid.*, 8.

upper rungs in Arnstein's ladder of delegated power or citizen control.¹⁵¹¹ However, as negotiated rulemaking under the US APA demonstrates,¹⁵¹² it is not per se impossible to consider formalized types of participation which would require consent, even though it generally makes sense with regard to policy initiatives with a limited impact (in terms of a limited number of people affected). One example of relevance to international law concerns the obligation to obtain free, prior and informed consent from indigenous peoples for certain projects and policies. At the same time, granting such a veto-right to certain stakeholders against legislative processes or other forms of policy-making can conflict with the principle of democracy. Before this background, competing claims of human rights and democratic legitimacy can be raised, and if this is the case, it would not be justified to regard participation at the lower rungs of Arnstein's ladder "inferior". And even if the top rungs of the participation ladder might be unavailable for many policy decisions, there are still several modalities of participation left.

Participatory mechanisms in the context of impact assessment and evaluation can also be classified according to information flows.¹⁵¹³ The broadest form of participation involves a bidirectional flow of information. Here, the three categories developed by Rowe and Frewe can be applied in a slightly modified way: First, there can be unidirectional flow from the Commission to external participants. This is what the Access to Information Regulation is about, but it also plays an important role in the Consultation guidelines in which the Commission is committed to publishing Roadmaps, Inception Impact Assessments, Evaluations, etc. The Better Regulation regime also establishes a variety of channels for unidirectional flow from externals to the Commission. Therefore, every citizen, enterprise or association can provide the Commission with input.¹⁵¹⁴

However, the Commission strives – in the Minimum Standards for Consultation Communication, the Better Regulation Guidelines and other instruments – for a bidirectional flow of information. This includes the establishment of expert committees or civil society dialogues. But also in the context of impact assessments and evaluations, the respective guidelines require, as far as feasible, to not only receive and analyze stakeholder input, but also provide "[a]dequate feedback" to stakeholders as it is "critical for those participating in stakeholder consultations to know how, and to what extent, their input has been taken into account and to understand why certain suggestions could not be taken up in the policy formulation. Providing effective feedback will contribute to the overall transparency of the Commission's policy-making, enhance the Commission's accountability and credibility, and potentially solicit better responses to future consultations."¹⁵¹⁵

The Better Regulation Guidelines define stakeholder consultation as "a formal process by which the Commission collects information and views from stakeholders about its policies."¹⁵¹⁶ Stakeholder consultation is decentralized in the sense that the competent Commission services choose the adequate methods and tools based on the objectives, target groups and available resources; however, the Better Regulation Guidelines contain certain minimum mandatory re-

¹⁵¹¹ See section 7.1.4.1.

¹⁵¹² See section 7.1.4.1.

¹⁵¹³ See section 7.2.4.1.

¹⁵¹⁴ European Commission, *General principles and minimum standards for consultation of interested parties by the Commission* (above, n. 1482), p. 11.

¹⁵¹⁵ European Commission, *Better Regulation Guidelines* (above, n. 199), p. 86.

¹⁵¹⁶ *Ibid.*, p. 68.

quirements.¹⁵¹⁷ The Consultation strategies and documents must be discussed with and agreed by the inter-service group (ISG).¹⁵¹⁸ Generally, the Guidelines distinguish between two methods, namely open-public consultations and targeted consultations.¹⁵¹⁹ Both methods require to make important selection decisions. The *open-public consultation* intends to reach a broad scope of participants. The Better Regulation Guidelines require (“must”), as a minimum, a mandatory 12-week Internet-based public consultation for all initiatives subject to impact assessments.¹⁵²⁰ Open public consultation is also required for HRIAs of trade agreements.¹⁵²¹

Open-public consultation has the advantage that it is inclusive: everyone can provide his or her input. But as this consultation method is not necessarily ensuring full representativeness, it is particularly important to carefully review the relevance of the input¹⁵²² and thus select between more relevant and less relevant input. The second method is *targeted consultations*, which means to admit stakeholders based on their interests or expertise concerning the policy. This allows for more focused and in-depth deliberation. Here, relevant stakeholders must usually be selected - the Better Regulation Guidelines contain recommendations for a “successful stakeholder mapping”¹⁵²³ -, and this selection process might be susceptible to undue political influence.¹⁵²⁴

After these decisions have been taken, consultation enters into the second phase, which requires (1) to adequately announce and communicate the consultation design in order to make participation meaningful, (2) to run the consultation itself, (3) to inform the public about contributions made, and (4) to analyze the content of the contributions made.¹⁵²⁵ The Guidelines emphasize that it is important to identify the identity and interests of stakeholders, as both aspects need to be considered when assessing the contributions.¹⁵²⁶ This is clearly important to increase transparency and reduce the risk of undue influence. Therefore, the Guidelines encourage stakeholders to register in the “Transparency Register”¹⁵²⁷ – otherwise their contributions will be treated in a separate category.¹⁵²⁸ This clause implies that contributions which cannot be clearly attributed to representatives who disclose their affiliations will not receive special consideration as expert or “public interest” representation. After the consultation, the stakeholder contributions should be published with a summary of the key contributions.¹⁵²⁹

¹⁵¹⁷ Ibid., p. 69, 71.

¹⁵¹⁸ Ibid., p. 67, 71.

¹⁵¹⁹ Ibid., pp. 70 et seq., 78

¹⁵²⁰ Ibid., p. 70 et seq.

¹⁵²¹ European Commission, ‘Handbook for Trade Sustainability Impact Assessment’ (above, n. 212), 25 et seq.

¹⁵²² European Commission, *Better Regulation Guidelines* (above, n. 199), p. 78.

¹⁵²³ Ibid., 77 .

¹⁵²⁴ This risk is reflected in the Guidelines when they warn that “privileged access” should be avoided: Ibid., p. 78.

¹⁵²⁵ Ibid., p. 80 et seq.

¹⁵²⁶ Ibid., p. 82.

¹⁵²⁷ The legal basis for the Transparency Register is an interinstitutional agreement: European Union, *Agreement between the European Parliament and the European Commission on the transparency register for organisations and self-employed individuals engaged in EU policy-making and policy implementation* (2014), L 277/11.

¹⁵²⁸ European Commission, *Better Regulation Guidelines* (above, n. 199), p. 82.

¹⁵²⁹ Ibid., 83 et seq.

Naturally, the contributions need to be analyzed. This requires a certain disaggregation or classification according to stakeholders on the one hand and the content of the contribution on the other hand. First, as stakeholder participation is usually not very representative, the Guidelines require to classify the contributions according to stakeholder distribution across the Member States or third countries and different stakeholder categories.¹⁵³⁰ Second, the content must be analyzed.¹⁵³¹ Here, the relevance of the contribution should be considered, and where possible information and opinion should be separated. Contributions that strongly diverge from “mainstream” opinion are to be marked. The competent services are asked to provide a qualitative appreciation of the responses and respondents (e.g.: their involvement/interest in the policy; how they are impacted; whether input is made on their behalf or as representatives of specific interests). This analysis of stakeholder input results in the presentation of the findings, which can be structured either based on different stakeholder categories or different consultation topics.¹⁵³²

Here begins the third phase, which requires to inform policy-makers and provide feedback to stakeholders who made contributions.¹⁵³³ Essential for the relevance of consultation is how contributions in stakeholder consultations will inform Commission staff, the College of Commissioners and, in the case of legislative proposals, the EU legislator. The third phase of the consultation process is therefore dedicated to adequately present the input made and the findings. A synopsis report must be drafted, which is a central document to provide the relevant information.¹⁵³⁴ In addition, especially the legislator, but also the general public will be informed about the reasons for the adoption of a legislative proposal, and the explanatory memorandum “should explain how far the main contributions have been taken into account in the draft policy initiative, or why they could not (all) be taken into account.”¹⁵³⁵

7.2.4.2 Timing of Participation

Impact assessment guidelines – for the Commission’s general IAs and for Trade SIAs - emphasize that it is important to consult as early as possible,¹⁵³⁶ but that some form of participatory processes can in principle take place throughout the whole policy cycle – provided the initiative has received political validation.¹⁵³⁷ For initiatives accompanied by impact assessments, stakeholders must already be able to give feedback on the Inception Impact Assessment after its publication, and after the feedback period, the consultation strategy and documents must be finalized and, at least, a 12-week internet-based public consultation must take place.¹⁵³⁸

¹⁵³⁰ Ibid., p. 84.

¹⁵³¹ Ibid.

¹⁵³² Ibid., p. 85 et seq.

¹⁵³³ Ibid., 86.

¹⁵³⁴ Ibid., p. 86. If the consultation was conducted in the context of an IA, this synopsis will be integrated into the IA-report as an annex.

¹⁵³⁵ European Commission, *Better Regulation Toolbox*, (above n. 204), Tool #55, p. 436.

¹⁵³⁶ European Commission, *Better Regulation Guidelines* (above n. 199), p. 8; European Commission, ‘Handbook for Trade Sustainability Impact Assessment’ (above, n. 212), p. 26.

¹⁵³⁷ European Commission, *Better Regulation Guidelines* (above, n. 199), p. 70.

¹⁵³⁸ Ibid., in particular pp. 14, 67 and 71.

In the case of Trade SIAs accompanying ongoing trade negotiations, the process consists of three main phases – inception, interim and final. The consultation process is managed by the external consultant in charge, in coordination with the European Commission. At each stage, a report will be prepared (inception, interim, and final), and a draft version of each report will be subject to consultation. The respective draft report will first be made public for comments online, in the form of an open consultation. It will also be discussed with the SIA Inter-Service Steering Group (“ISG”) of the Commission. Here, a targeted consultation will also be carried out, namely a discussion with civil society organizations in the framework of the DG Trade’s civil society dialogues. When finalizing each draft report, stakeholder contributions must be taken into account.¹⁵³⁹

What is not clear from the IA-guidelines is that the Commission wished to reserve a “thinking space”¹⁵⁴⁰ after the initial consultations and during the elaboration of the IA-Report. This issue came up in an action brought by *ClientEarth*, an environmental NGO, against the Commission. *ClientEarth* challenged the rejection of its request to disclose two (draft) IA-Reports and the respective opinions from the (then) Impact Assessment Board (now: Regulatory Scrutiny Board). The Commission in particular rejected the requests because the impact assessment process was still ongoing. This is an important question, in particular if IAs are understood in the sense of the transformation model. As the transformative effect of deliberation during the IA-process is generally higher the earlier it takes place in the decision-making cycle – i.e. before the institution has formed an opinion it then tends to defend -, the question arises at what stage access to (draft) IA documents must be granted, in particular whether third parties can claim access to draft IA reports or Board opinions even before the proposal has been forwarded for inter-service consultation or to the College of Commissioners. The General Court supported the Commission’s position.¹⁵⁴¹ Even though this judgment was later reversed by the Court of Justice, it is worth to briefly look at the reasoning of both judgments as they address, from different perspectives, several important questions regarding the right to inspect IA documents during an ongoing decision-making process.

The IA documents the NGO *ClientEarth* wished to inspect concerned impact assessments accompanying proposals for a reform of EU environmental policy. While these (draft) reports are “documents of the institutions” and therefore generally covered by the Access to Information Regulation,¹⁵⁴² the Commission refused disclosure, as one Impact Assessment was still in a draft stage and the other had yet to be forwarded for inter-service consultation.¹⁵⁴³ It based its decision to deny access on the first subparagraph of Article 4 (3) of the Access to Information Regulation, claiming that a publication at that stage would seriously undermine the decision-making process. Disclosure “would restrict its room for manoeuvre and reduce its ability to help to seek a compromise”, and it would be important to “preserve an atmosphere of trust during discussion

¹⁵³⁹ European Commission, ‘Handbook for Trade Sustainability Impact Assessment’ (above, n. 212), 11 et seq.

¹⁵⁴⁰ General Court, Judgment of 13 November 2015, Joined Cases T-424/14 and T-425/14, *ClientEarth vs. Commission*, para 33.

¹⁵⁴¹ Ibid.

¹⁵⁴² European Union, *Regulation (EC) 1049/2001*, Art. 2 (1).

¹⁵⁴³ General Court, *ClientEarth vs. European Commission* (above, n. 1540), para 69.

and negotiation processes”.¹⁵⁴⁴ Later in 2014, *ClientEarth* filed an action for annulment against the decision which the General Court dismissed in 2015.

ClientEarth claimed a violation of the duty to give reasons and to provide an individual and specific assessment of the requested documents. In essence, the applicant claimed that the Commission failed to prove that disclosure would seriously undermine the decision-making process.¹⁵⁴⁵ However, the Commission argued that, in the case of draft impact assessment documents, no specific and individual examination is required, but that a general presumption applies. In consequence, it would be sufficient if the Commission gives general reasons for non-disclosure. In the respective case, these reasons were the sensitivity of the issue and the fact that it was controversial among the Member States. Therefore, the Commission claimed it needed to preserve “room for manoeuvre” and “thinking space” to be free from external pressure.¹⁵⁴⁶

The General Court first refers to established case law according to which exceptions to the principle of the widest possible public access to documents must be interpreted and applied strictly.¹⁵⁴⁷ In this context, the General Court also confirms that the justification of non-disclosure can be based on a general presumption of confidentiality that applies to certain categories of documents.¹⁵⁴⁸ If such a general presumption applies, it would consequently be easier for the Commission to reject requests to inspect documents. So far, the case law of the Court of Justice has recognized general presumptions for five categories of documents, namely (1) documents in the administrative file relating to a procedure for reviewing State aid; the (2) documents exchanged between the Commission and the notifying parties or third parties in the context of merger control proceedings; the (3) pleadings lodged by an institution in court proceedings; the (4) documents relating to an infringement procedure during the pre-litigation stage of that procedure, and (5) the documents in a file relating to a proceeding under Article 101 TFEU.¹⁵⁴⁹ In the *ClientEarth* judgment, the General Court established a new general presumption for draft impact assessment documents, i.e. documents at a stage before the Commission has decided on the pro-

¹⁵⁴⁴ Ibid., para 51.

¹⁵⁴⁵ Ibid., para 42.

¹⁵⁴⁶ Ibid., para 33.

¹⁵⁴⁷ Ibid., para 58; ECJ, Judgment of 1 July 2008, Joined Cases C-39/05 P and C-52/05 P, *Sweden and Turco v Council*, para 36. The Commission must in principle explain how “access to the requested document(s) could specifically and actually undermine the interest protected by the exception”, and this “risk must be reasonably foreseeable and not purely hypothetical”, so that the “mere fact that a document concerns an interest protected by an exception is not of itself sufficient to justify application of that exception”: General Court, *ClientEarth vs. European Commission* (above, n. 1540), para 59. In consequence, the “application of the exception laid down in the first subparagraph of Article 4(3) of Regulation No 1049/2001 requires it to be established that access to the document in question, drawn up by the institution for its internal use, was likely specifically and actually to undermine the protection of the institution’s decision-making process, and that the risk of that interest being undermined was reasonably foreseeable and not purely hypothetical”: Ibid., para 60. In addition, the decision-making process must be “seriously undermined”, which is the case where the disclosure would have a substantial impact on the decision-making process: Ibid., para 61.

¹⁵⁴⁸ Ibid., para 63; ECJ, *Sweden and Turco v Council* (above, n. 1547), para 50.

¹⁵⁴⁹ General Court of the European Union, *ClientEarth vs. European Commission* (above, n. 1540), para 64. In addition, the General Court had recognized three further general assumptions: (6) bids submitted by tenderers in a public procurement procedure in the event that a request for access is made by another tenderer, (7) documents relating to an “EU Pilot” procedure, and (8) documents sent by the national competition authorities to the Commission pursuant to Article 11(4) of Council Regulation (EC) No 1/2003 concerning the implementation of the rules on competition, Ibid., para 65.

posals. The General Court argued that “access to the documents involved in certain procedures is incompatible with the proper conduct of such procedures”, and that there was a “risk that those procedures could be undermined”; the general presumption should therefore “ensure that the integrity of the conduct of the procedure can be preserved by limiting intervention by third parties”.¹⁵⁵⁰ The General Court further refers to the rules governing the legislative process and the role assigned to the Commission to generally decide whether or not to submit a proposal for a legislative act and, in doing so, promote in accordance with Article 17 (1) TEU the general interest of the European Union.¹⁵⁵¹ Consequently, the General Court concludes, the Commission must be placed to develop legislative proposals in a completely independent manner in the general interest,¹⁵⁵² which would justify the application of a general presumption in favor of the non-disclosure of draft impact assessment reports.¹⁵⁵³

Where such a general presumption exists, applicants would have to show that there is an overriding public interest to nevertheless inspect documents.¹⁵⁵⁴ However, while the non-disclosure in cases where a general presumption exists can be justified on general grounds, the same is not true for establishing an overriding public interest.¹⁵⁵⁵ Therefore, the General Court rejected the applicant’s arguments emphasizing the public interest in transparent decision-making in general and the fact that the underlying environmental policy issues in particular were of high public interest. The General Court was also unwilling to distinguish between for-profit and not-for-profit organizations in determining whether or not there is an overriding public interest in disclosure: “taking an active part in the procedure of developing the Impact Assessment report, or even in the development of a policy proposal, does not constitute an overriding public interest, even where the party in question is, like the applicant, a not-for-profit organization whose object is the protection of the environment.”¹⁵⁵⁶

Such an interpretation, which restricts access to information to preserve the Commission’s room for manoeuvre, is problematic if read in context with the ability of the European Commission to decide on the composition of its advisory committees. This means that the European Commission can reject requests to inspect documents and thus shield itself from external scrutiny by NGOs. At the same time, members of advisory committees have access to Commission documents, even though there is no effective mechanism in place to ensure that the representation on advisory committees is actually balanced between for-profit and not-for-profit representatives.

It is also against this background that the judgment of the Court of Justice, which overturned the General Court’s decision, should be evaluated. The European Court of Justice emphasized that institutions must “conduct their work as openly as possible”¹⁵⁵⁷. Regarding the five general presumptions of confidentiality, the Court emphasized that they only referred to ongoing *adminis-*

¹⁵⁵⁰ Ibid., para 67.

¹⁵⁵¹ Ibid., para 81.

¹⁵⁵² Ibid., para 82.

¹⁵⁵³ Ibid., para 97. However, the Court indicates that the applicant can, after the Commission adopted a legislative proposal, submit a request for access to earlier versions of the reports, which would – still subject to Article 4 but without the general assumption – have to be granted: Ibid., para 145.

¹⁵⁵⁴ Ibid., para 114.

¹⁵⁵⁵ Ibid., para 136.

¹⁵⁵⁶ Ibid., para 151.

¹⁵⁵⁷ ECJ, *ClientEarth v. Commission*, Case C-57/16 P (above, n. 1219), para 74.

trative or judicial proceedings.¹⁵⁵⁸ However, the case of access to impact assessment documents takes place in a context where the Commission acts in a legislative context.¹⁵⁵⁹ The Access to Information Regulation states that wider access should be granted to documents in such legislative context. Having access to relevant information “in good time” is a precondition for the exercise of democratic rights.¹⁵⁶⁰ As the goal of the impact assessment procedure is to also ensure that the Commission’s decision-making process is transparent and open, the Court of Justice does not regard it as justified to apply a general presumption of confidentiality.¹⁵⁶¹ In particular, it held that the General Court did not establish that potential external pressure would impede the Commission’s capacity to act in a fully independent manner and exclusively in the general interest.¹⁵⁶² Consequently, there is no general assumption that documents drawn up in the context of an impact assessment may, generally, remain confidential until that institution has made such a decision.¹⁵⁶³ Access to draft impact assessment documents should therefore, in general, be granted, even before the Commission has taken a decision.¹⁵⁶⁴ Consequently, the burden of proof rests on the EU institution: the respective institution must, as usual, demonstrate in each individual case that the reasons justifying a refusal to grant access to the requested documents prevail.

7.2.4.3 Quality of Participation

The quality of participation in EU law varies necessarily between the different modalities. In general, the EU organs are required to inform the public in an accessible and understandable manner about a planned intervention. Consultation documents need to be endorsed by the ISG or by the Secretariat-General, as the quality of consultation documents determines the quality of contributions made and, consequently, the quality of input to policy-making.¹⁵⁶⁵ The Better Regulation Guidelines require that stakeholders are able to provide feedback on the Inception Impact Assessments,¹⁵⁶⁶ i.e. already at an early stage of the IA process. Similarly, the Trade SIA Handbook requires to publish the draft Inception Report and provide the opportunity for stakeholders to comment on it. Information about an ongoing Trade SIA must be provided via a dedicated website: to publicize the SIA, communicate with stakeholders, share information, or facilitate discussion, for example via a discussion forum. Similarly, the reports of all three stages - inception, interim and final- must be published, both in the draft and final version.¹⁵⁶⁷ Moreover, consultants are encouraged to use other electronic tools, such as email, newsletters or Twitter to

¹⁵⁵⁸ Ibid., para 81.

¹⁵⁵⁹ While the Commission, when drafting IA documents, does not act strictly in a legislative capacity, the Commission is nevertheless a “key player in the legislative process”: Ibid., para 88.

¹⁵⁶⁰ Ibid., para 84.

¹⁵⁶¹ Ibid., 102 et seq.

¹⁵⁶² Ibid., para 108.

¹⁵⁶³ Ibid., para 109.

¹⁵⁶⁴ In the *ClientEarth* judgment, the Court of Justice also (“in the second place”) based its reasoning on the rationale of Regulation No 1367/2006, which aims to ensure the widest possible systematic availability and dissemination of environmental information: Ibid., 96 et seq.

¹⁵⁶⁵ European Commission, *Better Regulation Guidelines* (above, n. 199), p. 82.

¹⁵⁶⁶ Ibid., p. 14.

¹⁵⁶⁷ European Commission, ‘Handbook for Trade Sustainability Impact Assessment’ (above, n. 212), p. 27.

increase the outreach.¹⁵⁶⁸ Similarly, input received from stakeholders must be published – unless stakeholders object.¹⁵⁶⁹

The Guidelines also require Commission officials to “identify target groups that run the risk of being excluded”, and to adopt the consultation-tools accordingly to achieve wider participation.¹⁵⁷⁰ In line with the principle of balanced representation, Commission officials must seek comprehensive coverage among the participants/selected stakeholder groups.¹⁵⁷¹ Similarly, external consultants conducting a Trade SIA shall be “given a wide mandate to conduct far-reaching consultations with all relevant stakeholders including women and vulnerable groups (e.g. low income, children, people with disabilities, ethnic minorities, indigenous peoples and unskilled workers) in the EU and the partner country(ies)”.¹⁵⁷²

The Better Regulation Guidelines require that the IA report be drafted in an “accessible manner”, and consultation documents must be easy to understand.¹⁵⁷³ However, the quality of participation also depends on the scope of participants. For example, the option to organize workshops in the course of IAs may allow in-depth discussions with a small group of workshop participants. This is a modality frequently used for Trade SIAs. However, this is not possible if one wishes to include all those potentially affected by a trade or development agreement. Here, online-consultation is a highly inclusive tool, but in order to be manageable, mainly multiple-choice approaches appear viable. On the bright side, theoretically everyone with internet access and capable of reading any of the official EU languages can participate. Online discussion fora¹⁵⁷⁴ might strike a balance between these two extreme positions.

The quality of discourse is also determined by the extent to which all sides are open to engaging in discourse and open to hearing new and potentially uncomfortable viewpoints. As mentioned above, Commission staff is encouraged to pay special attention to non-mainstream viewpoints. The EU legislature is obliged to provide, in the respective legal acts, the “reasons on which they are based and shall refer to any proposals, initiatives, recommendations, requests or opinions required by the Treaties” (Article 296 (2) TFEU). But even beyond this constitutionally required obligation to give reasons, the European Commission’s Minimum Standards for Consultation and the Better Regulation Guidelines explicitly require Commission officials to analyze contributions carefully to see whether and if so, to what extent the expressed views can be accommodated in the policy proposals.¹⁵⁷⁵ In the same document, the importance to respond to these comments is emphasized, reiterating that “the main mechanism for providing feedback to participants in consultations will be through an official Commission document to be approved by the College of Commissioners, i.e., in particular, the explanatory memoranda accompanying legislative proposals.”¹⁵⁷⁶

¹⁵⁶⁸ Ibid., p. 28.

¹⁵⁶⁹ Ibid.

¹⁵⁷⁰ European Commission, *Better Regulation Guidelines* (above, n. 199), p. 77.

¹⁵⁷¹ Ibid., p. 77.

¹⁵⁷² European Commission, ‘Handbook for Trade Sustainability Impact Assessment’ (above, n. 212), p. 22

¹⁵⁷³ European Commission, *Better Regulation Guidelines* (above, n. 199), pp. 29, 82.

¹⁵⁷⁴ Ibid., p. 79.

¹⁵⁷⁵ European Commission, *General principles and minimum standards for consultation of interested parties by the Commission* (above, n. 1482), Standard E.

¹⁵⁷⁶ Ibid., p. 12.

The Better Regulation Guidelines also stress the importance to provide feedback to stakeholders who made contributions – and thus the relevance of bidirectional information flows. It is not only important for stakeholders to understand the relevance of their contributions and understand the reasons why some contributions were not taken into account. The Commission also recognizes the added value for transparency and accountability. Interestingly, the Commission also gives another reason for why responsiveness matters: it would help to increase the credibility of the Commission’s consultation approach in order to “potentially solicit better responses to future consultations.”¹⁵⁷⁷ In addition, the duty to give reason is, in public law, one of the few mechanisms to force public institutions to pay full attention to contributions. Therefore, the duty to give reasons especially for why certain suggestions were not considered in the policy proposal is an important legal requirement and essential for effective judicial and quasi-judicial review.¹⁵⁷⁸ Therefore, it is not surprising that already the Minimum Standards for Consultation, but also the Better Regulation Guidelines require to provide feedback to stakeholders, e.g. in the explanatory memorandum or a synopsis report.¹⁵⁷⁹

7.2.5 Scope of Participants

The scope of participants depends on the goal, objective and modalities of participation. In some cases, participation is only granted to those whose rights or interests are directly affected; this refers to what has been described above as the first dimension of participation. Here, individuals have a fundamental right to participate and have access to documents. But even beyond that, all citizens and residents have, under the Access to Information Regulation, a right to access EU documents unless at least one of the narrowly interpreted exceptions applies. While this is not an IA-specific right to participation, it enables external actors to get access to information necessary for meaningful participation during an impact assessment process, but also to review and control whether the EU institutions comply with the respective IA guidelines. This latter aspect will be analyzed more closely in the final chapter.

7.2.5.1 Legal Classification of Publics: From affected individuals to the general public

Individuals generally have a right to participate in decision-making insofar as their rights are affected by a decision. This is usually the case in the first dimension illustrated above, i.e. in administrative procedures. In addition, the general public has a right to gain access to EU documents – thanks to the EU Access to Information Regulation, which was discussed as the second dimension of participation. In the third dimension concerning the involvement in policy-making, individuals generally have no justiciable right to participate, even though the EU organs explain to be committed to inclusive decision-making. However, under certain circumstances even individuals can be affected by a general-abstract policy-decision to the extent that they have

¹⁵⁷⁷ European Commission, *Better Regulation Guidelines* (above n. 199), p. 86.

¹⁵⁷⁸ See chapters 9.2 and 10.2 on impact assessments and judicial review.

¹⁵⁷⁹ European Commission, *Better Regulation Guidelines* (above, n. 199), p. 86 and further details in Tool # 55 of the *Better Regulation Toolbox*; European Commission, *General principles and minimum standards for consultation of interested parties by the Commission* (above, n. 1482), p. 12 and 22.

standing to bring an action before the European courts against such a decision.¹⁵⁸⁰ This will be analyzed in the final chapters on compliance and effectiveness.

The IA guidelines state that a public consultation is mandatory for IAs, evaluations or fitness checks.¹⁵⁸¹ As mentioned before, European Commission consultations can be categorized as open consultation - where the general public can participate - and as targeted consultation - where relevant stakeholders are explicitly identified and selected. An open consultation is required for all IAs, including Trade SIAs conducted by external consultants.¹⁵⁸² For open consultations, the European Commission largely relies on online tools,¹⁵⁸³ and consultation is thus not limited to certain affected persons. In addition, targeted consultations are recommended. The Better Regulation guidelines describe minimum standards and procedures that must be followed to “map” relevant stakeholders;¹⁵⁸⁴ the same is true for the Trade SIA Handbook.¹⁵⁸⁵ The objective of such a consultation in the context of an Impact Assessment is to consult those who will be affected by a planned initiative, and those who will have to implement it¹⁵⁸⁶. While the guidelines provide minimum guidance, the Commission acknowledges that, due to the huge variety of different initiatives concerned, there is no one-size-fits-all approach.¹⁵⁸⁷ Planning and conducting consultations is decentralized: The Commission service responsible for the respective initiative is also responsible to set up consultation activities.¹⁵⁸⁸ The Guidelines require the Commission service to plan a consultation at an early stage of the impact assessment. In order to ensure coherence and compliance with the minimum requirements, the consultation plan needs internal approval: It must be discussed with and agreed by “the interservice group (ISG) or by the Secretariat-General and other associated services if no ISG is established.”¹⁵⁸⁹

7.2.5.2 Advisory Committees

In addition to ad-hoc consultation, or interviews, meetings and roundtables at the inter-professional level arranged in the context of a specific initiative,¹⁵⁹⁰ the Commission has set up expert groups to provide the Commission with advice and expertise.¹⁵⁹¹ These expert groups are defined as “consultative entities set up by the Commission or its services, comprising at least six public and/or private-sector members, which are foreseen to meet more than once”.¹⁵⁹² The Commission can set up *formal* expert groups which require a Commission Decision and *informal*

¹⁵⁸⁰ See sections 9.2 and 10.2.

¹⁵⁸¹ See, for example: European Commission, *Better Regulation Toolbox* (above, n. 204), Tool #53, p. 391.

¹⁵⁸² European Commission, ‘Handbook for Trade Sustainability Impact Assessment’ (above, n. 212), p. 28.

¹⁵⁸³ Available at: https://ec.europa.eu/info/consultations_en <last accessed: 18 March 2019>.

¹⁵⁸⁴ European Commission, *Better Regulation Guidelines* (above, n. 199), pp. 75 et seq.

¹⁵⁸⁵ European Commission, ‘Handbook for Trade Sustainability Impact Assessment’ (above, n. 212), p. 28.

¹⁵⁸⁶ European Commission, *Better Regulation Toolbox* (above, n. 204), p. 385 et seq.

¹⁵⁸⁷ *Ibid.*, p. 394.

¹⁵⁸⁸ European Commission, *Better Regulation Guidelines* (above, n. 199), p. 71.

¹⁵⁸⁹ *Ibid.*, p. 67. On the emergence of ISGs: Miriam Hartlapp, Julia Metz, and Christian Rauh, *Which policy for Europe?* (Oxford Univ. Press, 2014), p. 245.

¹⁵⁹⁰ European Commission, ‘Handbook for Trade Sustainability Impact Assessment’ (above, n. 212), p. 28.

¹⁵⁹¹ European Commission, *Framework for the Commission Expert Groups: Horizontal Rules and Public Register* (above, n. 1078), Art. 3.

¹⁵⁹² *Ibid.*, p. 3. These expert groups are thus different from other EU committees, such as comitology committees which assist with policy implementation, and the formal grand committees, namely the European Economic and Social Committee and the Committee of the Regions. In addition, there are also working groups of the European Council and the European Parliament, see: Metz, ‘Expert groups in the European Union: A sui generis phenomenon?’ (above, n. 1428), p. 268.

expert groups which are set up by a Commission Service with the agreement of the Secretariat General.¹⁵⁹³ While expert groups can make important contributions to informed decision-making, a controversial issue is the composition of these groups. This concerns not only the limited objectivity of expertise as discussed above in the context of the risk paradigms. Members of expert groups are not necessarily only experts of independent research institutions, but can also be appointed to represent “an interest”.¹⁵⁹⁴ While rules on expert groups generally require ensuring “as far as possible”¹⁵⁹⁵ a balanced representation of relevant stakeholders, critics, including Members of the European Parliament, observe an overweight of for-profit interest representatives.¹⁵⁹⁶ The same has been observed with regard to stakeholder consultations in the context of Trade SIAs.¹⁵⁹⁷

An investigation by the EU Ombudsman found that a large majority of members in expert groups come from for-profit organizations. This might in part be a pure consequence of the fact that business organizations generally have more resources which allows them to send more representatives to Brussels. For example, out of 3500 registered interest groups in Brussels, more than $\frac{3}{4}$ either represent employers or producers.¹⁵⁹⁸ It is therefore not surprising that this often results in an unbalanced representation within the respective EU expert groups. Already in 2011, the European Parliament voted to freeze parts of the budget for Commission expert groups until new safeguards against regulatory capture by special interests are enacted.¹⁵⁹⁹ In 2014, the EU Ombudsman initiated an inquiry concerning the selection process for and composition of Civil Society Groups, a type of expert-group established by the Commission, in the particular case by DG Agriculture and Rural Development (“DG AGRI”). The Ombudsman identified several shortcomings in the process for the composition of these groups, including a lack of balanced representation even though this was explicitly required by Article 4 (3) Commission Decision 2013/767/EU establishing the respective expert group.¹⁶⁰⁰ As in other cases of unequal representation, one response could be for the European Commission to take “affirmative action” to invite and (where financial costs are an obstacle) better compensate less represented groups in the expert committees.¹⁶⁰¹ However, perfectly balanced representation is probably not possible, in particular because it also requires a certain value judgment to determine what the relevant interests that need to be balanced are.

¹⁵⁹³ European Commission, *Framework for the Commission Expert Groups: Horizontal Rules and Public Register* (above, n. 1078), Rule 2.

¹⁵⁹⁴ *Ibid.*, Rule 9 (2).

¹⁵⁹⁵ *Ibid.*

¹⁵⁹⁶ Corporate Europe Observatory, ‘Parliament freezes problematic expert groups budget for second time in four years’, 22 October 2014.

¹⁵⁹⁷ Walker, ‘Human Rights in the Trade and Sustainability Impact Assessment of the EU-Tunisia Free Trade Agreement’ (above, n. 57), p. 120: „There appears to be greater emphasis placed on consultation and participation of economic actors, such as SMEs, rather than human rights organizations and individuals and groups whose rights might be affected by the introduction of the DCFTA.”

¹⁵⁹⁸ Martin Nettesheim, ‘Art. 11 EUV’, in: Eberhard Grabitz, Meinhard Hilf, Martin Nettesheim et al. (eds.), *Das Recht der Europäischen Union*, para 13.

¹⁵⁹⁹ OECD, *Lobbyists, Governments and Public Trust, Volume 3 - Implementing the OECD Principles for Transparency and Integrity in Lobbying* (Paris: OECD Publishing, 2014), 3rd ed., p. 76.

¹⁶⁰⁰ European Ombudsman, *Composition of Civil Dialogue Groups* (above, n. 1089).

¹⁶⁰¹ This is already done to a certain extent. For example, DG Trade makes available a limited budget support to CSO participants in the Civil Society Dialogues (CSD), see:

http://trade.ec.europa.eu/civilsoc/trav_exp.cfm

To what extent the Commission expert groups actually influence decision-making cannot be analyzed here.¹⁶⁰² However, apart from a brief reference to the influence of epistemic authority and the risk of regulatory capture, one other aspect is important: unlike other external participants, expert groups may have privileged access to information. The General Court found in 2013 that it is justified to disclose documents in the context of EU-India trade negotiations only partially to the applicant, a European NGO, while officially appointed experts representing trade associations and companies may have access to the unredacted versions.¹⁶⁰³

7.2.5.3 The Involvement of NGOs

The Minimum Standards for Consultation Communication divided the scope of participants for targeted consultation into three groups: Those affected by a policy, those involved in its implementation; and bodies with “stated objectives” that gives them a “direct interest”.¹⁶⁰⁴ The Better Regulation Guidelines build on this approach, requiring a so-called stakeholder-mapping:¹⁶⁰⁵ First, it is necessary to identify stakeholder categories relevant for or interested in the concerned policy area(s); and second, the stakeholder categories must be sorted according to the level of interest in or influence on the concrete initiative.

There is no precise procedure or methodology for the identification of relevant stakeholders, but two aspects must be considered, namely the interest of stakeholders, and the expertise and knowledge they can provide. Apart from this general guidance, the Guidelines only contain a pool of ideas and suggestions on how to identify stakeholders: the Member States can provide lists, or existing contacts should be used – such as those in mailing or distribution lists, subscribers to the Commission-at-Work-notifications or those enrolled in the “Transparency Register”.

Once a range of potential stakeholders has been identified, the competent services must sort stakeholder categories based on their level of interest in or influence on the concrete initiative. In order to enable wide consultation, the Guidelines recommend the use of different categories: between stakeholder groups (consumers vs. industry; those who benefit vs. those who lose, etc.) and within stakeholder groups (e.g.: small, medium, big business, etc.).¹⁶⁰⁶ The Guidelines recognize that this is a delicate exercise and therefore encourage to actively seek to involve stakeholders likely to be excluded, to respect the principle of balanced representation, to avoid regulatory capture and use clear and transparent selection criteria.¹⁶⁰⁷

The Commission gives, traditionally, three reasons for NGO-participation: technocratic expertise, good management practice, and representation of interests.¹⁶⁰⁸ Especially the latter is, as has

¹⁶⁰² For a closer analysis, considering also the demand-side, i.e. how and why the Commission uses expert groups: Metz, ‘Expert groups in the European Union: A sui generis phenomenon?’ (above, n. 1428) with further references.

¹⁶⁰³ For a closer discussion see section 7.2.6.

¹⁶⁰⁴ European Commission, *General principles and minimum standards for consultation of interested parties by the Commission* (above, n. 1482), p. 19, also referenced in: European Commission, *Better Regulation Guidelines* (above, n. 199), p. 69.

¹⁶⁰⁵ *Ibid.*, 76 et seq.

¹⁶⁰⁶ *Ibid.*, p. 77.

¹⁶⁰⁷ *Ibid.*, p. 77.

¹⁶⁰⁸ Bignami, ‘Three Generations of Participation Rights Before the European Commission’ (above, n. 1466), p. 75.

been discussed above, controversial.¹⁶⁰⁹ The Minimum Standards for Consultation regard consultation as a supplement to democratic decision-making that gives interested parties “a voice, but not a vote”.¹⁶¹⁰ The goal is to ensure that the Commission proposals are “technically viable, practically workable and based on a bottom-up approach. In other words, good consultation serves a dual purpose by helping to improve the quality of the policy outcome and at the same time enhancing the involvement of interested parties and the public at large.”¹⁶¹¹ Representation models often regard civil society as pre-existing, static or “naturalistic”.¹⁶¹² This not only relates to the oft-observed imbalance between for-profit and not-for-profit organization¹⁶¹³ but also concerns imbalances even between the Member States, irrespective of the category of CSOs.¹⁶¹⁴ CSOs play different roles in different Member States which may be due to the fact that different states have different democratic cultures:¹⁶¹⁵ while the republican traditions are skeptical of the idea that legitimate interest representation through associates can create stable, virtuous political community, corporatist traditions are more favorable to the idea of associational life as “legitimate representation of interest”,¹⁶¹⁶ whereas pluralist traditions give interest groups a broad right to challenge decisions in courts and political fora.¹⁶¹⁷

An institutionalized structure for stakeholder participation exists in the context of Trade SIAs. There is at least one mandatory meeting with CSOs per stage, i.e. to discuss the inception, interim and final draft report. This takes place in Brussels with CSOs as part of DG Trade’s civil society dialogues. These are meetings on a regular basis between civil society groups and the Commission in order to discuss aspects of EU trade policies.¹⁶¹⁸ In addition, workshops in partner countries should be conducted “where appropriate”.¹⁶¹⁹ The fact that workshops in partner countries are not mandatory but discretionary can be criticized as not paying sufficient respect to a *human rights* principle of participation. At the same time, a certain degree of flexibility is necessary to be able to balance the principle of participation with sovereignty claims of the affected state.

¹⁶⁰⁹ Ibid.

¹⁶¹⁰ European Commission, *General principles and minimum standards for consultation of interested parties by the Commission* (above, n. 1482), p. 5.

¹⁶¹¹ Ibid.

¹⁶¹² Bignami, ‘Three Generations of Participation Rights Before the European Commission’ (above, n. 1466), p. 78.

¹⁶¹³ Christine Quittkat, ‘The European Commission’s Online Consultations: A Success Story?’, *Journal of Common Market Studies*, 49 (2011), pp. 653–674, p. 654.

¹⁶¹⁴ Bignami, ‘Three Generations of Participation Rights Before the European Commission’ (above, n. 1466), p. 78.

¹⁶¹⁵ On republican, corporatist, and pluralist models of interest organizations: Vivien Schmidt, ‘Democracy in Europe: The Impact of European Integration’, *Perspectives on Politics*, 3 (2005), pp. 761–779; Philippe Schmitter, ‘Still the Century of Corporatism?’, *The Review of Politics*, 36 (1974), pp. 85–131.

¹⁶¹⁶ Bignami, ‘Three Generations of Participation Rights Before the European Commission’ (above, n. 1466), p. 79.

¹⁶¹⁷ For a general discussion in the EU context: Ibid.

¹⁶¹⁸ European Commission, ‘Handbook for Trade Sustainability Impact Assessment’ (above, n. 212), p. 29.

¹⁶¹⁹ Ibid., p. 30. A closer analysis of how workshops in partner countries are conducted could be a fruitful exercise. With regard to the Tunisian workshop organized in the context of the Trade SIA for the DCFTA negotiated between the EU and Tunisia, Walker observes that this was a stand-alone event and did “not provide an opportunity for participants to review results and analyze them further in order to provide more comprehensive input at a later date (for example, at a second consultation).” Walker, ‘Human Rights in the Trade and Sustainability Impact Assessment of the EU-Tunisia Free Trade Agreement’ (above, n. 57), p. 117.

7.2.6 Transparency and Access to Information

The Better Regulation Guidelines require Commission officials in charge of the consultation to be transparent and provide, as previously discussed, high quality consultation documents to enable meaningful contributions during the consultation. Similarly, the Commission must be transparent about the contributions made during a consultation. The contributions – both in case of the Commission’s general IAs and the Trade SIAs – must be published online,¹⁶²⁰ and summarized in the final reports. However this requirement is restricted by applicable data protection rules.¹⁶²¹

While the Better Regulation Guidelines and other Impact Assessment guidelines are of major relevance for the process and substance of consultation in the context of impact assessments, these norms are internally, but not externally binding. The fact that the Better Regulation guidelines require Commission staff to publish IA documents is not per se justiciable - unless applicants can successfully prove a violation of the principle of legitimate expectations.¹⁶²² Otherwise, third parties wishing to get access to information in relation to the IA report must rely on general EU law to claim the right to inspect documents.

As discussed before, an important “guarantee of openness”¹⁶²³ in this sense is the Access to Information Regulation,¹⁶²⁴ (now also constitutionally embedded in Art. 15 (3) TFEU) which grants citizens as well as natural and legal persons residing or having its registered office in the EU the right to access Commission documents unless non-disclosure is exceptionally justified. As IA-reports or RSB opinions qualify as Commission documents, they fall under the Regulation and disclosure may only be denied if it is justified under the exception clauses. According to established case-law, this requires a strict proportionality test. The ClientEarth judgment has already been discussed above because it also concerns the timing of participation and access to information. This section will focus on another limitation to transparency, namely the international relations exceptions. This is of major relevance for the assessment of the human rights impacts of trade, investment and development agreements.

Access to information is also restricted insofar as international relations are concerned (third indent of Article 4 (1) lit. a) of the Access to Information Regulation (EC) No 1049/2001). Consequently, it is difficult for individuals or civil society organizations to get access to information about ongoing negotiations for international agreements, and to assess the potential human rights impacts of these agreements, both occurring within and outside the EU. The General Court

¹⁶²⁰ European Commission, *Better Regulation Guidelines* (above, n. 199), p. 83; European Commission, ‘Handbook for Trade Sustainability Impact Assessment’ (above, n. 212), p. 26.

¹⁶²¹ European Commission, *Better Regulation Guidelines* (above, n. 199), p. 83. Data protection rules applicable to the Union institutions are laid down in Regulation (EU) 2018/1725 of the European Parliament and of the Council on the protection of natural persons with regard to the processing of personal data by the Union institutions, bodies, offices and agencies and on the free movement of such data, and repealing Regulation (EC) No 45/2001 and Decision No 1247/2002/EC [2018].

¹⁶²² On the principle of legitimate expectations see section 3.2.2.2.1.

¹⁶²³ Term borrowed from: Fujita, *The World Bank, Asian Development Bank and Human Rights* (above, n. 311), p. 124.

¹⁶²⁴ Regulation (EC) No 1049/2001; see: Maurer, ‘Comparative study on access to documents (and confidentiality rules) in international trade negotiations: Study requested by the European Parliament’s Committee on International Trade’ (above, n. 1458), p. 9.

rejected a claim by an NGO, *Stichting Corporate Europe Observatory* ("*Stichting CEO*") which had requested access to documents concerning the ongoing trade negotiations between the EU and the Republic of India. The judgment was upheld by the ECJ.¹⁶²⁵

The European Commission has involved experts to support the preparation for the negotiation of the trade agreement. Mainly representatives of trade associations and companies participated as "experts" in the work of the advisory committee. When *Stichting CEO* applied for access to documents that had been fully provided to these "experts", it was granted only partial access to some of these documents. *Stichting CEO* argued that, under these circumstances, the documents at issue could "not contain any confidential information or had, in any event, entered the public domain".¹⁶²⁶ The European Commission nevertheless justified the only partial disclosure based on the international relations exception in Article 4 (1) lit. a) of the Access to Information Regulation. The clause states: "The institutions shall refuse access to a document where disclosure would undermine the protection of the public interest as regards [...] international relations". The General Court confirmed this view. In order for the advisory committee to give its opinion, it was necessary to share documents with the committee members as well as with "the trade associations and companies that were acting as experts".¹⁶²⁷ In consequence, these documents are still regarded as internal documents that have not entered the public sphere, so that non-disclosure can be justified under Article 4 (3) of Regulation No. 1049/2001.¹⁶²⁸

While such a broad interpretation of "internal" is still defensible, the decision has a potentially discriminatory effect on a different account. As the European Commission enjoys broad discretion in appointing "experts" to advisory committees or working groups, there is no effective control mechanism to ensure that the principle of balanced representation (see sections 5.5.3.2.2 and 7.2.5.2) is respected. In particular, the fact that for-profit organizations are often over-represented raises legitimacy concerns, and these concerns are exacerbated if one considers that these appointed experts have, unlike external civil society organizations, unlimited or at least preferential access to internal institutional documents. While there are good reasons to limit access to documents concerning international relations, and while it is also justifiable to grant privileged access to advisory committees, the Court missed the opportunity to clarify that, at the same time, the institutions must at least ensure that these advisory committees are composed in compliance with the principle of balanced representation.

Insofar, EU law still reflects the assumption that international relations are the prerogative of the executive. While secrecy in international diplomatic relations is obviously important, especially in order to gain a level playing field with other states and organizations which may apply similar standards, it appears doubtful whether it is still justified to extend the exemption to all areas of international relations without taking into account the increasing interconnectedness of international and domestic regulation. Illustrative of a new approach is that the European Commission now strongly favors deep and comprehensive trade agreements which regulate many areas of public interest beyond traditional trade issues. Nevertheless, it is clear that transparen-

¹⁶²⁵ General Court, Judgment of 7 June 2013, T-93/11, *Stichting Corporate Europe Observatory*; appeal case before the Court of Justice : ECJ, Judgment of 4 June 2015, Case C-399/13 P, *Stichting Corporate Europe Observatory*.

¹⁶²⁶ *Ibid.*, para 8.

¹⁶²⁷ General Court, T-93/11 (above n. 1625), para 33.

¹⁶²⁸ *Ibid.*, para 33 et seq.

cy is not per se desirable and not per se better for human rights or democratic decision-making. However, the *Stichting CEO* judgment demonstrates the underlying problem of *selective* transparency. The Court appears to regard the involvement of expert groups composed of trade associations and companies as a “technical exchange” to enable participants to fulfill their role as advisors “on issues of obvious special interest to all of the private sector entities involved in that process of consultation, reflection and information exchange.”¹⁶²⁹ This reflects an objective-managerial paradigm and an idealization of experts as neutral advisers.

7.2.7 Interim Conclusion and Outlook

This chapter focused on the role of participation in HRIAs. It has examined how the goal and object of participation influence the modalities of participation and the scope of (potential) participants. To classify modalities of participation, I referred to a continuum model (namely “Arnstein’s ladder”) and an information flow model. These models reveal different types or categories of participation, varying in the level of inclusiveness. Against this background, I have argued that a legal participation proportionality test can guide the choice of adequate participation modalities. The basic assumption is that participation should be as inclusive as possible. This is, inter alia, reflected in the ECJ’s recent *ClientEarth* judgment. Starting from the upper rung of Arnstein’s ladder, the institution which opts for a less inclusive participation modality would bear the burden of proof to establish why this is necessary.

¹⁶²⁹ Ibid., para 37.

8 CHAPTER 8: THE IMPACT ANALYSIS

8.1 Introduction: The Analysis of Impacts

Alongside participation, a central element of IAs is the analysis of impacts understood as a structured, analytical process to determine the potential consequences of different options of an initiative. It is an element that distinguishes IAs from pure consultation about initiatives and their consequences. Analytical tools are applied at different stages of the IA process, for example when determining the likelihood of significant impacts during the pre-assessment stage to decide whether a full IA is necessary. However, there is also an “analysis stage” in the narrow sense¹⁶³⁰ where different options are identified, where qualitative and quantitative methods are used to predict the likely impacts of these options, and where these impacts are evaluated in order to prepare the IA report, the central work product of an IA process that contains the main findings and recommendations. It serves to inform decision-makers and the public. This chapter discusses how law guides the analysis of impacts in the narrow sense, in particular the use of different scientific methodologies. This process is situated at the intersection between politics, scientific expertise and law. This thesis addresses these issues, as previously stated, from a macro-perspective¹⁶³¹, i.e. the goal is not to develop specific methodological tools to analyze impacts of a specific type of policy on specific human rights.

8.2 Analysis of Human Rights Impacts: A Comparative Perspective

This section focuses on the analysis of impacts, including the consideration of and comparison between alternative options. The analysis of impacts in an HRIA requires, first, to define the objective of an initiative. Once the policy objectives are clear, it is necessary to identify different alternative options that are suitable to achieve the respective objective (8.2.1), to analyze the different impacts caused by each of these alternatives (8.2.2), and to compare and evaluate these impacts against each other (8.2.3).

8.2.1 Identification of Objectives and of Alternative Options

A first preparatory step is to identify the objectives of the initiative, a necessary precondition to being able to identify different policy options the impact of which could be assessed.¹⁶³² The consideration of alternative options is at “the heart of the [...] impact statement”.¹⁶³³ Under NEPA, the environmental impact statement (“EIS”) – the report to be provided explaining the findings of the assessment – must make clear that all reasonable alternatives have been rigorously explored and objectively evaluated. It shall discuss why certain alternatives have been elimi-

¹⁶³⁰ On the different stages of IAs as distilled from EIA Law as “background norms”: See section 2.4.1.

¹⁶³¹ On the difference between a macro- and micro-perspective on HRIA law see section 1.4.1.

¹⁶³² Margaret Desmond, ‘Decision criteria for the identification of alternatives in strategic environmental assessment’, *Impact Assessment and Project Appraisal*, 25 (2007), pp. 259–269, p. 260 describes the identification of objectives as an “essential precursor to alternative generation”. See also: Walker, ‘Human Rights in the Trade and Sustainability Impact Assessment of the EU-Tunisia Free Trade Agreement’ (above, n. 57), p. 106.

¹⁶³³ 40 CFR § 1502.14.

nated from the detailed assessment, and for those options subject to closer impact analysis, the agency shall “[d]evote substantial treatment to each alternative considered in detail including the proposed action so that reviewers may evaluate their comparative merits.”¹⁶³⁴ In order to broaden the scope of potential alternatives, also those which are not within the jurisdiction of the lead agency as well as the “no action” option shall be considered.¹⁶³⁵ Similar – even though at times less rigorous – requirements exist in other EIA-laws, including the EU’s EIA and SEA Directives.¹⁶³⁶

The consideration of alternatives helps to identify the *relative* costs and benefits – which is particularly important where explicit standards are lacking.¹⁶³⁷ In the case of project IAs, alternatives are often rare due to physical constraints: a harbor must be constructed at the shore, a mine in an area where mineral resources are located. In other cases, IAs are often conducted where important planning decisions have already (at least informally) been made, and where due to path dependencies decision-makers might be unwilling to review certain options critically. Attempts to consider environmental (and other) impacts already at a previous and broader programming or planning stage could help to broaden the scope of alternative options. This is what strategic environmental assessments (“SEA”) shall achieve in environmental law.¹⁶³⁸ In fact, projects are often based on prior policy and planning decisions which limit the scope of available alternatives:¹⁶³⁹ the more one moves from the project to the planning level, the more alternative options are generally available – even though these are likely to be broader and vaguer.¹⁶⁴⁰ This is insofar challenging as strategic decisions often evolve over time: there are many crossroads that could be taken during the development of a policy or plan subject to a strategic IA.¹⁶⁴¹ Therefore, it is, on the one hand, difficult to provide a fully informative strategic environmental assessment without permanent updates, and second, it is also difficult to determine the effectiveness of strategic IAs in influencing decision-making.¹⁶⁴²

These observations are also true for policy IAs of all types, in particular as specific policy proposals are often modified during the decision-making process. An additional challenge for the HRIA of international agreements is the fact that international negotiations often follow a different logic than other forms of decision-making, including (partly) secret negotiations. And as in-

¹⁶³⁴ 40 CFR § 1502.14 (b).

¹⁶³⁵ 40 CFR § 1502.14 (c) and (d).

¹⁶³⁶ EIA Directive 2011/92/EU (as amended), Art. 5 (1) (d); European Union, SEA Directive 2001/42/EC (above, n. 1360), Art. 5 (1).

¹⁶³⁷ Craik, *The International Law of Environmental Impact Assessment* (above, n. 59), p. 31.

¹⁶³⁸ Desmond, ‘Decision criteria for the identification of alternatives in strategic environmental assessment’ (above, n. 1632), p. 261.

¹⁶³⁹ Craik, *The International Law of Environmental Impact Assessment* (above, n. 59), p. 156.

¹⁶⁴⁰ Desmond, ‘Decision criteria for the identification of alternatives in strategic environmental assessment’ (above, n. 1632), p. 261.

¹⁶⁴¹ Pope et al., ‘Advancing the theory and practice of impact assessment: Setting the research agenda’ (above, n. 75), p. 5.

¹⁶⁴² Arwin van Buuren and Sibout Nooteboom, ‘Evaluating strategic environmental assessment in The Netherlands: content, process and procedure as indissoluble criteria for effectiveness’, *Impact Assessment and Project Appraisal*, 27 (2009), 145-154, p. 146. The same is true for programming and planning decisions in international development law: Potential social and human rights impacts should therefore, as far as possible, already be considered during the programming stage. On programming in development cooperation: Dann, *The Law of Development Cooperation* (above, n. 4), 303 ff. It is therefore important to bear in mind that this is the stage where still the broadest variety of alternatives exist; at the same time, it is important to regard impact assessments as an iterative process that requires regular updates.

ternational treaty negotiations are generally less transparent,¹⁶⁴³ fewer participants are able to inform and control the ongoing negotiations effectively.

Empirical research has identified that the consideration of alternatives is often methodologically weak, both in the project or policy area.¹⁶⁴⁴ Especially in the context of project-IAs, there is a tendency to focus on projects rather than on preceding strategic planning: The project-developer exerts significant control over the project development,¹⁶⁴⁵ for example by providing essential information for the impact assessment, and often has no interest in seriously assessing real alternatives or the no-policy-change option. Another problem identified in empirical studies about impact assessments is that often clear criteria to aid decision-makers in the development of alternative options are missing.¹⁶⁴⁶ In addition, the requirement to consider alternatives has the potential for abuse. Those in charge of preparing the IA can influence the outcome by down-playing or omitting “more benign alternatives” in order to “place the proposal in a more favorable light”.¹⁶⁴⁷ But even where intentions are good, the identification of potential alternatives can be limited without “second-loop-learning” or “double-loop-learning”,¹⁶⁴⁸ namely the critical reflection about underlying paradigms, principles, practices and concepts. For example, the alternative models developed in the EU’s Trade SIA all follow a neo-liberal paradigms, basically assuming that more liberalization is good for economic and human development as long as limited negative side-effects are corrected.¹⁶⁴⁹ This paradigm is not questioned. Insofar, IAs as tools of knowledge generation appear to enable mainly single-loop learning.¹⁶⁵⁰

From a public law perspective, the consideration of alternatives is an expression of the principle of proportionality. Proportionality is a fundamental principle in constitutional and international law¹⁶⁵¹ and is also applied in international trade¹⁶⁵² and investment¹⁶⁵³ adjudication. While dif-

¹⁶⁴³ In the EU, exceptions of the right to access to information exist in the area of international relations, which includes international trade negotiations European Union, *Regulation (EC) No 1049/2001 of the European Parliament and of the Council* (above, n. 43), Art. 4 (1).

¹⁶⁴⁴ Monica Fundingsland Tetlow and Marie Hanusch, ‘Strategic environmental assessment: the state of the art’, *Impact Assessment and Project Appraisal*, 30 (2012), pp. 15–24, p. 19; Pope et al., ‘Advancing the theory and practice of impact assessment: Setting the research agenda’ (above, n. 75), p. 5.

¹⁶⁴⁵ Desmond, ‘Decision criteria for the identification of alternatives in strategic environmental assessment’ (above, n. 1632), p. 261.

¹⁶⁴⁶ Ibid. who therefore proposes, based on the Irish experience, further criteria to be considered in a SEA; see also Pope et al., ‘Advancing the theory and practice of impact assessment: Setting the research agenda’ (above, n. 75), p. 5.

¹⁶⁴⁷ Craik, *The International Law of Environmental Impact Assessment* (above, n. 59), p. 31.

¹⁶⁴⁸ Argyris, *Knowledge for Action* (above, n. 1060), p. 50.

¹⁶⁴⁹ Bürgi Bonanomi, ‘EU Trade Agreements and Their Impacts on Human Rights’ (above, n. 1175), p. 15.

¹⁶⁵⁰ On single-loop and double-loop learning see section 5.5.3.1.3.

¹⁶⁵¹ Schlink, ‘Proportionality in Constitutional Law: Why Everywhere But Here?’ (above, n. 652), pp. 296; on similarities and divergences in proportionality doctrine in constitutional law: Moshe Cohen-Eliya and Iddo Porat, ‘The Hidden Foreign Law Debate in Heller: The Proportionality Approach in American Constitutional Law’, *San Diego Law Review*, 46 (2009), 367 ff; ECtHR, no 13914/88; 15041/89; 15717/89; 15779/89; 17207/90, *Case of Informationsverein Lentia and others v. Austria* (1993), para 35.

¹⁶⁵² WTO Appellate Body, *European Communities - Measures Prohibiting the Importation and Marketing of Seal Products* (2014), 5.214; WTO Appellate Body, WT/DS332/AB/R, *Brazil - Measures Affecting Imports of Retreated Tyres* (2007), para 178 where, in applying Art. XX (b) GATT, the WTO Appellate Body in *Brazil-Retreated Tyres* summarized the requirements of necessity in the context of Art. XX (b) GATT as follows: “[A] panel must consider the relevant factors, particularly the importance of the interests or values at stake, the extent of the contribution to the achievement of the measure’s objective, and its trade restrictiveness. If this analysis yields a preliminary conclusion that the measure is necessary, this result must be

ferences and controversies about the exact scope of proportionality – especially the alleged subjectivity if proportionality tests require a balancing beyond a strict means-ends-analysis¹⁶⁵⁴ - a minimum requirement of proportionality is that no less restrictive but equally effective means are available. As concerns impact assessments, the consideration of alternatives during the analysis stage is therefore also an expression of the proportionality principle. This is one point where IAs and judicial review are linked: The IA report can insofar serve as a basis for judicial or quasi-judicial review bodies to assess compliance with the principle of proportionality.¹⁶⁵⁵

8.2.2 Principles and Methodologies of Impact Analysis

Once different alternative options are identified, the impacts of each of these alternatives must be more closely analyzed. Depending on the type of initiative, this requires different methodologies rooted in natural or social sciences. Law guides the impact analysis on different levels: it can establish broad principles, for example that the analysis is evidence-based and conducted in a transparent and participatory manner. It can also be more specific and prescribe preferences for certain methods, for example quantitative over qualitative methods, as will be seen later. Another example is the human rights non-discrimination principle, which arguably requires the use of disaggregated data in order to be able to consider how an initiative affects people depending on gender, race or religion. This is therefore part of a legal analysis of institutionalized HRIAs: to what extent do or should abstract norms determine the choice of HRIA methodologies, and to what extent is this left at the discretion of those conducting the respective HRIA?

Due to the huge variety of potential projects or policies that can be accompanied by an HRIA, it would be far beyond the scope of this book to provide a complete overview of all available methodologies. This is a consequence of the macro-perspective on institutionalization taken here which does not focus on specific policy areas or impacts on specific human rights.¹⁶⁵⁶ Therefore, this section will provide only a brief overview of important methodologies in social sciences that are generally used to assess the human rights impacts of economic projects and policies.

The choice of scientific methodologies for the assessment depends on different factors. Most important are the nature *of* what (object of the assessment) and the impact *on* what (types of impacts) is being assessed. In spite of the common objective, which is to provide information and knowledge about the potential consequences of an initiative, the methodologies will vary greatly - as will the disciplines involved. It is therefore not surprising that there is no clear and

confirmed by comparing the measure with possible alternatives, which may be less trade restrictive while providing an equivalent contribution to the achievement of the objective. This comparison should be carried out in the light of the importance of the interests or values at stake. It is through this process that a panel determines whether a measure is necessary.”

¹⁶⁵³ Gebhard Bücheler, *Proportionality in investor-state arbitration* (Oxford: Oxford Univ. Press, 2015), 1. ed.

¹⁶⁵⁴ Dieter Grimm, ‘Proportionality in Canadian and German Constitutional Jurisprudence’, *University of Toronto Law Journal*, 57 (2007), p. 393; Schlink, ‘Proportionality in Constitutional Law: Why Everywhere But Here?’ (above, n. 652), p. 300. For a broad overview of “balancing” see: Klatt and Meister, *The constitutional structure of proportionality* (above, n. 413), 45 et seq.

¹⁶⁵⁵ On this form of indirect judicial review: sections 9.2.3 and 10.2.2.

¹⁶⁵⁶ On this macro-perspective: see section 1.4.1.

universally accepted methodology for impact assessments in general and human rights impact assessments in particular.¹⁶⁵⁷ Other reasons for why it is difficult to find a consensus is probably because the choice of methodologies is often not a purely technical exercise: some methodologies might be controversial as the *reliability* is disputed, or their ability to lead to valid conclusions. Therefore, they may not be regarded as able to produce “admissible”¹⁶⁵⁸ evidence to inform decision-making. For example, in the area of development cooperation, controversies exist about the relevance of *context* in legal, economic or other social studies. While some argue that randomized field-trials are the most valid, reliable and objective way to produce hard evidence,¹⁶⁵⁹ critics emphasize the importance of context and argue that the generalizability of these randomized evaluations and thus the “external validity” has never been assured.¹⁶⁶⁰ A central point of criticism is that whether or not an initiative works or fails depends to a large extent on the social, political, economic or cultural context.¹⁶⁶¹

An important (often first) method used is desk research, which means that existing data and information are gathered and evaluated. Legal norms can, to a certain extent, guide how to conduct desk research, in particular by declaring what sources of information and knowledge count as relevant. For HRIAs, it matters to what extent only official information should be accessed, or whether and to what extent reports produced by – often more critical – civil society groups are also considered to be admissible knowledge sources. The EU applies a relatively broad and inclusive approach. The guideline on the human rights analysis of trade-related policies advises Commission staff to seek guidance from the UN charter and treaty-based human rights bodies, and information provided by civil society groups.¹⁶⁶² Consequently, defining the scope of approved knowledge sources for an impact assessment in such a broad and inclusive manner would be an expression of the analytic-deliberative paradigm. Considering also critical reports during desk research is a form of deliberation, and one that can – ideally – have a transformative effect. From a legal perspective, such an approach values the relevance of human rights reports by international organizations or civil society organizations: If such information is available and accessible but still not considered during the IA process (or at any other stage of decision-making), this failure can, under general public law principles, constitute an abuse of discretion

¹⁶⁵⁷ Walker, *The Future of Human Rights Impact Assessments of Trade Agreements* (above, n. 28), 114 ff.; Baxewanos and Raza, ‘Human Rights Impact Assessments as a New Tool for Development Policy?’ (above, n. 22), p. 18.

¹⁶⁵⁸ Dani Rodrik, ‘The New Development Economics: We Shall Experiment, but How Shall We Learn?’, Harvard Kennedy School, in: Faculty Research Working Papers Series, RWP08-055, October 2008, p. 2.

¹⁶⁵⁹ Abhijit V. Banerjee, *Making aid work* (Cambridge, Mass.: MIT Press, 2007).

¹⁶⁶⁰ Rodrik, ‘The New Development Economics: We Shall Experiment, but How Shall We Learn?’ (above, n. 1658), p. 4. On the limits of randomized testing (in particular: of the limits of what the results tell us): Kaushik Basu, ‘The New Empirical Development Economics: Remarks on its Philosophical Foundations’, *Economic and Political Weekly*, 40 (2005), pp. 4336–4339.

¹⁶⁶¹ A similar controversy exists in comparative legal studies and the extent to which legal comparison can help to identify a “better law”: Anne Peters and Heiner Schwenke, ‘Comparative Law beyond Post-Modernism’, *The International and Comparative Law Quarterly*, 49 (2000), pp. 800–834; H. Patrick Glenn, *Legal Traditions of the World* (Oxford: Oxford Univ. Press, 2014), 5. ed; Ralf Michaels, ‘Comparative Law by Numbers? Legal Origins Thesis, Doing Business Reports, and the Silence of Traditional Comparative Law’, *The American Journal of Comparative Law*, 57 (2009), pp. 765–795; Todd Landman and Edzia Carvalho, *Measuring human rights* (London: Routledge, 2010); Peters and Schwenke, ‘Comparative Law beyond Post-Modernism’ (above, n. 1661).

¹⁶⁶² European Commission, *Guidelines on the analysis of human rights impacts in impact assessments for trade-related policy initiatives* (above, n. 42), pp. 7 and 10.

or manifest error of assessment. This is essentially the reason why the EU's General Court invalidated the Council decision approving a trade agreement with Morocco: because the Council failed to examine the human rights impacts of a trade agreement on people living in Western Sahara even though there was significant evidence regarding same.¹⁶⁶³

Impact Assessments are often based on causal-chain-analysis which aims at identifying the significant cause-effect relationship between a (proposed) initiative and its effects.¹⁶⁶⁴ It is a technique that identifies and explains "factors that could lead to the predicted effect", and that sorts out other factors that are (probably) not related to the planned initiative.¹⁶⁶⁵ Causal-chain analysis would be built "on secondary material, such as reports, studies, experiences in similar situations, etc."¹⁶⁶⁶ It is an essential method to structure the assessment and distinguish relevant from irrelevant causes/impacts and thus particularly important at the scoping stage.¹⁶⁶⁷

Methodologies to determine the consequences of an initiative, in particular of general-abstract policies such as trade policies, include economic modeling.¹⁶⁶⁸ These methods use mathematical equations to predict the potential consequences of a project, or, more frequently, policy.¹⁶⁶⁹ For policy proposals affecting different sectors, models such as computable general equilibrium (CGE) are often used.¹⁶⁷⁰ Economic modeling can provide important information about potential changes in price development or trade flows, both of which can have an impact on human rights, as illustrated in the introduction. Economic models recommended by EU guidelines to be applied for impact assessments of trade policy are general equilibrium and gravity models.¹⁶⁷¹ At the same time, it is important to keep the limitations of economic modeling in mind.¹⁶⁷² Economic models are a "simplified description of reality, designed to yield hypotheses about economic behavior that can be tested",¹⁶⁷³ and it is, as a theoretical mathematical approach, not necessarily well-suited to take the peculiarities of human behavior into account. While basing impact assessments on economic modeling implies objectivity and can be very helpful to identify potential

¹⁶⁶³ General Court, *Front Polisario* (above, n. 746) para 245: "[...] those allegations received some publicity and were, in particular, brought to the notice of the UN. Therefore, they could not be ignored by the Council and merited an examination by it as to their likelihood."

¹⁶⁶⁴ European Commission, 'Handbook for Trade Sustainability Impact Assessment' (above, n. 212), p. 14.

¹⁶⁶⁵ de Vet, Jan Marteen et.al., 'Review of Methodologies Applied for the Assessment of Employment and Social Impacts', in: IZA Research Report, 28, January 2010, p. 16; Baxewanos and Raza, 'Human Rights Impact Assessments as a New Tool for Development Policy?' (above, n. 22), 18 et seq.

¹⁶⁶⁶ *Ibid.*, p. 19.

¹⁶⁶⁷ de Vet, Jan Marteen et.al., 'Review of Methodologies Applied for the Assessment of Employment and Social Impacts' (above, n. 1665), p. 16.

¹⁶⁶⁸ European Commission, 'Handbook for Trade Sustainability Impact Assessment' (above, n. 212), p. 18; European Commission, *Better Regulation Toolbox* (above, n. 204), Tool #62, p. 508 et seq. On the shift from legal compatibility to economic modelling in the trade and human rights discourse: Joseph, *Blame it on the WTO?* (above, n. 3), viii; see also: Zerk, 'Human Rights Impact Assessment of Trade Agreements' (above, n. 30), p. 12.

¹⁶⁶⁹ Baxewanos and Raza, 'Human Rights Impact Assessments as a New Tool for Development Policy?' (above, n. 22), p. 18.

¹⁶⁷⁰ For example: European Commission, *Better Regulation Toolbox* (above, n. 204), Tool #34, p. 268.

¹⁶⁷¹ European Commission, *Handbook for Trade Sustainability Impact Assessment* [2006], p. 36; for an overview of gravity models: Eli Kolundžija, *Exportdeterminanten serbischen Obstes* (Frankfurt a.M., 2014), 163 et seq.

¹⁶⁷² Baxewanos and Raza, 'Human Rights Impact Assessments as a New Tool for Development Policy?' (above, n. 22), p. 18.

¹⁶⁷³ Sam Ouliaris, 'What are Economic Models?: How economists try to simulate reality', *Finance & Development* (2011), pp. 46–47, p. 46.

changes with human rights implications, understanding its heuristic limits is crucial. This is obviously true for all assessment methods; however, as economic modeling requires a high degree of technical expertise, it is much more difficult for non-experts in this economic field to question and review the assessment process. In consequence, it can be misused by an institution to “bar-ricade” itself behind the results of the economic model – which can hardly be reviewed and effectively challenged by externals, for example during public consultation processes. In spite of the useful input economic modelling provides, it is a potential obstacle for meaningful participatory approaches to impact assessments. How does this relate to the ideal-type models of IAs and approaches to risk? Clearly, economic modelling reflects many of the characteristics of the objective-managerial approach to risk and, correspondingly, the information model. However, HRIAs would usually not only rely on economic modelling alone but be complemented by other methodologies of knowledge generation. The classification of IAs would therefore depend on how the respective modelling techniques are used, i.e. how openly their methodological limits are acknowledged, and how committed those conducting the HRIA are to also consider other forms of knowledge generation, for example through qualitative empirical methods and consultation.

Another important tool – at the intersection between participatory information gathering and technical impact analysis as a base for the assessment – are surveys.¹⁶⁷⁴ This can be a relatively easy and rapid way to gain information. This does not only mean information that needs to be further processed in order to be used for the technical impact analysis; surveys can already reveal people’s explicit knowledge about certain impacts. Surveys can take different forms, ranging from face-to-face interviews via town hall meetings to online questionnaires. Compared with other methods, surveys consist of a relatively strong participatory element, even though the degree varies according to the specific design of the survey. A survey can also have different downsides: How a question is formulated can distort the answer.¹⁶⁷⁵ When and by what means of communication a question is asked influences how representative an apparently random survey is. This is often very culture-specific: For example, online consultations allow everyone to participate – provided he/she has internet access, which still many poor people especially in rural areas in developing countries do not have. If questions are asked during the day, especially in more traditional societies, it might be more likely to meet women at home and men on the street.

In a similar vein, some authors suggest that seeking expert advice could be a supplementary methodology for the analysis. It is also, arguably, not a method in the narrow sense, but clearly a useful tool to quickly get access to information and knowledge. As experts are by definition well-informed about their area of expertise,¹⁶⁷⁶ it is a relatively efficient way to gather some important information at short notice.¹⁶⁷⁷ Expert knowledge can conveniently be used at all stages of the IA-process, however the trade-off is that there is no guarantee that expert opinions are

¹⁶⁷⁴ Baxewanos and Raza, ‘Human Rights Impact Assessments as a New Tool for Development Policy?’ (above, n. 22), p. 18.

¹⁶⁷⁵ On reactivity, i.e. the phenomenon that individuals change their behavior or answers considering that they are being observed/interviewed, and how to avoid it: Walter Hussy, Margrit Schreier, and Gerald Echtermann, *Forschungsmethoden in Psychologie und Sozialwissenschaften* (Berlin, Heidelberg: Springer, 2010), 1 Online-Ressource (VIII, 312 Seiten), 56 et seq.

¹⁶⁷⁶ David Coady, *What To Believe Now* (Chichester, West Sussex, Malden, MA: Wiley-Blackwell, 2012), p. 28.

¹⁶⁷⁷ Walker, *The Future of Human Rights Impact Assessments of Trade Agreements* (above, n. 28), p. 119.

objective or a-political as has already been discussed above.¹⁶⁷⁸ Here again, the concept and design of a survey – or of the expert interviews – can make a decisive difference and change the characteristic of an impact assessment, ranging from an objective-managerial information model to a really analytic-deliberative transformation model.

In particular participatory case studies can be a useful method to reveal the real-life consequences of an initiative and can reflect the ideal of a deliberative or participatory approach to impact assessments.¹⁶⁷⁹ The potential of case studies is that they are often context-specific and thus provide in-depth knowledge. This is at the same time also their major restriction as their findings may not be transferable to other situations or regions.¹⁶⁸⁰ It is therefore a useful method if one wishes to assess locally limited impacts (e.g.: the effect of a specific project, or the local impacts of a policy, such as on certain indigenous communities).¹⁶⁸¹ In particular by conducting broad-based interviews during the preparation of the case study, this methodology has the potential to combine analytical and deliberative elements at the same time, thus reflecting the ideals of a transformative model.

At a more general level, an almost ideological divide seems to exist, across different disciplines, about the preference that should be given to either quantitative or qualitative methods, even though increasingly mixed approaches are used.¹⁶⁸² One advantage of an at least preparatory qualitative study is that it may help to reveal unexpected new insights: Qualitative studies can therefore reduce closed ignorance.¹⁶⁸³ These findings from qualitative studies can then be checked for external validity in a subsequent quantitative study.¹⁶⁸⁴

Concerning risk and impact assessment, the decisive legal question is what counts as sufficient scientific evidence to justify to take or refrain from a certain regulatory initiative. While some IA-norms are deferential as regards the choice of quantitative or qualitative data, in other cases, a preference for quantitative approaches is expressed. Domestic and international courts were also confronted with this issue. In some cases courts are very deferential to the adequate method applied. In the dispute concerning Costa Rica and Nicaragua about the obligation to conduct an EIA due to transboundary impacts, the ICJ confirmed that there is such an obligation if there is “risk of significant transboundary harm”.¹⁶⁸⁵ The Court confirms that states have discretion in determining the content of the EIA required in each case: “State planning to undertake the activity is required, in conformity with its due diligence obligation, to notify and consult in good faith with the potentially affected State, where that is necessary to determine the appropriate

¹⁶⁷⁸ See section 5.3. See also Baxewanos and Raza, ‘Human Rights Impact Assessments as a New Tool for Development Policy?’ (above, n. 22), p. 19.

¹⁶⁷⁹ Ibid. Case studies are also listed among the methods to be used for the EU’s Trade SIAs: European Commission, ‘Handbook for Trade Sustainability Impact Assessment’ (above, n. 212), p. 16.

¹⁶⁸⁰ Walker, *The Future of Human Rights Impact Assessments of Trade Agreements* (above, n. 28), p. 118.

¹⁶⁸¹ Ibid., p. 119.

¹⁶⁸² Already in 1984: Alan Bryman, ‘The Debate about Quantitative and Qualitative Research: A Question of Method or Epistemology?’, *The British Journal of Sociology*, 35 (1984), pp. 75–92. It has also recently been discussed if, how and to what extent quantitative and qualitative methods can be combined with each other. For an overview: Kolundžija, *Exportdeterminanten serbischen Obstes* (above, n. 1671), p. 136 et seq.

¹⁶⁸³ On closed and open ignorance: section 5.2.

¹⁶⁸⁴ Kolundžija, *Exportdeterminanten serbischen Obstes* (above, n. 1671), p. 136 et seq. with further reference.

¹⁶⁸⁵ ICJ, *Costa Rica v. Nicaragua, Certain Activities carried out by Nicaragua in the Border Area* (above, n. 115).

measures to prevent or mitigate that risk.”¹⁶⁸⁶ So the Court mainly confirms due diligence and good faith principles when assessing transboundary impacts; it also refers to the usual criteria to determine significance, such as the nature of the project or the magnitude of the consequences. However, it misses the opportunity to specify criteria upon which the assessment of non-financial risks should be based.¹⁶⁸⁷

WTO case law is slightly more specific in this regard. The WTO dispute settlement bodies had to decide what constitutes “sufficient” scientific evidence, in particular what constitutes an adequate scientific risk assessment under Articles 2.2 and 5.1 of the SPS Agreement. In the hormone cases, the Appellate Body (“AB”) reversed the Panel’s attempt to exclude all matters not susceptible to quantitative analysis from the risk assessment. In doing so, the AB addresses the underlying limits of scientific research. It stated that some of the factors listed in Article 5.2 of the SPS agreement are “not necessarily or wholly susceptible of investigation according to laboratory methods of, for example, biochemistry or pharmacology”. It is “essential to bear in mind that the risk to be evaluated in a risk assessment under Article 5.1 [SPS Agreement] is not only risk ascertainable in a science laboratory operating under strictly controlled conditions, but also risk in human societies as they actually exist, in other words, the actual potential for adverse effects on human health in the real world where people live and work and die.”¹⁶⁸⁸

The Appellate Body holds that relevant scientific evidence is insufficient if “the body of available scientific evidence does not allow, in quantitative or qualitative terms, the performance of an adequate assessment of risks as required under Article 5.1 and as defined in Annex A to the SPS Agreement”.¹⁶⁸⁹ As the Appellate Body refers to quantitative or qualitative methods, it confirms the view that, generally, even a risk assessment using purely qualitative analysis might be sufficient. This would arguably be different ¹⁶⁹⁰ if quantitative evidence is available or could have been produced. In addition, the Appellate Body also makes clear that states may base their decision on “divergent or minority views provided they are from a respected and qualified source”.¹⁶⁹¹

Similarly, the EU guidelines on impact assessment contain a certain preference for quantitative methods: impacts should be quantified and monetized as far as possible.¹⁶⁹² Many authors appreciate, for human rights impact assessment literature, the use of human rights indicators,¹⁶⁹³

¹⁶⁸⁶ Ibid., p. 104

¹⁶⁸⁷ Diane Desierto, Evidence but not Empiricism? Environmental Impact Assessments at the International Court of Justice in Certain Activities Carried Out by Nicaragua in the Border Area (Costa Rica v. Nicaragua) and Construction of a Road in Costa Rica Along the San Juan River (Nicaragua v. Costa Rica), 26 February 2016.

¹⁶⁸⁸ WTO Appellate Body, WT/DS26/AB/R, WT/DS48/AB/R, *European Communities - Measures Concerning Meat and Meat Products (Hormones)* (1998), para 187.

¹⁶⁸⁹ WTO Appellate Body, WT/DS320/AB/R, *United States - Continued Suspension of Obligations in the EC - Hormones Dispute* (2008), para 677; WTO Appellate Body, WT/DS245/AB/R, *Japan - Measures Affecting the Import of Apples* (2003), para 179.

¹⁶⁹⁰ Markus Wagner, ‘Taking Interdependence Seriously: The Need for a Reassessment of the Precautionary Principle in International Trade Law’, *Cardozo Journal of International and Comparative Law*, 20 (2012), pp. 713–770, p. 746.

¹⁶⁹¹ WTO Appellate Body, *United States - Continued Suspension of Obligations in the EC - Hormones Dispute* (above, n. 1689), p. 677.

¹⁶⁹² European Commission, *Better Regulation Guidelines* (above, n. 199), pp. 14, 26.

¹⁶⁹³ Baxewanos and Raza, ‘Human Rights Impact Assessments as a New Tool for Development Policy?’ (above, n. 22), p. 16; S. Bakker, M. van Den Berg, D. Duzenli et al., ‘Human Rights Impact Assessment in

which however is not uncontroversial. In addition, the quantification or even monetization of (human) impacts runs the risk of being blind from an equality perspective: the monetization of non-monetary impacts not only implies the assumption that “money matters – more than anything else”, it often does not shed light on who bears the costs and who gets the benefits.¹⁶⁹⁴ Such an assessment might infringe the principle of non-discrimination.

Human rights analysis does not establish new empirical methodologies in the strict sense but rather requires that existing methods are used in the light of human rights principles. In other words, the impact analysis must be guided by human rights principles, and the findings must be evaluated in accordance with human rights rules and principles. As mentioned before, no consensus exists about what exactly constitutes a human rights impact assessments, which is why different types and models exist. It might increase normative determinacy in some cases if an impact assessment relies on explicit human rights norms. For example, an option that will result in the stagnation of the realization of social human rights would have to be discarded as it infringes the principle of progressive realization.¹⁶⁹⁵ At other times, human rights might increase normative uncertainty, for example insofar as human rights arguments can be made in favor of as well as against the disaggregation of sensitive data such as race, gender or religion. The use of disaggregated data may reveal a discriminatory effect of certain initiatives – at the same time, it may also have unintended effects, as outlined above.

8.2.3 Comparison and Evaluation of Impacts

The previous section outlined certain methods used to analyze the impacts of different policy options. In the next step, it is necessary to compare and evaluate the identified impacts of an initiative. It is at this stage that human rights principles can play a decisive role. At the very least, the comparison of different impacts of the identified alternatives allows to highlight the respective trade-offs and informs decision-makers about them. Such a comparison ideally helps to identify the initiatives with the least restrictive effect on the enjoyment of human rights. As such, a comparison operationalizes the proportionality principle.

There may be options that would be clearly illegal and that should be discarded for this reason alone. It is therefore necessary to analyze how impact assessments and substantive norms interact and to what extent law in general and human rights in particular can clearly set specific normative boundaries. Human rights can provide some degree of normative guidance to social and other types of impact assessments, however, often concise rules do not exist. Instead, as in most hard cases, it will require some form of balancing of competing rights and interests.¹⁶⁹⁶ Insofar as balancing is required, the UN Guiding Principles on HRIA of Trade and Investment Agreements emphasize the importance of information about different options insofar as

Practice: The Case of the Health Rights of Women Assessment Instrument (HeRWAI), *Journal of Human Rights Practice*, 1 (2009), pp. 436–458, 438 ff.; Gauthier de Beco, ‘Human Rights Impact Assessments’, *Netherlands Quarterly of Human Rights*, 27 (2009), pp. 139–166; Walker, *The Future of Human Rights Impact Assessments of Trade Agreements* (above, n. 28); James Harrison, ‘Human Rights Measurement: Reflections on the Current Practice and Future Potential of Human Rights Impact Assessment’, *Journal of Human Rights Practice*, 3 (2011), pp. 162–187, p. 174.

¹⁶⁹⁴ Fischhoff and Kadvany, *Risk* (above, n. 825), p. 147; similar: Tribe, ‘Policy Science: Analysis or Ideology?’ (above, n. 317), p. 97.

¹⁶⁹⁵ See section 8.2.3.1.

¹⁶⁹⁶ Human Rights Council, *Guiding Principles on Human Rights Impact Assessments of Trade and Investment Agreements, Report of the Special Rapporteur on the right to food, Olivier de Schutter* [2011], V.6.1.

“[h]uman rights impact assessments seek to clarify the nature of such choices, and to ensure that they are made on the basis of the best information available. The question of which trade-offs are acceptable is to be decided at the level of each country, through open and democratic processes, which the human rights impact assessment seeks to inform.”¹⁶⁹⁷ This reflects the margin of appreciation states enjoy in particular when balancing competing rights.¹⁶⁹⁸ However, as will be seen in the case of the EU, the guidelines also require discarding certain options at an early stage if it is clear that this option would violate human rights and thus be illegal. In these cases, normative judgments of legality and illegality would be required during the assessment, and insofar HRIAs would transform the decision-making process by discarding certain policy-options at an early stage. HRIAs can thus be more than an information tool. Similarly, the UN Guiding Principles on HRIA of trade and investment Agreements require that “the process of setting priorities and of managing trade-offs, as well as the substance of the outcome, must comply with certain conditions.”¹⁶⁹⁹ In particular, cross-cutting human rights standards determine certain differences in human rights analysis as opposed to, for example, social impact analysis. Some of these human rights standards that determine how to analyze impacts will be addressed in the following sub-section.

8.2.3.1 Principle of Progressive Realization and Non-Retrogression

An important cross-cutting human rights standard for economic, social and cultural human rights is the principle of progressive realization. Each State Party to the ICESCR “undertakes to take steps [...] to the maximum of its available resources, with a view to achieving progressively the full realization of the rights recognized in the present Covenant” (Article 2 (1) ICESCR). While intended to accommodate the limited financial resources of many developing countries, this principle has been criticized, already during its drafting, as granting only weak guarantee to economic, social and cultural rights and providing a loophole to evade obligations.¹⁷⁰⁰ And indeed, it is difficult to define when a state takes adequate steps to the maximum of its available resources to respect and fulfill socio-economic rights, and the provision thus contains a qualifier the indeterminacy of which can be used as a flexible defense mechanism for reluctant states. However, this is only one side of the coin. Article 2 (1) ICESCR also contains the (more specific) corollary principle of non-retrogression. The deterioration of the level of protection would be an infringement that is in need of justification: “[...] any deliberately retrogressive measures in that regard would require the most careful consideration and would need to be fully justified by reference to the totality of the rights provided for in the Covenant and in the context of the full use

¹⁶⁹⁷ Ibid., 6.2.

¹⁶⁹⁸ On the contours of the margin of appreciation: Matthew Saul, ‘The European Court of Human Rights’ Margin of Appreciation and the Processes of National Parliaments’, *Human Rights Law Review*, 15 (2015), pp. 745–774; Andrew Legg, *The Margin of Appreciation in International Human Rights Law* (Oxford: Oxford Univ. Press, 2012), 1. ed.

¹⁶⁹⁹ Human Rights Council, *Guiding Principles on Human Rights Impact Assessments of Trade and Investment Agreements, Report of the Special Rapporteur on the right to food, Olivier de Schutter* [2011], V.6.2.

¹⁷⁰⁰ On the drafting history of, inter alia, article 2 (1) ICESCR: Alston and Quinn, ‘The Nature and Scope of States Parties’ Obligations under the International Covenant on Economic, Social and Cultural Rights’ (above, n. 692).

of the maximum available resources.”¹⁷⁰¹ For example, an agreement that has retrogressive impacts would be an infringement of the respective socio-economic right. While it might be easier to identify such an infringement – by simply comparing expected impacts with the baseline – it is more difficult to determine the circumstances under which such an infringement can exceptionally be justified.¹⁷⁰²

Human Rights Impact Assessments cannot resolve these difficult questions. They can, however, raise awareness to infringements and point out that an initiative might require justification. The UN Guiding Principles on HRIA of trade and investment Agreements therefore take up this principle and state that “trade-offs whereby one right suffers a marked decline in its level of realization would need to be subject to the most careful consideration and to be fully justified by reference to the totality of human rights.”¹⁷⁰³ An infringement of the principle of non-regression in cases where negative impacts occur in consequence of a trade or development-related initiative might be doubtful as this might not be a deliberately retrogressive measure. However, deliberate retrogression does not mean that decision-makers must intentionally reduce the enjoyment of economic and social rights;¹⁷⁰⁴ in that sense, the scope of protection would be almost useless, given that social and economic rights infringement are generally a consequence of reforms *intended* to save resources which only *knowingly* but not *intentionally* deteriorate people’s living standards. Therefore, the principle of non-regression can be applied to projects or policies which have unintended negative (side-) effects on economic and social rights. An analysis of impacts based on human rights principles would have to consider these consequences and, if retrogression cannot be justified, discard such an option.

8.2.3.2 The Human Rights Baseline Scenario

A human rights-approach to impact assessments might modify the determination of the baseline scenario: While generally the different options are measured and compared with the *status quo* baseline, it is generally assumed that a human rights-based IA would require also comparing the different options with a *normative* human rights baseline established by existing human rights obligations. This is not only necessary to understand the applicable human rights commitments as well as related human rights compliance deficits that might exacerbate negative consequences of an initiative. Starting from a normative baseline scenario can actually influence the results of the comparison between alternative options, in particular with regard to the principle of progressive realization of social and economic human rights. As General Comment No. 3 states, economic and social human rights contain the “obligation to move as expeditiously and effectively

¹⁷⁰¹ UN Committee on Economic, Social and Cultural Rights, *General Comment No 3 - The nature of States parties obligations (Art. 2, para 1)* (above, n. 400), para 9.

¹⁷⁰² However, it appears that the approach to non-regression has changed during the course of the most recent global financial crisis granting states more flexibility in times of emergency. For a closer analysis: Ben T. C. Warwick, ‘Socio-economic rights during economic crises: A changed approach to non-regression’, *International and Comparative Law Quarterly*, 65 (2016), pp. 249–265.

¹⁷⁰³ Human Rights Council, *Guiding Principles on Human Rights Impact Assessments of Trade and Investment Agreements, Report of the Special Rapporteur on the right to food, Olivier de Schutter* [2011], V.6.6.

¹⁷⁰⁴ Katharine Young, ‘The Minimum Core of Economic and Social Rights: A Concept in Search of Content’, *The Yale Journal of International Law*, 33 (2008), pp. 113–175, p. 122.

as possible towards that goal”.¹⁷⁰⁵ For example, an SIA may conclude that an agreement is expected to have neither positive nor negative social impacts; it would thus predict a *neutral* social effect. Based on the principle of progressive realization discussed above, such an impact could nevertheless have a *negative* human rights impacts: This would be the case if, for example, an international agreement produces a “regulatory chill” that discourages governments from adopting policies to further fulfill their human rights obligations.¹⁷⁰⁶ Conditionalities attached to a financing agreement might affect the recipient states budget “in a way that would impede the full realization of human rights, making the fulfillment of human rights impossible or delayed.”¹⁷⁰⁷ Similarly, certain clauses in trade and investment agreements, or a standstill-clause, may limit a state’s domestic policy space, curb reforms necessary to improve the realization of social and economic rights and can therefore restrict the progressive realization of social and economic rights.¹⁷⁰⁸ It can therefore make a significant difference to assess social versus human rights impacts: Human rights principles and standards can modify the baseline scenario and the result of the impact analysis.

8.2.3.3 Minimum Core Concept

One cross-cutting principle limiting the balancing between different rights and interests is the protection of the essential content of human rights or, in the context of economic, social and cultural rights, the minimum core concept.¹⁷⁰⁹ The concept responds to the criticism that progressive realization waters down the content of economic, social and cultural rights: core obligations are *minimum* but *immediate* obligations and thus an attempt to counter the “dilution” of socio-economic rights.¹⁷¹⁰ It is in this sense that HRIA guidelines often explicitly require that projects or policy trade-offs may not deprive people of the ability to enjoy the essential content of human rights.¹⁷¹¹ The UN Guiding Principles on HRIA of trade and investment agreements state that no provision in a trade or investment agreement “is acceptable that might deprive people of their current income sources unless a credible, realistic and sustainable alternative is offered that

¹⁷⁰⁵ UN Committee on Economic, Social and Cultural Rights, *General Comment No 3 - The nature of States parties obligations (Art. 2, para 1)* (above, n. 400), para 9.

¹⁷⁰⁶ Adam Bradlow, ‘Human Rights Impact Litigation in ISDS: A Proposal for Enabling Private Parties to Bring Human Rights Claims through Investor-State Dispute Settlement Mechanisms’, *Yale J. Int’l L.*, 43 (2018), pp. 355–390, pp. 356–357.

¹⁷⁰⁷ Human Rights Council, *Guiding Principles on Human Rights Impact Assessments of Trade and Investment Agreements, Report of the Special Rapporteur on the right to food, Olivier de Schutter* [2011], II.2.4.

¹⁷⁰⁸ Paasch and others, *Right to Food Impact Assessment of the EU-India Trade Agreement* (above, n. 156), p. 8; Joseph, *Blame it on the WTO?* (above, n. 3), p. 23; similar: Simma, ‘Foreign Investment Arbitration: A Place for Human Rights?’ (above, n. 4).

¹⁷⁰⁹ Young, ‘The Minimum Core of Economic and Social Rights: A Concept in Search of Content’ (above, n. 1704).

¹⁷¹⁰ Lisa Forman, ‘Can Minimum Core Obligations Survive a Reasonableness Standard of Review under the Optional Protocol to the International Covenant on Economic, Social and Cultural Rights’, *Ottawa Law Review*, 47 (2016), pp. 561–573, p. 564.

¹⁷¹¹ Human Rights Council, *Guiding Principles on Human Rights Impact Assessments of Trade and Investment Agreements, Report of the Special Rapporteur on the right to food, Olivier de Schutter* [2011], V.6.5; see also: Nora Götzmann, Tulika Bansal, Elin Wrzoncki et al., ‘Human Rights Impact Assessment: Guidance and Toolbox’, The Danish Institute for Human Rights, 2016.

would allow for the continued enjoyment of human rights in full dignity.¹⁷¹² A policy option that would have such a consequence would therefore have to be discarded as illegal.

The ICESCR does not explicitly mention minimum core obligations, even though the concept is implicitly reflected in Articles 2 (1), 4 and 5 of the Covenant.¹⁷¹³ It is also enshrined in domestic constitutional law.¹⁷¹⁴ Minimum core obligations of socio-economic rights have therefore been defined as “everyone’s minimum reasonable demands upon the rest of humanity”,¹⁷¹⁵ as “minimum subsistence rights for all”,¹⁷¹⁶ an “absolute minimum entitlement”¹⁷¹⁷, or an “irreducible minimum”.¹⁷¹⁸ The UN Committee on Economic, Social and Cultural Rights (“ICESCR Committee”) provides some examples for what it believes to be core obligations: “a State party in which any significant number of individuals is deprived of essential foodstuffs, of essential primary health care, of basic shelter and housing, or of the most basic forms of education is, *prima facie*, failing to discharge its obligations under the Covenant.”¹⁷¹⁹

The core concept appears to bring some clarity into a system of economic, social and cultural rights that is, generally, difficult to grasp: As has been noted, it resembles Hart’s distinction between “a core of certainty and a penumbra of doubt when we are engaged in bringing particular situations under general rules”.¹⁷²⁰ An initiative that deprives people of essential foodstuff appears to evidently violate the right to food and an adequate standard of living. However, this observation is deceptive: uncertainty persists at different levels: the legal nature, function and scope of the core-concept are still controversial.¹⁷²¹ It is unclear, in particular, to what extent the core concept contains obligations of conduct or result, absolute or derogable obligations, and universal or country-specific thresholds.

¹⁷¹² Human Rights Council, *Guiding Principles on Human Rights Impact Assessments of Trade and Investment Agreements, Report of the Special Rapporteur on the right to food, Olivier de Schutter* [2011], V.6.5.

¹⁷¹³ Lisa Forman, Luljeta Caraoshi, Audrey R. Chapman et al., ‘Conceptualising minimum core obligations under the right to health: How should we define and implement the ‘morality of the depths’’, *The International Journal of Human Rights*, 20 (2016), pp. 531–548.

¹⁷¹⁴ Drawing on German and Turkish law, Özüdör describes the core in relation to the outside layers of a right, not necessarily distinguishing between socio-economic rights and civil and political rights. According to Özüdör, the “normative scope [consists of] three distinct parts: a core, a circumjacence, and an outer edge, the core being that part of a right which is essential to its definition”: Esin Özüdör, ‘The Core of Rights and Freedoms: the Limit of Limits’, in: Tom Campbell (ed.), *Human Rights*, pp. 37–59, p. 38.

¹⁷¹⁵ Henry Shue, *Basic Rights* (Princeton Univ. Press, 1980), p. 19.

¹⁷¹⁶ *Limburg Principles on the Implementation of the International Covenant on Economic, Social and Cultural Rights*, para 25.

¹⁷¹⁷ Philip Alston, ‘Out of the Abyss: The Challenges Confronting the New U. N. Committee on Economic, Social and Cultural Rights’, *Human rights quarterly*, 9 (1987), p. 353.

¹⁷¹⁸ Özüdör, ‘The Core of Rights and Freedoms: the Limit of Limits’ (above, n. 1714), p. 45.

¹⁷¹⁹ UN Committee on Economic, Social and Cultural Rights, *General Comment No 3 - The nature of States parties obligations (Art. 2, para 1)* (above, n. 400), para 10.

¹⁷²⁰ Hart, *The Concept of Law* (above, n. 366), p. 123; Young, ‘The Minimum Core of Economic and Social Rights: A Concept in Search of Content’ (above, n. 1704), p. 141.

¹⁷²¹ Forman, ‘Can Minimum Core Obligations Survive a Reasonableness Standard of Review under the Optional Protocol to the International Covenant on Economic, Social and Cultural Rights’ (above, n. 1710); Young, ‘The Minimum Core of Economic and Social Rights: A Concept in Search of Content’ (above, n. 1704); Forman et al., ‘Conceptualising minimum core obligations under the right to health: How should we define and implement the ‘morality of the depths’ (above, n. 1713); Alston, ‘Out of the Abyss: The Challenges Confronting the New U. N. Committee on Economic, Social and Cultural Rights’ (above, n. 1717).

In the context of socio-economic rights, General Comment No. 3 already uses the distinction between “obligation of conduct” and “obligation of result”.¹⁷²² This distinction appears easy in theory: An obligation of result allows the State to choose the means to achieve the result, whereas an obligation of conduct prescribes specific conduct.¹⁷²³ The distinction is much more problematic when specifically applied to human rights obligations.¹⁷²⁴ Insofar as minimum core obligations refer to conduct, an HRIA must check whether the initiative in question – for example a trade or investment agreement – makes it difficult or impossible for duty-bearers to comply with the obligation of conduct concerned. Where minimum core obligations refer to results, for example structural outcomes,¹⁷²⁵ an impact assessment must review whether the impacts would negatively affect their achievement.

It is also not clear whether minimum core obligations are absolute or non-derogable, even in a state of emergency. General Comment No 3 speaks in favor of an (exceptionally) derogable content. The Comment establishes, first, a presumption in the sense that “a State party in which any significant number of individuals is deprived of essential foodstuffs, of essential primary health care, of basic shelter and housing, or of the most basic forms of education is, *prima facie*, failing to discharge its obligations under the Covenant.”¹⁷²⁶ However, the State could refute this presumption under certain conditions: “In order for a State party to be able to attribute its failure to meet at least its minimum core obligations to a lack of available resources it must demonstrate that every effort has been made to use all resources that are at its disposition in an effort to satisfy, as a matter of priority, those minimum obligations.”¹⁷²⁷ In later Comments, at least with regard to the right to health, the Committee defined, relatively specific, non-derogable obligations of results.¹⁷²⁸ Some legal scholars also favor a non-derogable interpretation of the core

¹⁷²² UN Committee on Economic, Social and Cultural Rights, *General Comment No 3 - The nature of States parties obligations (Art. 2, para 1)* (above, n. 400), para 1.

¹⁷²³ M. Magdalena Sepúlveda, *The nature of the obligations under the International Covenant on Economic, Social and Cultural Rights* (Antwerpen: Intersentia, 2003), p. 190.

¹⁷²⁴ *Ibid.* Even the General Comments are not coherent: while General Comment No 3 seems to assume that the core of socio-economic rights corresponds with derogable core obligations of conduct, General Comment No 14 on the right to health assumes non-derogable core obligations of result (Forman et al., ‘Conceptualising minimum core obligations under the right to health: How should we define and implement the ‘morality of the depths’ (above, n. 1713); Young, ‘The Minimum Core of Economic and Social Rights: A Concept in Search of Content’ (above, n. 1704), 153 ff.). Similarly, scholars interpret the minimum core concept differently, containing, primarily, obligations of conduct, of result, or a combination of both (For minimum core obligations of conduct: Audrey Chapman, ‘Core Obligations Related to the Right to Health’, in: Audrey Chapman and Sage Russell (eds.), *Core obligations: building a framework for economic, social and cultural rights*, pp. 185–215, 201 ff.; for minimum core obligations of result: Tara Melish, ‘Rethinking the ‘Less as More’ Thesis: Supranational Litigation of Economic, Social and Cultural Rights in the Americas’, *International Law and Politics*, 39 (2006), pp. 171–343, pp. 248–249; for a combination of conduct and result: John Tobin, *The Right to Health in International Law* (Oxford: Oxford Univ. Press, 2012), 245 ff; critical of the distinction between obligations of conduct and result: Holger Hestermeyer, ‘Access to Medication as a Human Right’, *Max Planck UNYB*, 8 (2004), pp. 101–180, p. 132).

¹⁷²⁵ UN Committee on Economic, Social and Cultural Rights, *General Comment No. 14 - The Right to the Highest Attainable Standard of Health (Art. 12)* (above, n. 694), para 43; Forman et al., ‘Conceptualising minimum core obligations under the right to health: How should we define and implement the ‘morality of the depths’ (above, n. 1713).

¹⁷²⁶ UN Committee on Economic, Social and Cultural Rights, *General Comment No 3 - The nature of States parties obligations (Art. 2, para 1)* (above, n. 400), para 10.

¹⁷²⁷ *Ibid.*

¹⁷²⁸ UN Committee on Economic, Social and Cultural Rights, *General Comment No. 14 - The Right to the Highest Attainable Standard of Health (Art. 12)* (above, n. 694), para 43; Forman et al., ‘Conceptualising

content as an absolute minimum obligation that applies irrespective of the level of the availability of resources.¹⁷²⁹ Whether obligations are derogable is important in cases where a project or policy option would produce impacts that infringe minimum core obligations. If these obligations are non-derogable, the option must be discarded as “legally not viable” right away. If these obligations are derogable, an HRIA could theoretically proceed to ask whether it could be justified, and it should identify the respective requirements for such a justification. However, at least as far as the EU HRIAs are concerned, it is difficult to imagine situations where an EU policy that contributes to an infringement of core obligations could be justified.

It is also controversial to what extent minimum core obligations are or should be based on universal as opposed to country-specific thresholds. Considering the extreme differences in levels of economic development, some scholars and courts call for country-specific thresholds.¹⁷³⁰ This would be viable insofar as HRIAs only assess the internal – and thus country-specific – human rights impacts. However, under international law, it may be difficult to set country-specific thresholds: significant resources would be needed to establish such benchmarks, and countries may not have a sufficient incentive to establish ambitious benchmarks.¹⁷³¹ It would therefore be difficult or even impossible for the EU to use country-specific thresholds to assess the extraterritorial human rights impacts of its policies. At the same time, an HRIA could also become meaningless if it ignores the respective context in the country where the impacts are expected to occur. Against this background, some form of combination between universal and context-specific country thresholds seems necessary, as called for by different scholars.¹⁷³² Brand, for example, states that universal standards may be adequate for international enforcement of socioeconomic rights, but that it is necessary, at the domestic level, to be more specific, concrete, and context-sensitive when reflecting about core entitlements and minimum obligations.¹⁷³³ In con-

minimum core obligations under the right to health: How should we define and implement the ‘morality of the depths’ (above, n. 1713).

¹⁷²⁹ Alston, ‘Out of the Abyss: The Challenges Confronting the New U. N. Committee on Economic, Social and Cultural Rights’ (above, n. 1717), p. 353; *Limburg Principles on the Implementation of the International Covenant on Economic, Social and Cultural Rights* (above, n. 1716), para 25; *Maastricht Guidelines on Violations of Economic, Social and Cultural Rights*, Maastricht (1997), para 9; critical: Young, ‘The Minimum Core of Economic and Social Rights: A Concept in Search of Content’ (above, n. 1704), p. 167.

¹⁷³⁰ Asbjørn Eide, ‘Realization of Social and Economic Rights and the Minimum Threshold Approach’, *Human Rights Law Journal*, 10 (1989); the South African Constitutional Court similarly stated that it may be possible to develop minimum core obligations, but emphasized that these have to be country-specific (“Variations ultimately depend on the economic and social history and circumstances of a country”): Constitutional Court of South Africa, Case CCT 11/00, *Government of the Republic of South Africa & Ors v Grootboom & Ors* (2000), para 32; see also: Faranaaz Veriava and Fons Coomans, ‘The Right to Education’, in: Danie Brand and Christof Heyns (eds.), *Socio-economic Rights in South Africa*, pp. 57–83, p. 65.

¹⁷³¹ With further reference: Forman et al., ‘Conceptualising minimum core obligations under the right to health: How should we define and implement the ‘morality of the depths’ (above, n. 1713).

¹⁷³² Proposals have been made to define “general universal core contents” but include “distinguishing thresholds for countries at different levels of development” (Brigit Catharina Antonia Toebes, *The right to health as a human right in international law* (Antwerpen: Intersentia, 1999), quoted in: Lisa Forman, Luljeta Caraoshi, Audrey Chapman et al., ‘Conceptualising Minimum Core Obligations under the Right to Health: How Should We Define and Implement the ‘Morality of the Depths’?’, in: Sabine Klotz, Heiner Bielefeldt, Martina Schmidhuber et al. (eds.), *Healthcare as a Human Rights Issue*, pp. 95–122, p. 113). Others emphasize a combination of both universal/general and country-specific thresholds: Matthew C. R. Craven, *The International Covenant on Economic, Social, and Cultural Rights* (Oxford: Clarendon Press, 1995), p. 142.

¹⁷³³ Danie Brand, ‘The Minimum Core Content of the Right to Food in Context: A Response to Rolf Künemann’, in: Danie Brand and Sage Russell (eds.), *Exploring the Core Content of Socio-Economic Rights*, 99 ff.

sequence, the right path seems to be to build the analysis of human rights impacts on universal standards where they exist. In addition, in line with the partner state's collective autonomy, the assessment should, where possible, also consider the partner state's country-specific context: in some cases, these domestic standards may be more specific and thus concretize abstract universal standards. In other cases, such an approach would at least strike a better balance between universal human rights claims and the affected state's collective autonomy.

How can those in charge of conducting an HRIA address the aforementioned questions? They can rely on treaty text, committee decisions or human rights scholarship for further elaboration of the core obligations.¹⁷³⁴ As Alston noted, it "appear[s] to be an accurate reflection of the drafters' intention that the Committee should seek to identify some minimum core content of each right".¹⁷³⁵ The EU's impact assessment guidelines explicitly refer to the ICESCR and incorporate the human rights set out therein.¹⁷³⁶ The Trade HRIA Guidelines also refer to the work of the UN human rights treaties' bodies.¹⁷³⁷ While committee jurisprudence, let alone reports, are not binding, they can nevertheless serve as "subsidiary means for the determination of rules of law" (Article 38 (1) lit. d) ICJ-Statute). Similarly, other interpretive sources may be used, even though this raises the question whose opinion counts and whose opinion is ignored.¹⁷³⁸ In addition, those conducting HRIAs do not only apply human rights; the impact assessment itself is also an interpretive process and can thus contribute to finding a consensus about the core content of socio-economic rights. Borrowing from Häberle, those involved in the HRIA process can also be seen as members of a group of constitutional interpreters¹⁷³⁹ who also contribute to the development of human rights concepts. Still, this is not without risk, considering that focusing on the core of human rights might imply to ignore the periphery, and using language about minimum core obligations may re-structure the discourse about rights, needs and redistribution.¹⁷⁴⁰ This, however, would require further research.

8.2.3.4 Equality and Non-discrimination

The principle of equality and non-discrimination does not only, as discussed above, guide the IA-process, but is also a human rights principle applicable to the assessment of impacts. The UN Guiding Principles on HRIA of Trade and Investment Agreements state that the "principle of

However, the result is an "an amalgam of universal and country-specific cores, whose adjustability belies the pretensions of each "core" to represent an absolute (and nonderogable) minimum": Young, 'The Minimum Core of Economic and Social Rights: A Concept in Search of Content' (above, n. 1704), p. 117.

¹⁷³⁴ Forman et al., 'Conceptualising minimum core obligations under the right to health: How should we define and implement the 'morality of the depths'' (above, n. 1713).

¹⁷³⁵ Alston, 'Out of the Abyss: The Challenges Confronting the New U. N. Committee on Economic, Social and Cultural Rights' (above, n. 1717), p. 352.

¹⁷³⁶ European Commission, 'Handbook for Trade Sustainability Impact Assessment' (above, n. 212), p. 21.

¹⁷³⁷ European Commission, *Guidelines on the analysis of human rights impacts in impact assessments for trade-related policy initiatives* (above, n. 42), p. 15.

¹⁷³⁸ Young, 'The Minimum Core of Economic and Social Rights: A Concept in Search of Content' (above, n. 1704), p. 148

¹⁷³⁹ For further reference: See footnote 210.

¹⁷⁴⁰ By drawing attention to the symbolic features of minimum core terminology: Young, 'The Minimum Core of Economic and Social Rights: A Concept in Search of Content' (above, n. 1704), p.172 f. warns that the core obligation rhetoric might also have – yet unknown – negative consequences, for example a stigmatizing effect.

equality and non-discrimination rules out any trade-offs which would result in or exacerbate unequal and discriminatory outcomes, for example, giving priority to providing health and education services to the more affluent parts of society, rather than to the most disadvantaged and marginalized groups, particularly women.”¹⁷⁴¹ On a more general level, not only specific rules but the overall design of the policy should be assessed in order to ensure, to the fullest extent possible, that “losses and gains are shared across groups, rather than concentrated on one group.”¹⁷⁴² The UN Guiding Principles suggest identifying mitigating or redistributive measures, such as taxation schemes, so that those who benefit will at least in part compensate those who are negatively affected.¹⁷⁴³ Consequently, an HRIA would have to use disaggregated data that allows comparing impacts on different groups according to non-discrimination principles. This includes data disaggregated by grounds of discrimination as recognized in human rights law, for example according to sex, age, ethnicity, religion, income, etc.¹⁷⁴⁴ While disaggregated data can demonstrate existing inequalities and therefore hold decision-makers accountable, collecting and using disaggregated data is also a sensitive issue: at a structural level, the fact alone that public institutions use different religious or ethnic categories could confirm and perpetuate existing ethnic or religious differences. Collecting disaggregated data might under domestic law infringe individual and collective human rights, as illustrated above.¹⁷⁴⁵

8.2.4 Impact Analysis and Residual Risks

It has already been outlined that impact assessments can provide knowledge and thus reduce uncertainty. In many cases, uncertainty is not reducible, and stopping-rules exist that help to determine when information-gathering and knowledge-generation (e.g. through further scientific analysis) should come to an end in order to proceed to decision-making¹⁷⁴⁶. It has also been pointed out that new information can generate new uncertainties, both factually and normatively: Additional information can increase subjective uncertainty, as more information about potential impacts can make it more difficult to identify the apparently best option. This section will address the role law plays or can play in guiding decision-making under uncertainty. Law generally grants broad discretion to agencies or legislatures where decisions are taken under uncertainty but still provides normative guidance. This section will identify decision-rules developed in decision and risk theory, and will illustrate how they are or could be turned into legal decision-rules in order to guide impact assessments under uncertainty. This concerns also the relationship between risk and rights, namely to determine when a risk of a human rights violation would, in itself, be a human rights violation.¹⁷⁴⁷ Arguably, part of the objective of an HRIA is to determine whether an initiative would foreseeably expose groups of people to significant (human rights) risks.

¹⁷⁴¹ Human Rights Council, *Guiding Principles on Human Rights Impact Assessments of Trade and Investment Agreements, Report of the Special Rapporteur on the right to food, Olivier de Schutter* [2011], V.6.4.

¹⁷⁴² *Ibid.*, V.6.7.

¹⁷⁴³ *Ibid.*

¹⁷⁴⁴ OHCHR, ‘A Human Rights-Based Approach to Data: Leaving No One Behind in the 2030 Development Agenda: Guidance Note to Data Collection and Disaggregation’, 2016, p. 6.

¹⁷⁴⁵ See section 2.4.2.3.

¹⁷⁴⁶ On stopping-rules and knowledge generation, see section 5.5.4.

¹⁷⁴⁷ For a detailed analysis of the relationship between risks and rights: Klaus Steigleder, ‘Risk and Rights: Towards a Rights-based Risk Ethics: Working Paper, December 2012’ (above, n. 832);

8.2.4.1 Risk Decision Criteria

Risk and decision theorists have developed different criteria on how to make decisions under risk and genuine uncertainty. Many of them are based on the rationale of a cost-benefit analysis. It would be far beyond the scope of this thesis to provide a full overview of the different normative theories developed to guide risk decisions. Instead, some of the most prominent approaches should be illustrated in order to better understand whether these approaches do or should play a role in IA law.

Bayesian approaches concern decision under risk in the narrow sense, i.e. situations where probabilities are known.¹⁷⁴⁸ They are based on a subjective *probability* function and a subjective *utility* function. The utility is defined in terms of (subjective) preferences over uncertain prospects, and probability as (subjective) degrees of belief regarding the likelihood that these outcomes will occur. Bayesian models generally aim at maximizing subjective expected utility.¹⁷⁴⁹ Bayesian models have the advantage that they offer a high degree of precision – once the subjective preferences and probabilities have been determined. This is, however, also a central point of critique: Bayesian decision-making models mainly describe subjective preferences but do not provide rational reasons for choosing one alternative over the other.¹⁷⁵⁰ Consequently, attempts to restrict and “objectivize” the subjective preconditions of Bayesian approaches were developed. One example is “minimal subjectivism”, which essentially requires a “fine-tuning” of qualitative data to make them quantitative.¹⁷⁵¹ These and other approaches are closely related to the logic of cost-benefit analysis and therefore on the intuitively convincing assumption that decision-makers should balance the advantages and disadvantages of a decision.¹⁷⁵²

More important for HRIAs are criteria of how cautious risks should be assessed. Here, one of the major differences between decision-rules (which guide decisions under uncertainty and risk) is the extent to which decision-makers should base their decisions on optimistic or pessimistic assumptions. The Maximin criterion¹⁷⁵³ is a pessimistic and therefore cautious decision-rule that requires a comparison between the worst impacts of each option. Decision-makers should therefore choose the option with the best (or “least-bad”) worst-case outcomes.¹⁷⁵⁴ Generally, law or legal guidelines can stipulate that agencies apply the maximin criterion when making decisions under uncertainty: this can be described as the legalization of risk decision rules. In the United

¹⁷⁴⁸ For an overview of different risk concepts, see section 5.3.

¹⁷⁴⁹ Peterson, *An Introduction to Decision Theory* (above, n. 831), 201 ff.; Nida-Rümelin, Schulenburg and Rath, *Risikoethik* (above, n. 824), p. 74.

¹⁷⁵⁰ Peterson, *An Introduction to Decision Theory* (above, n. 831), p. 205.

¹⁷⁵¹ Peterson, *An Introduction to Decision Theory* (above, n. 831), p. 159.

¹⁷⁵² Nida-Rümelin, Schulenburg and Rath, *Risikoethik* (above, n. 824), p. 86.

¹⁷⁵³ Abraham Wald, ‘Statistical Decision Functions which Minimize the Maximum Risk’, *The Annals of Mathematics*, 46 (1945), pp. 265–280.

¹⁷⁵⁴ Adrian Vermeule, *Law’s Abnegation* (Cambridge, MA: Harvard University Press, 2016), p. 142; Nida-Rümelin, Schulenburg and Rath, *Risikoethik* (above, n. 824), p. 95; Suzanne Kingston, *Greening EU Competition Law and Policy* (Cambridge: Cambridge Univ. Press, 2012), p. 185. John Rawls considers the Maximin criterion as part of the social contract theory in the original position; however, he points out that “the maximin equity criterion and the so-called maximin rule for choice under uncertainty are two very different things”: John Rawls, ‘Some Reasons for the Maximin Criterion’, *The American Economic Review*, 64 (1974), pp. 141–146, p. 141.

States, some agencies tended to apply the Maximin criterion when conducting EIAs. However, the US Supreme Court held that NEPA does not require agencies to base their decision on a worst case scenario.¹⁷⁵⁵

At the other end of the pessimism-optimism scale is the Maximax criterion. It is extremely optimistic and would, in contrast, suggest to only compare the best outcomes of different options: decision-makers would identify the best possible outcome in order to “maximize the maximal value”.¹⁷⁵⁶ This approach conflicts with human rights principles and fundamental principles of public law. It would allow ignoring worst-case scenarios even if they could produce irreversible harm to human rights or other important legal interests. On the other hand, the maximin rule may be criticized as unnecessarily restricting innovation. Arrow and Hurwicz therefore suggested a “compromise” between the two criteria and developed an “optimism-pessimism index” which would consider the best and worst possible outcome for each option.¹⁷⁵⁷ The European Commission Toolbox on Better Regulation appears to favor the latter approach: it requires, for assessments under uncertainty, a worst/best case scenario analysis of different options.¹⁷⁵⁸

Courts may review administrative or legislative decisions under uncertainty in particular on the grounds of proportionality, and courts may review whether the decision-making authority gave rational or, depending on the type of human right affected, compelling reasons for the choice of the decision-rule it applied. Defining the best-case and the worst-case scenarios can increase the transparency of the decision-making process. In addition, some of the decision-rules can become relevant for the proportionality test which also requires a balancing between different rights and interests. Even though doctrinal differences exist between different jurisdictions, at least similar basic elements of proportionality can be found in different legal cultures, such as German, EU and US constitutional law.¹⁷⁵⁹ At least under strict scrutiny tests, courts often come to a point where they simply must compare the different positive and negative consequences of a chosen option with each other. To what extent human rights balancing and cost-benefit analysis are compatible is, however, controversial. There seems to be a broad consensus that cost-benefit analysis – or the other decision-making rules described above – can at least play *some* role in human rights proportionality tests.¹⁷⁶⁰ However, there is a certain risk that a cost-benefit analysis would not be embedded in a normative proportionality test but result in a pure balancing of interests. For example, under a cost-benefit analysis, the human rights “costs” suffered by an infringement might be balanced against the financial “benefits” the public or the state gains;

¹⁷⁵⁵ US Supreme Court, *Robertson v. Methow Valley Citizens Council* (above, n. 853).

¹⁷⁵⁶ Peterson, *An Introduction to Decision Theory* (above, n. 831), p. 47.

¹⁷⁵⁷ Leonid Hurwicz, ‘Optimality Criteria for Decision Making Under Ignorance,’ in: Cowles Commission Discussion Paper: Statistics, No. 370, 11 December 1951; Nida-Rümelin, Schulenburg and Rath, *Risikoethik* (above, n. 824), p. 101; Vermeule, ‘Rationally Arbitrary Decisions (in Administrative Law)’ (above, n. 1097), p. 10. It would go beyond the scope of this book to address other decision rules, such as the mini-max regret criterion developed by L. J. Savage, ‘The Theory of Statistical Decision,’ *Journal of the American Statistical Association*, 46 (1951), pp. 55–67 which basically states that one should choose the option with the “lowest maximal regret”. See, also for a useful introduction and overview: Sven Ove Hansson, ‘Decision Theory: A Brief Introduction,’ Department of Philosophy and the History of Technology, Royal Institute of Technology (KTH), 1994.

¹⁷⁵⁸ European Commission, *Better Regulation Toolbox* (above, n. 204), Tool #57, p. 455.

¹⁷⁵⁹ For example: Grimm, ‘Proportionality in Canadian and German Constitutional Jurisprudence’ (above, n. 1654); Schlink, ‘Proportionality in Constitutional Law: Why Everywhere But Here?’ (above, n. 652).

¹⁷⁶⁰ On the role of cost-benefit analysis and potential limits in proportionality tests: Kai Möller, ‘Proportionality: Challenging the critics,’ *I•CON*, 10 (2012), 709–731.

however, this would generally be inadmissible under human rights law. This is particularly important in the context of HRIAs, as many IA reports identify negative human rights consequences on the cost-side but appear to add expected economic growth on the benefit side of the equation which – and so at least the appearance of a normative human rights balancing is upheld – can be spent to promote the realization of social and economic rights. It is, from a human rights perspective, important to not create the impression that fiscal revenues may justify human rights infringements.

8.2.4.2 The Precautionary Principle

The precautionary principle is a “tool for decision-making in the absence of scientific evidence”¹⁷⁶¹ where there is the risk of serious and irreversible damage. In “almost any regulatory decision, risk is evaluated and weighed”.¹⁷⁶² The precautionary principle has most prominently been applied to decision-making under uncertainty in environmental law (see, by way of example, Article 191 (2) TFEU). The Rio Declaration states:

In order to protect the environment, the precautionary approach shall be widely applied by States according to their capabilities. Where there are threats of serious or irreversible damage, lack of full scientific certainty shall not be used as a reason for postponing cost-effective measures to prevent environmental degradation.¹⁷⁶³

Some critics regard the precautionary principle as an irrational risk decision criterion that has been “imbued with transcendental and cultural values”,¹⁷⁶⁴ while others criticized that it was invoked in international trade disputes to justify protectionist measures.¹⁷⁶⁵ To better evaluate the potential added value the precautionary principle may have for the analysis of human rights impacts, the following section first discusses the scope and function of the precautionary principle. Next, it argues that the precautionary principle can also be applied beyond environmental and health concerns. Rather, it can arguably be applied to all decisions taken under uncertainty and thus also be a legal decision-rule to deal with human rights risks of economic policies.

8.2.4.2.1 Dimension, Scope and Function of the Precautionary Principle

The precautionary principle is difficult to define – some authors have identified 19 different definitions.¹⁷⁶⁶ Instead of reappraising these definitions, the scope and function shall be outlined according to the substantive and the procedural components of the precautionary principle. As regards the substantive component, there are at least two major dimensions and implications of

¹⁷⁶¹ Wagner, ‘Taking Interdependence Seriously: The Need for a Reassessment of the Precautionary Principle in International Trade Law’ (above, n. 1690), p. 720.

¹⁷⁶² Ibid., p. 718.

¹⁷⁶³ *Rio Declaration on Environment and Development* (above, n. 533), Principle 15.

¹⁷⁶⁴ Steve Charnovitz, ‘Preamble SPS’, in: Rüdiger Wolfrum, Peter-Tobias Stoll, and Anja Seibert-Fohr (eds.), *WTO - Technical Barriers and SPS Measures*, p. 372.

¹⁷⁶⁵ For further reference: Ragnar Löfstedt, ‘The Swing of the Regulatory Pendulum in Europe: From Precautionary Principle to (Regulatory) Impact Analysis’, *The Journal of Risk and Uncertainty*, 28 (2004), pp. 237–260, p. 246.

¹⁷⁶⁶ Nida-Rümelin, Schulenburg and Rath, *Risikoethik* (above, n. 824), p. 107.

the precautionary principle, which one could call the “obligation” dimension and the “authorization” dimension. The *authorization* function refers to the authority to regulate risky behavior. It means that the restriction of individual freedoms – freedom of research, the right to run a business, etc. – can be justified even absent full scientific certainty that the respective activity is actually harmful.¹⁷⁶⁷ The *obligation* function concerns a different dimension, namely the obligation to protect third parties from risk. The obligation function can be divided into a weaker and a stronger version.¹⁷⁶⁸ The *weak* obligation dimension covers the most basic function of the precautionary principle as a “principle of public decision making that requires decision-makers in cases where there are “threats” of environmental or health harm not to use ‘lack of full scientific certainty’ as a reason for not taking measures to prevent such harm”.¹⁷⁶⁹ In this weak dimension, the precautionary principle does not require that decision-makers must necessarily react to the risk. It simply requires that inaction should not be justified by a lack of valid information. In other words, uncertainty does not justify inaction.¹⁷⁷⁰ Consequently, if there are clear indications that a measure causes irreversible harm to the environment (or to human rights), the fact that there is not full scientific certainty that the measure will actually cause the human rights violation does not mean that the authority may ignore that potential harm. The *strong* obligation dimension would go beyond the rule that lack of full certainty does not justify inaction; rather, it would imply that a risk of irreversible harm would, in spite of lack of full certainty, require taking action.¹⁷⁷¹ Unlike in the environmental context, an application of the precautionary principle with regard to human rights risks might more easily require such a strong obligation, namely if and insofar the risk of a human rights violation already constitutes a human rights violation. Critics however point out that such a strong dimension might tend to ignore “substitute risks” caused by prohibitive legislation.¹⁷⁷²

A *procedural* implication of the precautionary principle concerns the shift of the burden of proof: it requires that the party who benefits from a risky activity has to prove, to the satisfaction of the authority and/or the public, that the activity is safe.¹⁷⁷³ This makes sense because these parties generally have broad information about the risky initiative, and a shift of the burden of proof would be an additional incentive to reveal the necessary information. This may not be directly transferred to abstract policies, for example trade or development policies. Applying the precautionary principle to policy-making would mean that the burden of proof shifts to the government planning to enact the controversial policy. It is also important to note that the procedural component of the precautionary principle does not resolve the underlying problem how much risk is accepted and acceptable: putting the *burden* of proof on someone does not clarify the *standard* of

¹⁷⁶⁷ Brownsword and Goodwin, *Law and the Technologies of the Twenty-First Century* (above, n. 56), p. 159.

¹⁷⁶⁸ Nida-Rümelin, Schulenburg and Rath, *Risikoethik* (above, n. 824), 118 f.

¹⁷⁶⁹ Elizabeth Fisher, Judith Jones, and René von Schomberg, ‘Implementing the precautionary principle: perspectives and prospects’, in: Elizabeth Fisher, Judith Jones, and René von Schomberg (eds.), *Implementing the precautionary principle*, pp. 1–18, p. 2; Principle 15 of the Rio Declaration; Alexia Herwig and Christian Joerges, ‘The precautionary principle in conflicts law perspectives’, in: G. van Calster and D. Prévost (eds.), *Research Handbook on Environment, Health and the WTO*, pp. 3–40, p. 23.

¹⁷⁷⁰ Jonathan Wiener, ‘Precaution in a Multirisk World’, in: Dennis J. Paustenbach (ed.), *Human and ecological risk assessment*, pp. 1509–1531, p. 1514; Nida-Rümelin, Schulenburg and Rath, *Risikoethik* (above, n. 824), p. 118.

¹⁷⁷¹ Ibid., p. 119; similar: Wiener, ‘Precaution in a Multirisk World’ (above, n. 1770), p. 1515.

¹⁷⁷² Nida-Rümelin, Schulenburg and Rath, *Risikoethik* (above, n. 824), p. 120; Sunstein, *Risk and Reason* (above, n. 857), pp. 103–104.

¹⁷⁷³ Wiener, ‘Precaution in a Multirisk World’ (above, n. 1770), p. 1516.

proof.¹⁷⁷⁴ The standard of proof refers to the aforementioned substantive components of the precautionary principle.

The precautionary principle often appears to be heralded by the EU and its Member States, and it is sometimes juxtaposed with a science-based approach applied under US law. However, this should not be understood as a clear dichotomy. It is rather a simplification that might serve heuristic purposes at the price of being misleading because it incorrectly suggests that precaution is not “science-based”. The difference is rather one of degree and not of kind, i.e. the degree science plays in science-based and precautionary approaches is the main difference.¹⁷⁷⁵ This will be discussed below in more detail. As the precautionary principle is not a clearly specified concept, it leaves space for a “more” science-based or a “more” deliberative interpretation, in other words: it can be applied in the light of the objective-managerial or the analytic-deliberative paradigm identified above (section 5.3).

8.2.4.2.2 The Precautionary Principle and HRIAs

The precautionary principle has also been recognized in order to protect rights and interests beyond the environmental sphere, including human health.¹⁷⁷⁶ In the Report of Special Rapporteur Olivier De Schutter to the UN Human Rights Council on Guiding Principles on HRIA of trade and investment agreements, the Special Rapporteur recommends what could be understood as a human rights precautionary principle: if a human rights impact assessment identifies that there are “reasons to believe that the agreement may cause harm, even where those potentially harmful effects are not demonstrated or cannot be quantified, the burden of proof that it is not harmful falls on the Governments negotiating the agreement.”¹⁷⁷⁷ This reflects the procedural side of the precautionary principle, but again does not specify an applicable standard of proof. Similarly, the UN Human Rights Council endorses what appears to be a human rights precautionary principle in the strong obligation dimension to take preventive and precautionary action:

“human rights litigation is not well-suited to promote precautionary measures based on risk assessments, unless such risks pose an imminent threat to the human rights of specific individuals. Yet, by drawing attention to the broader human rights implications of climate change risks, the human rights perspective, in line with the precautionary principle, emphasizes the need to avoid

¹⁷⁷⁴ Ibid., p. 1517.

¹⁷⁷⁵ Andy Stirling and David Gee, ‘Science, Precaution, and Practice’, *Public Health Reports*, 117 (2002), pp. 521–533, p. 529 illustrating the relationship in a graphic display. The fact that especially US lawyers prefer the term precautionary approach over precautionary principle should not be over-estimated: “Leaving aside the non-binding nature of the Rio Declaration as a political statement and although it uses the term “precautionary approach”—at the insistence of the U.S. State Department - the difference between using the terms “approach” and “principle” seem largely semantic and in practice the two designations have not led to policy differences in the implementation stage.” Wagner, ‘Taking Interdependence Seriously: The Need for a Reassessment of the Precautionary Principle in International Trade Law’ (above, n. 1690), p. 719.

¹⁷⁷⁶ European Commission, *Communication from the Commission on the precautionary principle* (2000), COM(2000) 1 final, para 3; Wagner, ‘Taking Interdependence Seriously: The Need for a Reassessment of the Precautionary Principle in International Trade Law’ (above, n. 1690), p. 718.

¹⁷⁷⁷ Human Rights Council, *Guiding Principles on Human Rights Impact Assessments of Trade and Investment Agreements, Report of the Special Rapporteur on the right to food, Olivier de Schutter* [2011], III.3.2.

unnecessary delay in taking action to contain the threat of global warming.”¹⁷⁷⁸

The central argument is that human rights litigation is not able to adequately protect against the human rights impacts of climate change. Consequently, the Human Rights Council interprets the precautionary principle here in its obligation dimension. Similarly, as seen before, human rights litigation is also often not suitable to prevent the negative human rights impacts of projects or policies under international economic law.

Moreover, several international human rights bodies have enacted precautionary human rights measures.¹⁷⁷⁹ The Inter-American Court of Human Rights held that the risk of emerging damage constitutes sufficient grounds for the presence of violation, and in several cases, the Inter-American Commission and Court have ordered precautionary measures.¹⁷⁸⁰ Similarly, the European Court of Human Rights does not always require proof that the complainants have already become victims of a human rights violation. In several cases, in particular in extradition cases, it was sufficient that applicants were able to prove that there is an immediate or “real” (not only hypothetical) risk of a violation which would result in serious and irreparable harm.¹⁷⁸¹

In light of a more deliberative approach to risk decisions, the strength of the precautionary principle from a human rights perspective is that it values science but does not relent to scientific empiricism. The WTO Appellate Body in the EC-Hormones case seems to reflect such an approach. It found that the Panel erred in law when it excluded from the scope of a risk assessment “all matters not susceptible of quantitative analysis by the empirical or experimental laboratory methods [...]”. Instead, the Appellate Body continued, it is “essential to bear in mind that the risk that is to be evaluated in a risk assessment under Article 5.1 is not only risk ascertainable in a science laboratory operating under strictly controlled conditions, but also risk in human societies as they actually exist, in other words, the actual potential for adverse effects on human health in the real world where people live and work and die.”¹⁷⁸² Being generally applicable to local, transnational and global regulation, the precautionary principle emphasizes the necessity

¹⁷⁷⁸ UN Human Rights Council, ‘Report of the Office of the United Nations High Commissioner for Human Rights on the relationship between climate change and human rights’, A/HRC/10/61, 15 January 2009, para 91.

¹⁷⁷⁹ Center for Justice and International Law (CEJIL) et al., ‘Comparative Analysis of the Practice of Precautionary Measures Among International Human Rights Bodies’, 2012.

¹⁷⁸⁰ IACtHR, *Case of Herrera-Ulloa v. Costa Rica - Provisional Measures* (2001), Chapter IV; Inter-American Commission on Human Rights, Case 504/03, Report No. 69/04, *Community of San Mateo de Huanchor and its members v. Peru*, (2004); Center for Justice and International Law (CEJIL) et al., ‘Comparative Analysis of the Practice of Precautionary Measures Among International Human Rights Bodies’ (above, n. 1779).

¹⁷⁸¹ ECtHR, Application no. 14038/88, *Soering* (1989), para 88–90; Menno T. Kamminga, ‘The Precautionary Approach in International Human Rights Law: How It can Benefit the Environment’, in: David Free-stone and Ellen Hey (eds.), *The Precautionary Principle and International Law*, pp. 171–186, p. 181. In ECtHR, 67\1996\686\876, *Case of Balmer-Schafroth and others v. Switzerland* (1997), the applicants objected a decision to extend a licence for a nuclear power plant which they regarded as unsafe. They claimed, before the ECtHR, a violation of their human rights due to the risks caused by the close-by nuclear power plant. The majority held that the link between the licence to operate the plant and the human rights violations invoked were “too tenuous and remote” (Ibid., para 40). However, the dissenting judges based their arguments explicitly on the precautionary principle, stating that victims and potential victims are entitled to effective judicial protection.

¹⁷⁸² WTO Appellate Body, *European Communities - Measures Concerning Meat and Meat Products (Hormones)* (above, n. 1688), para 187.

of science, but also acknowledges the political and normative elements of regulatory decision-making.¹⁷⁸³ However, for objective-managerial approaches, this is exactly the problem. It is therefore not surprising that the precautionary principle (and how it should be applied) is generally controversial, as it encourages political discourse and normative value-based decisions which are by nature controversial. While the precautionary principle has been criticized as limiting individual freedoms, namely of project developers or companies investing in innovative scientific research, it can equally be heralded from a different angle, namely from a human rights perspective that appreciates space for deliberation. How the precautionary principle could be applied to human rights risk decision will be illustrated further in the second half of this chapter in the context of EU case law (see section 8.3.4.3). The following section will address the role and nature of the IA-report.

8.2.5 The Preparation of the IA-Report

The final work product of the IA-process is the IA report. IA-laws generally define minimum standards for the IA-report, which is central for different reasons. First, it contains the findings of the IA-process in a comprehensive manner; it thus forces those in charge of conducting the IA to abide by certain standards subject to quality review. It has a disciplinary function and is important to make “bureaucracies think”.¹⁷⁸⁴ It is in this sense that the recommended format shall “encourage good analysis and clear presentation of the alternatives including the proposed action”.¹⁷⁸⁵ Under US law, for example, the EIS shall specify the purpose and need to which the agency is responding and describe the alternatives including the proposed action, the affected environment, the environmental consequences, and add a list of the names of the persons who were primarily responsible for or significantly involved in the preparation of the EIS.¹⁷⁸⁶

Second, the IA-report informs decision-makers about the findings and results of the impact assessment process. It also informs the public and public debate. In spite of not being a binding statement, it is a document about which parties are willing to go to court; this was seen in the previous chapter where the NGO *ClientEarth* filed a lawsuit against the European Commission to get access to draft IA-reports.¹⁷⁸⁷ Parties would probably not go to court if an impact assessment report were a mere “paper tiger”.

Third, the IA-report can be an important basis for (quasi-)judicial review, insofar as it demonstrates to what extent the public institution has complied with due diligence standards. The report demonstrates whether or not the authority complied with its obligation to take all relevant aspects, including the results of the consultation process, into account: it is here where the duty to give reason becomes practically relevant.¹⁷⁸⁸ In practice, the IA-report can therefore inform not only political decision-makers or the public, but also judges to identify whether, for example,

¹⁷⁸³ Herwig and Joerges, ‘The precautionary principle in conflicts law perspectives’ (above, n. 1769), p. 20.

¹⁷⁸⁴ Serge Taylor, *Making Bureaucracies Think* (Stanford, Calif: Stanford University Press, 1984).

¹⁷⁸⁵ 40 CFR § 1502.10.

¹⁷⁸⁶ 40 CFR § 1502.13-17.

¹⁷⁸⁷ General Court, *ClientEarth vs. European Commission* (above, n. 1540); ECJ, *ClientEarth v. Commission* (above, n. 1219); see section 7.2.4.2.

¹⁷⁸⁸ Kischel, *Die Begründung* (above, n. 45), p. 129.

human rights impacts were diligently considered, or to identify the true motivation of regulatory or legislative action (e.g. as in the WTO Seals case).

In sum, the formal requirements for IA reports can have a compliance function in the broader sense, namely to the extent that HRIAs make decisions more compliant with substantive human rights. While the IA-report is not legally binding, it is not without legal relevance, in particular because it can help to identify substantive limits and thus have a revealing effect: First, by bringing facts to norms; second, by bringing norms to facts; and third, by informing decision-makers about both. This, in turn, can have factual and normative effects: The factual effect is that norms can only be complied with if their scope and content are known, both in abstract and concrete terms. The normative effect is that liability and the corresponding obligation to prevent harm often requires knowledge, e.g. as described under the complicity-model, and therefore IAs can provide decision-makers with this knowledge in order to lift the “veil of ignorance” that could otherwise be used as a defense.

8.2.6 Interim Conclusion and Outlook

The structured analysis of impacts is a central stage in impact assessments. In a nutshell, it is necessary to identify the policy objectives, different options that can achieve these objectives, an analysis of the impacts of each option and, finally, a comparison between these different impacts. The analysis of impacts as such is generally a technical exercise so that the choice of methodologies is largely discretionary, subject to expert judgment. However, law contains certain principles that may apply, depending on the IA regime, to guide the choice of methodologies. For example, law can prescribe the use of state-of-the-art methodologies, or to what extent quantitative and qualitative methods must be used. Probably more important is the role law plays to guide the comparison between the impacts of each option: First, because a policy option can be identified as being illegal; it would then have to be discarded. Second, in particular in cases of normative uncertainty absent specific thresholds or benchmarks, a comparison between different options enables decision-makers to evaluate impacts in relative terms and chose, in line with the proportionality principle, the least restrictive means. As a reflection of the proportionality principle, this comparison undertaken during an impact assessment can form the basis for indirect judicial review because it provides courts with the necessary information to review the accompanied legal act. This will be addressed in the final chapters.

However, it is often unclear what “alternative” means: it could include the analysis of fundamentally and conceptually different policy options – or of proposals varying only in detail. This will be illustrated in the remainder of this chapter with regard to EU Trade SIAs. As demonstrated above and experienced in the case of domestic EIA law, the consideration of alternatives also opens the door to potential misuse: those conducting the IA can present their preferred policy option in a better light by downplaying or omitting “more benign alternatives” or by exaggerating the negative impacts of other alternatives.

The added value of human rights during this analysis stage is that they can either serve as entitlements and boundary markers¹⁷⁸⁹ or at least as guiding legal policy principles. For example,

¹⁷⁸⁹ Brownsword and Goodwin, *Law and the Technologies of the Twenty-First Century* (above, n. 56), 225 et seq.

the infringement of the principle of progressive realization would justify to exclude an option as illegal, or compel decision-makers to identify the circumstances under which such an option may exceptionally be justified. Human rights can also make a difference insofar as they form a normative baseline against which initiatives must be evaluated.

In information models, an IA report would mainly inform about expected impacts. For transformative IA models, those involved in conducting the IA (including participants during consultation) could arguably have to take a stronger position on whether they regard the risk of a human rights violation as being so high that the respective option should be regarded as illegal. As will be seen, the EU's IA regime bears certain features of such a transformative IA model, holding that policy options that are "not legally viable"¹⁷⁹⁰ can be discarded at an early stage. This does not *per se* prevent the EU legislator from later adopting such a policy option anyway. However, this is less likely to happen if the Commission does not further develop such a policy option. Therefore, such an IA regime has a stronger potential to *transform* the policy development process early on, and thus, indirectly, also the political decision-making process.

Moreover, this chapter addressed the challenge of impact analysis under uncertainty. It has been argued that institutionalized impact assessments are a legal response to risk management. Law can and does provide decision rules that guide the evaluation of impacts under uncertainty. This will be illustrated in more detail in the remainder of this chapter, which will take a closer look at the analysis stage in the EU's Impact Assessment regime.

¹⁷⁹⁰ European Commission, *Better Regulation Guidelines* (above, n. 199), p. 22.

8.3 Analysis of Impacts in the EU Impact Assessment Regime

The EU Impact Assessment regime prescribes analytical steps that are similar to all impact assessments, in part because they are logical, in part because they turned out to be best-practice, and in part because of legal requirements. As seen in the first part of this chapter, the analytical phase consists of different steps: the definition of objectives and identification of alternative policy options, the impact analysis of these alternatives, the comparison of different options, and the drafting of the IA-report.¹⁷⁹¹

The Commission's general IA regime is now closely linked to the better regulation program. In its recent reform, better regulation is largely conceptualized as "Regulatory fitness": impact assessors are therefore required to regularly "cross-check" that the final proposal would contribute to regulatory fitness in the EU.¹⁷⁹² This should include not only a deregulation-program, but also a review of compliance with the Charter of Fundamental Rights.¹⁷⁹³ Nevertheless, one focus of the Better Regulation guidelines is still largely on deregulation. Fundamental and human rights, while frequently emphasized as central to the IA regime, do not play a too prominent role. In the document entitled "toolbox", human rights are classified as "Tool 28". It appears doubtful whether such a classification adequately reflects the normative role human rights should enjoy in the EU's normative order (e.g. according to Art. 2 TEU). As will be seen, it therefore comes as no surprise that not all IAs adequately consider the role and relevance of human rights. In addition to the Better Regulation Guidelines (first level guidance) and the Better Regulation Toolbox (second level guidance), the European Commission's DG Trade has enacted the Trade HRIA Guidelines,¹⁷⁹⁴ which provide additional third level guidance on how to assess human rights impacts of trade policies.¹⁷⁹⁵ The Trade HRIA Guidelines require, in line with the principle of affectedness, to consider compliance with the Charter of Fundamental Rights and with international human rights law for impacts occurring both in the EU and in third countries.¹⁷⁹⁶

As explained above, the general IAs are complemented by Trade SIAs to accompany major trade agreements. In this case, the Commission conducts IAs at the very beginning, namely to inform the decision of the Commission to request a negotiating authorization. Trade SIAs, on the other hand, provide additional "in-depth analysis" of impacts of the trade agreement under negotiation.¹⁷⁹⁷ They are conducted by external consultants but in close cooperation with the Commis-

¹⁷⁹¹ However, the analytical steps described here are not only relevant to the analysis stage as described above in the context of EIA background norms (see section 2.4.1.). As an iterative process, similar analytical approaches are required during the screening/pre-assessment stage when deciding whether a full IA is necessary at all. This pre-assessment also requires, at a high level at least (i.e. in the form of screening) to identify objectives of the initiatives, possible options to achieve the objective, and a determination of whether the impacts of these options are *likely to be significant*.

¹⁷⁹² European Commission, *Better Regulation Guidelines* (above, n. 199), p. 31.

¹⁷⁹³ *Ibid.*, p. 31. For example: it is necessary to make a final check and review whether "[w]ithout affecting the overall achievement of the objectives, [there is] scope to modify some of the legal provisions so as to reduce: [...] Any potential negative impacts on international trade, developing countries etc. [...] Impact on human rights in the partner country in relation to its obligations arising from international treaties (for proposals with an external dimension)", *Ibid.*

¹⁷⁹⁴ European Commission, *Guidelines on the analysis of human rights impacts in impact assessments for trade-related policy initiatives* (above, n. 42).

¹⁷⁹⁵ *Ibid.*, p. 5.

¹⁷⁹⁶ *Ibid.*

¹⁷⁹⁷ European Commission, 'Handbook for Trade Sustainability Impact Assessment' (above, n. 212), p. 14.

sion, which sets up a special SIA interservice steering group (“ISG”).¹⁷⁹⁸ The following sections will address how the norms in these guidelines and general principles of public law guide the identification of objectives and alternative options, the choice of appropriate methodologies for the analysis of impacts and the comparison and evaluation of different impacts.

8.3.1 Identification of Objectives and Alternative Options

The objectives of a specific policy action “should be clearly identified, including the level of policy ambition and the criteria against which alternative policy options would be compared and the success of any initiative assessed.”¹⁷⁹⁹ The primary task of an impact assessment as reflected in the Better Regulation Guidelines is to inform decision-makers about which option to pursue. But at least some requirements in the Better Regulation Guidelines indicate a shift towards a more transformative approach. Commission staff is encouraged to “think outside the box and give due consideration to all different options”, and should give a “solid justification” for “any relevant option that is discarded early on”.¹⁸⁰⁰ The Better Regulation Guidelines describe in more detail how to identify different options, how to screen them and how to identify those that should be retained and subject to further analysis.¹⁸⁰¹ Similar to the screening in the pre-assessment stage – to identify *which initiatives* require a full impact assessment – screening in the analysis stage serves to determine *which options* are viable and require an in-depth analysis.¹⁸⁰²

The Trade HRIA Guidelines specify what screening and scoping means at this stage. Screening, in particular, aims at identifying which particular trade measures under consideration have the potential for significant human rights impacts, and which specific human rights would be likely to be affected.¹⁸⁰³ Trade HRIAs are explicitly based on a normative framework, and the Trade HRIA Guidelines as well as the Trade SIA Handbook explicitly refer to different sources of EU and international human rights, including monitoring bodies, that form the basis of the human rights analysis.¹⁸⁰⁴ After narrowing down the list of issues for the detailed analysis, scoping serves to clarify the scope and content of the in-depth analysis, before the detailed analysis follows.¹⁸⁰⁵

The identification of different options is a key part of the analysis – and therefore, the Guidelines warn that external praise or critique of an impact analysis will mainly depend on how well, serious, transparent and participatory the consideration of alternatives was: it is central for the

¹⁷⁹⁸ See section 6.1.2.

¹⁷⁹⁹ European Commission, *Better Regulation Guidelines* (above, n. 199), p. 20.

¹⁸⁰⁰ *Ibid.*, p. 21.

¹⁸⁰¹ *Ibid.*, pp. 21–23.

¹⁸⁰² Similarly, Trade SIAs start with a screening and scoping exercise, followed by an overall and sectoral impact analysis: European Commission, ‘Handbook for Trade Sustainability Impact Assessment’ (above, n. 212), p. 14.

¹⁸⁰³ European Commission, *Guidelines on the analysis of human rights impacts in impact assessments for trade-related policy initiatives* (above, n. 42), 7 et seq. In the case of HRIAs of trade agreements under negotiation – as opposed to, for example, unilateral trade policies – the phases are still more differentiated. Screening and scoping already takes place during the first phase, the inception phase: European Commission, ‘Handbook for Trade Sustainability Impact Assessment’ (above, n. 212), p. 12.

¹⁸⁰⁴ European Commission, *Guidelines on the analysis of human rights impacts in impact assessments for trade-related policy initiatives* (above, n. 42), pp. 7–8.

¹⁸⁰⁵ *Ibid.*, pp. 8–9.

“credibility” of the whole IA-process.¹⁸⁰⁶ This reflects the perception identified in EIA law that the consideration of alternatives is “at the heart” of the assessment. Therefore, it is necessary to justify and provide good reasons for why relevant options are discarded.¹⁸⁰⁷ While this approach sounds intuitively convincing, it has been pointed out that – albeit with regard to former Guidelines - different interpretations of what is meant by “alternative options” exist:

“Some will think of substantive, detailed options within a certain policy framework, others will think in terms of rough options (no action, financial incentives, regulation etc.), whereas a legal perspective in turn may point to the choice between different legal instruments (regulation, directive, etc.).”¹⁸⁰⁸

The Better Regulation Guidelines shed some light on this question and clarify the concept a little further. First, they make clear that the baseline scenario should always be considered, which then requires to also evaluate the no-policy-change option. Second, the IA should also consider different policy approaches – and not only different options within one policy design. To what extent this actually leads to thinking “outside-the-box” remains to be seen. Third, alternative policy instruments and an alternative scope should be considered.¹⁸⁰⁹ After the screening of these options, especially those that are evidently technically or legally not viable should be sorted out.¹⁸¹⁰ Moreover, the Guidelines warn to uphold “straw man options”, such as proposals that are clearly not desirable and therefore only used to make the preferred option look relatively more appealing. This would, as the Guidelines state, undermine the credibility of the IAs.¹⁸¹¹ In addition, in particular if this straw-man strategy remains undiscovered, another consequence is possible: Such an IA report may, if it fulfills its purpose to inform decision-makers and the public, incorrectly shape peoples’ perception and would thus be one example where an IA process creates (and misuses) institutional epistemic authority.

The identification of options is an iterative process. It should start with “broad definitions of the problem, the objectives and the possible solutions and then narrow them down to what is most relevant.”¹⁸¹² While certain options can be sorted out early on, the more relevant options require further analysis. The Guidelines encourage to also consider options proposed by stakeholders and to not discard alternatives right away because they might be likely to face strong opposition.¹⁸¹³ To what extent this is realized in reality, however, requires further empirical research.

8.3.2 Principles and Methodologies of Impact Analysis

After different policy options are selected, the detailed analysis of their economic, social and environmental impacts and of the affected rights and interests must be carried out.¹⁸¹⁴ While the

¹⁸⁰⁶ European Commission, *Better Regulation Guidelines* (above, n. 199), p. 21.

¹⁸⁰⁷ *Ibid.*

¹⁸⁰⁸ Meuwese, *Impact Assessment in EU Lawmaking* (above, n. 267), 61 f.

¹⁸⁰⁹ European Commission, *Better Regulation Guidelines* (above, n. 199), p. 22.

¹⁸¹⁰ *Ibid.*, p. 22; on fundamental rights: European Commission, *Better Regulation Toolbox*, (above, n. 204), Tool # 28, p. 211.

¹⁸¹¹ European Commission, *Better Regulation Guidelines* (above, n. 199), p. 22.

¹⁸¹² *Ibid.*, p. 17.

¹⁸¹³ *Ibid.*, p. 22.

¹⁸¹⁴ *Ibid.*, 23 et seq.; European Commission, *Guidelines on the analysis of human rights impacts in impact assessments for trade-related policy initiatives* (above, n. 42), 9 et seq.; Meuwese, *Impact Assessment in EU Lawmaking* (above, n. 267), p. 63.

methodological approach must be tailored for each specific initiative, the impact analysis is nevertheless guided by common elements and key principles identified above. In particular, the analysis must be transparent and participatory, objective, proportionate and evidence-based.¹⁸¹⁵ This stage starts again with a scoping process: While the previous section concerned the identification of relevant *options* to be considered for closer analysis, it is now necessary to identify the most significant *impacts* of each option in order to prepare the in-depth analysis of the most likely significant impacts of the most relevant policy options. For that reason, the “IA analysis must assess all the relevant advantages and disadvantages of the retained policy alternatives (“the options”) against the reference of the baseline”.¹⁸¹⁶ All (relevant) potential impacts, irrespective of whether or not they can clearly be predicted, or whether they are direct or indirect consequences of the initiatives, must be considered.¹⁸¹⁷

In particular the Trade HRIA Guidelines specify, at this point, what that means for human rights impacts. It should be assessed “what would be the likely human rights developments if the proposed policy initiative were not implemented”.¹⁸¹⁸ In consequence, the “expected significance of impacts should be assessed in terms of changes relative to the baseline”.¹⁸¹⁹ Such a human rights baseline scenario would allow to later analyze, for example, whether a planned initiative might obstruct the progressive realization of human rights in the EU and its partner countries. This is an important element for human rights-based impact assessments. The Trade HRIA Guidelines indeed mention that such impacts on the ability to fulfill or progressively realize human rights obligations should be assessed, without, however, providing more specific guidance in this regard. Instead, the section on the baseline scenario in the Trade HRIA Guidelines rather draws attention to specific opportunity costs that might arise should the EU not conclude a new trade agreement with another country. This provides an argumentative “template” that can be used to more easily advocate the opening of trade negotiations.

The goal of this stage is to map out all potential positive or negative impacts according to their expected magnitude and likelihood as well as to the parties affected.¹⁸²⁰ For that reason, the Better Regulation Guidelines suggest the following classifications:¹⁸²¹ First, impacts should be classified broadly as economic, social or environmental, and then further by their specific nature (e.g.: Compliance costs; competitiveness and innovation; health, quality of the environment, combating climate change, levels of education and training, fundamental rights, employment and skills, social inclusion, poverty etc.). Next, these impacts should be categorized according to their relationship with the underlying initiatives as direct or indirect, they should clarify what parties, groups or regions are particularly affected and the frequency and certainty of these effects (e.g. as long/short term, one-off, recurrent; certain or likely (risks)). This latter part requires a categorization along the lines of probability and risk.

This mapping exercise then informs the next step, which is to select the most significant impacts, considering the expected overall magnitude, the relevance for specific stakeholders, the im-

¹⁸¹⁵ European Commission, ‘Handbook for Trade Sustainability Impact Assessment’ (above, n. 212), p. 14.

¹⁸¹⁶ European Commission, *Better Regulation Guidelines* (above, n. 199), p. 23.

¹⁸¹⁷ *Ibid.*, 23 et seq.

¹⁸¹⁸ European Commission, *Guidelines on the analysis of human rights impacts in impact assessments for trade-related policy initiatives* (above, n. 42), p. 9.

¹⁸¹⁹ *Ibid.*

¹⁸²⁰ European Commission, *Better Regulation Guidelines* (above, n. 199), p. 25.

¹⁸²¹ *Ibid.*

portance for Commission horizontal objectives, in order to be able to compare these against each other and the baseline scenario.¹⁸²² In a next step, the impact analysis in the narrow sense takes place: this requires the application of scientific qualitative and, where possible and proportionate, quantitative methods, many of which have already been mentioned above.¹⁸²³ It is necessary to analyze, in detail, the most significant impacts of the most relevant policy options. The analysis should provide a “solid understanding of the extent to which each option achieves the objectives, with what benefits and at what costs at the aggregate level and for affected parties”.¹⁸²⁴

The Guidelines make clear that there is no single best methodology, given the great variety of different impacts caused by different initiatives. Rather, those in charge of conducting the IA must identify, on a case-by-case basis, the most suitable methodology, inter alia among those briefly illustrated at the beginning of this chapter. So even within the EU, there is not (yet) a broad consensus on adequate methodologies, given that all policy initiatives are different and require individual solutions. However, the IA-guidelines establish certain principles, namely that an impact assessment should be “comprehensive, proportionate, evidence-based, open to stakeholders' views, unbiased, prepared collectively with relevant Commission services, embedded in the policy cycle, transparent and be of a high quality”.¹⁸²⁵

What is the role of law at the analysis stage? In spite of the generally broad discretion for the choice of methods, law explicitly and implicitly guides this choice. This includes, first, rules which explicitly address the conduct of IAs. As mentioned above, the Better Regulation Guidelines emphasize the value of quantitative methods: the reasons for not undertaking a quantitative analysis—because it is not possible or not proportionate—must be explained in the IA report.¹⁸²⁶ The Trade SIA Handbook recommends a mix of methodological tools, however it also appears that economic modelling is preferred over other social science methods like case studies.¹⁸²⁷ It emphasizes the importance to use quantitative data and consult stakeholders, but does not contain specific human rights measurement tools such as indicators.¹⁸²⁸ However, if human rights indicators are used, the IA report should explain the choice and type of indicators. As the Better Regulation Guidelines state, the choice of methods should be explained and justified in the IA report.

A formal accountability mechanism that allows reviewing the choice of methodologies is therefore the duty to give reason: those in charge of conducting the IA must explain and justify the choice of methods in the IA report.¹⁸²⁹ This duty to give reason is an expression of the principles of transparency and accountability. One can obviously argue about how far this obligation to state reasons goes. As one critic pointed out, the SIA for the trade agreement between the EU

¹⁸²² Ibid., p. 25 et seq.

¹⁸²³ Ibid., p. 26; see also section 8.2.2.

¹⁸²⁴ European Commission, *Better Regulation Guidelines*, p. 27.

¹⁸²⁵ Ibid., p. 17; Hachez and Lein, ‘Assessing EU Human Rights Impact Assessments’ (above, n. 507), p. 250.

¹⁸²⁶ European Commission, *Better Regulation Guidelines* (above, n. 199), p. 26.

¹⁸²⁷ Hachez and Lein, ‘Assessing EU Human Rights Impact Assessments’ (above, n. 507), p. 251.

¹⁸²⁸ Ibid., p. 252. The “Operational Guidance on taking account of fundamental rights” point out that it will often be very difficult to quantify or monetize human rights impacts. European Commission, *Operational Guidance on taking account of Fundamental Rights in Commission Impact Assessments* [2011], p. 17; Hachez and Lein, ‘Assessing EU Human Rights Impact Assessments’ (above, n. 507), p. 252.

¹⁸²⁹ European Commission, *Better Regulation Guidelines* (above, n. 199), p. 26.

and Tunisia relied on indicators to assess human rights impact, without, however, clearly displaying (e.g. in a dedicated table) which indicators were used, and whether they qualify as structural, process or outcome indicators.¹⁸³⁰ Failure to do so makes it more difficult to assess whether appropriate human rights indicators were used.

Second, not only IA-specific rules, but also general human rights principles guide the choice and application of methods. What exactly that implies depends on the type of initiative accompanied by an IA, and on which human rights are affected. This would require a specific analysis from a micro-perspective. However, to briefly illustrate where human rights law would affect the choice of methods and the design of the impact analysis: one goal of human rights is to protect the legal interests of disenfranchised and insular groups. The principle of equality and non-discrimination would arguably require to use disaggregated data in order to determine to what extent certain impacts will particularly affect, for example, indigenous people, minorities, or women. This is reflected in the Trade SIA Handbook, where consultants conducting the assessment shall “identify individuals or specific groups of people that are likely to be specifically affected by those impacts”.¹⁸³¹ Consequently, a CGE model could be insufficient in cases where a meaningful human rights analysis would require the use of disaggregated data.¹⁸³² However, as discussed above, human rights arguments can be raised in favor and against the use of disaggregated data where sensitive data such as racial or ethnic origin are concerned (see section 2.4.2.3). A solution could mean that, in general, relevant disaggregated data must be used to adequately assess human rights impacts in line with the non-discrimination principle, unless the collection and use of such disaggregated data (e.g.: racial or religious data, data concerning an indigenous status, etc.) would be unconstitutional in the country where the impacts are expected to occur.¹⁸³³

Third, the EU’s guidelines on impact assessments contain certain IA-specific principles. An overarching principle is that the analysis must be evidence-based. For example, the Trade SIA Handbook clearly states that the impact analysis “should be based on the best available research, information and data presented in a transparent manner.”¹⁸³⁴ This requirement – that the use of scientific evidence must be state-of-the-art – has already been mentioned above, as one element of the concept of human rights protection through organization and procedure.¹⁸³⁵ Failure to comply with this requirement may authorize courts to invalidate a decision. Arguably, the principle of evidence-based analysis as laid down in the Trade SIA Handbook could, therefore, also become a justiciable legal principle – should trade agreements be challenged before courts on the ground that the human rights impacts were not analyzed based on the best available research, information and data. As will be seen later, the requirement to consider state of the art scientific expertise and knowledge is, in particular, recognized as an important element of the

¹⁸³⁰ Walker, ‘Human Rights in the Trade and Sustainability Impact Assessment of the EU-Tunisia Free Trade Agreement’ (above, n. 57), p. 111.

¹⁸³¹ European Commission, ‘Handbook for Trade Sustainability Impact Assessment’ (above, n. 212), p. 22.

¹⁸³² ‘EU-Andean Trade Sustainability Impact Assessment: Final Report’ (above, n. 1057), p. 93; European Court of Auditors, ‘Are preferential trade arrangements appropriately managed?: Special Report’, No 2/2014, p. 45.

¹⁸³³ For a closer analysis: Michael Riegner, *Informationsverwaltungsrecht internationaler Institutionen* (Tübingen: Mohr Siebeck, 2017), p. 448.

¹⁸³⁴ European Commission, ‘Handbook for Trade Sustainability Impact Assessment’ (above, n. 212), p. 6.

¹⁸³⁵ See section 3.2.1.5.

legal precautionary principle under EU and WTO law.¹⁸³⁶ Failure to use the best available evidence may support the invalidation of a legal act.

Another principle is that IAs are transparent and participatory. While participation and transparency were addressed in the previous chapter, it is important to note that the EU's impact assessment guidelines recognize the value of participation and transparency for the analysis stage as well. This is most explicitly made clear in the Trade SIA Handbook, which defines the three phases of the assessment. During the inception phase, preliminary screening and scoping are carried out to identify the issues that are likely to have significant impacts, and the methodological approach must be explained. Already the draft inception report is made public for comments;¹⁸³⁷ consequently, it is possible for external stakeholders to review both the screening and scoping exercise, and the choice of methodologies to be used for the impact analysis.

Another IA-specific principle is the already mentioned principle of proportionate analysis.¹⁸³⁸ The IA guidelines define the principle of proportionate analysis as follows:

“The scope and analysis conducted must be tailored to the particular intervention, its maturity and the data available. For some criteria, new data will need to be collected, analysed and compared with other findings. For others, a short summary can be presented based on existing reports and information or providing a standard explanation [...]”.¹⁸³⁹

The procedural *proportionate analysis principle* should therefore be clearly distinguished from the substantive *principle of proportionality*.

Moreover, in particular the Trade HRIA Guidelines and the Trade SIA Handbook prescribe a normative approach to human rights analysis, which means that the analysis must be explicitly based on human rights.¹⁸⁴⁰ They explicitly recognize that human rights are interrelated and interdependent.¹⁸⁴¹ The human rights analysis must therefore, in principle, consider political, civil, economic, social and cultural rights. For the general IA regime, all departments must use a “Fundamental Rights checklist”.¹⁸⁴² It is also made clear that, when assessing the “impacts of initiatives with effect outside of the EU, consideration would have to be given to international human rights instruments. An example is the impacts on Rights in an External-Trade context for which

¹⁸³⁶ See section 8.2.4.2.

¹⁸³⁷ Ibid., p. 12.

¹⁸³⁸ European Commission, *Better Regulation Guidelines* (above, n. 199), pp. 17 and 56; Meuwese, *Impact Assessment in EU Lawmaking* (above, n. 267), 58 ff. As the conduct of IAs is time and money consuming, the assessment should focus on the most significant impacts. This concerns all aspects, ranging from the scoping via the analysis to the type of consultation necessary: Ibid.

¹⁸³⁹ European Commission, *Better Regulation Guidelines* (above, n. 199), p. 56.

¹⁸⁴⁰ European Commission, ‘Handbook for Trade Sustainability Impact Assessment’ (above, n. 212), p. 21; European Commission, *Guidelines on the analysis of human rights impacts in impact assessments for trade-related policy initiatives* (above, n. 42).

¹⁸⁴¹ Ibid., 6, 15 et seq.

¹⁸⁴² European Commission, *Better Regulation Toolbox* (above, n. 204), Tool #28, p. 211.

further guidance exists on how to address human/fundamental rights in impact assessments supporting Trade agreements".¹⁸⁴³

In conclusion, the EU guidelines guide HRIAs in a manner that reflects human rights principles as illustrated above: transparency and participation, non-discrimination, explicit reference to human rights, and the recognition of human rights as indivisible and interrelated. Still, the actual HRIAs carried out so far have faced criticism. Walker has evaluated the human rights analysis in the Trade SIA accompanying the EU-Tunisia DCFTA. In his analysis, he identified several weaknesses, arguing that the human rights analysis was incomplete, and that the classification of some impacts as insignificant was, at times, not well-founded.¹⁸⁴⁴ The weaknesses he identified are not (or not primarily) caused by inadequate guidelines. Assessing the human rights impacts is a complex exercise, facing factual and normative uncertainties, and major obstacles for an adequate human rights analysis are therefore time, resources and expertise. It would be beyond the scope of this book to review how well human rights analysis is conducted in particular cases. This must be left to further research from a micro-perspective.¹⁸⁴⁵ However, the final chapters will look at rules and principles that can increase compliance with HRIA norms and give more effect to HRIAs. This includes the identification and analysis of factors that may provide incentives for decision-makers to allocate more time, resources and expertise to human rights analysis.

8.3.3 Comparison and Evaluation of Impacts

Once the most significant impacts of the most relevant policy options have been analyzed as far as required by the principle of proportionate analysis, the impacts of each option must be compared and evaluated.¹⁸⁴⁶ The comparison between different options is an essential part of the IA, given that - in the absence of clear normative standards - evaluating impacts in relative terms is often the only chance to assess the proportionality of an initiative. In the end, the IA should present all information relevant to policy-makers and, where appropriate, the IA-Report could also suggest the preferred option.¹⁸⁴⁷ Similarly, there is no best method to compare the options, but the Guidelines state that "[c]ost-benefit analysis, cost-effectiveness analysis, compliance cost analysis and multicriteria analysis are the most commonly used methods to do this."¹⁸⁴⁸ The Guidelines do not contain any more specific decision criteria like those identified under domestic EIA law and in decision theory.¹⁸⁴⁹

The Trade HRIA Guidelines require to determine the expected significance of impacts in terms of changes to the relative baseline scenario. The baseline scenario is defined as the likely human

¹⁸⁴³ Ibid., Tool #28, p. 209. The fact that "additional" consideration must be given to international human rights law means that the European Commission assumes that fundamental rights equally apply extraterritorially - at least as a normative basis for the conduct of impact assessments.

¹⁸⁴⁴ Walker, 'Human Rights in the Trade and Sustainability Impact Assessment of the EU-Tunisia Free Trade Agreement' (above, n. 57), 111 et seq.

¹⁸⁴⁵ This thesis mainly looks at the institutionalization of HRIAs from a macro-perspective: see section 1.4.1.

¹⁸⁴⁶ European Commission, *Better Regulation Guidelines* (above, n. 199), 28 et seq.

¹⁸⁴⁷ Ibid., p. 29.

¹⁸⁴⁸ Ibid., p. 28.

¹⁸⁴⁹ See section 8.2.4.

rights developments if the proposed policy initiative were not implemented.¹⁸⁵⁰ This includes the consideration of opportunity costs that could arise if, for example the EU failed to conclude a new trade agreement with a partner country. This is consequent for a comprehensive analysis. However, more problematic is the single example that is given as potential opportunity costs. It should be considered whether the failure to conclude an agreement with the partner country would “leave space for the expansion of activities by other economic partners whose companies abide by less stringent codes of conduct than European companies would leave”.¹⁸⁵¹ This example reflects a bias in favor of agreements with the EU; it presumes that opportunity costs for failure to conclude an agreement with the EU may be high and thus makes an EU agreement look generally more favorable in the light of human rights.

Comparisons between alternative options are not always easy, in part because impacts are not or cannot always be quantified.¹⁸⁵² The Court of Auditors held that the depth of analysis of different options is often – in about 50 % of the cases – unbalanced: “significantly more information was presented for a subgroup of the options and often only for the specific option that was later retained for the Commission proposal”.¹⁸⁵³ This finding seems to support the fear of critics that IAs are, at least if not conducted by independent experts, used to justify the policy option that was preferred anyway. As will be seen in the next chapters, the comparison between, and evaluation of, different options are of important legal relevance and a basis for judicial review: an inadequate evaluation of all reasonable alternatives means that the European courts might annul a decision due to an abuse of discretion because the European Commission or the legislature did not sufficiently analyze the potential impacts of all reasonable alternatives.

Regarding the analysis of human rights impacts under the previous IA regime, it had been criticized that the EU’s IA guidelines are unspecific with regard to a hierarchy of norms, and that in particular the Trade SIA guidelines regarded the consideration of human rights only as complementary.¹⁸⁵⁴ This is contrary to an understanding where human rights are fundamental norms that “trump” other rules and principles.¹⁸⁵⁵ It would clearly be incompatible with human rights if they can be trumped by other norms, such as by WTO law. This is, however, what appears to be assumed in some Trade SIAs. In the context of the EU-ACP EPA Trade SIA, the SIA-report found that reciprocity under trade law can have significant impacts on developing countries where domestic producers compete with EU imports (which could also be conceptualized as an effect on the enjoyment of the right to an adequate standard of living). Still, the SIA report found that international trade law leaves only limited space for asymmetry in trade agreements between the EU and developing countries. A proper human rights impact assessment, however, should have taken a different starting point: it should first assess all options to identify those that best comply with human rights obligations, irrespective of whether or not they would also be com-

¹⁸⁵⁰ European Commission, *Guidelines on the analysis of human rights impacts in impact assessments for trade-related policy initiatives* (above, n. 42), p. 9.

¹⁸⁵¹ *Ibid.*, p. 10.

¹⁸⁵² European Court of Auditors, *Impact Assessments in the EU Institutions: Do they support decision-making?* (above, n. 1312), p. 36.

¹⁸⁵³ *Ibid.*, p. 39.

¹⁸⁵⁴ Elisabeth Bürgi, ‘EU Trade Agreements and their Impacts on Human Rights: Study Commissioned by the German Federal Ministry for Economic Cooperation and Development (BMZ)’, 2014, p. 16.

¹⁸⁵⁵ Nickel, *Making Sense of Human Rights* (above, n. 517), 41 ff. On the hierarchy of norms in international law: Bryde, ‘International Democratic Constitutionalism’ (above, n. 2), p. 106.

pliant with WTO law. Only in a second step would potential conflicts between trade law (e.g.: Art. XXIV GATT) and human rights be analyzed¹⁸⁵⁶ and, if possible, be resolved.

At least on paper, the new Better Regulation Toolbox, the updated Trade SIA handbook and the Trade HRIA guidelines recognize the supremacy of human rights. They require to assess potential interferences with human rights and, if so, whether such infringements are justified.¹⁸⁵⁷ Options that violate human rights can be discarded as “not legally viable”.¹⁸⁵⁸

However, the Guidelines are still unsatisfactory in another aspect. While they correctly point out that such a human rights analysis requires a necessity and proportionality test, it remains unclear what exactly that means, in particular where human rights impacts are diffuse. It will often be difficult or impossible due to factual and normative uncertainties to identify a violation of human rights. What is more likely is that simply a negative effect on the enjoyment of human rights can be identified.¹⁸⁵⁹ The respective guidelines are relatively silent on how to address these challenges and in particular how to deal with residual risks. One normative challenge in this context regards how, from a human rights perspective, potentially negative impacts on human rights can be evaluated before the background of expected economic growth. The Trade HRIA Guidelines assume that expected economic growth may be considered as having positive indirect human rights impacts:

“At the same time, a trade agreement which delivers increased growth in the future may also produce positive indirect impacts on the rights to health and to healthcare, if the increased growth generates higher government revenues that are allocated to human rights related policy objectives such as improved primary healthcare.”¹⁸⁶⁰

This is a typical but problematic argument, namely that liberalization leads to economic growth which in turn increases demand for labor and will improve social services.¹⁸⁶¹ Even if a trade agreement leads to economic growth – which is almost impossible to predict with certainty, and predictions may be distorted by a confidentiality bias – the consideration of expected economic growth in an HRIA can be problematic for two reasons: From a practical perspective, a trade or investment agreement does generally not provide for effective mechanisms to ensure that a trickle-down effect actually occurs and that a state actually invests in, for example, healthcare. The Commission has indicated its willingness to include a Trade and Sustainable Development

¹⁸⁵⁶ Bürgi, ‘EU Trade Agreements and their Impacts on Human Rights: Study Commissioned by the German Federal Ministry for Economic Cooperation and Development (BMZ)’ (above, n. 1854), p. 17; Similarly, Walker observes that the Trade SIA accompanying the EU-Tunisia DCFTA also conducts a trade compatibility test which assumes that human rights must comply with trade rules. A human rights analysis would, arguably, first and foremost identify options that are “best suited to improving the human rights situation”. Walker, ‘Human Rights in the Trade and Sustainability Impact Assessment of the EU-Tunisia Free Trade Agreement’ (above, n. 57), p. 116.

¹⁸⁵⁷ European Commission, *Guidelines on the analysis of human rights impacts in impact assessments for trade-related policy initiatives* (above, n. 42), p. 11.

¹⁸⁵⁸ European Commission, *Better Regulation Guidelines* (above, n. 199), p. 22.

¹⁸⁵⁹ Zerk, ‘Human Rights Impact Assessment of Trade Agreements’ (above, n. 30), p. 17. See already above section 2.4.2.

¹⁸⁶⁰ European Commission, *Guidelines on the analysis of human rights impacts in impact assessments for trade-related policy initiatives* (above, n. 42), p. 13.

¹⁸⁶¹ Hachez and Lein, ‘Assessing EU Human Rights Impact Assessments’ (above, n. 507), p. 253.

Chapter into the negotiated agreement. However, the argument that economic growth could lead to higher levels of economic and social human rights in EU partner countries cannot ignore the primary duty-bearers in this regard, the government of the partner country. It would therefore, from a human rights perspective, be necessary for an EU Impact Assessment Report to also include recommendations directed towards a partner state's government.¹⁸⁶² While this would be politically sensitive and could be perceived as an intrusion into the third state's sovereignty, such information would nevertheless be important should the EU, under the principle of policy coherence for development¹⁸⁶³, decide to support flanking measures in the context of its development cooperation policy. The viability of these flanking measures should therefore already be assessed during the IA in order to count as a meaningful mitigation measure.

Another problem with regard to the "economic growth for human rights" argument is rather normative. The consideration of expected economic growth as part of a *human rights* assessment may result in balancing between negative human rights impacts on the one hand and, even though indirectly, fiscal revenue. There is, consequently, a risk that the overall human rights impact of an initiative would appear in a different light. There could be a direct negative impact on human right x. At the same time, there might be an indirect positive impact on human rights y if increased economic growth generates higher government revenue that is allocated to policies supporting human right y. How do these human rights effects relate to each other?

First, it is helpful to consider the difference between human rights as entitlements and human rights as legal policy objectives, and thus to distinguish between cases where a policy leads to human rights *infringements* and those where negative impacts on the enjoyment of human rights may occur but would remain below the infringement-threshold. If the impact analysis finds that there is likely to be an infringement of human right x (as opposed to a negative impact on the enjoyment of human rights below an infringement level), it is not possible to justify such an infringement just because the unrelated human right y might be promoted. Otherwise, the normative content of human rights would be rendered void, and human rights would become mere interests or values. In this case, the policy option must be discarded. However, where the expected impacts do not constitute a human rights infringement but "only" somehow affect human rights below the threshold of infringement, it may nevertheless be justified to proceed with an initiative if the predicted overall human rights impacts are positive. In these cases, the risk that human rights are degraded to pure values, as Habermas observed, is less severe; rather, human rights as principles and policy objectives guide regulatory or legislative decision and require some form of optimization.¹⁸⁶⁴

Second, even where human rights are concerned in their non-individualized function as policy objectives, the mere expectation that potential economic growth might have a positive effect on investments in sectors such as healthcare and education is often nothing more than a vague hypothesis. It is a statement quickly written into the HRIA-report that would allow defending an initiative and that could make negative human rights effects look, overall, less problematic. As such, it would be a bookkeeping trick to turn a negative human rights balance into a positive one. Consequently, in order to be meaningful, the HRIA-report should do more than that and

¹⁸⁶² Walker, 'Human Rights in the Trade and Sustainability Impact Assessment of the EU-Tunisia Free Trade Agreement' (above, n. 57), p. 116.

¹⁸⁶³ See section 4.5.3.

¹⁸⁶⁴ See, on the Habermas-Alexy debate, above 3.2.2.3.

specify adequate measures to ensure the expected progressive realization of socio-economic rights. Thus, authorities could be better held accountable afterwards if the expected positive impacts on socio-economic rights do not occur. As illustrated above, this is difficult where human rights in third countries are concerned. Another approach to avoid the risk that that human rights impacts are, de-facto, balanced against expected economic growth would be the requirement that no overall human rights evaluation takes place. A summary like “the overall impact on human rights is positive” or “the overall impact on human rights is negative but small” at least creates the impression of inadmissible balancing. In addition, much of the human rights analysis could get lost in such a summary conclusion.¹⁸⁶⁵ Instead, and this is recommended in the Trade HRIA Guidelines, the results of the analysis should be accompanied by a table summarizing the impact on human rights of the different options, including a brief description of which human rights are affected.¹⁸⁶⁶ While such a table is necessarily crude with regard to the classification of the significance of impacts – indicated as “+”, “-”, or “0” – it would at least not sacrifice certain affected human rights over others.

A related problem concerns the consideration of mitigating measures when assessing human rights impacts. The consideration of mitigating measures in impact assessment is not unproblematic, as discussed in the context of domestic EIA law,¹⁸⁶⁷ as it may distract from the actual impacts and rather draw a more positive picture – even if it is not guaranteed whether mitigating measures will actually be implemented. It is therefore important to also assess the expected impacts without the mitigating measures first. Only then would it be possible, in a next step, to evaluate whether the proposed mitigation measure is adequate. Consequently, the expected impacts and the respective mitigation measures are clearly presented and can be evaluated. For example, the EU Trade Sustainability Impact Assessment with the Andean Community took the risk of negative impacts on indigenous peoples into account and highlighted further cooperation and initiatives on different social and health issues.¹⁸⁶⁸ However, to what extent these mitigating measures are actually applied is difficult to monitor. So there is a risk that mitigating measures are recommended in a report in order to be able to give “the green light” to an initiative, irrespective of whether these mitigating measures will ever be implemented. An HRIA report should therefore describe mitigation measures as precisely as possible, to be able to hold decision-makers accountable (e.g. if the EU does not fulfill its promise to support mitigation measures through development assistance).

Finally, another problem that has already been identified above and that becomes relevant in the context of trade policies concerns what actually counts as *alternatives*. EU Trade SIAs – in line with the Trade, Growth and Development” strategy - are generally based on the assumption that liberalization is desirable and that only some negative impacts need to be adjusted.¹⁸⁶⁹ Consequently, EU Trade SIAs compare mainly two options, namely a baseline scenario (no policy

¹⁸⁶⁵ Walker, ‘Human Rights in the Trade and Sustainability Impact Assessment of the EU-Tunisia Free Trade Agreement’ (above, n. 57), p. 120.

¹⁸⁶⁶ European Commission, *Guidelines on the analysis of human rights impacts in impact assessments for trade-related policy initiatives* (above, n. 42), p. 12

¹⁸⁶⁷ See section 6.2.2.2.

¹⁸⁶⁸ Commission Services Position Paper on the Trade Sustainability Impact Assessment (SIA) of the Multiparty Trade Agreement with Andean Countries (Nov. 2010), available at http://trade.ec.europa.eu/doclib/docs/2010/november/tradoc_146987.pdf.

¹⁸⁶⁹ Bürgi, ‘EU Trade Agreements and their Impacts on Human Rights: Study Commissioned by the German Federal Ministry for Economic Cooperation and Development (BMZ)’ (above, n. 1854), p. 16.

change) and a liberalization scenario, and variations among the liberalization scenario are – if at all – minor and all “in line with the trade liberalization agenda”.¹⁸⁷⁰ So usually no further trade policy scenarios are being considered, e.g. one option with only partial trade integration that might have more positive and/or less negative human rights impacts.¹⁸⁷¹ It is therefore difficult for such a Trade SIAs to enable double-loop learning¹⁸⁷² and to provide a process to critically review powerful underlying paradigms. Assessing more scenarios, for example a trade liberalization scenario with different sorts of exceptions to trade rules, would allow a more nuanced analysis that might better reflect human rights concern.¹⁸⁷³ This is particularly important if one considers the lessons learnt from domestic EIA law, namely that the consideration of alternative options is at the heart of the analysis.¹⁸⁷⁴

8.3.4 Impact Analysis and Residual Risks

The first part of this chapter has identified decision-rules, such as the precautionary principle, to deal with uncertainty. This part of the chapter will address what EU law has to offer on how to deal with residual human rights risks.

8.3.4.1 Decision-making Tools and Risk

The Better Regulation Guidelines explicitly describe different methods of information and knowledge generation but also how to deal with remaining uncertainty. The EU Impact Assessment Regime contains several organizational and procedural mechanisms to respond to the aforementioned biases that affect decision-making under uncertainty.¹⁸⁷⁵ IAs in the EU are based on what could be called a principle of collective preparation of the IA-report which may respond to some of the risk biases identified above. For example, the Better Regulation Guidelines require that evaluations, impact assessments (in the narrow sense), stakeholder consultations, policy proposals and implementation plans be prepared collectively by the services within an interservice group (ISG).¹⁸⁷⁶ This is, first, a tool of information gathering – in the form of internal participation using knowledge sources within the institution – given that knowledge within the European Commission is dispersed.¹⁸⁷⁷ At the same time, such a collective preparation can help to overcome certain risk biases, such as the limiting effects of availability heuristics by introduc-

¹⁸⁷⁰ Ibid., p. 15. An example is the SIA for the DCFTA between the EU, Georgia and Moldova. The SIA compared a specified liberalization/integration scenario encompassing the DCFTA with a baseline scenario that assumes no DCFTA in place: ECORYS, ‘Trade Sustainability Impact Assessment in support of negotiations of a DCFTA between the EU and Georgia and the Republic of Moldova’, Final Report, 27 October 2012, A13.

¹⁸⁷¹ Bürgi, ‘EU Trade Agreements and their Impacts on Human Rights: Study Commissioned by the German Federal Ministry for Economic Cooperation and Development (BMZ)’ (above, n. 1854), p. 15.

¹⁸⁷² On the concept of and requirements for double loop learning: Argyris, *Knowledge for Action* (above, n. 1060), p. 50.

¹⁸⁷³ Walker, ‘Human Rights in the Trade and Sustainability Impact Assessment of the EU-Tunisia Free Trade Agreement’ (above, n. 57), p. 110.

¹⁸⁷⁴ See section 8.2.1.

¹⁸⁷⁵ See section 5.4.4.

¹⁸⁷⁶ European Commission, *Better Regulation Guidelines* (above, n. 199), p. 7.

¹⁸⁷⁷ On this type of knowledge generation see section 5.5.3.1.

ing different perspectives and thus increasing the availability of perspectives which influence decisions under uncertainty.

One major type of uncertainty is normative uncertainty. The normative content of human rights is often unclear, at least if one only looks at human rights texts in international human rights treaties or domestic constitutions. Case law or other forms of interpretation is necessary to reduce normative uncertainty and allow for a meaningful human rights analysis. The Trade HRIA Guidelines respond to this challenge of normative uncertainty. They encourage the use of different sources of human rights, such as EU and UN human rights reports.¹⁸⁷⁸ This is a response to normative uncertainty: In particular the UN General Comments interpret and specify human rights standards that were unclear. One might have discussed whether these non-binding provisions may guide EU decision-making at all. It is therefore a useful clarification that the Trade SIA Handbook and the Trade HRIA Guidelines explicitly *authorize* and *encourage* Commission staff to rely on interpretations stemming from non-EU human rights institutions. Consequently, the Commission - and its external consultants where applicable - actively use information sources produced, inter alia, by UN treaty bodies and NGOs.¹⁸⁷⁹

This is different from, for example, impact assessments at the World Bank which largely avoid reference to human rights and human rights institutions. This means that, in the EU's IA regime, it is legally admissible and culturally accepted to use external human rights sources, which constitutes a shift of the argumentative burden of proof: Commission staff does not have to justify the consideration of these sources; they are rather declared to be reliable and legitimate sources of external information and knowledge. To what extent these sources are actually used would require further investigation. During its 2010 investigations into the EU's general impact assessments, the European Court of Auditors, found that not all available sources of information were used, for example EUROSTAT, the European Economic and Social Committee or the Commission's Joint Research Center (JRC), were generally not actively involved.¹⁸⁸⁰

With regard to remaining factual uncertainty, transparent risk communication is crucial as the "value of analysis depends on how well its limits are understood".¹⁸⁸¹ The clear communication of uncertainty is an important element of good risk and impact analyses; the Better Regulation Guidelines therefore encourage to explicitly acknowledge the "known unknowns".¹⁸⁸² This ideally helps to reduce closed ignorance.¹⁸⁸³ In particular, factual uncertainty should be quantified if possible. For that reason, the Better Regulation Toolbox contains instructions on how to conduct uncertainty and sensitivity analysis, the objective of which is to quantify the uncertainty in model results.¹⁸⁸⁴

¹⁸⁷⁸ European Commission, *Guidelines on the analysis of human rights impacts in impact assessments for trade-related policy initiatives* (above, n. 42), p. 10.

¹⁸⁷⁹ European Commission, 'Handbook for Trade Sustainability Impact Assessment' (above, n. 212), p. 22; European Commission, *Guidelines on the analysis of human rights impacts in impact assessments for trade-related policy initiatives* (above, n. 42), p. 9.

¹⁸⁸⁰ European Court of Auditors, *Impact Assessments in the EU Institutions: Do they support decision-making?* (above, n. 1312), p. 40.

¹⁸⁸¹ Fischhoff and Kadavy, *Risk* (above, n. 825), p. 150.

¹⁸⁸² European Commission, *Better Regulation Guidelines* (above, n. 199), p. 27.

¹⁸⁸³ On "closed" and "open" ignorance see section 5.2.

¹⁸⁸⁴ European Commission, *Better Regulation Toolbox* (above, n. 204), p. 510.

The Better Regulation Toolbox also contains certain risk decision rules. The Toolbox requires, for example, to use a worst/best case scenario analysis for different options in the case of decision-making under uncertainty.¹⁸⁸⁵ This corresponds with the “optimism-pessimism-index” described above, a middle-path between the maximax and maximin rules.¹⁸⁸⁶ The optimism-pessimism index provides a more moderate approach and would not only rely on optimistic predictions (which may imply high human rights risks), or on pessimistic scenarios (which may excessively restrict innovation).

8.3.4.2 EU Impact Assessments and the Precautionary Principle

Previously, I have argued that there is room for the precautionary principle to deal with human rights risks of regulation. However, with regard to EU law, some authors have argued that the “impact assessment regime” and the “precautionary principle” reflect two distinct “strategies” to achieve better regulation.¹⁸⁸⁷ Unlike the precautionary principle, impact assessments are allegedly based on a more scientific cost-benefit analysis and the general assumption that regulation should only be put in place if it justifies the costs of regulation. Impact assessments would therefore push back the often broadly applied precautionary principle. In this context, Löfstedt observed a “marked decrease in the use and mention of the precautionary principle” in the EU since the introduction of the impact assessment regime.¹⁸⁸⁸ A further indicator supporting the dichotomy is, in his view, the fact that business representatives as well as the American Chamber of Commerce are enthusiastic about the Better Regulation package including the introduction of impact assessments – even though environmental agencies were not clearly opposed either.¹⁸⁸⁹

However, there are overlaps between IAs and the precautionary principle, and they can be mutually reinforcing.¹⁸⁹⁰ Impact assessments can also be perceived as providing “precaution through process”.¹⁸⁹¹ The first argument is that the European Commission and ECJ both recog-

¹⁸⁸⁵ Ibid., p. 455.

¹⁸⁸⁶ See section 8.2.4.1; Nida-Rümelin, Schulenburg and Rath, *Risikoethik* (above, n. 824), p. 101; Vermeule, ‘Rationally Arbitrary Decisions (in Administrative Law)’ (above, n. 1097), p. 10.

¹⁸⁸⁷ Löfstedt, ‘The Swing of the Regulatory Pendulum in Europe: From Precautionary Principle to (Regulatory) Impact Analysis’ (above, n. 1765), p. 237; more nuanced: Meuwese, *Impact Assessment in EU Law-making* (above, n. 267), pp. 87–91. Similar uncertainties exist in environmental law. While the Rio Declaration mentions the precautionary approach and the responsibility to conduct environmental impact assessments as two independent principles (Principles 15 and 17 respectively), Judge Weeramantry (still quite cryptically) described the “Environmental Impact Assessment” as an ancillary principle to the precautionary principle: ICJ, Dissenting Opinion of Judge Weeramantry, I.C.J. Reports 1995, *Request for an Examination of the Situation in Accordance with Paragraph 63 of the Court’s Judgment of 20 December 1974 in the Nuclear Tests (New Zealand v. France) Case* (1995), p. 344.

¹⁸⁸⁸ Löfstedt, ‘The Swing of the Regulatory Pendulum in Europe: From Precautionary Principle to (Regulatory) Impact Analysis’ (above, n. 1765), p. 251.

¹⁸⁸⁹ Ibid., 250 and 253.

¹⁸⁹⁰ The view that that cost-benefit-analysis and the precautionary principle are not per se different can also be found in economic literature: Christian Gollier and Nicolas Treich, ‘Decision-Making Under Scientific Uncertainty: The Economics of the Precautionary Principle’, *The Journal of Risk and Uncertainty*, 27 (2003), pp. 77–103, p. 98.

¹⁸⁹¹ Markus W. Gehring, ‘Tools for More Sustainable Trade Treaties with Developing Countries’ (above, n. 62), p. 88; a similar distinction with slightly different terminology: Helle Tegner Anker, ‘The Precautionary Principle and Nature Conservation Law: EU and Danish Experiences’, in: Nicolas de Sadeleer (ed.), *Implementing the precautionary principle*, pp. 270–288, p. 271. Impact assessments regard the *risk assessment*

nize that the precautionary principle must also be “based on an examination of the potential benefits and costs”.¹⁸⁹² IAs contribute to such a cost-benefit analysis required by the precautionary principle. The Better Regulation Toolbox states that a „proportionate IA should also be carried out for every decision invoking the precautionary principle which should set out the elements necessary for the exercise of the principle“: it requires the evaluation of the tolerability of risk and, where uncertainties remain, states that “[p]roportionate risk management measures may then be based on the precautionary principle together with collection of additional evidence and review”.¹⁸⁹³ In other words, the IA guidelines regard impact assessments as a tool to gather sufficient evidence necessary to base decisions on the precautionary principle when deciding how to manage risks. The EU guidelines also suggest, for a different reason, that the precautionary principle must already be considered during the impact analysis and, again, later at the decision-making stage.¹⁸⁹⁴ This is insofar unavoidable as the EU impact assessment guidelines require to make specific recommendations and exclude *illegal* options.¹⁸⁹⁵ In order to determine whether an option is illegal, it can become necessary to apply the precautionary principle already for the conduct of an impact assessment. This is at least the case where the consequences of a policy proposal to regulate innovations and prevent harm to the environment and human health absent sufficient scientific evidence are being assessed. It would not be possible to determine whether such a proposal is legally viable without referring to the precautionary principle in its weak or strong dimension.¹⁸⁹⁶ Arguably, this might also include the application of a “human rights precautionary principle” as described in the first part of this chapter.

Before this background, I argue that the main differences do not exist between IAs and the precautionary principle, but rather how they are interpreted and applied. Both IAs and the precautionary principle can be applied in light of the objective-managerial paradigm, emphasizing the value of scientific, quantitative and objective evaluations. But they can also reflect more deliberative approaches: IAs can be conducted in an inclusive and participatory way, and an interpretation of the precautionary principle in light of the analytic-deliberative paradigm would grant decision-makers broader discretion to also base their decisions on scientific minority views. Therefore, the line is not between IAs and the precautionary principle, but between the different

side of the precautionary principle, whereas substantive decision criteria the *risk management* side. This is confirmed by the International Law Association’s New Delhi Declaration of Principles of International Law Relating to Sustainable Development: “4.2 Sustainable development requires that a precautionary approach with regard to human health, environmental protection and sustainable utilization of natural resources should include [...] (c) consideration in an environmental impact assessment of all possible means to achieve an objective (including, in certain instances, not proceeding with an envisaged activity)[...]”: ILA, *New Delhi Declaration of Principles of International Law Relating to Sustainable Development*, Resolution 3/2002, 4.2. In this sense: European Commission, *Better Regulation Toolbox* (above, n. 204), Tool #15, p. 93.

¹⁸⁹² European Commission, *Communication from the Commission on the precautionary principle* (above, n. 1776), 6.3.

¹⁸⁹³ European Commission, *Better Regulation Toolbox* (above, n. 204), p. 93 and 96.

¹⁸⁹⁴ At least from a risk regulation perspective, such an approach seems possible, namely to integrate the precautionary principle at the risk assessment stage requiring a “prudential” approach, and again later at the risk management stage when decision-makers have to consider the necessary level of protection: Brownsword and Goodwin, *Law and the Technologies of the Twenty-First Century* (above, n. 56), p. 143.

¹⁸⁹⁵ IA guidelines, under exceptional cases, require to discard certain options already at an early IA stage, for example because the option would infringe an absolute human right: European Commission, *Better Regulation Toolbox* (above, n. 204), Tool #28, p. 211. Similar, with regard to external trade and the EU’s international legal obligations: *Ibid.*, p. 184.

¹⁸⁹⁶ On the different dimensions of the precautionary principle: see section 8.2.4.2.1.

paradigms upon which they are based.¹⁸⁹⁷ What a precautionary principle might imply for decisions causing human rights risks will be discussed in the following section.

8.3.4.3 The Precautionary Principle and Consequences for HRIAs

The precautionary principle has different dimensions, as was explained in the first part of this chapter. The authorization function means that EU institutions can restrict individual freedoms to prevent human rights risks, even though full certainty as to whether such a risk actually exists is not available. The obligation function in its *strong* version implies that a decision-maker must, in any case, take steps to prevent that risk. Doctrinally, this is the case where an act that causes a *real risk* of a human rights violation would already qualify as a violation in itself, like the ECtHR held in the *Soering* case.

Most relevant to HRIAs is probably the obligation function in its *weak* version which means that an EU institution cannot justify its failure to adopt measures to prevent potential human rights violations simply because there is not enough scientific evidence. Correspondingly, a human rights precautionary principle in its procedural dimension shifts the burden of proof: If there is a human rights risk, the person or entity who wishes to adopt the risky initiative must prove that the activity is safe.

This is where HRIAs can make a difference, namely by forcing decision-makers to have at least a closer look at identified human rights risks. If an HRIA report provides evidence that a certain policy poses human rights risks, decision-makers would either have to adopt measures to prevent that risk, or identify good reasons that would justify inaction. This conclusion can, as I argue, be based on existing EU case law on risk decisions. While mainly dealing with technological risks, the rationale is comparable and, *mutatis mutandis*, applicable to human rights risks identified during an impact assessment. Should an HRIA identify a real human rights risk, such an assessment would not bind the Commission or legislator. This is because it is merely an expert opinion. However, such a finding indicates that there is a human rights risk that triggers the obligations under the precautionary principle: Either the institution adopts measures to prevent that risk, or it must – as I will argue – provide evidence “of a scientific level at least commensurate with that of the opinion in question”¹⁸⁹⁸ which proves that no such human rights risk exists.

This test has been established under EU case law. The essential question regarding impact assessments under uncertainty the Court of Justice had to deal with is whether the EU Court’s review is “restricted to addressing the various stages of the decision-making process”, or whether it should “assess the quality of the scientific analysis conducted or even review the latitude at-

¹⁸⁹⁷ This is also confirmed by the fact that even though IAs in the EU are solidly institutionalized, the EU legislator still applies the precautionary principle (at least at times) in a way that gives significant weight to normative and political concerns – which for some critics is too political and not sufficiently scientific. This does not exclude that the use of IAs can modify the application of the precautionary principle. In this sense probably: Wiener, ‘Better Regulation in Europe’ (above, n. 127), p. 460. This does not mean, however, that IAs and the precautionary principle are mutually exclusive or in permanent competition.

¹⁸⁹⁸ Cited from: CFI, Judgment of 11 September 2002, Case T-13/99, *Pfizer Animal Health*, para 199. For a closer analysis of judicial review of decisions under uncertainty see chapters 9 and 10.

tributed to policy as opposed to science".¹⁸⁹⁹ In particular for the regulation of technological risks to the environment and human health, the EU generally appoints scientific committees to conduct risk assessments. To what extent the EU is bound by the scientific opinions expressed by these committees was at length discussed by the (then) Court of First Instance in *Pfizer*, where the EU legislator departed from the recommendation given by the "Scientific Committee for Animal Nutrition" (SCAN) set up by the Commission. The SCAN report concluded that the use of virginiamycin does not constitute an immediate risk to public health.¹⁹⁰⁰ Pfizer argued that the EU was not allowed to disregard SCAN's conclusion.¹⁹⁰¹ The Court, however, found that the Council did not *ignore* the opinion of the SCAN report, but simply *not share* its conclusions.¹⁹⁰²

While, as usual, emphasizing the limited scope of judicial review - whether the institutions committed a manifest error, misused their powers or otherwise exceeded the limits of discretion¹⁹⁰³ - the Court clarified the role scientific knowledge and scientific advisory committees play. The Court states that "the role played by a committee of experts, such as SCAN, in a procedure designed to culminate in a decision or a legislative measure, is restricted, as regards the answer to the questions which the competent institution has asked it, to providing a reasoned analysis of the relevant facts of the case in the light of current knowledge about the subject, in order to provide the institution with the factual knowledge which will enable it to take an informed decision".¹⁹⁰⁴ If an EU institution opts to not follow the conclusions, it must

"provide specific reasons for its findings by comparison with those made in the opinion and its statement of reasons must explain why it is disregarding the latter. The statement of reasons must be *of a scientific level at least commensurate with that of the opinion in question*. In such a case, the institution may take as its basis either a supplementary opinion from the same committee of experts or other evidence, whose probative value is at least commensurate with that of the opinion concerned. In the event that the Community institution disregards only part of the opinion, it may also avail itself of those parts of the scientific reasoning which it does not dispute" (emphasis added).¹⁹⁰⁵

This finding is also justified "on grounds of principle relating to the political responsibilities and democratic legitimacy of the Commission", through Parliamentary control, as opposed to the advisory body's scientific legitimacy, which would not be a sufficient basis for the exercise of public authority.¹⁹⁰⁶ The Court generally confirmed in *Gowan* that the EU institutions may depart from a risk assessment and adopt more restrictive measures, and limited its review of the reasons given by the Commission to justify to depart from the risk assessment to the fact that it considered evidence brought to its attention by the Member States and different other studies

¹⁸⁹⁹ See on this point: Opinion of Advocate General Poiares Maduro of 14 September 2004, Case C-41/02, *Commission v. The Netherlands*, para 32.

¹⁹⁰⁰ Cited in: CFI, Case T-13/99, *Pfizer Animal Health* (above, n. 1898), para 53.

¹⁹⁰¹ *Ibid.*, para 187.

¹⁹⁰² *Ibid.*, para 194.

¹⁹⁰³ *Ibid.*, para 169.

¹⁹⁰⁴ *Ibid.*, para 197.

¹⁹⁰⁵ *Ibid.*, para 199.

¹⁹⁰⁶ *Ibid.*, para 201: "Whilst the Commission's exercise of public authority is rendered legitimate, pursuant to Article 155 of the EC Treaty (now Article 211 EC), by the European Parliament's political control, the members of SCAN, although they have scientific legitimacy, have neither democratic legitimacy nor political responsibilities. Scientific legitimacy is not a sufficient basis for the exercise of public authority."

indicating the potential risks of the substance.¹⁹⁰⁷ This implies that a measure can be justified by the precautionary principle if it is also supported by adequate evidence. This is a relatively flexible interpretation of precaution that resembles the analytic-deliberative paradigm, as it incorporates different opinions and views, including concerns expressed by the Member States who presented critical studies.¹⁹⁰⁸ This was sufficient for the Court to find that the Commission did not apply the precautionary principle in a manifestly erroneous way.¹⁹⁰⁹

What could these decisions imply for the analysis of human rights risks of EU policies? Admittedly, the relevant constellations are different insofar as they primarily concern not the regulation of risk but the risk of regulation. For example, an IA-report might identify human rights risks indirectly caused by a trade or development agreement, but the controversial trade or development policy is nevertheless implemented. Here, an affected individual might bring an action of annulment arguing that the human rights risks were not adequately taken into account and that the EU institutions should not have ignored the human rights impact report which identified a likely and significant adverse effect.¹⁹¹⁰ In spite of the aforementioned differences, the essential question common to both constellations is to what extent the EU institutions must consider evidence that *does not support* their policy choice.

In this case, the same question can arise, namely to what extent the European Commission or the legislature may deviate from a “scientific” human rights impact assessment that identifies a serious human rights risk. Arguably, if the IA report or an advisory committee identifies a significant human rights risk, the EU institutions may not simply ignore these findings and depart from the recommendations without giving sufficient reasons for why they evaluate the risk differently. Under a human rights precautionary principle (and applying the standard developed in *Pfizer*), the EU legislator or Commission, when adopting a legal act even though the HRIA had identified a significant human rights risk, would bear an additional burden of proof: Like the test in *Pfizer*, they would have to support their decision with a human rights analysis and a corresponding statement of reasons that is *of a scientific level at least commensurate with that of the opinion in question*.

8.3.5 The Preparation of the IA-Report

The IA-Report contains the central findings and recommendations of the IA. This includes a summary of stakeholders’ contribution.¹⁹¹¹ For the Commission’s general IAs, it takes the form of

¹⁹⁰⁷ ECJ, Judgment of 22 December 2010, Case C-77/09, *Gowan*, para 78.

¹⁹⁰⁸ For a critical review: Alberto Alemanno, ‘Case C-79/09, *Gowan Comércio Internacional e Serviços Lda v. Ministero della Salute*, Judgment of the Court of Justice (Second Chamber) of 22 December 2010’, *Common Market Law Review*, 48 (2011), pp. 1329–1348 who criticized that the Commission should have better justified why it departed from the risk assessment. In that sense, the Court is “less strict” than the CFI was in *Pfizer*.

¹⁹⁰⁹ ECJ, *Gowan* (above, n. 1907), para 79.

¹⁹¹⁰ Similar: General Court, *Front Polisario* (above, n. 746).

¹⁹¹¹ European Commission, ‘Handbook for Trade Sustainability Impact Assessment’ (above, n. 212), p. 26. In case of the Commission’s general IAs, a separate “report outlining the overall results of the consultation work and providing feedback to stakeholders (synopsis report) must be published on the consultation website and, where applicable, added as an annex to the impact assessment/evaluation report”: European Commission, *Better Regulation Guidelines* (above, n. 199), p. 67.

a Staff Working Document.¹⁹¹² In the case of Trade SIAs, the report is drafted by the external consultants who are in charge of conducting the analysis. Considering that the Trade SIA process consists of three main phases, there are nowadays also three reports: The inception report, the interim report and the final report.¹⁹¹³ The final report contains the main findings and recommendations. Once it is finished, the Commission services shall set out their views on these findings and recommendations; they will do so by means of a so-called position paper that explains how the SIA has and will contribute to the ongoing trade negotiations. The position paper shall also highlight the Commission services' views on the impacts identified in the SIA as well as on the measures proposed by the external consultants. It will also explain how the SIA findings have or will be used.¹⁹¹⁴ In other words, in drafting the position paper, the Commission must demonstrate that it took the findings into account. In the position paper, the Commission complies also with its duty to give reasons for its decision to follow or discard recommendations.

The IA reports are therefore not legally binding instruments, but nevertheless important because they document the process and results of the IA. They serve different functions. First, the report informs decision-makers and stakeholders. Second, the requirement to draft a report – which must also comply with certain standards – is also an instrument to force Commission officials in charge of the initiative to actively consider and digest the findings of the analysis, as well as of the inter-service and stakeholder consultations. It is an important piece of evidence upon which the Commission bases its decision for a legislative, regulatory or another type of proposal.¹⁹¹⁵ The report is, last but not least, also an important source of information for courts to review the legality of the decision-making process, for example whether the decision-maker took all relevant information into consideration, considered less restrictive means as part of a proportionality test, or based a risk decision on up-to-date information and state-of-the-art scientific analysis. For an information model, the IA-report plays a higher role than for transformation models. The latter would pay more attention to the transformative process that occurs during the IA-procedure as such. In the latter regard, it is important to note that the EU's HRIAs have a high transformative potential. The Commission's IAs are conducted by the responsible Commission officials, and thus those who are also responsible for drafting the proposal for the initiative accompanied by the HRIA. Similar effects exist with regard to Trade SIAs, even though conducted by external consultants. There is, as has been seen, ongoing exchange with the Commission's SIA ISG.¹⁹¹⁶ The consultants' work is therefore "continuously [fed] into the trade negotiations throughout the whole duration of the study."¹⁹¹⁷ This means that the IA-report is important but clearly not the only way in which the IA process can influence decision-making.

¹⁹¹²Ibid., p. 30.

¹⁹¹³ European Commission, 'Handbook for Trade Sustainability Impact Assessment' (above, n. 212), 11 et seq.

¹⁹¹⁴ Ibid., p. 30.

¹⁹¹⁵ European Commission, *Better Regulation Guidelines* (above, n. 199), p. 30.

¹⁹¹⁶ European Commission, 'Handbook for Trade Sustainability Impact Assessment' (above, n. 212), p. 11: „In addition to the meetings with the ISG, interaction between the consultants and EU officials should take place regularly. In order to help shape better-informed EU positions, the consultants should provide EU negotiators with frequent updates on their findings; in return, they should receive regular feedback from EU officials on developments in the negotiations, and on specific sectors or cross-cutting issues which should be analysed more closely. EU delegations in the partner country(ies) may also provide the consultants with relevant information, in particular regarding the consultation of stakeholders outside the EU.”

¹⁹¹⁷ Ibid., p. 30.

The IA-report should summarize and present the final results, while the technical details should go to an Annex. It should be written with non-expert readers in mind and therefore also contain an easily accessible summary translated into all EU languages.¹⁹¹⁸ In addition, a separate synopsis report covering the results of the consultation must be drawn up and annexed to the IA report.¹⁹¹⁹

The Better Regulation Guidelines establish certain minimum requirements all IA-reports should respect, namely “(i) a description of the environmental, social and economic impacts and an explicit statement if any of these are not considered significant; (ii) a clear description of who will be affected by the initiative and how; (iii) impacts on SMEs [...]; (iv) impacts on competitiveness; and (v) a detailed description of the consultation strategy and the results obtained from it”.¹⁹²⁰ While all three sustainability-impacts should be described, this recommendation in the Guidelines nevertheless demonstrates the special role economic impacts play, namely by clearly emphasizing the impacts for SMEs and competitiveness instead of explicitly mentioning other, non-economic and non-financial consequences. The Court of Auditors found an asymmetry between different types of impacts – which could, however, be due to the fact that not all impacts are equally relevant for all kinds of interventions.¹⁹²¹ Others criticize that the IA-report mainly focuses on economic impacts and only to a much lesser extent on environmental and social consequences. The new IA guidelines were developed also before the background of a critical analysis by the European Court of Auditors. It had found that the description of the problem and the reasonable policy options are generally presented in an adequate way but found deficits insofar as the impact assessment should be more accessible to and understandable for non-experts as a tool for policymaking.¹⁹²² The Court of Auditors identified different reasons for why it can be difficult to understand the IA-report, even if it follows the prescribed structure. Some of these challenges concern the length, technical nature, or the complexity of the language used.¹⁹²³ While there might be trade-offs between a long and comprehensive report on the one hand and a short superficial report, the requirement to provide a summary in an accessible language is an adequate response to the dilemma.

The impact analysis shall not be limited to a pure analysis of the impacts, but shall also warn of risks and contain “recommendations and proposals for flanking measures” to maximize the benefits of the proposed initiative and to prevent or minimize potential negative consequences.¹⁹²⁴

It is also required to be transparent about the methodologies used for the analysis. The IA-Report should therefore also outline the limitations of the analysis as well as uncertainties that

¹⁹¹⁸ European Commission, *Better Regulation Guidelines* (above, n. 199), p. 30; the Trade SIA Handbook also emphasizes that SIA reports should be “clear, concise and easily understandable”: European Commission, ‘Handbook for Trade Sustainability Impact Assessment’ (above, n. 212), p. 26.

¹⁹¹⁹ European Commission, *Better Regulation Guidelines* (above, n. 199), p. 18.

¹⁹²⁰ *Ibid.*, p. 14.

¹⁹²¹ European Court of Auditors, *Impact Assessments in the EU Institutions: Do they support decision-making?* (above, n. 1312), p. 36.

¹⁹²² *Ibid.*, p. 35.

¹⁹²³ *Ibid.*, p. 36.

¹⁹²⁴ European Commission, ‘Handbook for Trade Sustainability Impact Assessment’ (above, n. 212), p. 30; European Commission, *Guidelines on the analysis of human rights impacts in impact assessments for trade-related policy initiatives* (above, n. 42), p. 12.

could “significantly affect the result of the comparison referred to.”¹⁹²⁵ They encourage transparent risk communication. As the communication of “known unknowns” is important for informed deliberation and decision-making, this can be seen as an attempt to respond to the identified tendency to refrain from communicating uncertainty.¹⁹²⁶ The fact that the IA-report shall also contain recommendations illustrates that it serves more than a pure information function. It might be criticized that this empowers the Commission which not only gathers information and thus increases its epistemic authority, but which also has the authority to make recommendations and thus frame the political discourse. This might strengthen the authority of the Commission vis-à-vis the Parliament and the Council even further. On the other hand, the fact that the Commission shall make specific recommendations can increase transparency as it clearly reveals the Commission’s preferences. Before this background, a critical evaluation of the IA-report would be easier.

8.4 Interim Conclusion and Outlook

The impact analysis stage is central to impact assessments. The EU impact assessment guidelines already react to some deficits identified in EIA law. As seen before, they address potential shortfalls, such as the risk to use strawman options to make one’s preferred option look more attractive. Insofar, the guidelines aim at an educative effect to increase institutional learning.

While the choice of methodologies is largely discretionary, law in general and EU law in particular contains rules and principles that guide the choice and use of analytical methods, at least to a certain extent. These can be binding legal principles, such as the principle of proportionality, or non-binding guiding principles, such as the principle of proportionate analysis laid down in EU impact assessment guidelines. This section also discussed the role of risk decision rules, including the precautionary principle. At the same time, the EU impact assessment regime reveals and illustrates deficits. For example, the Court of Auditors had found that more facts and information were provided on the preferred policy option as opposed to the alternatives. This confirms the observation that the consideration of alternatives is still methodologically weak. Moreover, the Impact Assessment guidelines do not fully clarify the role of human rights in this regard. As illustrated above, some Trade SIAs excluded certain alternatives because they would not be compatible with trade law. For a human rights impact assessment, however, all options should first be assessed - irrespective of whether or not they would be compliant with WTO law. Only in a second step should potential conflicts between trade law and human rights law be analyzed, considering the hierarchy of norms. Another challenge is the often limited scope of options considered.

The chapter concluded with a discussion of the legal nature and minimum content of the IA-report. This is insofar important as the IA-report encompasses the findings of the IA and is thus a source used by the EU legislature and external stakeholders to inform themselves about expected consequences. The IA report is therefore a knowledge source that may further influence the decision-making process. It has no binding legal force but may possess epistemic authority to influence decisions. This brings us to the final part of this thesis. The final two chapters ask how the institutionalization of HRIAs can increase compliance with and give more effect to human rights. This includes, first, the question how to enforce the obligation to comply with proce-

¹⁹²⁵ European Commission, *Better Regulation Guidelines* (above, n. 199), p. 29.

¹⁹²⁶ On „risk communication“ see also sections 5.3 and 5.4.2.4.

dural HRIA rules and principles, e.g. the obligation to conduct an IA at all and in an adequate manner. It includes, second, the question whether the findings of the IA process (including input received during consultation) is adequately taken into account when the final decision is adopted. This is a fundamental and existential question not only for HRIAs but for all impact assessments: Do they matter at all? Or are IAs just “fig leaves” to show goodwill, and is an IA-report just a “paper tiger”? Not surprisingly, the ability of EIAs to influence decision-making has been subject to controversial debates and to empirical as well as theoretical analysis since NEPA entered into force. The result is that it is extremely difficult to assess the ability of EIAs to actually influence decision-making. Nevertheless, there are several factors that, generally, determine the ability of an IA-regime to influence decision-making and enhance the respective policy objectives. Drawing on compliance theories and a comparison with domestic EIA law, I will identify several such factors and analyze the institutionalization of HRIAs through the lenses of these factors.

**PART V: THE RELEVANCE OF HUMAN RIGHTS IMPACT ASSESSMENTS:
GIVING EFFECT TO AND INCREASING COMPLIANCE WITH HUMAN RIGHTS?**

9 CHAPTER 9: IMPACT ASSESSMENTS, COMPLIANCE AND EFFECTIVENESS

9.1 Introduction: Do Human Rights Impact Assessments Matter?

Can rules and principles governing the conduct of HRIAs – classified here as an emerging HRIA law - influence decision-making and ensure that decision-makers make decisions that are “more responsive” to human rights impacts? Otherwise, HRIAs would not be able to fulfill their self-proclaimed objective to avoid negative and increase positive human rights impacts. The extent to which HRIAs are able to influence decision-making determines to what extent HRIAs can protect human rights through organization and procedure. It is easy, as critics do, to dismiss the relevance of impact assessments as a purely technical and procedural exercise that only produces a non-binding report and would therefore hardly be able to really influence decision-makers. It is unfortunately very difficult to judge what real effect IAs have on the final decision,¹⁹²⁷ even for well-established domestic EIA-regimes. The fact that many proposals are largely modified after the completion of an EIA¹⁹²⁸ does not prove causality but at most a correlation between IAs and the final decision. In fact, there seems no quantifiable data to convincingly prove the success or failure of EIAs.¹⁹²⁹ Nevertheless, there is a broad consensus that EIAs can and do matter, even though research is often based on the experience and “anecdotal evidence” of consultants, administrators, or environmentalists.¹⁹³⁰ Drawing on the experience with NEPA, it is widely assumed that EIAs can contribute to protecting the environment, even though different opinion exists as to how and why exactly that is the case.¹⁹³¹ So IA theorists and practitioners struggle for a better understanding of whether, why and how IAs can have a positive effect on decisions.¹⁹³²

The question whether IAs are able to influence decision-making and the “continual struggle for relevance, resources and the attention of decision-makers to enable the full potential”¹⁹³³ can be observed all over the world and with regard to different IA regimes. Attempts to measure degrees of compliance or effectiveness of IA-law is beyond the scope of this thesis. Rather, the objective is to evaluate Impact Assessment *law* in how it *can* affect the decision-making process.¹⁹³⁴

¹⁹²⁷ Kersten, ‘Rethinking Transboundary Environmental Impact Assessment’ (above, n. 117), p. 174; Meuwese, *Impact Assessment in EU Lawmaking* (above, n. 267), p. 17; on the difficulties of measuring the effectiveness of the early EIA Directive already: Brun-Otto Bryde, ‘Problems of measuring the effectiveness of the Council directive on environmental impact assessment’, in: Heinhard Steiger (ed.), *The Implementation of the EEC Directive 85/337 on Environmental Impact Assessments*, pp. 3–18.

¹⁹²⁸ Wood, *Environmental impact assessment* (above, n. 864), p. 262; however, projects were rarely abandoned; rather, they were modified and mitigation measures were added, Wood (ibid.).

¹⁹²⁹ Kersten, ‘Rethinking Transboundary Environmental Impact Assessment’ (above, n. 117), p. 180.

¹⁹³⁰ Ibid.

¹⁹³¹ Wood, *Environmental impact assessment* (above, n. 864), p. 180.

¹⁹³² Cashmore et al., ‘The interminable issue of effectiveness: substantive purposes, outcomes and research challenges in the advancement of environmental impact assessment theory’ (above, n. 866), p. 302; Pope et al., ‘Advancing the theory and practice of impact assessment: Setting the research agenda’ (above, n. 75), p. 5; Alan Bond, Angus Morrison-Saunders, and Jenny Pope, ‘Sustainability assessment: The state of the art’, *Impact Assessment and Project Appraisal*, 30 (2012), pp. 53–62.

¹⁹³³ Pope et al., ‘Advancing the theory and practice of impact assessment: Setting the research agenda’ (above, n. 75), p. 4.

¹⁹³⁴ Similar in the context of international environmental impact assessments: Craik, *The International Law of Environmental Impact Assessment* (above, n. 59), p. 181: “Instead, international EIA obligations should be assessed largely in terms of how the relevant decision-making processes are affected; for exam-

I have argued that the conduct of HRIAs is increasingly regulated by legal rules and principles which I have defined in summary and for reasons of simplification as an emerging “HRIA-law”. The role law plays in this regard can be conceptualized as meta-regulation or “regulation of regulation”, understood as encompassing “any set of institutions and processes that embed regulatory review mechanisms on a systematic basis into the every-day routines of governmental policymaking”.¹⁹³⁵ It is therefore possible to analyze the ability of HRIA laws to influence decision-making from two starting-points: First, from a comparative perspective analyzing the effects of domestic EIAs. This is not a particularly legal approach. Rather, different disciplines have studied and analyzed the phenomenon of impact assessments, and have developed concepts to explain how IAs work (which I would therefore call “IA-theories”). Second, one can start from the law-perspective and look at the institutionalization of HRIAs through the lenses of legal compliance theories.

Compliance theories describe and explain why actors – states and international organizations, firms and individuals – comply with norms. Two dimensions can be distinguished for the institutionalization of HRIAs: first, compliance with the prescribed procedure, that i.e. rules and principles governing *if* and *how* to conduct HRIAs. Second, and this is the more complex dimension, to what extent they can increase compliance with substantive human rights, i.e. whether HRIAs lead to decisions which are “more” compliant with human rights obligations. Major differences exist between rational/consequentialist compliance theories on the one hand and normative/process-oriented compliance theories on the other. In a nutshell, rationalist theories assume that actors comply with norms because of certain consequences, e.g. sanctions or incentives. Normative and process-oriented theories, on the other hand, emphasize the compliance-value of the perceived appropriateness of a certain behavior, either because of its legitimacy or because of the persuasive power of arguments presented during the decision-making process.¹⁹³⁶ Rationalists have little reason to believe that HRIAs would make a difference unless the failure to adequately consider certain human rights impacts would come with costs or sanctions. Process-oriented theories, however, take a broader perspective. For example, they would emphasize the fact that it is likely that policy-makers would, during the HRIA process, realize that certain options have a significant human rights impact and would therefore discard these options: HRIA can therefore change the decision-making process silently before a proposal even reaches the formal decision-making stage. Still, these approaches are not mutually exclusive¹⁹³⁷; for example, the willingness of actors to engage in a process of deliberation and comply with the decision arrived at might be a consequence of the fact that non-compliance would result in negative consequences, e.g. judicial sanctions or reputational loss. Both theoretical approaches will be discussed in more detail.

ple, who makes the decision, whose views are taken into account, and what types of considerations are found to be relevant. Following from this, one measurement of effectiveness that this study employs is to look to the extent to which environmental norms become institutionalized within EIA processes themselves”.

¹⁹³⁵ Morgan, *Social citizenship in the shadow of competition* (above, n. 267), p. 2.

¹⁹³⁶ James March and Johan Olsen, ‘The Institutional Dynamics of International Political Orders’, *International Organization*, 52 (1998), pp. 943–969, p. 948; Thomas Risse, ‘“Let’s Argue!”: Communicative Action in World Politics’, 54 (2000), pp. 1–39.

¹⁹³⁷ Craik, *The International Law of Environmental Impact Assessment* (above, n. 59), p. 251; Christine Parker and Vibeke Lehmann Nielsen, ‘Introduction’, in: Christine Parker and Vibeke Lehmann Nielsen (eds.), *Explaining compliance*, pp. 1–33, p. 12.

The following sections will outline different rationalist and normative/process-oriented approaches to compliance and analyze the (potential) role of HRIAs through their lenses. This thesis follows the assumption that rationalist reasons for compliance – in particular the focus on self-interested actors and the fear of sanctions – are important but insufficient. Rather, different process-oriented factors contribute to making policy- and decision-makers comply with the law. The next section will analyze IA-theories: In particular a comparison with domestic EIA law confirms the assumption that the legal institutional context in which EIAs are conducted can increase the ability of EIAs to advance environmental objectives. Some of the institutional factors concern judicial review, political accountability, and guidance by specific procedural and substantive norms.¹⁹³⁸

Before the background of IA theories (related mainly to domestic EIA regimes) and legal compliance theories, I argue that in particular five factors step out that influence to what extent HRIAs can increase compliance with and give effect to human rights: (1) formal accountability mechanisms, (2) political accountability mechanisms, (3) legal determinacy, (4) norm internalization and institutional learning, and (5) the availability of flexibility mechanisms to adapt to ex-post findings about unforeseen human rights impacts. This list is not supposed to be exclusive. However, it contains denominators that are, as I will argue in the following, common to most, in some cases all, compliance and impact assessment theories. For example, even normative compliance theories recognize the value of formal accountability mechanisms such as judicial review and sanctions. Differences mainly exist, among compliance theories, as to how relevant each factor actually is. It is through the lenses of these five factors that the institutionalization of HRIAs in EU law will be analyzed in the final chapter. This has two advantages: first, it allows to use these factors as yardsticks to structure and evaluate legal and institutional mechanisms available that determine to what extent HRIAs can actually influence decision making. Second, it links this analysis to the general discourse about compliance and identifies areas for further research.

9.1.1 Compliance and Effectiveness: Introductory Observations

The meaning of implementation, compliance and effectiveness depends largely on the concept of law and on why people, organizations or states obey the law. Rationalist and rules-based perspectives would regard the meaning of a legal rule distinct from its implementation.¹⁹³⁹ Process-oriented theories, on the other hand, assume that it is impossible to clearly separate the content of a norm from its implementation context; rather, implementation is defined as the “process by which intent gets transferred into action”.¹⁹⁴⁰ Implementation is in itself an exercise of interpretation, so that no clear-cut line between law-making and law-implementation exists, and IAs offer these types of interpretative opportunities:¹⁹⁴¹ a human rights impact assessment of trade agreements must analyze the factual impacts and then interpret the meaning of human rights.

¹⁹³⁸ Kersten, ‘Rethinking Transboundary Environmental Impact Assessment’ (above, n. 117), 182 ff.

¹⁹³⁹ Craik, *The International Law of Environmental Impact Assessment* (above, n. 59), p. 178.

¹⁹⁴⁰ David Victor, Kal Raustiala, and Eugene Skolnikoff, ‘Introduction and Overview’, in: David Victor, Kal Raustiala, and Eugene Skolnikoff (eds.), *The Implementation and Effectiveness of International Environmental Commitments*, pp. 1–46, p. 1; Kal Raustiala and Anne-Marie Slaughter, ‘International Law, International Relations and Compliance’, in: Carlsnaes, Walter et. al. (ed.), *Handbook of International Relations*, pp. 538–558, p. 539; Craik, *The International Law of Environmental Impact Assessment* (above, n. 59), p. 179.

¹⁹⁴¹ Ibid.

Consequently, not only the guidelines that require Commission staff to assess the human rights impacts of initiatives are an implementation of the human rights commitments; rather, every specific HRIA can constitute an act by which the intent to respect human rights gets translated into action.

Compliance has often been defined as “state of conformity or identity between an actor’s behavior and a specified rule”.¹⁹⁴² Effectiveness, on the other hand, would refer to the degree to which a norm actually induces changes in behavior that furthers the rule’s objective (e.g. protection of the environment; respect for human rights, etc.).¹⁹⁴³ Compliance and effectiveness are closely related even though at times compliance may not have any effect, or at other times a rule can be effective irrespective of the degree of compliance. Another difference is that compliance does not necessarily say much about the ability of a rule to change behavior, for example for rules that only reflect the lowest common denominator.¹⁹⁴⁴ However, compliance can not only be defined in a static sense where a certain behavior would be evaluated against a specific rule. As will be seen, such a clear distinction between rules and behavior is problematic from a process-oriented approach to law and compliance, so that it may neither be possible nor desirable to draw a sharp line between legal norms and outcomes.¹⁹⁴⁵ Instead, normative and process-oriented theories pursue a more dynamic approach: it starts from the assumption that the implementation of rules and principles requires an interpretation thereof, and that implementation also gives legal meaning to rules and principles. In consequence, compliance is not necessarily limited to “mapping behavior onto a chosen rule”¹⁹⁴⁶, but rather to arrive, through a specified procedure, at a decision that represents an “acceptable level of compliance”.¹⁹⁴⁷ Compliance in this broader sense means that behavior not only conforms to specific rules, but also to broad principles which must be brought into coherence. Compliance with human rights obligations in the light of a principle of affectedness requires that decision-makers not only establish certain standards to be followed, but examine whether their decisions affect these human rights, interests and needs.¹⁹⁴⁸ The logic of process-oriented theories is therefore closely related to the logic of transformational IA-models.¹⁹⁴⁹

Often, academic literature distinguishes between compliance with international and national norms: International compliance mainly deals with state behavior and how international law works; national compliance, on the other hand, mainly addresses the behavior of companies or

¹⁹⁴² Raustiala and Slaughter, ‘International Law, International Relations and Compliance’ (above, n. 1940), p. 539.

¹⁹⁴³ Ibid.; Victor, Raustiala and Skolnikoff, ‘Introduction and Overview’ (above, n. 1940), p. 1, similar: Robert Keohane, Peter Haas, and Marc Levy, ‘The Effectiveness of International Environmental Institutions’, in: Peter M. Haas (ed.), *Institutions for the earth*, pp. 3–24.

¹⁹⁴⁴ Raustiala and Slaughter, ‘International Law, International Relations and Compliance’ (above, n. 1940), p. 539.

¹⁹⁴⁵ Craik, *The International Law of Environmental Impact Assessment* (above, n. 59), p. 180.

¹⁹⁴⁶ Ibid., p. 177.

¹⁹⁴⁷ Abram Chayes and Antonia Handler Chayes, ‘On Compliance’, *Int. Org.*, 47 (1993), p. 175, p. 198.

¹⁹⁴⁸ On the institutionalization of human rights impact assessments to increase compliance with human rights obligations: de Beco, ‘Human Rights Impact Assessments’ (above, n. 1693), p. 139.

¹⁹⁴⁹ See section 5.3; see also: Barrett, Brendan F. D., ‘Transformation of the Development Process’, in: Barrett, Brendan F. D. (ed.), *Ecological modernization and Japan*, pp. 111–128, p. 125: “While the influence of information obtained via EIA on the final decision may be difficult to trace, the entire process is important in altering the context in which project decisions are made”.

individuals.¹⁹⁵⁰ However, this strict separation is neither compelling nor necessarily useful. Especially in times of globalization where international and national norm creation, implementation and application are increasingly intertwined, a separation between these levels at the compliance stage is often impossible. For example, as many international norms are implemented domestically through ratification, compliance with the domestic statute which transposes a treaty into domestic law automatically implies compliance with the underlying international norm.¹⁹⁵¹ Moreover, theories on domestic and international compliance are based on a similar logic, mainly either a rationalist and interest-based logic or normative considerations of appropriateness. This will briefly be outlined in the following sub-sections, as it constitutes the theoretical basis for the five compliance factors identified above.

9.1.1.1 Rationalist Theories: The Logic of Consequences

Rationalist theories are based on the general assumption that actors – states, international organizations or individuals – are primarily self-interested. Non-compliance is thus primarily a consequence of an actor's unwillingness because compliance would come with higher costs than benefits. The different approaches within rationalist theories differ on what relevant costs and benefits are. Morgenthau states that most rules of international law are complied with because states have "complementary interests", but that in the "minority of important and generally spectacular cases [...] considerations of power rather than of law determine compliance and enforcement".¹⁹⁵² Consequently, deterrence and incentives are seen as the most effective means to ensure compliance. Rationalist approaches to compliance are reinforced by narrow positivist views of law and the idea that law must by definition be enforceable.¹⁹⁵³ For IA-law, the focus would be on judicial review, and the ability to sanction non-compliance with procedural HRIA rules.

Such an orthodox type of realism, however, had a hard time explaining why states or other actors cooperate and create institutions, such as international organizations, even if this does not serve their immediate interests. A school of thought explaining this phenomenon is institutionalism: actors cooperate even though it might not be in their short-term interest but because it has advantages in the long run,¹⁹⁵⁴ for example by reducing transaction costs. A central argument is that states fear that unreliability damages the cooperative relationship with other states; even if returns in the specific case might be disadvantageous, it is the strategic long-term benefits that

¹⁹⁵⁰ Louis Henkin, *How nations behave* (New York: Columbia Univ. Press, 1979), 2. ed.; Harold Koh, 'Why Do Nations Obey International Law?', *The Yale Law Journal*, 106 (1997), 2599-2659.

¹⁹⁵¹ Oran R. Young, *Governance in world affairs* (Ithaca, NY: Cornell Univ. Press, 1999), p. 93.

¹⁹⁵² Hans Joachim Morgenthau, *Politics among nations* (New York: Knopf, 1949), 3. print, p. 230.

¹⁹⁵³ Jutta Brunnée and Stephen J. Toope, *Legitimacy and legality in international law* (Cambridge: Cambridge Univ. Press, 2010), 1. publ, p. 89; Jack L. Goldsmith and Eric A. Posner, *The limits of international law* (Oxford, New York: Oxford University Press, 2005). For example, early positivists like Austin regard the imperative character of a norm and thus the ability to sanction non-compliance as a constitutive element of law itself: John Austin, *The province of jurisprudence determined* (London: J. Murray, 1832), 18 ff.

¹⁹⁵⁴ Robert O. Keohane, *After hegemony* (Princeton, N.J.: Princeton University Press, 1984), 85 ff.; Paul Milgrom, Douglass North, and Barry Weingast, 'The role of institutions in the revival of trade: the law merchant, private judges, and the champagne fairs', *Economics and Politics*, 2 (1990), pp. 1-23.

make them comply with international law.¹⁹⁵⁵ Institutionalism provides a convincing answer to why states comply with transnational EIA-law: there is a certain pressure to comply because every state could, earlier or later, become the victim of transnational pollution. This is probably one of the differences between international EIAs and HRIAs: While developing and industrialized states alike can cause harmful transboundary impact, it is less likely that a developing state will enact a policy that will cause severe social impacts in a developed country. Consequently, there is not a comparable mutual interest in enforcing a transnational HRIA system.

Inspired by mainly (neo-) realism and institutionalism, scholars of international relations and international law have developed enforcement or reputational models of compliance.¹⁹⁵⁶ Enforcement and reputational models largely rely on arguments of political economy and, like all rationalist theories, assume that actors take their decision primarily based on self-interest: They will comply with legal obligations if the (short- or long term) costs of non-compliance are higher than the benefits.¹⁹⁵⁷ While many authors regard the fear of retaliation to be the most compliance-inducing sanction,¹⁹⁵⁸ a more open approach emphasizes the importance of other negative consequences such as reputational costs.¹⁹⁵⁹

Liberalism also regards rational arguments as decisive for compliance, but without regarding states or organizations as a black-box with unitary interests; liberalism rather disaggregates these actors and focuses on internal processes.¹⁹⁶⁰ Compliance is not simply identified by aggregating and comparing benefits and costs of different options for a state, for an international organization or a company. Rather, liberal theories focus on internal processes and the involvement of different actors with different interests within one entity. Such a theory is thus better able to capture the complexities of decision-making, where politicians and bureaucrats, NGOs and business representatives, the media and the general public can all be involved.¹⁹⁶¹ This is an important aspect with regard to the role of impact assessments. Taking the case of the World Bank, for example, it becomes quickly clear that it is not a unitary actor. Opening the black-box "World Bank" reveals the governance structure and the fact that important decisions are taken by the Board of Governors¹⁹⁶², where all Member States are represented, and, on a more executive level, by the Board of Directors with 25 Executive Directors. Different interests are accumulated or even clashing, so that it is difficult to determine the interests of "the" World Bank. But

¹⁹⁵⁵ However, Downs and Jones argue that empirical evidence shows that the compliance-impact of reputational costs is either weaker or more complicated than generally assumed in international relations theories: George Downs and Michael Jones, 'Reputation, Compliance, and International Law', *Journal of Legal Studies*, 31 (2002), pp. 95–114, p. 96.

¹⁹⁵⁶ Guzman, 'A Compliance-based Theory of International Law' (above, n. 380), p. 1840; George Downs, 'Enforcement and the Evolution of Cooperation', *Michigan Journal of International Law*, 19 (1998).

¹⁹⁵⁷ Goldsmith and Posner argue that international law is created and sustained by states which are rational actors willing to maximize their interests: Jack Goldsmith and Eric Posner, 'The New International Law Scholarship', *Georgia Journal of International and Comparative Law*, 34 (2006), pp. 463–483, p. 463; Goldsmith and Posner, *The limits of international law* (above, n. 1953).

¹⁹⁵⁸ *Ibid.*, p. 469.

¹⁹⁵⁹ Guzman, 'A Compliance-based Theory of International Law' (above, n. 380).

¹⁹⁶⁰ Andrew Moravcsik, 'Taking Preferences Seriously: A Liberal Theory of International Politics', *International Organization*, 51 (1997), pp. 513–553; Koh, 'Why Do Nations Obey International Law?' (above, n. 1950), p. 2633.

¹⁹⁶¹ Durwood Zaelke, Donald Kaniaru, and Eva Kružiková, eds., *Making Law Work*, p. 57; Laurence Helfer and Anne-Marie Slaughter, 'Toward a Theory of Effective Supranational Adjudication', *The Yale Law Journal*, 107 (1997), 273–391.

¹⁹⁶² Art. V, Sect. 2, IBRD Articles.

one can even go further, and take the power and influence of the World Bank bureaucracy into account. The President supervises some 10,000 employees, who often have their own interest and agenda, resulting in what might be called “competing rationalities”¹⁹⁶³. Sarfaty has recently illustrated that some of the employees who are more oriented towards “social justice” had formed the Critical Development Thinking (CDT) Group to discuss alternative approaches to development; for that purpose, they have also formed alliances with civil society organizations such as the Bank Information Center (BIC) and invited speakers from social movements from the Global South¹⁹⁶⁴. Understanding compliance fully would therefore require to also analyze these internal interests and structures. For the relevance of IA-law, it means that it is important to consider who, within one institution, is involved in the IA-process, and who is interested in and able to put pressure on decision-makers from within an institution.

Rational theories can in particular explain compliance with procedural IA requirements: Public authorities are more likely to comply with the obligation to conduct IAs in a participatory and transparent manner, for example, if it is in their self-interest. The threat of judicial or administrative sanctions can be such a factor, for example if the final decision can be invalidated due to a violation of IA-norms. This works at an institutional but also at an individual level. There may be incentives or disincentives for staff members to comply with IA-norms, depending on the legal, political or reputational consequences. In an institutional culture where IAs are mainly seen as a bureaucratic burden, the IA might result in a half-hearted tick-box exercise. This could be different where every IA-report is subject to an internal quality review before a proposal proceeds. Where IAs are internally reviewed by an independent review mechanism¹⁹⁶⁵ and proposals accompanied by the IA will not proceed unless minimum standards are fulfilled, incentives are likely to be higher for an institution’s staff to comply with the necessary requirements. The same would be true if the overall quality of IAs is part of the evaluation of staff performance. Therefore, in order to evaluate the relevance of institutionalized impact assessments, it is necessary to understand the importance of organizational management mechanisms, including promotional schemes. This is also where (quasi-)judicial review can play an important role: if a legal act could be invalidated for failure to produce an adequate HRIA, staff would have a higher incentive to comply with HRIA requirements. Absent such incentives or sanctions, rationalist theories would suggest that the ability of institutionalized HRIAs to change decision-making is limited at best. This would be different for normative and process-oriented theories.

9.1.1.2 Normative and Process-Oriented Theories: The Logic of Appropriateness

The starting point for normative and process-oriented compliance theories is the observation that rational self-interest is not sufficient to explain compliance. As Louis Henkin has observed and concisely summarized in his well-known statement, it is “probably the case that almost all nations observe almost all principles of international law and almost all of their obligations almost all of the time.”¹⁹⁶⁶ This observation, if true, is impressive given that traditional sanction

¹⁹⁶³ Sarfaty, *Values in Translation* (above, n. 13), p. 8.

¹⁹⁶⁴ *Ibid.*, p. 113.

¹⁹⁶⁵ This is the case with the EU Commission’s Regulatory Scrutiny Board (RSB). For more on these types of quality review mechanisms, see section 10.5.2.

¹⁹⁶⁶ Louis Henkin, *How Nations Behave* (London: Pall Mall Press, 1968), p. 42.

mechanisms are rare under international law. This observation is not limited to state compliance with international law. Similarly, other actors also comply with norms without constant fear of punishment or other sanctions, but because compliant behavior appears appropriate – compliance, in other words, does not only follow the logic of *consequences*, but also the logic of *appropriateness*.¹⁹⁶⁷ These approaches can be called normative because they assume that actors are committed to complying with regulation “because of a sense of moral agreement with the specific regulation or a generalized sense of moral duty to comply with regulation”.¹⁹⁶⁸ These approaches do not deny that enforcement mechanisms and sanctions are important, especially where actors are unwilling to comply.¹⁹⁶⁹ Rather, a basic assumption is that actors are often not *unwilling*, but for different reasons *unable* to comply. It is therefore necessary to identify these manifold causes of non-compliance and look for suitable responses.

The deficit of rational enforcement models to explain compliance with international treaties is that “sanctioning authority is rarely granted by treaty, rarely used when granted, and likely to be ineffective when used”.¹⁹⁷⁰ Chayes and Chayes argue that non-compliance with treaty obligations is usually not a consequence of unwillingness of states, but has manifold reasons, including the ambiguity of norms or a lack of capacity to adequately implement obligations. Non-compliance is “endemic rather than deliberate”.¹⁹⁷¹ In consequence, the authors emphasize to shift attention “to sources of noncompliance that can be managed by routine international political processes”.¹⁹⁷² Dispute resolution, for example, can reduce ambiguity, and technical as well as financial assistance increase the capacity to comply effectively.¹⁹⁷³ In order to increase the compliance rate, it would be necessary to focus more on these managerial mechanisms than on enforcement through coercion. In this sense, managerialism is based on principles of deliberation, discourse and reason-giving:

“These approaches merge in the process of jawboning—an effort to persuade the miscreant to change its ways—that is the characteristic form of international enforcement activity. This process exploits the practical necessity for the putative offender to give reasons and justifications for suspect conduct. These reasons and justifications are reviewed and critiqued in a variety of venues, public and private, formal and informal. The tendency is to winnow out reasonably justifiable or unintended failures to fulfill commitments—those that comport with a good-faith compliance standard—and to identify and isolate the few cases of egregious and willful violation”¹⁹⁷⁴.

¹⁹⁶⁷ March and Olsen, ‘The Institutional Dynamics of International Political Orders’ (above, n. 1936), p. 944; Risse, ‘“Let’s Argue!”: Communicative Action in World Politics’ (above, n. 1936), 6 ff.

¹⁹⁶⁸ Parker and Lehmann Nielsen, ‘Introduction’ (above, n. 1937), p. 11; Søren Winter and Peter May, ‘Motivation for Compliance with Environmental Regulations’, *Journal of Policy Analysis and Management*, 20 (2001), pp. 675–698, p. 677; Tyler, *Why people obey the law* (above, n. 1087), p. 4.

¹⁹⁶⁹ Chayes and Chayes, ‘On Compliance’ (above, n. 1947), p. 204.

¹⁹⁷⁰ Abram Chayes and Antonia Handler Chayes, *The New Sovereignty* (Cambridge, MA: Harvard University Press, 1995), pp. 32–33.

¹⁹⁷¹ Chayes and Chayes, ‘On Compliance’ (above, n. 1947), p. 204.

¹⁹⁷² *Ibid.*

¹⁹⁷³ *Ibid.*

¹⁹⁷⁴ *Ibid.*

Consequently, the goal is to persuade and control through deliberation in a rational discourse, where participants are forced to give reason and justification, which in turn is again subject to critique and public discourse. This can also address problems of normative uncertainty: it is often through rational discourse that the contours of a human right can be further specified. Such a compliance approach resembles the transformation model of IAs.

Chayes and Chayes have limited their analysis to treaty obligations and assigned to the treaty regime the tasks to manage an interactive and justificatory discourse, in which norms are “invoked, interpreted, and elaborated in a way that generates pressure for compliance.”¹⁹⁷⁵ The model does not, without further modification, explain (non-)compliance with non-treaty obligations such as customary law.¹⁹⁷⁶ Another point of criticism relates to the neglect of substantive considerations. This defect makes it more difficult to explain why actors also comply with “under-enforced” treaties such as human rights treaties.¹⁹⁷⁷ It is at this point that Thomas Franck’s theory of legitimacy and compliance becomes an important complement. Franck focuses strongly on the properties of the norm to be complied with and thus attempts to explain compliance with international law irrespective of the legal source in question.

Franck was equally puzzled by the question of why states obey international law even absent coercive enforcement mechanisms. He found one answer in the concept of legitimacy, stating that “in a community organized around rules, compliance is secured – to whatever degree it is – at least in part by the perception of a rule as legitimate by those to whom it is addressed.”¹⁹⁷⁸ Franck assumes that states have a tendency to promote compliance if they perceive a norm as legitimate. He allocates four characteristics of legitimacy: The determinacy of a rule, the ability of the rule to communicate authority, the rule’s coherence with other rules and principles, and adherence to normative hierarchy.¹⁹⁷⁹ If a rule is, based on these characteristics, perceived as legitimate, it will “pull towards compliance those who cannot be compelled”.¹⁹⁸⁰ It is equally an analytical and normative theory, as it indicates how to produce rules that are perceived as legitimate and thus play a greater role in society: “If a decision has been reached by a discursive synthesis of legitimacy and justice, it is more likely to be implemented and less likely to be disobeyed.”¹⁹⁸¹ This legitimacy pull could increase compliance with HRIA-requirements directly and, potentially, indirectly. IA-norms themselves are often developed in a discursive manner: the reform of the World Bank Safeguards had been ongoing for years,¹⁹⁸² and similarly, the European Commission has reformed its IA-guidelines in a similar open manner, involving both Commission staff and external actors. If Commission staff thus perceives the IA-regime as a legitimate type of meta-regulation (and not just an additional burden), a “legitimacy pull” may increase the chance that staff will comply with the IA requirements. The legitimacy pull might also work indi-

¹⁹⁷⁵ Quoted in: Koh, ‘Why Do Nations Obey International Law?’ (above, n. 1950), p. 2638.

¹⁹⁷⁶ Ibid., p. 2637.

¹⁹⁷⁷ Ibid., p. 2641.

¹⁹⁷⁸ Thomas Franck, ‘Legitimacy in the International Legal System’, *The American Journal of International Law*, 82 (1988), pp. 705–759, p. 706.

¹⁹⁷⁹ Ibid., p. 712.

¹⁹⁸⁰ Thomas M. Franck, *The power of legitimacy among nations* (New York: Oxford University Press, 1990), p. 24.

¹⁹⁸¹ Thomas M. Franck, *Fairness in International Law and Institutions* (Oxford: Oxford Univ. Press, 2002), Reprinted., p. 481.

¹⁹⁸² For an overview of the recent reform: Dann and Riegner, ‘The World Bank’s Environmental and Social Safeguards and the evolution of global order’ (above, n. 116).

rectly. HRIAs may increase the legitimacy of the final decision if the public perceives that the decision was made in a more transparent, participatory and informed manner. The goal to produce legislative or administrative norms that are complied with might thus constitute an incentive for Commission staff to abide by legitimacy-enhancing HRIA norms.

Franck's theory has been subject to different strains of criticism. First, the concept of legitimacy remains slightly unclear, which might also be due to the fact that it is based on characteristics that concern the rule itself, such as the degree of determinacy, and the process of its norm-creation.¹⁹⁸³ Koh criticizes that Franck does not explain why discursive processes add to the obligatory force of norms.¹⁹⁸⁴ Koskenniemi points out that it is difficult to determine the perception of legitimacy by those addressed by a rule; legitimacy would thus be less a property of a rule, than a "psychological predisposition" or "feeling of legitimacy", which is extremely difficult to determine.¹⁹⁸⁵ Nevertheless, Koskenniemi does not deny that determinacy, symbolism and the other characteristics which are so important for Franck's theory may explain the degree of compliance.¹⁹⁸⁶ Similarly, Harold Koh regards managerial and legitimacy-based explanations of compliance as "appealing but incomplete".¹⁹⁸⁷ Koh emphasizes the role of norm internalization in domestic settings, such as judicial incorporation, legislation, or executive acceptance,¹⁹⁸⁸ which are important factors to determine compliance with international law even beyond treaty obligations,¹⁹⁸⁹ and which can only be fully understood if one considers both the vertical and horizontal perspective, including the involvement of companies, civil society organizations, social movements, or the media. His process-oriented compliance theory thus shifts attention from international to transnational legal processes. Compliance is based on a three-step process, which Koh defines as interaction, interpretation and internalization:¹⁹⁹⁰ One or more transnational actors provoke "an interaction [...] with another which forces an interpretation or enunciation of the global norm applicable to the situation".¹⁹⁹¹ In consequence, the "moving party seeks not simply to coerce the other party, but to internalize the new interpretation of the international norm into the other party's internal normative system".¹⁹⁹² Internalization is thus key to compliance without coercive enforcement:

"The aim is to "bind" that other party to obey the interpretation as part of its internal value set. Such a legal process is normative, dynamic, and constitutive. The transaction generates a legal rule which will guide future transnational interactions between the parties; future transactions will further internalize those norms; and eventually, repeated participation in the process will

¹⁹⁸³ Craik, *The International Law of Environmental Impact Assessment* (above, n. 59), p. 190.

¹⁹⁸⁴ Koh, 'Why Do Nations Obey International Law?' (above, n. 1950), p. 2645.

¹⁹⁸⁵ Martti Koskenniemi, 'Review: The Power of Legitimacy Among Nations', *American journal of international law*, 86 (1992), pp. 175–178, p. 176.

¹⁹⁸⁶ *Ibid.*, p. 178.

¹⁹⁸⁷ Koh, 'Why Do Nations Obey International Law?' (above, n. 1950), p. 2639.

¹⁹⁸⁸ *Ibid.*, p. 2640.

¹⁹⁸⁹ *Ibid.*, p. 2641.

¹⁹⁹⁰ *Ibid.*, p. 2634; similar: Harold Koh, 'Transnational Legal Process', *Nebraska Law Review*, 75 (1996), pp. 181–207, 183 f.

¹⁹⁹¹ Koh, 'Why Do Nations Obey International Law?' (above, n. 1950), p. 2646.

¹⁹⁹² *Ibid.*

help to reconstitute the interests and even the identities of the participants in the process".¹⁹⁹³

Compliance in transnational legal process theory therefore relies, to a very large extent, on a self-reflexive and to a certain extent iterative process where transactions generate rules which in turn guide future transactions. Not all impact assessments, however, require or imply such a form of transnational transaction. Still, the logic of compliance based on interaction, interpretation and internalization can equally explain norm compliance in a non-transnational context.

Critics of process-oriented theories raise different concerns. A fundamental point regards the lack of empirical evidence that managerial or transnational legal processes increase compliance. But this argument can be reverted to rationalist compliance theories as well: While it may appear intuitively convincing that states or organizations comply with law because they fear sanctions and reputational loss, this is also rather an assumption than an empirically proven fact: "That nations generally comply with their international agreements, on the one hand, and that they violate them whenever it is 'in their interests to do so' are not statements of fact or even hypotheses to be tested, but assumptions."¹⁹⁹⁴ It might appear so convincing simply because sanctions and punishment appeared for centuries to be the main instruments a public authority had to respond to severe cases of non-compliance.

What all normative and process-oriented theories have in common is that they emphasize the importance of understanding compliance beyond coercive enforcement. Four aspects play a major role in all theories. First, the recognition that "process matters" is at the heart of these theories: while this is evident for transnational legal process theory, the same is true for Franck's legitimacy theory where the procedure of norm creation also influences the legitimacy of that norm. This implies the simple observation that how decisions are made usually influences the outcome.¹⁹⁹⁵ But it also reflects a different understanding of law as a process and not primarily a "collection of hierarchically structured rules".¹⁹⁹⁶ The lines between law creation, interpretation, application and enforcement consequently blur. Understanding legal process – including the process of impact assessment – as part of law-making and law-implementing is therefore a necessary requirement to understand compliance.

Second, normative and process-oriented theories regard – even though to a varying degree¹⁹⁹⁷ - substantive values as important. This might seem surprising for process-based theories. However the process is not an end in itself, but rather essential to achieve better compliance with substantive principles. As many of these principles are relatively broad, it is through principled discourse that they can be operationalized and applied in a specific context. Compliance in this sense is therefore not limited to "mapping behavior onto a chosen rule"¹⁹⁹⁸, but rather to arrive, through a specified procedure, at a decision that represents an "acceptable level of compliance".¹⁹⁹⁹ This is particularly important for the second level of compliance: The first level of compliance concerns compliance with the procedural and organizational rules guiding the con-

¹⁹⁹³ Ibid.

¹⁹⁹⁴ Chayes and Chayes, 'On Compliance' (above, n. 1947), p. 176.

¹⁹⁹⁵ Craik, *The International Law of Environmental Impact Assessment* (above, n. 59), p. 267.

¹⁹⁹⁶ Ibid.

¹⁹⁹⁷ Koh, 'Why Do Nations Obey International Law?' (above, n. 1950), p. 2619.

¹⁹⁹⁸ Craik, *The International Law of Environmental Impact Assessment* (above, n. 59), p. 177.

¹⁹⁹⁹ Chayes and Chayes, 'On Compliance' (above, n. 1947), p. 198.

duct of HRIAs. The second level concerns compliance with the substantive human rights an HRIA is supposed to protect. This is particularly important in situations of factual or normative uncertainty. Critics might argue that it is impossible to precisely predict the impacts a trade policy has on small-scale farmers in the Global South, and even if it were, that there is no precise normative yardstick to determine when such an impact becomes a human rights infringement. It is therefore impossible to map behavior – the enactment of a trade policy – to a chosen rule – the small-scale farmers’ right to an adequate standard of living. Taking a process-oriented perspective, this is, however, not a significant problem. Rather, it is necessary to develop, during the HRIA-process, solutions that lead to an acceptable level of compliance with the human right to an adequate standard of living.

Therefore, transparency, participation, and deliberation are essential process-values. The interaction between different actors can result in norm-internalization. Even though this is most prominently carved out in transnational process theory, also managerial or legitimacy approaches to compliance regard internalization to be important. As Koh himself admits:

“Upon examination, this process explanation comports with both the Chayeses’ managerial approach and Franck’s fairness approach. The “discursive process” to which the Chayeses refer is simply a multiply iterated version of the transactional approach I describe. Moreover, the parties to the transaction will typically view an internalized rule that emerges from such a process with the “internal” sense of fairness and legitimacy that Franck deems necessary for that rule to have “compliance pull”.”²⁰⁰⁰

The fact that IAs require an early assessment of different policy options and to discard options that would be illegal, the process itself can increase compliance, even though it is hard to measure. IAs can therefore contribute to the effect Henkin described: “Every day, legal counsel suppress or modify proposals that are deemed illegal before they reach the level of decision”.²⁰⁰¹ In this sense, one effect of IAs can be the elimination of hazardous or illegal options before the proposal even reaches the decision-making stage.²⁰⁰² HRIAs can therefore be a quiet, bureaucratic and in this sense quite unspectacular compliance mechanism.

Process-oriented theories to (non-)compliance seem to correspond with what practitioners inside public institutions often see, namely that the alleged human rights deficit of their initiatives is often less caused by a lack of the recognition of human rights, but rather because it is difficult to find ways to “implement and apply them” to the institution’s operations.²⁰⁰³

²⁰⁰⁰ Koh, ‘Why Do Nations Obey International Law?’ (above, n. 1950), p. 2646 Fn. 238.

²⁰⁰¹ Henkin, *How Nations Behave* (above, n. 1966), p. 42.

²⁰⁰² Peter Wathern, ‘An introductory guide to EIA’, in: Peter Wathern (ed.), *Environmental impact assessment*, pp. 3–30, p. 6: “Indeed, the greatest contribution of EIA to environmental management may well be in reducing adverse impacts before proposals come through to the authorization phase”.

²⁰⁰³ Fujita, *The World Bank, Asian Development Bank and Human Rights* (above, n. 311), p. 18.

9.1.2 Compliance Theories and Lessons from IA Theory: Factors influencing Compliance and Effectiveness

The previous section has looked at legal compliance theories to identify factors that influence compliance. This section will add insights from research about the effectiveness of domestic EIA regimes. However, it is important to recall that it is difficult to measure effectiveness because the effects of IAs can be different. In any case, the evaluation of effectiveness requires, first, to identify what IAs are supposed to achieve.²⁰⁰⁴ Over the past years, numerous theoretical models have been developed to further explain the purpose and function of impact assessments,²⁰⁰⁵ among which three major categories were previously identified: to inform decision-makers (information model), to provide a platform for broad-based participation (preference-accumulation model), or to transform the decision-making process (transformation model). While information models mainly appeal to the rationality of decision-makers and can affect decision-making by persuasion or “speaking truth to power”,²⁰⁰⁶ the logic of the transformation model is similar to process-oriented compliance theories.

However, as mentioned, process-theories of compliance are based on the assumption that different factors increase compliance. Discourses leading to compliance often take place in the “shadow of sanctions”.²⁰⁰⁷ Louis Henkin emphasized the complexity of compliance factors, including reputation, reciprocity, norm observation, domestic politics, and the like,²⁰⁰⁸ and Koh assumes that legitimacy as well as the threat of enforcement increases the likelihood of the norm to be internalized.²⁰⁰⁹ Similarly, research on the effectiveness of domestic EIAs as well as regulation theory in general has demonstrated that different factors are decisive to give effect to IA-obligations.²⁰¹⁰ An example are theories of responsive regulation. While focusing on a slightly different constellation, namely the regulation of private actors by public authorities, these approaches nevertheless illustrate how different factors – such as a combination of sanctions and incentives, of cooperation and confrontation – increase compliance.²⁰¹¹ To illustrate how re-

²⁰⁰⁴ O’Faircheallaigh, ‘Effectiveness in social impact assessment: Aboriginal peoples and resource development in Australia’ (above, n. 926), p. 95; Pope et al., ‘Advancing the theory and practice of impact assessment: Setting the research agenda’ (above, n. 75), p. 6. Already in the early 1990s, Bryde addressed the difficulty of measuring the effectiveness of EIAs and, against this background, pointed out that two main goals must be distinguished: on the one hand, the procedural goal of improving environmental information and on the other hand the goal to improve environmental conditions through taking account of this information: Bryde, ‘Problems of measuring the effectiveness of the Council directive on environmental impact assessment’ (above, n. 1927), p. 15.

²⁰⁰⁵ For an overview see: Nooteboom, ‘Impact assessment procedures for sustainable development: A complexity theory perspective’ (above, n. 1461), p. 646; Robert Bartlett and Priya Kurian, ‘The theory of environmental impact assessment’, *Policy & Politics*, 27 (1999), pp. 415–433.

²⁰⁰⁶ Meuwese, *Impact Assessment in EU Lawmaking* (above, n. 267), p. 42.

²⁰⁰⁷ Koh, ‘Why Do Nations Obey International Law?’ (above, n. 1950), p. 2639.

²⁰⁰⁸ Quoted in: Raustiala and Slaughter, ‘International Law, International Relations and Compliance’ (above, n. 1940), p. 540.

²⁰⁰⁹ Koh, ‘Why Do Nations Obey International Law?’ (above, n. 1950), pp. 2656–2657; Craik, *The International Law of Environmental Impact Assessment* (above, n. 59), p. 193; similar: March and Olsen, ‘The Institutional Dynamics of International Political Orders’ (above, n. 1936), p. 952 stating that the logic of consequences and the logic of appropriateness are not mutually exclusive.

²⁰¹⁰ Kersten, ‘Rethinking Transboundary Environmental Impact Assessment’ (above, n. 117), 181 et seq.

²⁰¹¹ Ian Ayres and John Braithwaite, *Responsive regulation* (New York: Oxford University Press, 1995); John Braithwaite, ‘The Essence of Responsive Regulation’, *UBC Law Review* (2011), pp. 475–520; an application of responsive regulation for international regulation: Kenneth Abbott and Duncan Snidal, ‘Taking

sponsive regulation is and should work, responsive regulation theorists have designed so-called regulatory pyramids of support and sanction,²⁰¹² starting usually with cooperative and discursive strategies at the bottom, continuing with sanctions on the one side and incentives on the other, ranging from informal to formal incentives/sanctions. The exact design and content of these pyramids greatly vary depending on the regulatory context. Insofar as public institutions use an IA regime to regulate their decision-making - described above as meta-regulation - similar compliance mechanisms could be applied to ensure compliance with these types of meta-regulation obligations.

In the compliance and IA theories identified above, one or several of the following factors are regarded as important to increase compliance with legal norms and the effectiveness of impact assessments. These factors, which I will use as lenses to analyze the EU's emerging HRIA regime, are formal accountability mechanisms, political accountability mechanisms, substantive determinacy, internalization and institutional learning, and ex-post assessments in combination with legal flexibility mechanisms. This final factor is also important due to the challenges of uncertainty: It is often impossible to precisely predict and thus to consider all human rights impacts *ex-ante*. However, if human rights impacts are only recognized after a legal act (e.g. an international agreement) entered into force, it is not easy to change such an act in order to accommodate these findings unless sufficient legal flexibility mechanisms exists. The availability of formal and informal flexibility mechanisms is therefore the fifth factor for the following analysis. This is not supposed to be an exclusive list. Rather, these factors are denominators common to (most) regulation, compliance and impact assessment theories.

9.1.2.1.1 Formal Accountability: Judicial Review

Justiciability is one institutional factor that increases the ability of impact assessments to influence decision-making and operationalize the commitment to human rights. Judicial review can help to enforce compliance with the obligation to conduct IAs, to respect procedural rules on transparency and participation, and, to a certain extent, to take the findings into consideration. All compliance and regulation theories regard judicial review as important, even though to varying degrees. While rationalist approaches emphasize that judicial sanctions deter self-interested actors, normative and process-oriented theories regard it as one among different important factors. It can impose sanctions, which is important for compliance both according to process-oriented and rationalist compliance models. Judicial review thus reinforces political through legal accountability.²⁰¹³ In addition, judicial review can interpret vague norms, increase the determinacy of norms and therefore the likelihood of compliance.

The role of judicial review in influencing decision-making means more than pronouncing a judgment of illegality. Especially EIA-litigation has become somewhat strategic. NGOs have begun to use litigation as a tactical instrument to increase transaction costs.²⁰¹⁴ This strategy has

responsive regulation transnational: Strategies for international organizations', *Regulation & Governance* (2013), pp. 95–113.

²⁰¹² Braithwaite, 'The Essence of Responsive Regulation' (above, n. 2011), 481 et seq.

²⁰¹³ Kersten, 'Rethinking Transboundary Environmental Impact Assessment' (above, n. 117), p. 195.

²⁰¹⁴ Bradley Karkkainen, 'Whither NEPA?', *N.Y.U. Envtl. L. J.*, 12 (2004), pp. 333–363, p. 341; Kersten, 'Rethinking Transboundary Environmental Impact Assessment' (above, n. 117), p. 197.

proven effective to the extent that even those who do not believe in the *informative* or *transformative* power somehow recognize the value of IAs.²⁰¹⁵ Nevertheless, differences exist regarding the adequate scope for judicial review: Information models regard information as the most important prerequisite for better decision-making, while pluralistic and transformational models pay major attention to discursive elements, such as the involvement of different departments, organizations, affected individuals or civil society organizations. Therefore, the scope of justiciability would be different: Transformational approaches would regard the violation of participatory rules and principles as a significant violation that requires invalidating the final decision accompanied by the assessment. Information models would rather focus on the availability of relevant information; if decision-makers are sufficiently informed irrespective of the violation of IA procedures, it would not be justified to invalidate the final act.

Justiciability and impact assessments can be analyzed from two perspectives. First, *direct* review of compliance with IA-law in the strict sense is possible: did the public authority comply with the obligation to conduct an impact assessment, does the procedure comply with the respective principles, rules and standards, and were the findings adequately taken into consideration when taking the final decision? These are often challenges made in domestic courts but also before quasi-judicial panels. However, IAs can also be *indirectly* relevant, namely as a justificatory element of decision-making, and courts may rely on IA reports to review whether a public authority has adequately taken the consequences of its decision into account (in particular in the context of the proportionality test). Here, impact assessments become indirectly important to evaluate the substantive legality of a decision. Insofar, it is not decisive whether IAs are required by a binding and justiciable norm; rather, IAs are considered for judicial review because they operationalize the proportionality principle and the duty of care. The fact that there is an institutionalized and structured procedural framework can facilitate judicial review, especially review of the justificatory arguments,²⁰¹⁶ and if the justificatory reasoning is wanting, the court should invalidate the decision.²⁰¹⁷ Domestic EIAs for projects are generally subject to direct judicial review. Legislative and regulatory impact assessments are so far mainly either subject to indirect judicial review, or reviewed by non-judicial regulatory oversight bodies.²⁰¹⁸ As judicial review is important in particular for a legal analysis of institutionalized HRIAs, the final section of this chapter will be dedicated to the relationship between impact assessments and judicial review.

²⁰¹⁵ Ibid.; Karkkainen, 'Whither NEPA?' (above, n. 2014), p. 341.

²⁰¹⁶ Paul Craig and Gráinne de Búrca, *EU Law* (Oxford: Oxford University Press, 2015), 6th ed., p. 94; pointing out that it is difficult to sort out the "good cases" of resistance: Kersten, 'Rethinking Transboundary Environmental Impact Assessment' (above, n. 117), p. 203.

²⁰¹⁷ Craig and Búrca, *EU Law* (above, n. 2016), p. 94.

²⁰¹⁸ Jonathan Wiener and Alberto Alemanno, 'Comparing regulatory oversight bodies across the Atlantic: the Office of Information and Regulatory Affairs in the US and the Impact Assessment Board in the EU', in: Susan Rose-Ackerman and Peter Lindseth (eds.), pp. 309–335. One example is the European Commission's Regulatory Scrutiny Board which will be discussed below. Similarly, legislative or regulatory proposals can be reviewed by government organs. In France, for example, the quality of the IA for executive bills is not only supervised by the Conseil d'Etat but also by the "Secrétariat Général du Gouvernement": Duprat, 'The Judicial Review of Ex Ante Impact Assessment in France: An Attempt to Fuse the Principles of Legal Certainty and Institutional Balance' (above, n. 854), 381 and 390.

9.1.2.1.2 Political Accountability

In many domestic EIA regimes, the involvement of citizens in EIA processes is another important factor to give effect to EIA-law.²⁰¹⁹ Even in states with a strong legal system, it is not always the case that the “bonds of accountability [...] fasten together the citizenry, the elected officials, and the unelected administrators into a responsive, functioning political system. In reality, though, certain factors impede this integration”.²⁰²⁰ These factors are information asymmetry and limited time: Often, civil society has less information than the administrative agency or a project developer, and even where – thanks to transparency legislation – it is possible to gain access to information, citizens or NGOs may not have the time to organize political alliances to resist a proposal.²⁰²¹ This is also one response to the risk of regulatory capture by special interests or, even worse, corruption. Ayres and Braithwaite emphasize that tripartism is important to avoid these inherent risks, namely through the empowerment of public interest groups to reduce the risk that cooperation is captured by special interests.²⁰²² EIA law can therefore increase political accountability if it provides these two important resources, namely information and time.²⁰²³ There is at least anecdotal evidence that the EIS, for example, raised awareness and alarmed affected individuals and groups to get involved.²⁰²⁴

However, in particular IAs where extraterritorial effects are assessed face additional challenges. Here, distant strangers affected by a decision transnationally are not directly relevant to the public authority’s own constituency.²⁰²⁵ This includes the assessment of transboundary environmental impacts as well as the assessment of social and human rights impacts on people living in faraway countries. International impact assessments can also provide information and time, insofar as information must be provided a specified period of time before decisions may be taken. Still, they face several other challenges compared to domestic situations, such as international information exchange, institutional coordination, sensitivity to sovereignty, different cultural approaches, language barriers etc.²⁰²⁶ Political institutions generally have a domestic constituency and therefore a rational incentive to consider domestic (human rights) impacts more than those occurring abroad. From a political economy perspective, it appears therefore more difficult that political accountability would increase compliance with extraterritorial impact assessment commitments compared to domestic ones. Nevertheless, transnational networks are

²⁰¹⁹ Kersten, ‘Rethinking Transboundary Environmental Impact Assessment’ (above, n. 117), p. 183; van Buuren and Nooteboom, ‘Evaluating strategic environmental assessment in The Netherlands: content, process and procedure as indissoluble criteria for effectiveness’ (above, n. 1642); for a critical overview: O’Faircheallaigh, ‘Effectiveness in social impact assessment: Aboriginal peoples and resource development in Australia’ (above, n. 926), p. 98.

²⁰²⁰ Kersten, ‘Rethinking Transboundary Environmental Impact Assessment’ (above, n. 117), p. 184.

²⁰²¹ Ibid.; Kenneth Murchison, ‘Does NEPA matter? : An Analysis of the Historical Development and Contemporary Significance of the National Environmental Policy Act’, *University of Richmond Law Review*, 18 (1984), p. 611.

²⁰²² Ayres and Braithwaite, ‘Regulatory Capture and Empowerment’ (above, n. 1348).

²⁰²³ Kersten, ‘Rethinking Transboundary Environmental Impact Assessment’ (above, n. 117), p. 185; Murchison, ‘Does NEPA matter? : An Analysis of the Historical Development and Contemporary Significance of the National Environmental Policy Act’ (above, n. 2021), pp. 611–613.

²⁰²⁴ Kersten, ‘Rethinking Transboundary Environmental Impact Assessment’ (above, n. 117), p. 186.

²⁰²⁵ In this sense already: Bryde, ‘Grenzüberschreitende Umweltverantwortung und ökologische Leistungsfähigkeit der Demokratie’ (above, n. 427), p. 81.

²⁰²⁶ Kersten, ‘Rethinking Transboundary Environmental Impact Assessment’ (above, n. 117), p. 183; Cassar and Bruch, ‘Transboundary Environmental Impact Assessment in International Watercourse Management’ (above, n. 117), p. 179.

emerging, and labor organizations or NGOs are increasingly transnationalized. As has been seen during the trade negotiations between the US and Colombia, alliances between trade unions from both countries united to object certain parts of the trade agreement and to lobby Congress in this regard. Similarly, representatives from Colombian civil society organizations exchanged views with committee members of the European Parliament,²⁰²⁷ and supporters and opponents of the trade negotiations did not align according to nationality. Consequently, the political struggle for or against the trade agreement was not (at least not only) organized along national borders, but according to transnationally identified interests.

9.1.2.1.3 Determinacy of Procedural and Substantive Standards

Another factor concerning the ability of impact assessments to influence decision-making is legal determinacy, as identified above in particular by normative compliance theorists. In IA law, in particular procedural norms can be very specific: Law can require IAs for very specific projects (e.g. the “mandatory EIAs” under EU law) and set clear rules on participation, consultation periods or on the requirements for IA reports. The determinacy of substantive norms and their relevance for IAs is more complicated. As discussed above, the very reason for IAs is that substantive standards are rare. IAs should help to protect and promote broadly defined legal rights and interests in spite of the lack of existing normative standards that would clearly guide decision-making.

The link between substantive standards and IA law is two-folded: First, it concerns how procedure forms substance – and this is what process-oriented theories are mainly about. The second direction concerns how substance can determine procedure, mainly in limiting discretion.²⁰²⁸ The more substantive standards are explicitly made part of an IA-regime, the more likely it is that these rights and interests will be considered during the process. Substantive norms determine the IA-process at different stages, for example at the screening and scoping stage when deciding what impacts are to be taken into account, and at the analysis and recommendation stage when comparing and evaluating different impacts. Therefore, the degree of determinacy of each norm can make a difference: From a normative or process-oriented compliance perspective, determinacy of norms can cause a compliance or legitimacy-pull. For rationalist compliance theories, compliance with substantive norms causes lower (reputational) costs, considering that debates about (non-)compliance are often debates about legal content.

IA-theory also emphasizes the added value of specific guidance. This concerns, first, procedural questions on how to conduct an IA. Still, some voices express concern about the curbing effect of too much normative information, such as an overload of guidelines that might appear frustrating and crush creativity²⁰²⁹ or incentivize duty-bearers to look for creative ways to avoid compliance.²⁰³⁰ Before this background, the new approach used by the European Commission has some

²⁰²⁷ European Parliament, Committee on International Trade, ‘Notice to Members: Report of the delegation of the Committee on International Trade to Colombia (Bogotá) and Peru (Lima) on 25-27 March 2014’, 28 April 2014.

²⁰²⁸ Kersten, ‘Rethinking Transboundary Environmental Impact Assessment’ (above, n. 117), 181 et seq.

²⁰²⁹ Pope et al., ‘Advancing the theory and practice of impact assessment: Setting the research agenda’ (above, n. 75), p. 7.

²⁰³⁰ Doreen McBarnet and Christopher Whelan, ‘The Elusive Spirit of the Law: Formalism and the Struggle for Legal Control’, *The Modern Law Review*, 54 (1991), pp. 848–873.

advantages. Since 2015, the EU Impact Assessment regime also uses a toolbox concept that provides specific guidance in an accessible manner: It reduces the information overload because users do not have to read hundreds of pages but can pick the “tools” they need for the impact assessment in question. Second, specific guidance also concerns substantive rules, in the case of HRIAs in particular specific rules defining the scope of human rights obligations. Arguably, part of NEPA’s effectiveness is said to come from its interaction with substantive, precise, command-and-control laws.²⁰³¹ Not only do substantive norms limit and guide agency discretion. An IA also has its own added value, for example as it can help to detect potential violations of substantive norms that would otherwise have been undetected.²⁰³² But experience from environmental law also suggests that it is often difficult - or for technological reasons impossible - to agree on specific standards. Similarly, it is as of now difficult to agree on specific standards for human rights beyond the state. A consequence is that liability standards are often modified from “strict liability” to “due diligence”.²⁰³³ However, it is nevertheless important to at least agree on “due diligence” standards, and this directly affects impact assessment law: IAs can enhance deliberative processes if actors agree on “meaningful standards for due diligence”, e.g. to use the best available technology, the best possible location for a project, to install appropriate mitigation measures or to adopt precautions to minimize risk.²⁰³⁴

Generally, international IAs are not based on strong substantive rules and standards.²⁰³⁵ This is also true for HRIAs: the substantive scope of international and extraterritorial human rights obligations is still controversial and vague. However, UN treaty bodies or scholars increasingly elaborate more specific – albeit non-binding – substantive standards. Therefore, the substantive determinacy of human rights relevant for HRIAs would increase if an institution authorized its staff to rely on these non-binding standards, such as General Comments. While the World Bank has so far been hesitant to do so, the European Commission explicitly encourages the application of these international soft-law norms, as will be seen below.²⁰³⁶

9.1.2.1.4 Institutional Culture, Learning and Norm Internalization

If, how and to what extent IAs are conducted and the findings are taken into consideration for the final decision also depends on institutional culture and institutional learning. In order to comply with human rights norms in general and HRIA norms in particular, it appears necessary that institutions – be they international organizations, state institutions or other entities – inter-

²⁰³¹ Kersten, ‘Rethinking Transboundary Environmental Impact Assessment’ (above, n. 117), p. 191.

²⁰³² Ibid.; on the relationship between procedure and substance in NEPA: Richard Lazarus, ‘The National Environmental Policy Act in the U.S. Supreme Court: A Reappraisal and a Peek Behind the Curtains’, *The Georgetown Law Journal*, 100 (1012), 1507-1586; William Rodgers, ‘The Environmental Laws of the 1970s: They Looked Good on Paper’, *Vermont Journal of Environmental Law*, 12 (2010), pp. 1-42, pp. 35-36 arguing that the Supreme Court “crossed out” some substantive criteria contained in NEPA.

²⁰³³ Kersten, ‘Rethinking Transboundary Environmental Impact Assessment’ (above, n. 117), p. 202.

²⁰³⁴ Ibid., p. 203.

²⁰³⁵ For the case of transnational EIAs: Ibid., p. 193.

²⁰³⁶ However, at a certain point, more substantive standards can have a counterproductive effect if these standards are contradictory, or if they are conflicting and therefore require balancing. Norm collisions can render the decision-making process less deterministic.

nalize these norms,²⁰³⁷ as stressed, inter alia, by process-oriented compliance theories. Internalization can be understood formally and socially. Formally, internalization mainly refers to what has been defined as implementation, namely the “process by which intent gets transferred into action”.²⁰³⁸ This has been illustrated above. In addition, and this draws mainly on process-oriented compliance theories, internalization can be understood as social internalization or cultural change in an institution.²⁰³⁹

Obviously, such a process of internalization into an institution’s culture depends on a whole range of elements beyond the formal implementation of the respective norms. This cannot be analyzed here in closer detail. However, law may contribute to shaping the institutional culture. First, the commitment to human rights in an institution’s internal norms and formal practices can influence the institutional culture, at the very least because it means that members (or staff) of the organization wishing to actively consider these substantive norms (e.g. human rights) do not have to justify that these norms are applicable, an effect that I described above as the argumentative shift of the burden of proof. Instead, human rights arguments can and must legally be considered, and decisions that might violate human rights can be challenged at least during the decision-making process at a deliberative stage.

A second related aspect concerns what Koh describes as social internalization, namely “when a norm acquires so much public legitimacy that there is widespread general obedience to it.”²⁰⁴⁰ For the context of institutional law, social internalization would mean that for example European Commission staff regards a norm requiring the conduct of HRIAs to be an essential part of their professional tasks²⁰⁴¹ – not only in the legal sense, but also in the sense that “others” expect it, such as member state governments, the public, the media, etc. Social internalization can obviously be enhanced if the respective norm is also legally internalized in the respective normative order. Here, overlaps with liberal approaches to compliance exist, in particular the importance to open an institution’s black box. Then it becomes apparent that other aspects support or hinder social internalization, such as the financial incentive structure: The fact alone that human rights are normatively implemented into World Bank or EU law would be one step. Another is that these norms are also given adequate weight within the institution’s broader legal order. This is often not the case. One author noted that compliance in the World Bank and borrower countries with safeguards is often regarded as unreasonably expensive: “[l]oans go through more smoothly when compliance is not questioned, satisfying the Bank’s financiers and getting borrowers the money they need more quickly.”²⁰⁴² In consequence, the staff has, “once the initial tranche of a loan has been made available [...] a strong incentive to make the loan ‘work’. This is

²⁰³⁷ In the context of indigenous peoples’ rights and the World Bank: Galit A. Sarfaty, ‘The World Bank and the Internalization of Indigenous Rights Norms’, *The Yale Law Journal*, 114 (2005), pp. 1791–1818; in general on internalization: Koh, ‘Why Do Nations Obey International Law?’ (above, n. 1950), p. 2646.

²⁰³⁸ Victor, Raustiala and Skolnikoff, ‘Introduction and Overview’ (above, n. 1940), p. 1; Raustiala and Slaughter, ‘International Law, International Relations and Compliance’ (above, n. 1940), p. 539; Craik, *The International Law of Environmental Impact Assessment* (above, n. 59), p. 179.

²⁰³⁹ For example, Sarfaty states that the “internalization” of indigenous rights norms in “in the culture of the [World] Bank means incorporating the norms into its identity”: Sarfaty, ‘The World Bank and the Internalization of Indigenous Rights Norms’ (above, n. 2037), p. 1813.

²⁰⁴⁰ Koh, ‘Why Do Nations Obey International Law?’ (above, n. 1950), p. 2656.

²⁰⁴¹ For social internalization of indigenous peoples’ rights at the World Bank: Sarfaty, ‘The World Bank and the Internalization of Indigenous Rights Norms’ (above, n. 2037), p. 1814.

²⁰⁴² Natalie Bridgeman, ‘World Bank Reform in the “Post-Policy” Era’, *Georgetown International Environmental Law Review*, 13 (2001), pp. 1013–1046, p. 1025.

partly because their own success depends on effectively managing aid disbursements and partly because punishments imposed by the Bank for failing to meet Bank conditions lack moral legitimacy. The threat not to make subsequent tranches available therefore has relatively low credibility, and the Bank learns to accept partial success.”²⁰⁴³ The success or failure of institutionalized human rights impact assessments will therefore also depend on the institutional culture and the “hidden internal operations”²⁰⁴⁴ within the respective organizations. In other words, an institution’s staff may have different incentives to consider or ignore “human rights impacts”.²⁰⁴⁵ Some of these incentives can be influenced by reforming the respective legal framework, for example the financial incentive structure. A bonus system or promotional scheme that considers not only the financial but also the social impact of projects and policies implemented by staff members can contribute to the social internalization of human rights impact assessments.

However, opening the black box of an institution in order to better understand the institutional culture also reveals that often not *unwillingness* but an (at least perceived) *inability* to adequately assess the human rights consequences of one’s action is the reason for low compliance rates. This relates to the aforementioned problem of indeterminacy and the fact that decision-makers at the operational level often feel it is difficult to evaluate human rights impacts given the great variety of other (regulatory) goals and objectives to be pursued. This resembles the managerial and process-oriented approaches to compliance and would emphasize the need for “capacity building” and a better managerial approach, including checklists, training, or decision-making procedures that enable learning-cycles. It is in this context that also non-binding norms, such as the Guidelines on HRIA developed by the Nordic Trust Fund or other institutions might increase the relevance of IAs: whether or not they are binding does not matter if the compliance deficit is not unwillingness but a (perceived) lack of normative determinacy.

Important for institutional learning is the combination of ex-ante and ex-post impact assessments. Two types of expectations are generally placed on ex-post IAs: First, they can help to identify impacts that become evident only after the implementation of the initiative; and second, they can contribute to improve IA methodologies in general, as they allow to compare predicted with actual impacts and thus may improve the accuracy of predictions in the future.²⁰⁴⁶ This, however, is a justification that strongly believes in the rationality and ability to predict future impacts if only one had better methodology at hand: it reflects the objective-managerial paradigm. A different approach to institutional learning through IA is its ability to “create tensions in the political arena”²⁰⁴⁷ which could then result in interdependency between different actors and adaptive behavior in the future. In order to increase effectiveness, the right question should not

²⁰⁴³ Christopher Gilbert, Andrew Powell, and David Vines, ‘Positioning the World Bank’, *The Economic Journal*, 109 (1999), F598-F633, F617.

²⁰⁴⁴ Sarfaty, ‘The World Bank and the Internalization of Indigenous Rights Norms’ (above, n. 2037), p. 1817.

²⁰⁴⁵ Sarfaty, *Values in Translation* (above, n. 13), p. 85.

²⁰⁴⁶ Cary Coglianese and Lori Benneer, ‘Program Evaluation of Environmental Policies: Toward Evidence-Based Decision-Making’, in: Garry D. Brewer and Paul C. Stern (eds.), *Decision making for the environment*, pp. 246–269, p. 251. However, it is even ex-post not always easy to clearly prove the causality between an initiative and its impacts. Especially in the case of risk decisions, the occurrence of harm does not mean that the determination of the probability was correct or incorrect; on the other hand, if predicted and actual impacts match, it does not mean that the methodology was correct but could also be a matter of coincidence. See above, section 5.4.4.

²⁰⁴⁷ Nooteboom, ‘Impact assessment procedures for sustainable development: A complexity theory perspective’ (above, n. 1461), p. 650.

be how to best inform about the specific impacts of a specific initiative, but rather where “such tension [is] most constructive” and where it leads to a “social learning process”,²⁰⁴⁸ even though the right “dose” of irritation is very context-specific, as too much negative feedback might lead to backlash against IA-procedures as a whole.²⁰⁴⁹ IAs can serve as a form of checks-and-balances because a proposal is “evaluated from other points of view than the ones that have produced it”.²⁰⁵⁰ This means that, in order to have such an effect, IA-procedures must “irritate”²⁰⁵¹ those in charge. This obviously makes the evaluation of IA-effectiveness a bit more difficult: In particular, interviewees might tend not to answer questions such as “Do you find IAs useful?” in the affirmative if they feel rather *irritated* than *informed* – even though this would, according to such an approach, be exactly what IAs are supposed to do.

Not only irritants can be drivers for *social* learning; there is also a political economy consideration²⁰⁵² if institutions “learn” that failure to, for example, conduct IAs can increase transactional costs or result in backlash. Especially with regard to investment projects, negative environmental and social impacts have increasingly been associated with financial risks, and studies confirm that delays and additional costs of projects in the extractive sector are almost equally caused by technical and non-technical risks such as social and environmental risks (e.g. community resistance).²⁰⁵³ Therefore, the conduct of impact assessments and the avoidance, reduction or mitigation of adverse impacts can also be motivated by an institution’s financial self-interests where social impacts are increasingly identified as real business risks.²⁰⁵⁴ The development and application of the IFC Performance Standards and the Equator Principles are largely driven by these financial self-interests.²⁰⁵⁵ However, political economy considerations alone are no reliable drivers for organizational change: where social resistance against a project is low in spite of human rights risks, there would be no strong incentive to learn and adapt.

²⁰⁴⁸ Ibid., p. 660.

²⁰⁴⁹ Ibid.

²⁰⁵⁰ Ibid., p. 648.

²⁰⁵¹ Ibid., p. 660.

²⁰⁵² Bartlett and Kurian, ‘The theory of environmental impact assessment’ (above, n. 2005), 419 et seq.; Esteves, Franks and Vanclay, ‘Social impact assessment: The state of the art’ (above, n. 1279) illustrate how SIA were increasingly applied as a tool for corporate risk management.

²⁰⁵³ Rachel Davis and Daniel M. Franks, ‘Costs of Company-Community Conflict in the Extractive Sector’, Corporate Social Responsibility Initiative Report No. 66. Cambridge, MA: Harvard Kennedy School, 2014, 19 ff.

²⁰⁵⁴ In 2003, the World Bank’s Operations Evaluation Department observed that the (then) Operational Directive 4.20 on Indigenous Peoples was applied in 55 out of 89 projects that could have affected Indigenous Peoples, and that projects applying the Directive had better outcomes in terms of their stated objectives: Operations Evaluation Department, ‘Implementation of Operational Directive 4.20 on Indigenous Peoples: An Independent Desk Review’, World Bank, Report No. 25332, 2003, 2.3.

²⁰⁵⁵ Esteves, Franks and Vanclay, ‘Social impact assessment: The state of the art’ (above, n. 1279), 35 f.; UN Human Rights Council, ‘Report of the Special Representative of the Secretary-General on the issue of human rights and transnational corporations and other business enterprises, John Ruggie: Business and human rights: further steps toward the operationalization of the “protect, respect and remedy” framework’, A/HRC/14/27, 69 ff.; Pope et al., ‘Advancing the theory and practice of impact assessment: Setting the research agenda’ (above, n. 75), p. 6; Morgan, ‘Environmental impact assessment: the state of the art’ (above, n. 865), p. 8.

9.1.2.1.5 Ex-post IAs and Legal Flexibility Mechanisms

Ex-post impact assessments including the establishment of monitoring mechanisms are important, last but not least in order to detect unforeseen consequences and to be able to review and amend the legislative or regulatory decision accordingly.²⁰⁵⁶ While ex-ante impact assessments are largely predictive and conducted under situations of uncertainty, ex-post impact assessments allow to analyze the actual impacts of an intervention. This does not necessarily mean that ex-post assessments are always easy to conduct. There might still be a high level of uncertainty, in particular as it is often very difficult to distinguish causality from correlation. Nevertheless, ex-post assessments can produce valuable insights. Therefore, the UN Guiding Principles on HRIA of Trade and Investment Agreements recommend reviewing the human rights impacts of trade and investment agreements every three to five years.²⁰⁵⁷ The relevance of ex-post IAs – and thus the ability to increase human rights compliance – depends on mainly two conditions, namely the *willingness* and *ability* to respond to human rights impacts that become apparent after a legal act entered into force. Such an obligation to remedy human rights impacts occurring after the enactment of a decision exists under human rights law. However, it may, for legal reasons, be difficult to respond to these human rights impacts discovered ex-post, in particular if they are caused by an international agreement (e.g. a trade or investment agreement, a financing contract, etc.) that already entered into force. Generally, all parties must agree to formally amend the agreement, unless other flexibility mechanisms exist. Therefore, the ability of ex-post HRIAs to increase human rights compliance goes hand in hand with the flexibility of the underlying legal commitment, such as a trade, investment or financing agreement.

Factual uncertainty requires regulatory flexibility; this is true for domestic administrative²⁰⁵⁸ but also international law. The World Bank's legal framework, for example, allows for the renegotiation and, finally, termination of a contract if the project developer does not comply with his contractual obligations, including environmental and social norms.²⁰⁵⁹ While domestic regulation, such as unilateral trade policies, can generally be modified in normal legislative or regulatory amendment procedures, the modification of international treaties is usually more difficult as it requires the consent of all state parties. If, once a treaty is in force, negative human rights (or other) impacts occur, options to react are more limited. Consequently, flexibility mechanisms can reduce the risks of joining an international agreement by providing protection against risks by allowing a party to modify or even terminate a commitment.²⁰⁶⁰ At the same time, flexibility mechanisms allow states and international organizations to experiment with substantive stand-

²⁰⁵⁶ Human Rights Council, *Guiding Principles on Human Rights Impact Assessments of Trade and Investment Agreements*, Report of the Special Rapporteur on the right to food, Olivier de Schutter [2011], III.3.3.

²⁰⁵⁷ Ibid.

²⁰⁵⁸ Eberhard Schmidt-Aßmann, *Das allgemeine Verwaltungsrecht als Ordnungs idee* (Berlin: Springer, 2006), p. 364, a term also used by the EU Committee of the Regions: "The Committee would however support the creation of a flexibility reserve made up of automatic decommitment resources and used to fund experimental initiatives in the area of smart, sustainable or inclusive growth or to intervene during a crisis": European Union, Committee of the Regions, *Opinion of the on 'Proposal for a general regulation on the funds covered by the Common Strategic Framework' 2012/C 225/07*, para 36.

²⁰⁵⁹ For example: World Bank, OP 10.00 para 28.

²⁰⁶⁰ Laurence Helfer, 'Flexibility in International Agreements', in: Jeffrey L. Dunoff and Mark A. Pollack (eds.), *Interdisciplinary Perspectives on International Law and International Relations*, pp. 175–196, p. 175.

ards and to better understand how they operate in real life.²⁰⁶¹ Consequently, the relevance of ex-post impact assessments will also depend on the scope of treaty flexibility in order to be *legally* able to respond to new findings.

Flexibility mechanisms can be classified as either formal or informal. Some few mechanisms exist as principles of international treaty law, such as the *rebus sic stantibus* principle,²⁰⁶² others are explicitly made part of the agreement, while again others, such as informal change through judicial interpretation, may be implicit. Over the last two decades or so, international law and relations scholars have shown an increasing interest in flexibility in international treaties and studied a variety of different aspects.²⁰⁶³ What are these mechanisms, and how can they be used to give more effect to ex-post HRIAs?

Formal flexibility mechanisms²⁰⁶⁴ are those that explicitly provide procedures to modify an agreement. They can apply to the whole life-cycle of an international agreement: Before a treaty enters into force (first stage), while it is in force (second stage), and once a state wishes the cessation of treaty obligations (third stage).²⁰⁶⁵

Before a treaty enters into force, states may unilaterally include reservations²⁰⁶⁶ (provided this is admissible under international law), or add declarations and interpretive statements. Even where this is not possible, governments can issue informal statements of (future) intent. These instruments may work where the risk of human rights infringements are already identified. This is most promising in cases of open ignorance.

Uncertainty may also be addressed collectively. In the first stage, during treaty negotiations, states may incorporate duration provisions²⁰⁶⁷ such as sunset clauses, or they may arrange for the provisional application of a treaty. Sunset clauses are used at times in domestic law in order to facilitate compromise and to allow to “experiment” with regulation and legislation. These are clauses that stipulate the expiration date of a statute, statutory instrument or another norm. Ideally, these clauses encourage scientific impact analysis and political debate about the respective norms before these norms are re-enacted or expire. Even though sunset clauses are still rather the exception than the rule, they are found in different national legal sources²⁰⁶⁸ and are sometimes also required by international law.²⁰⁶⁹ These sunset clauses would render ex-post

²⁰⁶¹ Timothy Meyer, ‘Power, Exit Costs, and Renegotiation in International Law’, *Harvard International Law Journal*, 51 (2010), pp. 379–425, p. 418; Barbara Koremenos, ‘Loosening the Ties That Bind: A Learning Model of Agreement Flexibility’, *International Organization*, 55 (2001), pp. 289–325, p. 292.

²⁰⁶² Article 62 VCLT.

²⁰⁶³ A good overview is provided by Helfer, ‘Flexibility in International Agreements’ (above, n. 2060).

²⁰⁶⁴ Examples of formal flexibility provisions: Anthony Aust, *Modern treaty law and practice* (Cambridge: Cambridge Univ. Press, 2007), 2. ed., 262 ff.; United Nations Environment Programme et. al., ‘Multilateral Environmental Agreement Negotiator’s Handbook’, 2007.

²⁰⁶⁵ Helfer, ‘Flexibility in International Agreements’ (above, n. 2060), p. 179.

²⁰⁶⁶ Thomas Miles and Eric Posner, ‘Which States Enter into Treaties, and Why?’, University of Chicago, in: John M. Olin Law & Economics Working Paper, 420, 2008, p. 7.

²⁰⁶⁷ Barbara Koremenos, ‘Contracting around International Uncertainty’, *The American Political Science Review*, 99 (2005), pp. 549–565.

²⁰⁶⁸ United States: *Public Safety and Recreational Firearms Use Protection Act*, P.L. 103-322 (1994), Title XI, Subtitle A (Assault Weapons), Sec. 110105; *Economic Growth and Tax Relief Reconciliation Act* (P.L. 107-16, 115 (2001), Sec. 901. Germany: laws enacted under the emergency provisions “shall cease to have effect six months after the termination of a state of defense”, Art. 115k (2) Basic Law.

²⁰⁶⁹ For example: safeguards under WTO law.

impact assessments more meaningful. These clauses allow to gather information and gain knowledge about the actual impacts – including human rights impacts – of different treaties. At the end of each period, ex-post impact assessments may evaluate the actual consequences of the respective treaty regime. The treaty will automatically terminate unless it is renegotiated and/or confirmed. These treaty provisions can work better in some types of treaties and are less suitable for others. For example, they might be more suitable for trade than investment treaties: The central objective of investment agreements is to provide long-term guarantees to investors. Therefore, most investment agreements contain a “continuum effect clause”, which means that investments made prior to the date of termination will remain protected for a period of generally ten to twenty years after the date of termination of the treaty.²⁰⁷⁰ Consequently, duration provisions like sunset clauses are less effective to quickly respond to unforeseen negative human rights impacts of investment agreements.

The most relevant and suitable flexibility modalities to integrate the findings of ex-post human rights impact assessments are those at the second stage, namely instruments that allow adapting to unforeseen human rights impacts while the treaty is in force, and that do not aim at the termination, denunciation or withdrawal from that agreement.

Collectively, regimes can be based on framework conventions which require a regular renegotiation of the respective protocols,²⁰⁷¹ a mechanism most commonly used in environmental law. Another mechanism is delegation to international organizations,²⁰⁷² be it for rule-making in the narrow sense or rule-interpretation. In particular where collective action is required, this would be a mechanism to respond to future challenges. It could also be a regulatory instrument to find adequate responses to unexpected consequences, including unexpected human rights consequences. While delegation may include the transfer of authority to issue binding decisions, delegation may also involve non-binding recommendations. For example, several international organizations issue non-binding standards that guide and influence the international trading systems, such as the Codex Alimentarius Commission created by the Food and Agriculture Organization (FAO) and the World Health Organization (WHO).²⁰⁷³ A similar form of delegation concerns the delegation of adjudicatory authority to international courts and tribunals, which can apply existing rules to unanticipated circumstances.²⁰⁷⁴

Escape clauses are a prominent unilateral flexibility modality. These allow for a “unilateral act” by which a party “temporarily suspends or derogates from some or all of its obligations without, however, withdrawing from membership or violating the treaty”.²⁰⁷⁵ An important escape clause in international trade law is Article XIX GATT:

²⁰⁷⁰ Jeswald Salacuse, ‘The Emerging Global Regime for Investment’, *Harvard International Law Journal*, 51 (2010), pp. 427–473, p. 472.

²⁰⁷¹ John Setear, ‘Ozone, Iteration and International Law’, *Virginia Journal of International Law*, 40 (1999), 193–309.

²⁰⁷² Andrew Guzman and Jennifer Landside, ‘The Myth of International Delegation’, *Cal. L. Rev.*, 96 (2008), pp. 1693–1723.

²⁰⁷³ *Ibid.*, p. 1709.

²⁰⁷⁴ *Ibid.*, p. 1713.

²⁰⁷⁵ Alan Sykes, ‘Protectionism as a “Safeguard”: A Positive Analysis of the GATT “Escape Clause” with Normative Speculations’, *University of Chicago Law Review*, 58 (1991), pp. 255–305; Helfer, ‘Flexibility in International Agreements’ (above, n. 2060), 186 ff.

“If, as a result of unforeseen developments and of the effect of the obligations incurred by a contracting party under this Agreement, including tariff concessions, any product is being imported into the territory of that contracting party in such increased quantities and under such conditions as to cause or threaten serious injury to domestic producers in that territory of like or directly competitive products, the contracting party shall be free, in respect of such product, and to the extent and for such time as may be necessary to prevent or remedy such injury, to suspend the obligation in whole or in part or to withdraw or modify the concession.” (Article XIX (1) (a) GATT)

Escape clauses such as Article XIX GATT reflect the *rebus sic stantibus* doctrine, which is recognized as customary international law and enshrined in Article 62 VCLT.²⁰⁷⁶ However, safeguard clauses such as Article XIX GATT usually contain certain provisions that shall prevent abuse. If parties do not come to an agreement, the party may still apply the safeguard clause but affected parties may in turn themselves suspend certain trade provisions (Article XIX (3) GATT). In addition, the ability to “challenge the escaping state’s assertions” before the WTO dispute settlement bodies has, as empirical studies suggest, a deterring effect preventing the excessive and arbitrary application of the safeguards clause.²⁰⁷⁷ The safeguard clause in Article XIX GATT allows limiting the import of certain products that threaten producers of like or directly competitive products. This is relevant for some trade and development-related human rights impacts, in particular where the excessive “flooding” of developing markets with products threatens the livelihood of local producers and, consequently, affects their socio-economic human rights. So if an ex-post HRIA identifies such impacts, the safeguard clause might be triggered. The fact that human rights are affected should arguably also be considered when evaluating whether the exporting country is entitled to compensation or to suspend substantially equivalent concessions or obligations.

Alternative flexibility mechanisms to protect the local production of importing countries are adopted as a result of negotiations. Regarding the protection of local production, instead of triggering Article XIX GATT, states and private parties increasingly use soft law solutions, such as “Voluntary Export Restraints (VERs)”, “Voluntary Restraint Arrangements (VRAs)” or “Orderly Marketing Arrangements” (OMAs). These measures are not formally adopted by the importing country, but rather “formally taken by the exporting country or negotiated by exporting companies with the importing country.”²⁰⁷⁸

Other flexibility mechanisms are joint declarations on the interpretation of provisions. Prominent examples concern the debate about access to life-saving drugs under the TRIPS agreement. While the compulsory licensing regime under TRIPS was supposed to protect adequate access to life-saving drugs, disputes about the scope of compulsory licensing arose in the 1990s. For example, the United States initiated a complaint against Brazil claiming a violation of TRIPS.²⁰⁷⁹ In response to what appeared to many as an infringement of the right to an adequate standard of

²⁰⁷⁶ Formerly, this doctrine had been used as an argument to negate the nature of international law. For a critical analysis of the *rebus sic stantibus* doctrine: Hersch Lauterpacht, *The Function of Law in the International Community* (Oxford, New York: Oxford University Press, 2011), Chapter XIII § 10.

²⁰⁷⁷ Helfer, ‘Flexibility in International Agreements’ (above, n. 2060), p. 188.

²⁰⁷⁸ UNCTAD, ‘Dispute Settlement: World Trade Organization: 3.8 Safeguard Measures’, p. 4.

²⁰⁷⁹ Joseph, *Blame it on the WTO?* (above, n. 3), p. 223.

health (access to medicine), massive campaigns by developing countries and NGOs pushed the WTO to adopt the Declaration on the TRIPS Agreement and Public Health.²⁰⁸⁰ The Declaration recognizes the importance of intellectual property rights, but also of states taking measures to protect public health. Consequently, the “Agreement can and should be interpreted and implemented in a manner supportive of WTO Members’ right to protect public health and, in particular, to promote access to medicines for all” and reaffirms the right of WTO member states to “use, to the full, the provisions in the TRIPS Agreement, which provide flexibility for this purpose”.²⁰⁸¹ This Declaration is one example of a flexibility mechanism to mitigate the negative human rights consequences of a provision in an international trade agreement. Other informal mechanisms exist which one could label as political modification. It is not uncommon that rules in international agreements are “totally redefined by unwritten practice”²⁰⁸². By way of example, “understandings, practices and usages, traditions, conventions, and gentleman’s agreements”²⁰⁸³ can be named.

A related important informal mechanism to respond to unexpected human rights impacts is the consequential (“*folgenorientierte*”) interpretation of clauses in the agreement in the light of human rights. This is required under international law (Article 31 (3) lit. c) VCLT)²⁰⁸⁴ and authorizes in particular international courts and tribunals to consider potential human rights impacts of agreements. Norms to which the VCLT applies must therefore be interpreted in the light of certain legal principles, including human rights.²⁰⁸⁵

The third stage in a treaty life-cycle includes the cessation of treaty obligations. Exit clauses grant the state generally a right to a “unilateral withdrawal from or denunciation of an international agreement that a state has previously ratified”.²⁰⁸⁶ States that consider withdrawing from a treaty usually insist on the incorporation of an exit clause, as the termination or withdrawal is otherwise only possible under the limited circumstances laid down in Article 56 VCLT.²⁰⁸⁷ Exit clauses are, compared with the clauses described above, usually only an option of last resort. Nevertheless, it can be a sort of “insurance policy”²⁰⁸⁸ if the agreement turns out to have unexpected negative consequences. In the case that negative human rights impacts are identified ex-post, i.e. after the entry into force of an agreement, and if no other flexibility clause provides sufficient remedies, making use of an exit clause would be a possible response to these unexpected impacts.

9.1.3 Interim conclusion

So far, the chapter addressed the ability of institutionalized HRIAs to influence decision-making in order to make decisions more compliant with human rights. This section started with a dis-

²⁰⁸⁰ WTO, *Declaration on the TRIPS Agreement and Public Health* (2001), WT/MIN(01)/DEC/2.

²⁰⁸¹ *Ibid.*, para 4.

²⁰⁸² Myres McDougal, Harold Lasswell, and Michael Reisman, ‘The World Constitutive Process of Authoritative Decision’, *Journal of Legal Education*, 19 (1967), 253-300, p. 260.

²⁰⁸³ Helfer, ‘Flexibility in International Agreements’ (above, n. 2060), p. 177.

²⁰⁸⁴ For international trade law: Joseph, *Blame it on the WTO?* (above, n. 3), p. 53; for international investment law: Simma, ‘Foreign Investment Arbitration: A Place for Human Rights?’ (above, n. 4), p. 584.

²⁰⁸⁵ Hestermeyer, *Human rights and the WTO* (above, n. 4).

²⁰⁸⁶ Helfer, ‘Flexibility in International Agreements’ (above, n. 2060), p. 181.

²⁰⁸⁷ *Ibid.*

²⁰⁸⁸ *Ibid.*

cussion of different compliance theories. For rationalist theories, mainly sanctions, including those in the form of judicial review or reputational loss, would increase compliance with law, in our case with norms guiding the conduct of HRIAs. In addition, in particular from the perspective of liberalism in international relations theory, incentives for an organization's staff members to comply with HRIA-requirements may also produce the desired effect. This section has further identified several deficits of rationalist compliance theories and outlined different approaches of normative and process-oriented theories. Here, other factors that may increase compliance were identified, including determinacy and norm-internalization. Studies on the effectiveness of domestic EIA-law have shed more light on these requirements with regard to IA-specific challenges. Drawing both on insights from compliance theories in general and IA-theories in particular, I have identified five major factors that influence the effectiveness of HRIAs and their ability to make decisions "more" compliant with human rights: formal accountability mechanisms, political accountability mechanisms, legal determinacy, norm internalization, and the availability of flexibility mechanisms. The final chapter will look at the institutionalization of HRIAs in EU law through the lenses of these five factors. Beforehand, though, the remainder of this chapter takes a closer look at the relationship between judicial review and impact assessments in a comparative manner. In particular for a *legal* analysis of the institutionalization of HRIA, judicial review plays a prominent role.

The remainder of this chapter analyzes, from a comparative perspective, the relationship between impact assessments and judicial review. This serves, *inter alia*, to identify the potential - but also the structural limits - of judicial review as a mechanism to ensure compliance with IA law. It is against this background that the actual and potential role of judicial review of HRIAs in EU decision-making becomes more visible.

9.2 Judicial Review: Theories and Doctrinal Concepts

There is a risk that impact assessments become a tick-box exercise or are misused to justify not the objectively best but the individually preferred policy option. Public authorities might regard IAs as burdensome and not have an inherent interest in always conducting a deep and participatory impact assessment. Judicial review can therefore help to ensure compliance with procedural norms and substantive principles. And indeed, judicial review plays an important role for the implementation of domestic EIA law.²⁰⁸⁹ However, the review of compliance with rules and principles guiding the conduct of impact assessments is challenging. Impact assessments deal with the factual consequences of an initiative. They are generally conducted under levels of factual uncertainty, and largely rely on scientific methods. As stated above, impact assessments are placed at an "intersection" between law, politics and scientific expertise.²⁰⁹⁰ It is therefore debatable to what extent judicial review should verify the assessment of (political or bureaucratic) decision-makers or scientific experts. Moreover, impact assessments are usually conducted in situations where clear legal rules do not exist, and where decisions must be taken under normative uncertainty. Against the background of factual and normative uncertainties, it

²⁰⁸⁹ Bryde, 'Problems of measuring the effectiveness of the Council directive on environmental impact assessment' (above, n. 1927), p. 17.

²⁰⁹⁰ Craik, *The International Law of Environmental Impact Assessment* (above, n. 59), p. 225. See section 3.2.1.4.

is questionable what the adequate scope of judicial review should be. Would a violation of the obligation to conduct an (adequate) impact assessment render the final decision illegal? Would the failure to adequately consider the findings of an impact assessment invalidate the decision? And who should have standing and thus the right to challenge any of these aforementioned cases of non-compliance? Judicial review requires a normative-theoretical justification and poses doctrinal questions that will be addressed in the following. Many of these follow-up questions were already subject to judicial disputes in domestic EIA-law,²⁰⁹¹ but also in constitutional adjudication when the constitutional review of legislative acts was at stake. Especially the shift towards proceduralization and scientization of decision-making has changed the role of judicial review. This is in particular true for impact assessments, which combine legal, political and scientific elements. A comparative look at judicial review in IA-law in the US, the UK and Germany helps to carve out doctrinal concepts regarding the judicial review of impact assessments. Even where similar forms of judicial review do not (yet) exist for the EU's HRIAs, such a comparative analysis nevertheless reveals doctrinal approaches and therefore allows to ask, *de lege ferenda*, whether similar concepts could be applied for HRIAs.

From a general and comparative perspective, I will in particular address three topics that will be again of relevance for the role of judicial review of HRIAs in EU decision-making: First, the distinction between indirect and direct review of IAs. Direct review means that a court reviews compliance with IA-law as such and then determines the consequences a potential violation has on the final decision. This requires that IA law constitutes a binding and therefore justiciable obligation (like in domestic EIA regimes). Indirect review means that the court, absent justiciable IA-norms, reviews whether the impacts of an initiative have been adequately considered; this may have occurred by way of a formalized impact assessment which then becomes indirectly subject to judicial review. In that regard, it does not matter whether the conduct of the IA was legally prescribed or simply good practice. Indirect review is most relevant for policy IAs, i.e. the review of the legality or constitutionality of abstract regulatory or legislative acts. Second, different standards of review apply with regard to legislative as opposed to non-legislative acts. The contours of the justification of review in both cases will briefly be outlined. Third, standing requirements are important to determine the relevance of IA requirements. Under EU court procedure law, standing is severely restricted where affected individuals are not the addressees of an EU act and seek to challenge such an act directly before the European courts (action for annulment). Under the narrow interpretation of the "individual concern" requirement (Art. 263 (4) TFEU), applicants who claim to be victims of a general-abstract economic policy decision would usually not be individually concerned because these non-financial (i.e. human rights) impacts of an economic policy are often too widespread. Therefore, the problem of what I would call "widespread affectedness" will be briefly addressed from a comparative law perspective in the following subsection and, again, from an EU law perspective in the final chapter.

²⁰⁹¹ For an overview: Kleesiek, *Zur Problematik der unterlassenen Umweltverträglichkeitsprüfung* (above, n. 350).

9.2.1 Type of Judicial Review of Impact Assessments: Direct vs. indirect, legislative vs. non-legislative

Questions about the applicable standards of judicial review arise, in domestic law, in different constellations, the two most relevant for the present thesis are, however, constitutional adjudication (mainly the review of legislative acts), and the review of administrative actions. This is a fundamental and often controversial topic in legal theory, doctrine and politics²⁰⁹² whenever legal norms are not clear but subject to different reasonable interpretations and therefore constitute “hard cases”²⁰⁹³. In spite of vast practical and theoretical differences between civil law and common law systems, it is still recognized that administrative discretion is often necessary, and that courts should – where discretion exists – mainly review administrative decisions based on an abuse of discretion doctrine.²⁰⁹⁴ The rationale of this principle can – sometimes under different names such as “margin of appreciation doctrine” – also be found in international law, such as human rights and investment protection.²⁰⁹⁵ The role of judicial review is even more problematic where constitutional courts review legislative acts, given that legislators are directly elected and thus possess a high degree of democratic legitimacy.

So far, policy-IAs (as opposed to project-IAs) have rarely been subject to direct judicial review; instead, public authorities tend to use independent but non-judicial review mechanisms to improve the quality of specific IAs and enhance institutional learning.²⁰⁹⁶ In particular the review of legislative policies must respect the democratic mandate, and in consequence, even where constitutional adjudication exists, courts – if they review legislative decisions on grounds of constitutionality – generally recognize – and should recognize – sufficient parliamentary discretion.²⁰⁹⁷

²⁰⁹² The review of legislative acts requires justification from a democratic perspective, the review of administrative activities mainly from the separation-of-powers perspective. Administrative agencies have an own important function: they are required to regulate below the legislative level and apply legislative provisions to individual cases; this is – among other things – justified because agencies have the expertise and experience, but also the ability to gain knowledge about the specific circumstances in order to apply discretionary norms adequately on a case-by-case basis. Administrative agencies can be held more directly accountable: Through hierarchical structures, but also through interaction – between deliberation and resistance – with the population. If courts had the competence to fully review administrative decisions and replace the administrative by their own evaluation, these legitimate functions would be undermined.

²⁰⁹³ Ronald Dworkin, ‘Hard Cases’, *Harvard Law Review*, 88 (1975), pp. 1057–1109.

²⁰⁹⁴ William Wade and Christopher Forsyth, *Administrative law* (Oxford: Clarendon Press, 1994), 7. ed., 379 ff.; Martin Shapiro, ‘Administrative Discretion: The Next Stage’, *The Yale Law Journal*, 92 (1982), 1487–1522; Hermann Pünder, ‘German administrative procedure in a comparative perspective: Observations on the path to a transnational ius commune proceduralis in administrative law’, *I•CON*, 11 (2013), pp. 940–961. On standards of review of compliance with EIA law at the necessity stage under UK law see already above section 6.2.1.1., and in particular: Court of Appeal, *R (Goodman) v London Borough of Lewisham* (2003), para 10.

²⁰⁹⁵ William W. Burke-White and Andreas von Staden, ‘Private Litigation in a Public Law Sphere: The Standard of Review in Investor-State Arbitrations’, *The Yale Journal of International Law*, 35 (2010), pp. 283–346, p. 319.

²⁰⁹⁶ Wiener, ‘Better Regulation in Europe’ (above, n. 127), p. 517; Wiener and Alemanno, ‘Comparing regulatory oversight bodies across the Atlantic: the Office of Information and Regulatory Affairs in the US and the Impact Assessment Board in the EU’ (above, n. 2018), p. 322.

²⁰⁹⁷ Critical of the temptation of constitutional courts to put their own judgments about what a rational law should be above that of the legislature: Bryde, *Das Verfassungsprinzip der Gleichheit* (above, n. 489), p. 10. On the tension between findings of fact in the case of judicial human rights review and legislative discretion: Bryde, ‘Tatsachenfeststellungen und soziale Wirklichkeit in der Rechtsprechung des Bundesverfassungsgerichts’ (above, n. 349), p. 556.

This is different with regard to implementing acts or administrative policy decisions. In this case, judicial review can enforce the will of the democratic legislature: Courts review whether an agency decision complies with a legislative act. Courts therefore, ideally, enforce the legislator's will. In states where respect for environmental (and human rights) principles is required, it can be assumed that all legislative acts shall be implemented in a way compatible with these principles. Consequently, to review agency decisions for failure to adequately assess environmental (or human rights) principles is not in conflict with parliamentary discretion. The indirect judicial review of impact assessments will be discussed in more detail in the final chapter.

9.2.2 Direct Review of Impact Assessments

Under the EIA laws of many states, courts can directly review compliance with IA-law. If they find that a provision regulating whether or how to conduct IAs has been violated, they have to determine the consequences such a violation has on the final decision. This is less relevant to HRIAs at EU level, given that the obligation to conduct IAs is not enshrined in clearly binding sources of primary or secondary EU law. Still, I will argue that the failure to conduct an IA even though it would be clearly required under an inter-institutional agreement and the respective impact assessment guidelines, could be a violation of the principle of legitimate expectations and of an essential procedural requirement (Art. 263 (2) TFEU). If so, this would be a case of direct review. Against this background, I will therefore briefly outline the contours of direct judicial review of EIAs in selected jurisdictions, and point out approaches that might also be used for the judicial review of HRIAs at EU level.

9.2.2.1 Review of the Impact Assessment Procedure: “If” and “How” to Conduct IAs

There are two starting points for the judicial review of impact assessments: the first regards the impact assessment procedure as such. It seems hardly controversial that judicial review should at least cover purely procedural issues, namely whether an agency conducted an IA at all and compliant with rules regarding periods of time, participation, transparency and reason-giving. However, the lines between procedural and substantive criteria are fluent, as in particular transformation models in IA-theory and procedural compliance models in legal theory illustrate. For example, while a rule determining if IAs are necessary – such as NEPA or the EU's EIA directive – might seem procedural at first sight, a closer look reveals that this is often not the case. Unlike in the case of so-called mandatory IAs²⁰⁹⁸, many IA norms determine necessity by the *likelihood* and *significance* of impacts on rights and interests. Whether an impact is significant, however, is also a question of substantive law. The second starting point concerns the relationship between the impact assessment findings (through analysis and consultation) and the final decision, in particular to what extent the findings were adequately taken into account.²⁰⁹⁹

Some violations of IA law might be obvious, for example if statutory periods requiring the length of a consultation process were not respected. Others are less evident, for example when authorities decide not to disclose all documents to protect trade secrets or security interests. In

²⁰⁹⁸ See section 6.2.1 above on the distinction between mandatory and screening approaches.

²⁰⁹⁹ Bryde, ‘Problems of measuring the effectiveness of the Council directive on environmental impact assessment’ (above, n. 1927), 15 et seq.

these cases, meaningful participation of external actors is generally more difficult to achieve, and courts could play a role in deciding whether or not disclosure is necessary. In judicial proceedings, it is possible to strike a fair balance between conflicting rights and interests, and mechanisms such as the in-camera proceedings would even allow to independently review sensitive documents. Increasingly courts hold that the goal of EIAs is not only to inform decision-makers, but also to grant affected individuals a “directly enforceable right to have the need for an EIA considered before the grant of planning permission”.²¹⁰⁰ This follows the logic of transformation IA models: The IA process may transform decision-making, and participatory IAs would thus be an essential and indispensable requirement.

If a court finds that such a violation of IA-law occurred, the next question is whether and, if so, to what extent such a violation of procedural law affects the legality of the final decision.²¹⁰¹ Insofar as human or other individual rights are concerned, the violation of such a procedural norm would, if one takes the concept of human rights protection through organization and procedure seriously, result in the invalidation of the final decision unless it is clear that the omitted or defective IA could not have influenced the outcome. In some EU member states, like Germany, courts were hesitant to annul a decision if no or no adequate EIA was conducted. Instead, the applicant had to prove causality between the procedural violation and the final act (Sec. 46 German Administrative Procedure Act). This has changed following the “Europeanization” of environmental law.²¹⁰² The EIA Directive and EU case law have made clear that these procedural norms are to be taken seriously. The ECJ held that such a shift in the burden of proof to the detriment of the applicant would make it, in reality, very difficult for an applicant to bring a successful claim. Instead, only where the developer or the competent authorities – not the applicant! – can prove that the contested decision would not be any different without the procedural defect could the latter be regarded as irrelevant.²¹⁰³ The sanction to invalidate the final decision (e.g. a project approval) would remind agencies of the fact that process matters.²¹⁰⁴ This trend is in line with the general paradigmatic change in regulation theory, namely a shift from command-and-control to more flexible impact-oriented regulatory approaches: Procedure – including transparency and participation – does not only have a subordinate “serving function”, at least not in the sense of a less relevant norm.²¹⁰⁵ Consequently, the failure to conduct a necessary EIA at all, and a defective EIA procedure would in general result in the invalidation of the final decision.²¹⁰⁶

²¹⁰⁰ House of Lords, *Berkeley vs. Secretary of State for the Environment and others* (above, n. 918); ECJ, *World Wildlife Fund and others/Bozen* (above, n. 1258), para 71.

²¹⁰¹ Kleesiek, *Zur Problematik der unterlassenen Umweltverträglichkeitsprüfung* (above, n. 350).

²¹⁰² Interestingly, even though the German Federal Constitutional Court has endorsed the principle of human rights protection through procedure, administrative law jurisprudence tended to emphasize the serving function (“dienende Funktion”) of administrative procedure, including impact assessment law: Ludwig Krämer, *Casebook on EU environmental law* (Oxford: Hart, 2002), p. 152. Before this background, a certain cultural clash between German and EU law was inevitable.

²¹⁰³ ECJ, Judgment of 15 October 2015, Case C-137/14, *European Commission v. Germany*, para 60; ECJ, Judgment of 7 November 2013, Case C-72/12, *Gemeinde Altrip*, para 53.

²¹⁰⁴ Krämer, *Casebook on EU environmental law* (above, n. 2102), p. 152.

²¹⁰⁵ On the concept of the “serving function” under German administrative law: Christian Quabeck, *Dienende Funktion des Verwaltungsverfahrens und Prozessualisierung* (Tübingen: Mohr Siebeck, 2010).

²¹⁰⁶ ECJ, *Gemeinde Altrip* (above, n. 2103); ECJ, Judgment of 12 May 2011, Case C-115/09, *Trianel*, 37 ff. This is now clearly stated in Sec. 4 of the Environmental Appeals Act (“UmwRG”). However, a statutory amendment became necessary after a ruling by the Court of Justice: To limit the applicability to grant broad public access to courts/judicial review solely to these cases where no EIA has been carried out even where the EIA “is found to be vitiated by defects — even serious defects — would render largely nugatory

In other words, EU law increasingly recognizes that rules determining “if” and “how” EIAs are to be conducted are essential procedural norms with implications for the legality of the final decision. Whether similar reasoning is or could be applied to impact assessments in EU decision-making will be addressed in the next chapter.

US Courts felt less uncomfortable and quickly confirmed that a violation of the procedural requirements under NEPA is subject to judicial review,²¹⁰⁷ even though NEPA was silent about justiciability.²¹⁰⁸ Still, soon after NEPA’s enactment, the courts made clear that affected or interested private parties have, under certain conditions, a right to sue agencies if they fail to produce an EIS;²¹⁰⁹ this right was based on the US Administrative Procedures Act (APA)²¹¹⁰ and thus on general administrative law. Courts reviewed the legality of a decision based on whether or not a legally required EIA was adequately conducted, i.e. in compliance with the respective procedural provisions. The adequacy of the EIA-process concerns different factors such as “timeliness of preparation, the public comment procedures used and responses to comment, the correctness of agency assessment methodology, the quality of the discussion of environmental affects [sic] including cumulative impacts, or even the readability of the EIS from a layperson’s point of view”.²¹¹¹ More difficult is the question of whether all potentially significant and likely impacts were addressed during the impact assessment. Here again, limited judicial review is possible, even though the *judicial* should not replace the *agency* assessment. Against this background, US courts held that an agency’s assessment is sufficient unless its “deficiencies are significant enough to undermine informed public comment and informed decisionmaking.”²¹¹² The main controversies arose over the next step: is judicial review restricted to compliance with procedural norms, or can courts also review whether an agency adequately considered the findings and recommendations of the IA?

the provisions of Directive 2011/92 relating to public participation”, ECJ, *European Commission v. Germany* (above, n. 2103), para 48.

²¹⁰⁷ US Court of Appeals (D.C. Cir.), *Calvert Cliffs v. AEC* (above, n. 1227); for an empirical analysis of the success of NEPA litigation, in particular challenges claiming that (1) inadequate EA or EIS, or that (2) no EA or EIS were conducted/prepared: Shorna Broussard and Bianca Whitaker, ‘The Magna Charta of Environmental Legislation: A historical look at 30 years of NEPA-Forest Service Litigation’, *Forest Policy and Economics*, 11 (2009).

²¹⁰⁸ Kersten, ‘Rethinking Transboundary Environmental Impact Assessment’ (above, n. 117), p. 196.

²¹⁰⁹ US Court of Appeals (D.C. Cir.), *Calvert Cliffs v. AEC* (above, n. 1227); Jennifer Wieman, ‘The Reality of NEPA: Can the Act Realize its Potential: Great Rivers Habitat Alliance v. U.S. Army Corps of Engineers’, *Missouri Environmental Law & Policy Review*, 14 (2006), 393-420, p. 399; Broussard and Whitaker, ‘The Magna Charta of Environmental Legislation: A historical look at 30 years of NEPA-Forest Service Litigation’ (above, n. 2107).

²¹¹⁰ Pub. L. No. 79-404, 60 Stat. 237 (1946).

²¹¹¹ Gary Meyers, ‘Meeting Public Expectations-Judicial Review of Environmental Impact Statements in the United States: Lessons for Reform in Western Australia?’, *Murdoch University Electronic Journal of Law*, 3 (2), para 9.

²¹¹² Recently: US District Court for the District of Columbia, *Wildearth Guardians et al v. Zinke* (above, n. 1072) with further reference; US Court of Appeals, District of Columbia Circuit, 867 F.3d 1357, *Sierra Club v. FERC* (22 Aug, 2017), p. 1368.

9.2.2.2 Judicial Review and the Obligation to Take the Findings of IAs into Account

Under EU and US law, courts generally do not assume that EIA provisions contain strict substantive requirements in the sense that they directly restrict agency or parliamentary discretion. Rather, there is, broadly speaking, only an obligation to take the findings into account. This may follow directly from statutory provisions. The EIA-Directive explicitly requires:

„The results of consultations and the information gathered pursuant to Articles 5 to 7 shall be duly taken into account in the development consent procedure”²¹¹³

This is only a consideration-duty, in particular if interpreted in contrast with the explicitly substantive limits established under the EU Habitats Directive where the

“competent national authorities shall agree to the plan or project only after having ascertained that it will not adversely affect the integrity of the site concerned”.²¹¹⁴

However, it is not clear to what extent courts should review whether decision-makers actually took the findings duly into account. Similar uncertainties existed under US law. For the purpose of judicial review, one could read the term “take into account” in a purely procedural or in a (limited) substantive manner. The *procedural* interpretation would simply require an agency to have a look at the IA-report; a more *substantive* interpretation would allow judges to reverse a decision if the impacts identified in the IA-report were not balanced “in good faith”.

There is broad consensus that courts shall at least review agency decisions based on a procedural interpretation of the term “take into account”. This is almost a logical necessity: It is a minimum requirement without which the whole IA-process could be useless, as the D.C. Circuit Court of Appeals in its *Calvert Cliffs* judgment most emphatically put it:

“We believe that the Commission's crabbed interpretation of NEPA makes a mockery of the Act. What possible purpose could there be in the Section 102 (2) (C) requirement (that the “detailed statement” accompany proposals through agency review processes) if “accompany” means no more than physical proximity — mandating no more than the physical act of passing certain folders and papers, unopened, to reviewing officials along with other folders and papers? What possible purpose could there be in requiring the “detailed statement” to be before hearing boards, if the boards are free to ignore entirely the contents of the statement? NEPA was meant to do more than regulate the flow of papers in the federal bureaucracy. The word “accompany” in Section 102(2) (C) must not be read so narrowly as to make the Act ludicrous. It must, rather, be read to indicate a congressional intent that environmental factors, as compiled in the “detailed statement,” be considered through agency review processes.”²¹¹⁵

²¹¹³European Union, *EIA Directive 2011/92/EU* [2011], Article 8.

²¹¹⁴European Union, *Council Directive 92/43/EEC of 21 May 1992 on the conservation of natural habitats and of wild fauna and flora*, Article 6 (3).

²¹¹⁵US Court of Appeals (D.C. Cir.), *Calvert Cliffs v. AEC* (above, n. 1227), para 29.

In consequence, agencies must at least “take a “hard look” at environmental consequences”, as the Supreme Court later confirmed.²¹¹⁶ However, attempts to interpret NEPA as allowing courts to “review substantive agency decisions on the merits”²¹¹⁷ and to herald NEPA as an “environmental magna charta”²¹¹⁸ met severe criticism. Instead, critics regarded NEPA merely as a “full disclosure bill”,²¹¹⁹ due to concerns that the judicial decision would substitute the agency decision.²¹²⁰ This procedural reading was ultimately confirmed by the US Supreme Court in *Robertson v. Methow Valley Citizens Council*,²¹²¹ in which the Court illustratively describes the goal and function an impact assessment should have, and the corresponding role courts should play:

“NEPA does not impose a substantive duty on agencies to mitigate adverse environmental effects or to include in each EIS a fully developed mitigation plan. Although the EIS requirement and NEPA's other “action-forcing” procedures implement that statute's sweeping policy goals by ensuring that agencies will take a “hard look” at environmental consequences and by guaranteeing broad public dissemination of relevant information, it is well settled that NEPA itself does not impose substantive duties mandating particular results, but simply prescribes the necessary process for preventing uninformed -- rather than unwise -- agency action. While a reasonably complete discussion of possible mitigation measures is an important ingredient of an EIS, and its omission therefrom would undermine NEPA's “action-forcing” function, there is a fundamental distinction between a requirement that mitigation be discussed in sufficient detail to ensure that environmental consequences have been fairly evaluated and a substantive requirement that a complete mitigation plan be actually formulated and adopted. Here, since the off-site envi-

²¹¹⁶ US Supreme Court, *Robertson v. Methow Valley Citizens Council* (above, n. 853), p. 333.

²¹¹⁷ US Court of Appeal (8th Cir.), 470 F.2d 289, *Environmental Defense Fund*, para 37. Substantively, Sec. 101 NEPA makes environmental protection a part of the agency's mandate, and these substantive provisions are reinforced by the procedural requirements under Sec. 102 NEPA – which requires federal agencies to assess environmental impacts - which are “designed to see that all federal agencies do in fact exercise the substantive discretion given them”: US Court of Appeals (D.C. Cir.), *Calvert Cliffs v. AEC* (above, n. 1227), para 12. Judicial review is necessary as NEPA itself requires the consideration of environmental values “to the fullest extent possible” – a phrase cited 17 times in the judgment to emphasize that judicial review is necessary to achieve that goal. Similarly, the Court of Appeals of the 8th Circuit followed this reasoning and ironically remarks: “The unequivocal intent of NEPA is to require agencies to consider and give effect to the environmental goals set forth in the Act, not just to file detailed impact studies which will fill governmental archives.” US Court of Appeal (8th Cir.), *Environmental Defense Fund* (above, n. 2117), para 35.

²¹¹⁸ Citations found, with further reference, in: Philip Michael Ferester, ‘Revitalizing the National Environmental Policy Act: Substantive Adaptations from NEPA's Progeny’, *Harv. Envtl. L. Rev.*, 16 (1992), p. 207, para 207.

²¹¹⁹ Quoted in: *Ibid.*

²¹²⁰ United States District Court, E. D. Arkansas, W. D., 325 F.Supp. 728 (1971), *Environmental Defense Fund v. Corps of Eng. of US Army*.

²¹²¹ In this case, the competent agency had issued a permit for a downhill ski resort as recommended by the EIS (the “Study”). The Study found that negative impacts could be mitigated but did not determine any specific mitigation measures. Consequently, the respondents challenged the permit on the grounds that the Study did not satisfy NEPA's requirement. The Court of Appeals confirmed their view, namely that the Study was inadequate as a matter of law, inter alia on the grounds that NEPA “imposes a substantive duty on agencies to take action to mitigate the adverse effects of major federal actions, which entails the further duty to include in every EIS a detailed explanation of specific actions that will be employed to mitigate the adverse impact”. US Supreme Court, *Robertson v. Methow Valley Citizens Council* (above, n. 853), p. 332.

ronmental effects of the project cannot be mitigated unless the nonfederal government agencies having jurisdiction over the off-site area take appropriate action, it would be incongruous to conclude that the Service has no power to act until the local agencies have finally determined what mitigation measures are necessary. More significantly, it would be inconsistent with NEPA's reliance on procedural mechanisms -- as opposed to substantive, result-based standards -- to demand the presence of a fully developed mitigation plan before the agency can act."²¹²²

The Supreme Court therefore reviews whether the IA-report was adequately produced,²¹²³ and whether agencies took a "hard look" at environmental consequences.²¹²⁴ While the hard look doctrine *as such* convinces more by its figurativeness than its precision, it still indicates that the goal of judicial review should be to make sure that agencies seriously took consequences into account and that the quality of the process and the report is not legally irrelevant. Courts can intervene if IAs become a pure tick-box exercise. However, in the end, the "agency is not constrained by NEPA from deciding that other values outweigh the environmental costs."²¹²⁵

While this restriction of judicial review appears disappointing to many commentators, some assume that NEPA can nevertheless induce positive change as "procedure matters".²¹²⁶ For some, the democratization-effect is important: transparency and the publication of the EIS can generate public or media interest, so that people will participate – or even organize social resistance against the initiative.²¹²⁷ Another reason for optimism regards institutional learning and the observation that, due to the procedural obligations, agencies pay more attention to environmental consequences of their decisions²¹²⁸ and that "far more projects are altered as a consequence of agency discretion than judicial injunction".²¹²⁹ A third important point is that the Court in *Robertson* denies substantive constraints "by NEPA"; other laws can nevertheless contain substantive limits and constraints. In this context, the IA procedure can have a "revealing

²¹²² *Ibid.*, p. 333.

²¹²³ Ferrester, 'Revitalizing The National Environmental Policy Act: Substantive Law Adaptions From NEPA's Progeny', *Harvard Environmental Law Review*, 16 (1992), 207-269, p. 210.

²¹²⁴ US Supreme Court, *Robertson v. Methow Valley Citizens Council* (above, n. 853), p. 333; United States Court of Appeals, Tenth Circuit, 288 F.3d 1205 (2002), *Utah Shared Access Alliance v. U.S. Forest Service*; on the "hard look" doctrine see already: U.S. Supreme Court, 427 U.S. 390 (1976), *Kleppe v. Sierra Club*.

²¹²⁵ US Supreme Court, *Robertson v. Methow Valley Citizens Council* (above, n. 853), p. 350.

²¹²⁶ William L. Andreen, 'In Pursuit of NEPA's Promise: The Role of Executive Oversight in the Implementation of Environmental Policy', *Indiana Law Journal*, 64 (1989), pp. 205-261, pp. 208-209 regards judicial restraint as justified but recommends stronger regulatory oversight.

²¹²⁷ On the link between participation and protest: Holder, *Environmental Assessment* (above, n. 27), pp. 184-234; Karkkainen, 'Whither NEPA?' (above, n. 2014), p. 341.

²¹²⁸ Thomas France, 'NEPA - The Next Twenty Years', *Land & Water Law Review*, 25 (1990), p. 135.

²¹²⁹ Meyers, 'Meeting Public Expectations-Judicial Review of Environmental Impact Statements in the United States: Lessons for Reform in Western Australia?' (above, n. 2111), para 9 (quoting M. Blumm). The Court in *Robertson* also assumes that an enforcement of NEPA's procedural decision is "almost certain to affect the agency's substantive decision": US Supreme Court, *Robertson v. Methow Valley Citizens Council* (above, n. 853), p. 350. This statement should however be taken with care, as it is made by the Court which restricted the scope of judicial review. In this case, it could also attempt to anticipate criticism by emphasizing that it did not totally undermine the relevance of NEPA.

effect” in that they “shed light”²¹³⁰ on potential impacts that would be unlawful due to different substantive laws.

9.2.3 Indirect Review of IAs and Standards of Review

Indirect review of IAs is particularly important where decisions are taken outside a justiciable legal framework prescribing if and how to conduct IAs. For the purpose of indirect review, it does not matter whether IAs are explicitly required by binding laws – like under NPEA or the EIA-Directive. Consequently, as far as EU impact assessments are concerned, indirect judicial review of the impact assessment procedure and findings is important, irrespective of whether or not the assessment is based on binding norms. As argued previously,²¹³¹ public authorities must comply with certain legal principles, including human rights. This implies an obligation to consider, according to the principle of affectedness, human rights impacts irrespective of where they occur. Insofar as agencies and legislatures have broad discretion or a margin of appreciation to interpret these principles, judicial review is limited to cases where that discretion has been abused. This is the case if they have not adequately considered all relevant facts, as well as the likely and significant impacts on the relevant substantive principles. HRIAs can form the basis upon which courts assess whether or not this is the case. Indirect review of impact assessments is therefore part of the judicial review of the final act. Consequently, the scope of indirect review of IAs depends on the scope of judicial review of the challenged final legal act. This is why HRIA can indirectly affect the validity of a final decision – even if the conduct of HRIAs is not explicitly prescribed by a binding legal norm.

9.2.3.1 Standard of Review: Non-legislative Acts

The standard of review of agency decisions depends on the function assigned to administrative activities, especially to what extent an agency is supposed to or, due to practical necessities, obliged to choose among different options. In *Chevron*²¹³², the US Supreme Court developed a two-step approach. First, if the question at issue is directly and unambiguously addressed in the respective statute, the agency and the court must give effect to the respective norm.²¹³³ However, if this is not the case, the court may not impose its own interpretation, but must review “whether the agency’s answer is based on a permissible construction of the statute”²¹³⁴ so that the administrative decision is reasonable.²¹³⁵ The applicability of the Chevron doctrine was later

²¹³⁰ Gary Meyers, ‘Divining Common Law Standards for Environmental Protection: Application of the Public Trust Doctrine in the Context of Reforming NEPA and the Commonwealth Environmental Protection Act’, *Environmental and Planning Law Journal*, pp. 289–306, p. 300.

²¹³¹ See section 3.2.

²¹³² US Supreme Court, 467 U.S. 837 (1984), *Chevron U.S.A., Inc. v. NRDC*. For an analysis of the Chevron doctrine and further developments see: William Eskridge and Lauren Baer, ‘The Continuum of Deference: Supreme Court Treatment of Agency Statutory Interpretations from Chevron to Hamdan’, *The Georgetown Law Journal*, 96 (2008), 1083–1226.

²¹³³ US Supreme Court, *Chevron U.S.A., Inc. v. NRDC* (above, n. 2132), 842 et seq.

²¹³⁴ *Ibid.*

²¹³⁵ *Ibid.*, p. 845; Burke-White and Andreas von Staden, ‘Private Litigation in a Public Law Sphere: The Standard of Review in Investor-State Arbitrations’ (above, n. 2095), p. 318.

narrowed and supplemented by the *Mead* Doctrine, under which deference to an agency in the sense of a reasonability-test regarding an agency's interpretation of a statute is only applicable when it appears that "Congress delegated authority to the agency generally to make rules carrying the force of law, and that the agency interpretation claiming deference was promulgated in the exercise of that authority. Delegation of such authority may be shown in a variety of ways, as by an agency's power to engage in adjudication or notice-and-comment rulemaking, or by some other indication of a comparable congressional intent."²¹³⁶ Apparently, the court assumes that deference is more justified if agency decisions were taken following a procedure allowing for deliberation and reflection.²¹³⁷ Applied to IA law, this doctrine would imply that broader agency discretion is justified where decisions are accompanied by participatory impact assessments.

German theories of judicial review of administrative decisions also focus on the functions assigned by statute. Where agencies are explicitly commissioned to decide among different options ("*Ermessen*"), courts must be deferential and may only review whether the limits of discretion have been exceeded. This would constitute an abuse of discretion: The agency must decide issues consistently with the purpose of the statute in mind and in accordance with general principles²¹³⁸, including constitutional human rights principles. Such a deferential approach is justified because the legislator has specifically delegated the competence to choose among different options to an administrative agency.²¹³⁹ The situation is opposite where discretion exists because indeterminate legal terms are used: The general assumption is that it is not intended that the agency shall have the last word and chose among different optional legal interpretations only because it is difficult to more clearly define the normative prerequisites.²¹⁴⁰ Courts can review whether these indeterminate provisions are properly applied, and can at the same time contribute to specifying the contours of these terms. However, under certain circumstances judicial review is restricted where judicial review appears inadequate ("*Beurteilungsspielraum*"). This regard, inter alia, certain planning decisions and risk assessments²¹⁴¹ if these are based on particular evidence and if courts lack the competence to fully review such a political and scientific evaluation. This is not only justified by the generally high expertise of administrative agencies, but also by the "epistemological problems that require, by their very nature, an iterative process of repeated adjustments based on new facts and insights".²¹⁴²

IAs are, as has been seen, often institutionalized in such an iterative manner, and where ex-post IAs are required, they contribute to adjusting decisions based on new facts and insights. Compliance with IA-requirements can therefore indicate compliance with general principles of administrative law. This category is relevant to both project and policy IAs: As seen before, IAs mainly

²¹³⁶ U.S. Supreme Court, 533 U. S. 218 (2001), *United States v. Mead Corp.* (18 June, 2001).

²¹³⁷ Cass R. Sunstein, 'Chevron Step Zero', *Virginia Law Review*, 92 (2006), pp. 187–249, p. 193.

²¹³⁸ Ernst Pakuscher, 'The Use of Discretion in German Law', *University of Chicago Law Review*, 44 (1976), pp. 94–109, p. 106; Mahendra P. Singh, *German Administrative Law* (Berlin, Heidelberg: Springer, 1985), p. 85; on abuse of discretion in English administrative law: Wade and Forsyth, *Administrative law* (above, n. 2094), 379 ff.

²¹³⁹ Burke-White and Andreas von Staden, 'Private Litigation in a Public Law Sphere: The Standard of Review in Investor-State Arbitrations' (above, n. 2095), p. 320.

²¹⁴⁰ Ibid.

²¹⁴¹ Ibid.; Matthias Jestaedt, 'Maßstäbe des Verwaltungshandelns', in: Hans-Uwe Erichsen and Dirk Ehlers (eds.), *Allgemeines Verwaltungsrecht*, pp. 329–378, para 46.

²¹⁴² Burke-White and Andreas von Staden, 'Private Litigation in a Public Law Sphere: The Standard of Review in Investor-State Arbitrations' (above, n. 2095), p. 321.

respond to factual uncertainty, which is why the assessments of administrative agencies or experts involved in the assessment should not be replaced by the court's own assessment, in particular if deliberation and participation preceded the analysis and final decision. As in the case mentioned above, this does not reduce the role of courts to insignificance: apart from the review of procedural norms, they can and must review abuse of discretion, including an evident misinterpretation of facts or the choice of inadequate methodologies to assess impacts.

9.2.3.2 Standard of Review: Legislative Acts

The scope of review of legislative acts is different. Strict scrutiny of *administrative* action serves, generally, to enforce statutes as an expression of the will of a democratically elected legislature. Constitutional adjudication, however, always struggles with the reproach for being counter-majoritarian, and therefore requires different theoretical justifications on why it is exceptionally justified to strike down a statutory provision. This also affects the indirect judicial review of impact assessments: While it enhances principles of good administration and promotes democratic principles to invalidate an administrative decision that was taken without an (adequate) impact assessment – a tool to compensate for the lack of legislative determinacy – this reasoning cannot simply be transferred to impact assessments accompanying legislative acts.²¹⁴³ This section will illustrate, relying on US and German constitutional law, the potential of indirect judicial review of IAs which accompany legislative acts.

In jurisdictions where the constitutional control of legislative acts is recognized, courts often apply different standards of review. These range – for example in German and US constitutional law – from a mere reasonability test to a strict scrutiny or strict proportionality test.²¹⁴⁴ In par-

²¹⁴³ However, at times courts may be in a better position to review the constitutionality of a law. For example, when courts review a law "ex post", practical experience with a law has usually already been gained. If, for example, these experiences reveal unintended human rights effects of the law, judicial review does not mean that the court wants to replace the legislator's with the court's own evaluation. In such a case, it would not appear problematic from the point of view of the separation of powers if the court mandates the legislator to carry out a reassessment and, if necessary, adapt the law accordingly. In this sense probably: Bryde, 'Tatsachenfeststellungen und soziale Wirklichkeit in der Rechtsprechung des Bundesverfassungsgerichts' (above, n. 349), p. 554.

²¹⁴⁴ Under US law, the most deferential test is the rational basis test (U.S. Supreme Court, 517 U. S. 620 (1996), *Romer v. Evans* (20 May, 1996), p. 631), according to which the constitutionality of a law is upheld if it is rationally related to a public purpose. At the other end of the spectrum is the strict scrutiny test, which is the least deferential one and is used to evaluate statutes based on "suspect classifications" (Burke-White and Andreas von Staden, 'Private Litigation in a Public Law Sphere: The Standard of Review in Investor-State Arbitrations' (above, n. 2095), p. 316), such as race or where it burdens fundamental rights (U.S. Supreme Court, 374 U.S. 398 (1963), *Sherbert v. Verner* (17 June, 1963) applying strict scrutiny to a regulation restricting the free exercise of religion). The test requires a "compelling government interest" and the statute must be narrowly tailored to achieve that objective, which means that no less restrictive but equally effective alternatives are available (U.S. Supreme Court, 364 U.S. 479 (1960), *Shelton v. Tucker* (12 Dec, 1960), p. 493; Vicki Jackson, 'Constitutional Law in an Age of Proportionality', *Yale Law Journal*, 124 (2015), pp. 3094–3196, 3097 ff.). The intermediate test, as the name suggests, is placed somewhere between the rational basis and strict scrutiny test and applied for example to gender-based discrimination (Ibid., p. 3177). Similarly, German constitutional case law recognizes different standards of review: Bryde, *Das Verfassungsprinzip der Gleichheit* (above, n. 489), 11 et seq.; Edward Eberle, 'German Equal Protection: Substantive Review of Economic Measures', *German Law Journal*, 9 (2008), pp. 2095–2108, p. 2099. The different standards of review do not need further analysis here.

ticular the application of strict scrutiny or strict proportionality tests to review the constitutionality of legislative acts can lead to an institutional dilemma for courts where these impacts are particularly uncertain: the demand for proof to survive strict scrutiny is in conflict with realities of policy-making “under conditions of factual uncertainty”.²¹⁴⁵ German constitutional jurisprudence has, in response, refined the scope of parliamentary discretion for decisions taken under uncertainty²¹⁴⁶ and established certain parameters that Parliament must comply with. These parameters can, as I argue, serve as useful yardsticks for the judicial review of HRIAs as far as human rights *risks* are concerned. If properly applied, they would compel the legislator to respect certain participatory procedures, to appropriately consider scientific evidence, and to take the findings – of the participatory and analytical steps – into account. Ideally, this should “make legislators think”²¹⁴⁷, but not allow a court to put its own judgment above the assessment of the legislature.²¹⁴⁸

This approach has been prominently confirmed in the *Kalkar-I* decision²¹⁴⁹ concerning the constitutionality of constructions of nuclear power plants, challenged because the risks involved affect fundamental rights. The parameters the Court established are not limited to the regulation of technological risk (such as the risks caused by the construction of the Kalkar nuclear power plant) but also the risk legislative or regulatory acts can cause for the enjoyment of human rights. This is what the Federal Constitutional Court had to decide in the later *Codetermination* case:²¹⁵⁰ The Court had to review the constitutionality of a statute requiring co-determination, i.e. labor representation in a firm’s corporate board. Many of the medium and long-term impacts of such a regulation were unclear; therefore, the Court had to clarify whether and under what conditions the legislator may enact laws that might have, in the future, significant consequences for companies, employers and shareholders. The legislator assumed that the codetermination statute would achieve the intended positive and not cause severe negative impacts. The Court respects a margin of political discretion – including a “margin of error”²¹⁵¹ – as long as the legislator complies with the general constitutional parameters for a legislative prognosis which the Court established.²¹⁵² Here, the Court not only refers to general principles, but also takes a closer look at the analysis of and deliberation about the statute’s predicted impacts. In consequence, the Court establishes four requirements or parameters to be met which are of relevance for an indirect judicial review of impact assessments accompanying legislative decisions. The first requirement is a comprehensive investigation of the relevant facts.²¹⁵³ Consequently, it is important that sources of information and instruments of knowledge generation – such as those

²¹⁴⁵ Sujit Choudhry, ‘So What is the Real Legacy of Oakes? Two Decades of Proportionality Analysis under the Canadian Charter’s Section 1’, *Supreme Court Law Review*, 34 (2006), pp. 501–535, p. 503.

²¹⁴⁶ BVerfG, Order of 9 March 1971, *Absicherungsgesetz*, 2 BvR 326/69, para 36–37 (juris).

²¹⁴⁷ Expression based on and borrowed from: Taylor, *Making Bureaucracies Think* (above, n. 1784).

²¹⁴⁸ On this risk: Bryde, *Das Verfassungsprinzip der Gleichheit* (above, n. 489), p. 10.

²¹⁴⁹ BVerfG, *Kalkar I* (above, n. 358), para 111 (juris).

²¹⁵⁰ For a closer review: Grimm, ‘Proportionality in Canadian and German Constitutional Jurisprudence’ (above, n. 1654).

²¹⁵¹ Kommers and Miller, *The Constitutional Jurisprudence of the Federal Republic of Germany* (above, n. 358), p. 34.

²¹⁵² BVerfG, Judgment of 1 March 1979, *Codetermination*, 1 BvR 532/77, para 110 et seq. (juris).

²¹⁵³ „Umfassende Sachverhaltsermittlung“: BVerfG, *Codetermination* (above n. 2152), para 114 (juris): „Der Gesetzgeber hat sich zunächst an dem erreichbaren Material orientiert. Die sichersten Anhaltspunkte für die Auswirkungen eines Gesetzes vermögen Erfahrungen mit vergleichbaren Regelungen im Inland und Ausland zu liefern.“

identified above²¹⁵⁴ - are *comprehensively used*. Second, the available information must be *comprehensively evaluated*, considering political, economic and legal aspects as well as the respective political and scientific debate in this regard.²¹⁵⁵ In the *Codetermination* case, a special committee was charged with this task, and while the Court does not require that all recommendations are implemented in the legislative proposal, the fact that there is a general congruence between the statute and the recommendations is regarded as an indicator that these recommendations were seriously considered.²¹⁵⁶ Third, the predicted likely impacts of the draft bill must be *comprehensively debated* in Parliament.²¹⁵⁷ Finally, the recommendations of the impact analysis as well as the results of the Parliamentary debate must be *adequately reflected* in the draft bill.²¹⁵⁸ In that case, the prognosis is justifiable from a constitutional perspective and within the political margin of discretion. However, the Court also emphasizes that, if at a later stage, the assessment turns out to be partly or totally incorrect, the legislator might be obliged to correct the statute.²¹⁵⁹ This is discussed in more detail in the context of ex-post impact assessments.

So uncertainty about the future impact of a draft bill, including its human rights risks, does not justify to prohibit such an act of legislation constitutionally, but does not justify to exempt it from judicial control either.²¹⁶⁰ It is particularly in these cases that human rights protection must be ensured through organization and procedure.²¹⁶¹ It is necessary to unveil the basis ("*Grundlagen*") upon which a legislative prediction is based, and judicial review focuses on an evaluation thereof.²¹⁶² The German Constitutional Court develops certain factors that influence the depth of constitutional review. The level of review varies depending on the "nature of the policy area, the possibility of basing the decision on reliable facts, and the importance of the constitutionally protected goods or interests at stake".²¹⁶³ As the Court summarizes in the *Codetermination* case, the Court has applied varying criteria when assessing the legislature's predictions. It can review whether an assessment is evidently incorrect ("*Evidenzkontrolle*"),²¹⁶⁴ apply a reasonableness test ("*Vertretbarkeitskontrolle*")²¹⁶⁵ or standards similar to strict scrutiny, which includes an intensified content-based review for the restriction of particularly sensitive areas of fundamental right protection ("*intensivierte inhaltliche Kontrolle*")²¹⁶⁶. In many cases (even though this

²¹⁵⁴ See section 5.5.

²¹⁵⁵ *Ibid.*, para 136.

²¹⁵⁶ *Ibid.*

²¹⁵⁷ *Ibid.*, para 137.

²¹⁵⁸ *Ibid.*, para 138.

²¹⁵⁹ *Ibid.*; BVerfG, *Mühlengesetz* (above, n. 357), para 28 (juris).

²¹⁶⁰ BVerfG, *Codetermination* (above, n. 2153), para 110 (juris).

²¹⁶¹ See section 3.2.1.5.

²¹⁶² *Ibid.*

²¹⁶³ *Ibid.*, English translation cited from: Grimm, 'Proportionality in Canadian and German Constitutional Jurisprudence' (above, n. 1654), p. 391.

²¹⁶⁴ BVerfG, Judgment of 31 July 1973, *Grundlagenvertrag*, 2 BvF 1/73, para 56 (juris); BVerfG, Order of 14 October 1975, *Güterkraftverkehrsgesetz*, 1 BvL 35/70, para 94 (juris). On these categories: BVerfG, *Codetermination* (above, n. 2153), para 110 (juris); on the corresponding English terminology: Grimm, 'Proportionality in Canadian and German Constitutional Jurisprudence' (above, n. 1654).

²¹⁶⁵ BVerfG, *Mühlengesetz* (above, n. 357), para 36 (juris); BVerfG, *Absicherungsgesetz* (above, n. 2146), para 36 (juris).

²¹⁶⁶ BVerfG, *Apotheken* (above, n. 657), para 89-90 (juris); BVerfG, Judgment of 23 March 1960, *Kassenärzte*, 1 BvR 216/51, para 32 ff (juris); BVerfG, Judgment of 21 June 1977, *Lebenslange Freiheitsstrafe*, 1 BvL 14/76, para 176 (juris); on the levels of judicial review see also: BVerfG, Order of 29 October 1987, *Lagerung chemischer Waffen*, 2 BvR 624/83, *Dissenting Opinion*, para 144 et seq. (juris). If necessary, in the

may vary between jurisdictions), a constitutional court would review the constitutionality of a law – including compliance with human rights – only ex-post after the respective law entered into force. At the time of judicial review, practical experience has often been gained. This means that courts may be in a position to better understand the actual effects of the law.²¹⁶⁷ In consequence, it would not be an unjustified form of judicial activism for courts to request that the legislator conducts a new ex-post impact analysis and amends the law if necessary.

The more evidence exists that human rights impacts are likely to occur, the more likely it is that the Court would apply stricter scrutiny. It has been stated above that impact assessment law is situated at the edge of law, politics and expertise. It is at this point where human rights expertise, political decision-making and judicial review meet: If human rights experts produce evidence on potential human rights impacts, political decision-makers must effectively consider this evidence, and a court would be more likely to apply a strict scrutiny test to review whether the requirements outlined above are met. Impact Assessments are instruments of knowledge generation. Even where not explicitly prescribed, they can help to prove that Parliament used and evaluated the available information, and thus complied with the requirements established, inter alia, in the *Codetermination* case.

While less nuanced, a similar approach to judicial review of legislative decisions that can affect human rights exists under EU law. EU Constitutional law requires that “[l]egal acts shall state the reasons on which they are based and shall refer to any proposals, initiatives, recommendations, requests or opinions required by the Treaties” (Article 296 TFEU). The reason is to inform, first, those who are concerned by the legislative act so that they may “learn of the conditions under which the Community institutions have applied the Treaty” and to inform the Court so that it “can exercise its power of review”.²¹⁶⁸ IAs are not explicitly “required by the Treaties”. However, the obligation to give reasons under the first alternative can require the consideration of at least the core findings of the impact assessments: as there is a duty to give a “statement of the reasons which led the institution to adopt” a measure,²¹⁶⁹ this arguably implies a duty to explain if the adopted measure followed *or why it disregarded* the recommendations made in an IA report. Impact assessments can therefore become indirectly relevant: If they identify a less restrictive means, which would indicate that the adopted legislative act is more restrictive and therefore not necessary, the minimum requirement would be to give reasons for why, in the legislator’s view, this is not the case. As Article 296 TEU is an essential procedural requirement²¹⁷⁰, the violation thereof would result in the invalidation of the respective act. Similarly, as will be seen in the final chapter, the European courts have reviewed legislative and regulatory acts and based their judgments on findings contained in impact assessment reports. Before addressing the direct and indirect review of compliance with impact assessment requirements under EU law, another important factor determining the effect of judicial review should be addressed: standing.

latter case, the Court even collects the relevant facts on its own behalf: Grimm, ‘Proportionality in Canadian and German Constitutional Jurisprudence’ (above, n. 1654), p. 391.

²¹⁶⁷ Bryde, ‘Tatsachenfeststellungen und soziale Wirklichkeit in der Rechtsprechung des Bundesverfassungsgerichts’ (above, n. 349), p. 554.

²¹⁶⁸ ECJ, Judgment of 13 May 1997, Case C-233/94, *Germany v European Parliament and Council of the European Union*, para 25.

²¹⁶⁹ *Ibid.*, para 25.

²¹⁷⁰ Robert Schütze, *European Constitutional Law* (Cambridge: Cambridge Univ. Press, 2012), p. 266.

9.2.4 Standing

So far, this chapter focused on the scope of judicial review. A related but different question concerns standing:²¹⁷¹ Even if courts may – directly or indirectly – review whether IAs were adequately conducted and taken into consideration, the ability of HRIA-law to influence decision-making may nevertheless be limited if standing rules are interpreted and applied restrictively. Broadening standing rights to ensure that interested parties can complain against defective IAs or failure to adequately consider the findings can increase the “effectiveness” of an IA regime.²¹⁷² It is therefore necessary to ask who has the right to enforce legal rules and principles governing the conduct of HRIAs in court. If human rights impacts are concerned, in particular those affected by decisions or human rights organizations have the greatest incentive to challenge the decision. This is particularly difficult where HRIAs also assess extraterritorial effects, as reflected in the principle of affectedness. Would distant strangers, or NGOs acting on behalf of distant strangers, have standing? In administrative and constitutional law, standing is often – but not always – limited to persons or groups of persons who can claim a potential violation of their individual rights, or who otherwise demonstrate to have a “sufficient interest”.²¹⁷³

Under German law, standing requires, unless stated otherwise, that the plaintiff can claim a possible violation of an individual right. In addition, public interest litigation in certain areas of environmental law is possible, if an organization has a sufficient interest in bringing a claim.²¹⁷⁴ In the United States, a person suffering “legal wrong” because of agency action, or adversely affected or aggrieved by agency action within the meaning of a relevant statute, is entitled to judicial review thereof.²¹⁷⁵ Under US case law, standing in administrative court proceedings was extended over time: Courts interpreted the term “legal wrong” from the potential violation of a “legal right” to the potential violation of “legally protected interests”.²¹⁷⁶ This extension was interpreted as a reaction to the agency’s perceived lack of representation of these interests.²¹⁷⁷ This legit-

²¹⁷¹ On standing under US law in the context of EIAs recently: US District Court for the District of Columbia, *Wildearth Guardians et al v. Zinke* (above, n. 1072) with detailed references.

²¹⁷² In the context of EIA law: Bryde, ‘Problems of measuring the effectiveness of the Council directive on environmental impact assessment’ (above, n. 1927), p. 17.

²¹⁷³ This is illustrated by Art. 11 European Union, *EIA Directive 2011/92/EU* [2011], which attempts to provide sufficient discretionary space considering the different approaches taken by the EU Member States.

²¹⁷⁴ See Sec. 2 UmwRG.

²¹⁷⁵ 5 U.S.C. § 702 (Administrative Procedure Act). Whether persons are “adversely affected or aggrieved” by an agency action also depends on the substantive content of the relevant statute, namely whether the statute is intended to protect his/her interests: “While the standing requirements imposed by Article III of the Constitution require a plaintiff to suffer a sufficient injury in fact, § 10 of the APA requires that the plaintiff also demonstrate that it has prudential standing [...] Prudential standing requires “the interest sought to be protected by the complainant [to be] arguably within the zone of interests to be protected or regulated by the statute or constitutional guarantee in question” [...]” United States Court of Appeals, Sixth Circuit, 401 F.3d 666 (2005), *Dismas Charities vs. Department of Justice*.

²¹⁷⁶ Bonzon, *Public Participation and Legitimacy in the WTO* (above, n. 280), p. 39; Richard B. Stewart, ‘The Reformation of American Administrative Law’, *Harvard Law Review*, 88 (1975), pp. 1669–1813, 1725 et seq. The term “legally protected interests” refers to “those interests which an administrator is statutorily obligated to consider in taking action” *Ibid.*, p. 1735; requiring a “distinct risk to a particularized interest of the plaintiff”: US District Court for the District of Columbia, *Wildearth Guardians et al v. Zinke* (above, n. 1072).

²¹⁷⁷ Stewart, ‘The Reformation of American Administrative Law’ (above, n. 2176), p. 1728.

imacy deficit similarly exists in situations described in the introductory part, namely where people are affected by decisions taken by another state or by an international organization. Insofar as these interests are protected by human rights law, they are arguably “legally protected interests” in the aforementioned sense. The problem with such a broad approach to standing is evident: There is no logical limit.²¹⁷⁸ However, narrow standing rights - requiring, for example, that applicants are individually concerned (Art. 263 (4) TFEU) - result in the dilemma of *widespread affectedness*: Where a contested decision has broad-ranging impacts without, however, affecting a “distinguished” range of persons in particular, standing is often denied. In other words: the more people’s interests are affected, the less accountable an agency is to these people. This dilemma is an obstacle for the effective implementation of HRIAs under EU law as will be discussed in the final chapter. Against this background, it is worth to take a brief look at approaches to standing under US law and the phenomenon of widespread affectedness.

The problem of widespread affectedness is exacerbated where impacts of general policies in an international context are at stake. This can be illustrated by reference to the NAFTA dispute, an interesting example for the potential of direct review of EIAs for abstract policies – in particular, the (then) planned North American Free Trade Agreement (NAFTA). Even if, in the last instance, the competent US Court of Appeals ruled that NEPA did not apply to trade agreements due to formal reasons, the proceedings before the District Court illustrate the opportunities and challenges of direct judicial review of impact assessments accompanying an international agreement. The United States had, in 1991, reviewed the environmental impacts of the planned NAFTA,²¹⁷⁹ but the government was of the opinion that such a review was voluntary and not required by NEPA. Three nonprofit organizations therefore sued the US Trade Representative, arguing that it was obliged to produce an Environmental Impact Statement (EIS) before the agreement was submitted to Congress. They argued that NEPA requires that all federal agencies prepare an EIS for “every recommendation or report on proposals for legislation and other major Federal actions significantly affecting the quality of the human environment.”²¹⁸⁰

NEPA itself does not define justiciability, so the plaintiffs had to rely on the APA, which grants – as stated above - standing for those who are “adversely affected or aggrieved by agency action within the meaning of a relevant statute.”²¹⁸¹ A broad test for standing of applicants claiming a violation of NEPA seems justified considering that NEPA operates under generally high levels of uncertainties and requires an EIS in particular to identify (thus allowing decision-makers to mitigate) a broad range of *potential* risks. Failure to conduct an adequate EIS therefore constitutes a “cognizable injury, namely, the increased risk that the agency might overlook these adverse consequences in reaching its decision without the benefit of an EIS.”²¹⁸² In light of this consideration, “[t]he procedural and informational thrust of [the] NEPA gives rise to cognizable injury from denial of its explanatory process, so long as there is a reasonable risk that environmental injury

²¹⁷⁸ Ibid., p. 1735.

²¹⁷⁹ For further information, including on later regulatory developments: Office of the United States Trade Representative, available at: <https://ustr.gov/issue-areas/environment/environmental-reviews> <last reviewed: June 2020>.

²¹⁸⁰ 42 U.S.C. § 4332(2) (C).

²¹⁸¹ 5 U.S.C. Sec. 702.

²¹⁸² US Court of Appeals, District of Columbia Circuit, 912 F.2d 478 (D.C. Cir. 1990), *City of Los Angeles v. NHTSA*. Nevertheless, the judges disagreed about the scope of potentially affected applicants in that particular case.

may occur.”²¹⁸³ However, in *Davis*, the court had also required a “sufficient geographical nexus to the site of the challenged project”:

“The procedural injury implicit in agency failure to prepare an EIS — the creation of a risk that serious environmental impacts will be overlooked — is itself a sufficient “injury in fact” to support standing, provided this injury is alleged by a plaintiff having a sufficient geographical nexus to the site of the challenged project that he may be expected to suffer whatever environmental consequences the project may have. This is a broad test, but because the nature and scope of environmental consequences are often highly uncertain before study we think it an appropriate test.”²¹⁸⁴

Against this background, one might have expected the claims against the adoption of a free trade agreement like NAFTA would be dismissed due to a lack of a sufficient geographical nexus. However, the District Court in the NAFTA case held that there is such a reasonable risk, as federal and state laws protecting public health would have to be changed under NAFTA to the detriment of the applicants.²¹⁸⁵ The Court agrees that changes in federal and state law would become necessary to conform with the NAFTA and that these changes “may very likely result in environmental injuries to certain members of the Plaintiff organizations, particularly those in California and Wisconsin. [...] For example, the NAFTA could serve as a basis to challenge federal and state laws, such as the Federal Food, Drug, and Cosmetic Act”.²¹⁸⁶ Insofar, no geographical nexus was required, as long as the potential harm caused to the applicants was sufficiently concrete.

Moreover, the Court also took the potential negative impacts on the rights and interests of those represented by the plaintiffs into account, namely people living on both sides of the border, as the analysis of the environmental consequences of the Maquiladora program makes clear:

“Furthermore, the Court notes that the allegations of possible environmental harm as a result of the NAFTA to members of the Plaintiff organizations who live on the United States-Mexico border region are sufficiently concrete as to establish standing [...]. In particular, the Court notes that a limited free trade zone along the United States-Mexican border, known as the Maquiladora program, demonstrates that the Plaintiffs’ environmental concerns are not speculative. The Maquiladora program has resulted in grave environmental problems to those people living on either side of the border [...] These problems are so severe that the area has been called a “virtual cesspool and breeding ground for infectious diseases....” [...] The Plaintiffs also make claims as to the air quality on behalf of their members in specific metropolitan areas, such as San Diego, California, and El Paso, Texas, and allege that air quality in these cities will suffer as a result of the NAFTA.”²¹⁸⁷

The Court finally rejects the defendant’s argument that these alleged environmental effects of the NAFTA were “too widespread to be confined to a particular geographical location” stating

²¹⁸³ Ibid.; US District Court for the District of Columbia, 822 F.Supp.21 (1993), *Public Citizens v. Office of the US Trade Representative* (1993).

²¹⁸⁴ United States Court of Appeals, Ninth Circuit, 521 F.2d 661 (9th Cir. 1975), *City of Davis v. Coleman*.

²¹⁸⁵ US District Court for the District of Columbia, *Public Citizens v. Office of the US Trade Representative* (above, n. 2183).

²¹⁸⁶ Ibid.

²¹⁸⁷ Ibid.

that “the absence of a geographical nexus does not defeat a claim of standing because that ‘would mean that the most injurious and widespread Government actions could be questioned by nobody.’”²¹⁸⁸

The District Court granted a motion for summary judgment and ordered that an EIS of the NAFTA be prepared “forthwith”.²¹⁸⁹ The US Court of Appeals, however, reversed the decision for a formal reason on the ground that NAFTA is not a “final agency action”²¹⁹⁰ within the meaning of Section 704 APA. The Court emphasized that the President still had to transmit NAFTA to Congress, and that therefore, even though “the OTR has completed negotiations on NAFTA, the agreement will have no effect on Public Citizen’s members unless and until the President submits it to Congress.”²¹⁹¹ Nevertheless, the Court of Appeals did not question the District Court’s analysis that the plaintiffs would be significantly affected once the agreement entered into force. In the end, the political pressure to present environmental impact statements for trade agreements increased – in the United States and in Mexico.²¹⁹²

While the proximity test as applied in *Davis*²¹⁹³ required a “sufficient geographical nexus to the site of the challenged project”, in particular the NAFTA case demonstrated that standing rights may, in principle, also be granted where general-abstract policies are at stake. The cited case-law in particular rejected the government’s “widespread affectedness” objection.²¹⁹⁴ And indeed, it seems possible to develop parameters for a “non-geographical proximity test” that identifies direct and significant effects of abstract policies on certain individuals or regions. These effects could be legal or factual, for example if, due to a new regulatory policy, small-scale farmers are not allowed or able to place their products on the EU market anymore.²¹⁹⁵ At least *de lege ferenda*, it would be possible to further develop criteria for such a non-geographic proximity test considering not only legal but also factual effects. For example, under German construction law, planning authorities can regulate major investments such as shopping malls if they are likely to cause severe impacts on central supply areas – such as historically grown inner cities – of other cities.²¹⁹⁶ To determine the significance of these impacts, an impact assessment determines inter alia the expected purchasing power outflow, and case law has established specific thresholds above which revenue redistribution or purchasing power outflow generally qualifies as so significant that the project should not proceed without safeguards.²¹⁹⁷ It is irrelevant whether these impacts occur outside the planning city’s borders. As long as these thresholds are met, impacts

²¹⁸⁸ Ibid. citing: US Supreme Court, 412 U.S. 669 (1973), *United States v. SCRAP* (18 June, 1973).

²¹⁸⁹ US District Court for the District of Columbia, *Public Citizens v. Office of the US Trade Representative* (above, n. 2183).

²¹⁹⁰ US Court of Appeals, District of Columbia Circuit, 5 F. 3d 549, *Public Citizen v. US Trade Representative*, para 15.

²¹⁹¹ Ibid., para 9.

²¹⁹² Markus Gehring, *Nachhaltigkeit durch Verfahren im Welthandelsrecht* (Berlin, 2007), p. 115; Paul Kibel, ‘The Paper Tiger Awakens: North American Environmental Law After the Cozumel Reef Case’, *Columbia Journal of Transnational Law*, 39, pp. 395–482.

²¹⁹³ United States Court of Appeals, Ninth Circuit, *City of Davis v. Coleman* (above, n. 2184).

²¹⁹⁴ US District Court for the District of Columbia, *Public Citizens v. Office of the US Trade Representative* (above, n. 2183); US Supreme Court, *United States v. SCRAP* (above, n. 2188).

²¹⁹⁵ For more on this see the discussion of the Inuit-cases in the final chapter.

²¹⁹⁶ Sec. 34 (3) of the German Federal Building Code.

²¹⁹⁷ By way of example and with further references: Higher Administrative Court of Saxony, Judgment of 20 October 2016, 1 A 857/10, para 50 (juris). On the admissibility of quantitative methods and thresholds to determine the significance of these impacts in general: BVerwG, Judgment of 11 October 2007, 4 C 7/07.

are presumably significant. Geographic proximity is one factor that might increase the likelihood of significant purchasing power outflows, but it is in no way decisive for the test as such. This approach could also be applied to transnational affectedness. Similarly, it would be possible to develop thresholds above which a trade or development policy would affect distant strangers to such an extent that the impact could be classified as significantly affecting legally protected interests. This would require a combination of normative criteria and economic models. By way of example: Like in the construction law cases where courts rely on expected revenue redistribution or purchasing power outflow, courts reviewing the negative impacts of trade policies could rely on IAs based on economic modelling to determine which groups of individuals are so significantly affected that they meet the envisaged threshold. Like in the construction law example, such a threshold would always be to a certain extent arbitrary. Nevertheless, it would be suitable to make sure that the most severe impacts are identified. Granting standing to individuals would incentivize decision-makers to take these effects into account.

Even if there were adequate thresholds for a non-geographic proximity test, the risk that numerous individual complaints would overload courts might still persist. However, individual standing is not the only option to enable judicial review. In order to enable judicial review to protect the rights and interests of those affected while at the same time protecting the court system against an excessive overload of actions, a variety of options to modify standing requirements exist. They could ensure a better representation of affected individuals in court, and in consequence increase incentives for decision-makers to adequately consider the impacts on individual human rights during the IA process. One is the concept of surrogate or public interest standing,²¹⁹⁸ for example as foreseen by the EIA-Directive and the Aarhus Convention.²¹⁹⁹ Environmental NGOs have thus privileged access to courts, while generally plaintiffs must maintain the impairment of their own rights. While some critics still fear that such a form of public interest litigation might overstrain the capacity of courts, there is so far no statistical evidence supporting such a trend; rather, it appears that NGOs use their resources in a well-considered and strategic way and thus avoid costly but evidently unsuccessful litigation.²²⁰⁰ One argument raised in favor of public interest litigation is that it contributes to the effective implementation of (EU) law. While the ECJ has used *effet utile* arguments in several ways to broaden standing rights under Member States' court procedure law, it will be discussed in the final chapter to what extent the ECJ should modify its case law on standing requirements under EU court procedure law to ensure the *effective* implementation of the EU's commitment to respect and promote human rights in economic policy-making.

Another option to deal with an overload of claims is applied especially by some Supreme or Constitutional Courts, which have discretion to hear complaints.²²⁰¹ From a human rights and com-

²¹⁹⁸ Stewart, 'The Reformation of American Administrative Law' (above, n. 2176), p. 1730; on different "types" of public interest litigation: T. Mullen, 'Public interest litigation in Scotland', *Juridical Review* (2015), pp. 363–383.

²¹⁹⁹ Article 9 (2) (b) UNECE, *Convention on Access to Information, Public Participation in Decision-Making and Access to Justice in Environmental Matters* ("Aarhus Convention") (above, n. 1360).

²²⁰⁰ German Federal Environmental Office, available at:

<https://www.umweltbundesamt.de/service/uba-fragen/gibt-es-einen-trend-zu-haeufigeren>
<last visited: June 2020 >.

²²⁰¹ The US Supreme Court, for example, accepts only a few appeals on a discretionary basis. Similarly, the acceptance of a constitutional complaint with the German Federal Constitutional Court is governed by a complex regime, which aims at finding a fair balance between the effective protection of constitutional

pliance perspective, it might still be better for distant strangers to have a right to discretionary judicial review than no right at all. Again a different system to deal with a potential overload of complaints is found in the Inter-American human rights system. The two-tiered process, where the Inter-American Commission of Human Rights reviews the applications first and, under certain circumstances, files the complaint with the Inter-American Court of Human Rights, is at least a workable option that allows mitigating a potential overload of complaints without applying a strict binary code to individual standing.

These alternative approaches to standing and judicial review could also be a viable solution to give procedural effect to the principle of affectedness and to make sure that rights and interests of those affected are better taken into account without sacrificing the functionality of existing judicial review systems. For example, in the case of the EU, the Ombudsman has already reviewed certain Commission decisions, also with regard to their human rights impacts occurring within and outside the EU (see section 10.3.1). It is unlikely to assume that the ECJ would be overloaded by complaints if the EU Ombudsman enjoyed a right to file an action of annulment if he/she finds a violation of the principle of good administration. Similar rights to bring a suit exist in Austria, Sweden or Finland.²²⁰² Failure to adequately conduct an HRIA could constitute such a case of maladministration.²²⁰³ Many of the trans- and international human rights impacts result in a widespread affectedness. Broadening the scope of access to judicial review would give effect to the commitment to human rights also vis-à-vis distant strangers. Judicial review might in these cases even be of particular importance, as political process theory²²⁰⁴ suggests: in particular because the human rights of distant strangers are often not adequately considered in a meaningful way during political decision-making, courts can help to ensure that the human rights of distant strangers – such as small-scale farmers as mentioned in the introduction – are given greater consideration in the political process.

9.3 Interim Conclusion and Outlook

Compliance theories as well as a comparison with domestic EIA law demonstrates that, generally, several factors affect the relevance of IAs, first in the sense that procedural IA requirements are respected, and second in the sense that IAs can increase compliance with and give effect to the substantive objectives pursued, such as environmental or human rights protection, mainly by requiring decision-makers to adequately take the findings into account. These main factors are formal accountability mechanisms, political accountability mechanisms, legal determinacy, norm internalization and institutional learning, and, finally, the availability of flexibility mecha-

rights and the institutional interest in managing the huge load of individual complaints and enjoys, within strict limits, a certain discretion to reject a constitutional complaint without giving specific reasons where the case is not of general constitutional relevance or where the complainant would not suffer a particularly severe damage, Sec. 93a and 93d of the Federal Constitutional Court Act (“BVerfGG”).

²²⁰² Saskia Eckhardt, *Die Akteure des außergerichtlichen Grundrechtsschutzes in der Europäischen Union* (Frankfurt am Main: Lang, 2010), p. 152.

²²⁰³ See, for example: European Ombudsman, *HRIA for the EU-Vietnam Free Trade Agreement* (above, n. 157).

²²⁰⁴ John Hart Ely, *Democracy and Distrust* (Cambridge: Harvard University Press, 1980); U.S. Supreme Court, 304 U.S. 144 (1938), *United States v. Carolene Products Co.* (1938).

nisms to respond to ex-post findings of real-life impacts. Using these five factors as evaluative yardsticks, the final chapter will analyze the role HRIAs do and could play in EU law.

10 CHAPTER 10: THE RELEVANCE OF IMPACT ASSESSMENTS IN EU LAW

10.1 Introduction

The previous chapter identified several factors that determine the ability of institutionalized impact assessments to influence decisions, and that can in particular increase the ability of institutionalized HRIAs to make decisions “more” compliant with human rights. It would be beyond the scope of this thesis to analyze the actual effect of impact assessments, i.e. to empirically assess how they have actually influenced EU decision-making so far. It suffices to say that there are certain indications that, even absent judicial enforcement mechanisms, IAs are able to influence decision making. For example, proposals adopted by the College of Commissioners are prepared by their Private Office staff. According to interviews conducted by the Court of Auditors, Private Office staff regards the IA-reports as a valuable source of information regularly discussed at the weekly preparatory meetings.²²⁰⁵ This indicates that they are seriously taken into account – and that the College of Commissioners takes at least a “hard look”. Another observer found that Trade SIAs recommended the inclusion of sustainable development chapters – a nowadays generally accepted practice in EU trade agreements.²²⁰⁶ As is always the case, also in well-established domestic EIA-regimes, it is difficult to prove to what extent it is the IA that actually induced a policy change. Nevertheless, this anecdotal evidence suggests that there is a good chance that HRIAs might, through their informative and persuasive effect, influence the Commission’s decision-making process and at least occasionally result in “more” compliance with human rights. These questions should be addressed in other research projects. This chapter, instead, focuses on the legal and institutional context in which IAs take place in EU decision-making and analyzes the EU Impact Assessment regime through the lenses of the five factors identified above: formal accountability mechanisms, political accountability mechanisms, legal determinacy, mechanisms for institutional learning and ex-post flexibility mechanisms.

10.2 Formal Accountability: Judicial Review

The European courts invalidate legislative and regulatory acts if they violate fundamental/human rights. But to what extent does the Court invalidate EU acts absent an individual violation of rights but rather because of an incompatibility with general principles and objectives? The Court has made clear in *Bettati* that it will grant broad legislative discretion to the EU legislature and only invalidate a legislative act in exceptional cases. The Court was asked to determine the validity of a Regulation based on its (in) compatibility with the environmental objectives and principles laid down in the Treaty:

“[I]n view of the need to strike a balance between certain of the objectives and principles mentioned in Article 130r and of the complexity of the implementation of those criteria, review by the Court must necessarily be limited to the question whether the Council, by adopting the Regulation, committed a mani-

²²⁰⁵ European Court of Auditors, *Impact Assessments in the EU Institutions: Do they support decision-making?* (above, n. 1312), p. 20.

²²⁰⁶ Hachez and Lein, ‘Assessing EU Human Rights Impact Assessments’ (above, n. 507), p. 254.

fest error of appraisal regarding the conditions for the application of Article 130r of the Treaty.”²²⁰⁷

This judgment suggests that the Court would only invalidate an EU legislative act because of non-consideration of environmental objectives in exceptional cases.²²⁰⁸ This is different, as the Court has clearly stated in 2014 in *Electronic Communications*, if interference with fundamental rights is at stake: then, the legislator’s discretion would be more limited. This means for the proportionality test that

“where interferences with fundamental rights are at issue, the extent of the EU legislature’s discretion may prove to be limited, depending on a number of factors, including, in particular, the area concerned, the nature of the right at issue guaranteed by the Charter, the nature and seriousness of the interference and the object pursued by the interference (see, by analogy, as regards Article 8 of the ECHR, Eur. Court H.R., *S. and Marper v. the United Kingdom* [GC], nos. 30562/04 and 30566/04, § 102, ECHR 2008-V).”²²⁰⁹

While the mentioned case concerned the invalidity of a directive due to fundamental rights violations occurring within EU-territory, insofar as EU law recognizes the extraterritorial application of fundamental and human rights, there is no reason to distinguish *per se* between “internal” and “external” human rights infringements. However, two considerations make it more difficult to challenge the validity of an EU legislative or regulatory act on the bases of extraterritorial human rights violations: First, causality requirements, and second, the EU Court’s restrictive case law concerning standing. In the following, three issues will be addressed, following the concepts of judicial review identified in the previous chapter: First, the potential justiciability of an infringement of the commitment to conduct IAs (*direct review*), second, the implicit role of impact assessments in judicial review (*indirect review*), and third, standing rights that might affect the relevance of judicial review, in particular where the rights of distant strangers are concerned.

10.2.1 Direct Judicial Review

Direct judicial review in impact assessment law means, as defined in the previous chapter, that a final decision can be invalidated because procedural norms determining if and how to conduct IAs were violated. This requires that these rules are binding and thus justiciable. While this is clearly the case if statutory laws or EU Directives and Regulations require the conduct of EIAs,²²¹⁰ the same cannot (yet) be said about the EU Impact Assessment regime discussed here. However, the case for direct judicial review could be made if the obligation to conduct IAs is either an essential procedural requirement, or understood in conjunction with the principle of legitimate expectations.

²²⁰⁷ ECJ, Judgment of 14 July 1998, Case C-341/95, *Bettati*, p. 35.

²²⁰⁸ Emily Reid, *Balancing Human Rights, Environmental Protection and International Trade* (Oxford u.a: Hart, 2015), p. 90.

²²⁰⁹ ECJ, Judgment of 8 April 2014, Joined Cases C-293/12 and C-594/12, *Electronic communications*, para 47.

²²¹⁰ See sections 6.2 and 9.2.

Impact assessments in EU law are based on different sources. While the general obligation to assess the internal and external human rights impacts of legislative, regulatory and other acts is enshrined in EU primary law, this does not necessarily oblige the Commission to conduct formalized impact assessments. Rather, the commitment to conduct impact assessments in this narrow sense is laid down in an inter-institutional agreement as well as in tertiary soft-law, such as communications and guidelines. This raises the question of whether the failure to conduct an adequate IA can be a valid ground to annul an otherwise lawful legislative or non-legislative act. The ECJ held in *Grimaldi* that the fact that a norm – in the particular case a Recommendation – is not legally binding does not mean that it is legally irrelevant, so that national courts have to take Recommendations into consideration.²²¹¹ While the ECJ in *Grimaldi* declared a Recommendation to be not binding but legally relevant for national courts, it has also repeatedly recognized informal agreements as self-binding on the European Commission. The first series of decisions concerned staff appointments. In *Ragusa*, the Court held that, for staff appointment decisions, the Commission is bound by its own internal memoranda even though they were not part of the Staff Regulation: if the “appointing authority voluntarily institutes a compulsory consultative procedure which is not prescribed by the Staff Regulations, it is obliged to abide by such a procedure, which cannot be regarded as lacking any legal validity.”²²¹² This self-binding effect was soon applied to other areas. In *Hüls*, the Court confirmed that the Commission “may not depart from rules which it has thus imposed on itself”.²²¹³ The self-binding effect of procedural rules and guidelines was confirmed as settled case law in *Pfizer*, an action for annulment of a Regulation banning the use of certain antibiotics: “the Community institutions may lay down for themselves guidelines for the exercise of their discretionary powers by way of measures not provided for in Article 249 EC, in particular by communications, provided that they contain directions on the approach to be followed by the Community institutions and do not depart from the Treaty rules. In such circumstances, the Community judicature ascertains, applying the principle of equal treatment, whether the disputed measure is consistent with the guidelines that the institutions have laid down for themselves by adopting and publishing such communications.”²²¹⁴ It is necessary that the communications are adopted by the Commission and published at the time when the disputed action is taken.²²¹⁵ Insofar, the case law can generally apply to the guidelines on IAs. However, to produce a self-binding effect, the respective norms must be sufficiently specific: the clearer the rules, the more likely the self-binding effect. This is insofar relevant as IA-guidelines to a large extent are an aid to decision-making²²¹⁶ and should be used by the Commission services in a flexible manner. However, some rules are sufficiently specific, for example concerning the necessity to prepare and publish a Roadmap or an Inception Impact Assessment for certain initiatives, or the scope and timing of consultations.

²²¹¹ ECJ, C-322/88, *Grimaldi* (1989), para 18.

²²¹² ECJ, Judgment of 21 April 1983, Case 282/81, *Ragusa*, para 18; ECJ, Judgment of 21 March 1985, Case C-263/83, *Turner v. Commission* (1985), para 16 ff.

²²¹³ CFI, Judgment of 10 March 1992, Case T-9/89, *Hüls*, para 48.

²²¹⁴ CFI, Case T-13/99, *Pfizer Animal Health* (above, n. 1898), para 119; CFI, T-7/89, *Hercules Chemicals v Commission* (1991), para 53; CFI, Judgment of 5 November 1997, Case T-149/95, *Ducros v Commission*, para 61 et seq.; CFI, Judgment of 30 April 1998, Case T-214/95, *Vlaams Gewest*, para 79, 89.

²²¹⁵ CFI, *Pfizer Animal Health* (above, n. 1898), para 121–122.

²²¹⁶ European Union, *Interinstitutional Agreement on Better Law-Making* (above, n. 1136), para 12; Meuwese, *Impact Assessment in EU Lawmaking* (above, n. 267), p. 8.

So IA-guidelines – such as those forming part of the Better Regulation package – can arguably create a certain legal or self-binding effect on the Commission. Still, there is one structural difference: In contrast with the aforementioned ECJ case law dealing with competition law or state aid, the promise to conduct IAs accompanying certain legislative and regulatory initiatives concerns a stage where it is often not clear whether individual rights and interests will be affected or even infringed at all. The Commission has, one could object, simply made a promise to other EU institutions or possibly the general public but not to individuals to abide by a certain procedure – in consequence, there would be no individuals who could legitimately rely on the promise to conduct IAs. This concerns again the problem of widespread affectedness: the more people are affected, the less effective procedural safeguards are. Still, the self-binding effect of the promise to conduct HRIAs could be justified for a different reason: due to the concept of human rights protection through organization and procedure. Exactly because it is factually and normatively uncertain how many people's rights will be affected by a legislative or regulatory initiative, it is important that organizational and procedural provisions aimed at safeguarding human rights are respected at an early stage of the decision-making procedure. Therefore, it can be justified to regard the specific promise to conduct an HRIA as a self-binding commitment. The public's expectation that the EU institutions will abide by this commitment is legitimate, it is in particular not outweighed by the EU institutions' interest in adopting new or modifying existing rules and principles. As mentioned above, the promise to conduct IAs, first, mainly raises *procedural* expectations; it does not impose an obligation to take a particular *substantive* decision. Second, it is flexible insofar as the European Commission could revoke this commitment with effect for the future.²²¹⁷ However, so far the European courts have not taken that path.

In addition to the principle of legitimate expectations and the Commission's self-commitment, the obligation to conduct impact assessments can also constitute an "essential procedural requirement" (Article 263 (2) TFEU). If this were the case, then the ECJ would have jurisdiction to review a legislative or non-legislative act on the grounds that (and declare the act concerned to be void because) no such IA has been conducted.²²¹⁸ So is the commitment to conduct IAs an essential procedural requirement in this sense? This can be the case as the obligation to conduct impact assessments is laid down in the interinstitutional agreement on better lawmaking.²²¹⁹ The interinstitutional agreement states that the Commission *will* carry out impact assessments of its "legislative and non-legislative initiatives, delegated acts and implementing measures which are expected to have significant economic, environmental or social impacts."²²²⁰

So, is this an essential procedural requirement? The commitment to conduct IAs to accompany certain Commission proposals can be classified as *procedural*. It has also been argued above that the interinstitutional agreement obliges the Commission, under the respective conditions laid down therein, to conduct IAs (see above section 6.1.4 and in the following). It can thus also be a procedural *requirement*. More difficult is the question whether it is *essential*. One might object that the obligation to conduct impact assessments is not explicitly laid down in the EU treaties and might therefore not be regarded as essential. However, this is not a compelling objection. First, the Court can annul an act on the grounds that it is an infringement of an essential proce-

²²¹⁷ See section 3.2.2.2. This is at least the case insofar as the non-retrogression principle is not violated.

²²¹⁸ Alberto Alemanno, 'A Meeting of Minds on Impact Assessment: When Ex Ante Evaluation Meets Ex Post Judicial Control', *European Public Law*, 17 (2011), pp. 485–505, p. 497.

²²¹⁹ European Union, *Interinstitutional Agreement on Better Law-Making* (above, n. 1136).

²²²⁰ See section 6.1.4 for a closer analysis.

dural requirement or of the Treaties: this shows that it is not relevant whether a procedural rule is imposed by primary law or elsewhere.²²²¹ Second, the inter-institutional agreement in which the EU institutions committed to conduct IAs²²²² concretizes the principle that “institutions shall practice mutual sincere cooperation” (Article 13 (2) TEU). Moreover, the commitment to conduct Impact Assessments is laid down in the interinstitutional agreement on *better lawmaking*. This indicates that the institutions themselves – including the EU legislature – regard impact assessments, at least in principle, to be an essential part of the legislative process. Failure to conduct an adequate Impact Assessment in violation of the interinstitutional agreement would thus allow the Court to declare the accompanied act to be void. This would be in line with European case law: Generally, the violation of rules determining participation and the involvement of other institutions in the decision-making process are essential in the sense that their violation can influence the outcome of the final decision; such a violation generally renders the final act illegal.²²²³

At least in situations where the European Commission fails to conduct an IA to accompany a non-legislative initiative, there is also a close link between a missing IA and the non-legislative act adopted by the Commission. This, however, may be different with regard to legislative initiatives: If the Commission fails to carry out an impact assessment accompanying a proposal for a legislative act, the European Parliament and the Council would have the opportunity in the course of the legislative procedure to make up for such a failure.²²²⁴ In a recent Judgment, the European Court of Justice addressed the implications of a failure to conduct impact assessments accompanying legislative acts. The Court mainly followed Advocate General Sharpston’s Opinion.²²²⁵ Sharpston asked whether it follows automatically that a legislative act should be annulled if no impact assessment pursuant to the Interinstitutional Agreement was carried out. She argues that the Interinstitutional Agreement does not use mandatory language in the sense that “the Interinstitutional Agreement does not cast them as a prior condition to proposing or adopting legislation in all circumstances,” but that there are exceptions, for example “where the circumstances clearly demonstrate the need for urgent action”²²²⁶. What follows from her Opinion is that under *normal* circumstances, failure to conduct an IA as required under the Interinstitutional Agreement could result in the annulment of the respective legislative act. The Court, in principle, confirms this “rule-expection” approach, holding that “the preparation of impact assessments is a step in the legislative process that, as a rule, must take place if a legislative initiative is liable to have such implications”, but that „[n]ot carrying out an impact assessment cannot be regarded as a breach of the principle of proportionality where the EU legislature is in a particular situation requiring it to be dispensed with and has sufficient information enabling it

²²²¹ Alemann, *Die Handlungsform der interinstitutionellen Vereinbarung* (above, n. 1193), pp. 307–314.

²²²² European Union, *Interinstitutional Agreement on Better Law-Making* (above, n. 1136).

²²²³ Charlotte Gaitanides, ‘AEUV Art. 263’, in: von der Groeben/Schwarze/Hatje (ed.), *Europäisches Unionsrecht*, para 123.

²²²⁴ Rudolf Mögele, *Grundrechtswahrung im EU-Normsetzungsprozess*, EuR 2020, pp. 18–19.

²²²⁵ ECJ, Judgment of 3 December 2019, *Czech Republic v European Parliament and Council of the European Union*, C-482/17, para 76 et seq.; Opinion of Advocate General Sharpston, *Czech Republic v European Parliament and Council of the European Union* (above, n. 1198), para 85 et seq. The Court and the Opinion address the question whether there is a legal obligation to conduct IAs in the context of proportionality. Still, the legal arguments discussed therein are also relevant to analyze whether direct judicial review would be viable.

²²²⁶ *Ibid.*, para 96–97.

to assess the proportionality of an adopted measure.”²²²⁷ Consequently, the Court accepts a “flexible commitment” – without sufficient justification, the failure to carry out an impact assessment may justify the annulment of the legislative act.

10.2.2 Indirect Judicial Review

Indirect review means that a court, absent justiciable IA-norms, reviews whether the impacts of an initiative have been adequately considered (on indirect judicial review in general: section 9.2.3). This may have occurred by way of an impact assessment which then becomes indirectly subject to judicial review, usually as part of the proportionality test. The ECJ had several times the opportunity to clarify the relationship between impact assessments and indirect judicial review.

10.2.2.1 The *Vodafone* Case

In *Vodafone*, the ECJ was asked to review whether the harmonization of mobile phone charges in Regulation 717/2007 for EU-wide roaming was correctly based on Article 95 (now: Article 114 TFEU) and in compliance with the principles of proportionality and subsidiarity. In order to determine whether the requirements of Article 95 EC were fulfilled, the Court referred to the explanatory memorandum and the impact assessment, which indicated that national “measures would have been likely to lead to a divergent development of national laws”.²²²⁸ Based on these findings, the Court concluded that the objective of the challenged decision was indeed to improve the conditions for the functioning of the internal market.

Regarding the principle of proportionality, the Court reaffirms that the Community legislature “must be allowed a broad discretion in areas in which its action involves political, economic and social choices and in which it is called upon to undertake complex assessments and evaluations.”²²²⁹ Consequently, the Court limits its review to measures that are manifestly inappropriate with regard to the objective pursued.²²³⁰ In spite of the broad discretion, the decision must be based on objective criteria, and the legislature must determine whether the objectives justify the negative consequences – in the respective case the negative consequences on the rights of operators.²²³¹ In order to review whether the legislature complied with these requirements, the Court recalls that “the Commission carried out an exhaustive study, the result of which is summarized in the impact assessment mentioned in paragraph 5 of this judgment. It follows that the Commission examined various options including, inter alia, the option of regulating retail charges only, or wholesale charges only, or both, and that it assessed the economic impact of those various types of regulation and the effects of different charging structures.”²²³² The Court also looked at the content of the impact assessment and the input made during the preceding consultations.²²³³

²²²⁷ ECJ, Judgment, C-482/17, *Czech Republic v European Parliament and Council the European Union*, para 84-85.

²²²⁸ ECJ, Judgment of 8 June 2010, Case C-58/08, *Vodafone*, para 45.

²²²⁹ *Ibid.*, para 52.

²²³⁰ *Ibid.* On the (varying) degrees of factual scrutiny: Vivian Kube, *EU Human Rights, International Investment Law and Participation* (above n. 733), pp. 251 et seq.

²²³¹ ECJ, Case C-58/08, *Vodafone* (above n. 2228), para 53.

²²³² *Ibid.*, para 55.

²²³³ *Ibid.*, para 65.

10.2.2.2 The *Spain v Council* Case

In the context of Greece's accession, the European Communities established a cotton support scheme by Protocol 4 annexed to the Act of Accession; this scheme was later extended to Spain and Portugal. According to the Protocol, the scheme is intended in particular to "support the production of cotton in Community regions where it is important for the agricultural economy, to permit the producers concerned to earn a fair income, and to stabilize the market by structural improvements" (cited from the Court's judgment). As part of a reform of the common agricultural policy, the Council later adopted a new support scheme for cotton to bring it in line with support schemes for other agricultural sectors. Spain brought an action of annulment against the respective Regulation reforming the scheme. Among four pleas, only the last one is of relevance here, namely the plea that the Regulation violated the principles of proportionality.²²³⁴

The Spanish government emphasized the negative consequences of the new cotton scheme: fixing the amount of aid at a level of 35 % of the aid available under the previous scheme, and making eligibility conditional only on the maintenance of cultivation until the boll opening were inappropriate to achieve the objectives of the Protocol.²²³⁵ The Spanish government presented studies that demonstrate that the profitability of cotton production in the concerned regions would not be ensured; the probable consequence would be that cotton production will be abandoned or replaced by other crops.²²³⁶ The Commission and Council disputed that the new scheme was manifestly inappropriate, arguing that the income of producers under the new cotton support scheme would remain substantially the same, and that the profitability of cotton growing under the new scheme will be comparable to that of other crops.²²³⁷

The Court reviewed whether the measures under the new cotton support scheme were manifestly inappropriate in terms of the objective, which "consists essentially in fixing the amount of the specific aid for cotton at a level such that it ensures adequate profitability and hence the continuation of cotton production in regions which lend themselves to that crop, thus avoiding its being driven out by other crops."²²³⁸ It is undisputed that the socio-economic effects of the reform on the cotton sector were not assessed,²²³⁹ and the decision mainly based on a "comparative study of the foreseeable profitability of cotton growing under the new support scheme in comparison with that of other crops".²²⁴⁰ The Spanish government criticized the calculation on several grounds, including the fact that the study did not consider the full labor costs, given that cotton is more labor-intensive compared to other crops.²²⁴¹ The Commission and Council admitted this but assumed that it would not make a significant difference and that it would be technically difficult to collect and include these sector-specific costs. In essence, the Court had to decide whether, by developing the new scheme on the bases of the controversial study, the Com-

²²³⁴ ECJ, *Spain v. Council* (above, n. 1231), para 4 and 26. The three other pleas concern the infringement of Protocol 4, the misuse of power, and the breach of the obligation to state reasons; all three pleas were rejected.

²²³⁵ *Ibid.*, para 87.

²²³⁶ *Ibid.*, 87 ff.

²²³⁷ *Ibid.*, 91 et seq.

²²³⁸ *Ibid.*, para 102.

²²³⁹ *Ibid.*, para 103.

²²⁴⁰ *Ibid.*, p. 105.

²²⁴¹ *Ibid.*, para 113-114.

munity institutions infringed the principle of proportionality.²²⁴² In spite of the broad range of discretion, the institutions must demonstrate before the Court that they “actually exercised their discretion, which presupposes the taking into consideration of all the relevant factors and circumstances of the situation the act was intended to regulate.”²²⁴³ This means at a minimum to clearly identify the “basic facts which had to be taken into account as the basis of the contested measures of the act and on which the exercise of their discretion depended.”²²⁴⁴ So the Court was willing to review whether these basic facts were adequately considered when taking the decision. Interestingly, even though it is disputed to what extent the cotton-specific labor costs make a significant difference or can technically be collected, the Court regards it as evident that, to determine the aid necessary to calculate the aid necessary for profitable cotton production, the correct labor costs must be considered – even if this raises certain “technical problems”.²²⁴⁵

The Court not only criticized the incompleteness of the calculation, but it also pointed out that the scope of potential impacts to be considered was not broad enough. Instead of only focusing on the production costs to determine the profitability of cotton, the economic effects on the ginning undertakings were not assessed²²⁴⁶ - this, however, would have been necessary as cotton production and its processing by the ginning undertakings “appear to be inextricably linked”.²²⁴⁷ The contested part of the Regulation was therefore declared invalid.

The judgment *Spain v. Council* is important for impact assessments insofar as it demonstrates the Court’s willingness to strike down a legislative act if the impacts thereof are not or not adequately assessed. This approach means that the institutions must take all relevant factors and circumstances into consideration when making their decisions. The Commission and the legislator must therefore study likely significant impacts. While the Court does not say that this requires formalized impact assessments, these are clearly regarded as suitable tools to exactly do that. With regard to the degree of the potential impacts: it is not required that certain rights are violated, for example the rights of cotton farmers – the court even denied that they could legitimately expect to receive the same amount of support in the future. Similarly, a manifest error would not require that human rights as entitlements are likely going to be infringed in the technical sense; it would be sufficient to prove that the institutions assessed the potential impacts on human rights as policy objectives in a manifestly incomplete or incorrect manner. This bears similarities to the requirements established by the German Federal Constitutional Court in the *Codetermination* case²²⁴⁸, even though similarly specific criteria are missing. As human rights principles also inform external relations and are also legally relevant for decisions with external effects, there is no reason to limit the scope of judicial review as established under *Spain v. Council* to cases where negative impacts occur within the EU territory.²²⁴⁹

²²⁴² *Ibid.*, para 119.

²²⁴³ *Ibid.*, para 122.

²²⁴⁴ *Ibid.*, para 123.

²²⁴⁵ *Ibid.*, para 126.

²²⁴⁶ *Ibid.*, para 128.

²²⁴⁷ *Ibid.*, para 132.

²²⁴⁸ See section 9.2.3.2.

²²⁴⁹ Similar: Lorand Bartels, ‘A Model Human Rights Clause for the EU’s International Trade Agreements’, German Institute for Human Rights/Misereor, 2014, p. 31 who states that the Court did not find that there was an obligation to conduct a human rights impact assessments, but rather dealt with the consequences

10.2.2.3 The *Afton* Case

As argued previously, the comparison of different alternatives is an essential element of impact assessments and reflects the principle of proportionality: the goal is to identify the least restrictive policy option. In *Afton*, the ECJ had to clarify how the comparison of alternatives in an impact assessment relates to a substantive and justiciable proportionality test. The dispute mainly concerned a case where the Commission recommended voluntary measures while the Parliament and Council later enacted binding rules. The applicant therefore argued that the compulsory measures adopted by the EU Directive of the Parliament and Council are not the least restrictive measures. However, this argument was rejected by Advocate General Kokott and the Court.²²⁵⁰ The IA recommendation was not based on compelling scientific information but on the Commission's discretion, which it enjoys when preparing legislative proposals. Insofar, the EU legislator is, within the limits of EU law, free to amend the proposal, so that the Commission's identification of a preferred policy option cannot – and for democratic principles should not – automatically restrict the legislature's discretion in taking a different view within the limits of reasonableness.²²⁵¹ Even though the comparison of different impacts in the IA report correlates with the legal proportionality test, the IA recommendation cannot ascertain with any binding force what the less restrictive option is and therefore cannot bind the EU legislature in this regard.²²⁵² Nevertheless, this does not mean that the comparison of alternatives in the IA report is insofar without any relevance for judicial review. It at least imposes – as seen in *Afton* – an additional argumentative burden on the decision-maker to justify options other than the one recommended by the Commission. This is particularly true because the Court generally conducts a suitability and necessity test on its own, and findings in an impact assessment can help the parties to convince the court to dive into a deeper analysis of proportionality in the narrow sense, which the court is in general only willing to do when the parties present specific arguments in this regard.²²⁵³ An IA report with a differing recommendation therefore makes it easier for applicants to challenge the proportionality of an act before the European courts.²²⁵⁴

10.2.2.4 The *Front Polisario* Cases

It has already been stated above²²⁵⁵ that European courts invalidate legislative and regulatory acts if decision-makers failed to take the impacts on fundamental rights and principles into account. As the General Court in *Front Polisario* held, such a duty also applies extraterritorially. It had partly invalidated a Council decision to approve a Liberalisation Agreement between the EU and Morocco because the Council had failed to examine the effects such an agreement would

of not conducting such an assessment, and where there is no evidence that potential impacts had adequately been taken into account, the act can be annulled due to the violation of proportionality.

²²⁵⁰ Opinion of Advocate General Kokott of 6 May 2010, Case C-343/09, *Afton*, para 82 et seq.; ECJ, Judgment of 8 July 2010, Case C-343/09, *Afton*, para 30.

²²⁵¹ Opinion of Advocate General Kokott, *Afton* (above, n. 2250), para 87 et seq.

²²⁵² ECJ, *Afton* (above, n. 2250), p. 30.

²²⁵³ Alemanno, 'A Meeting of Minds on Impact Assessment: When Ex Ante Evaluation Meets Ex Post Judicial Control' (above, n. 2218), p. 498.

²²⁵⁴ Koen Lenaerts, 'The European Court of Justice and Process-Oriented Review', *Yearbook of European Law*, 31 (2012), pp. 3–16, p. 7; Alemanno, 'A Meeting of Minds on Impact Assessment: When Ex Ante Evaluation Meets Ex Post Judicial Control' (above, n. 2218), p. 498.

²²⁵⁵ For example in section 4.7.4.

have on the right to self-determination and the fundamental rights of the Sahrawi people in the Western Sahara. The General Court has also established a modest normative framework for a Human Rights Impact Assessment concerning trade agreements. It has, for example, confirmed a duty to assess human rights impacts if facts are “likely to give rise to doubt”²²⁵⁶ that an agreement may have negative human rights impacts and explained when that would be the case.²²⁵⁷

Nevertheless, the obstacles for a successful action for annulment are high. On the merits, this is because the European courts recognize wide discretion in economic external relations, and only annul a decision if the act is not simply wrong but “manifestly” wrong.²²⁵⁸ However, if an EU institution, first, completely fails to consider human rights impacts even though the facts gave rise to doubt that the agreement may have negative human rights impacts, or if it, second, does not “carefully and impartially” examine all the relevant factors, the General Court would invalidate that legal act.²²⁵⁹

The main obstacle for distant strangers to file an action of annulment, however, exists under EU court procedure law. The ECJ quashed the General Court’s judgment because it denied legal standing to the applicant, the Front Polisario. The standing requirements will be addressed in more detail below. Here, it suffices to say that the Court of Justice found that Front Polisario was not individually and directly concerned because the trade agreement would not legally apply to the territory of Western Sahara. The ECJ based its decision on a formalistic and selective reading of international law, relying on the principle of self-determination, on Article 29 of the VCLT, and on the principle of the relative effect of treaties.²²⁶⁰ The ECJ, however, ignored that the Liberalisation Agreement – and its predecessor, the Association Agreement – were *de-facto* applied to the territory of Western Sahara. This seems a victory for the Council and Commission. However, the judgment at the same time clarifies that the Liberalisation Agreement *may not* be applied to Western Sahara for legal reasons, recognizing inter alia the the people of Western Sahara’s right to self-determination.²²⁶¹ While the judgment cannot bind Morocco, it must be respected by the EU institutions. This is, in turn, at least a partial victory for Front Polisario²²⁶² and demonstrates that even inadmissible actions may result in judgments with far-reaching effects. In the aftermath, the European Commission has stopped the *de facto* application of the agreement to the territory of Western Sahara. For example, it has “fixed a map that displayed Western Sahara as part of Morocco - and has postponed further sanitary controls in the Sahrawi occupied territo-

²²⁵⁶ General Court, *Front Polisario* (above, n. 746), 235 ff.

²²⁵⁷ For a closer analysis see section 4.7.4.2.

²²⁵⁸ *Ibid.*, para 224; Bartels, ‘The EU’s Human Rights Obligations in Relation to Policies with Extraterritorial Effects’ (above, n. 12), p. 1089. On different degrees of intensity with which the EU courts examine facts within the “manifest error” framework: Vivian Kube, *EU Human Rights, International Investment Law and Participation* (above n. 733), p. 251 with further reference.

²²⁵⁹ General Court, *Front Polisario* (above, n. 746), para 225.

²²⁶⁰ ECJ, *Front Polisario* (above, n. 769), para 87 et seq. The Court’s judgment has been criticized for its “selective and artificial reliance on international law”: Eva Kassoti, ‘Between Sollen and Sein: The CJEU’s reliance on international law in the interpretation of economic agreements covering occupied territories’, *Leiden Journal of International Law* (2020), 33, p. 378 with further references.

²²⁶¹ ECJ, *Front Polisario* (above, n. 769), para 123. Therefore, Ryngaert compares the ECJ judgment with a Pyrrhus victory for the Council: Cedric Ryngaert, ‘The Polisario Front Judgment of the EU Court of Justice: a Reset of EU-Morocco Trade Relations in the Offing’.

²²⁶² Markus Gehring, ‘EU/Morocco relations and the Western Sahara: the ECJ and international law’, 23 December 2016. Gehring states that “this judgment constitutes a bit of a pyrrhic victory for Morocco”. Inversely, it was also only a “pyrrhic loss” for Front Polisario.

ry”.²²⁶³ Another consequence of the 2016 judgment was that, in early 2019, the Council and Parliament approved the extension of the EU’s preferential tariff scheme to the territory of Western Sahara.²²⁶⁴ This followed an agreement between the European Commission and Morocco on a traceability mechanism to identify the origin of products exported from the territory of Western Sahara. This should guarantee that products coming from that territory can be tracked so that the benefits of the lower tariffs will go to the local population in the territory of Western Sahara.²²⁶⁵ In addition, the Commission is working on a proposal on how to involve - and potentially get the support from - the people of Western Sahara for this agreement. In light of the *pacta tertiis* principle emphasized by the ECJ, this arguably also requires the consent from authorized representatives of the people in Western Sahara, which poses yet unresolved political and legal questions.²²⁶⁶ These shall not be addressed any further at this point. It should simply be pointed out that – even though standing was denied in the end – the judgment could also, to a certain extent, strengthen the right to self-determination of distant strangers.

What else do the Front Polisario judgments imply for the relevance of HRIAs for trade policy making? Most of all, neither the ECJ nor the Advocate General²²⁶⁷ called into question that the Council was obliged to examine the impacts on human rights and self-determination in Western Sahara. Admittedly, such an obligation is more difficult to enforce if those most severely affected are denied legal standing, according to the adage “no plaintiff, no judge”.²²⁶⁸ However, the door for judicial review in this or similar cases is not fully closed. This will be addressed in the following.

10.2.3 Standing

Besides the scope of judicial review, another important factor determining the relevance of impact assessment law is standing: who is entitled to bring actions against an initiative and therefore enable judicial review of compliance with the obligation to assess human rights impacts? Under EU court procedure law, different remedies are available, but in practice limited access to the courts²²⁶⁹ makes it difficult for affected individuals who are not the addressees of the challenged act to initiate judicial proceedings. They have therefore only a limited chance to have the European courts review whether their rights and interests were adequately considered in the IA or adequately taken into account in the final decision. Granting broader standing rights could be seen as a shift towards a more deliberative paradigm, because it would recognize the importance of taking differing opinions and concerns seriously into account. This section will look at standing for the action for annulment and the action for damages.

²²⁶³ < <http://www.wsrw.org/a105x3568> >.

²²⁶⁴ Council Decision (EU) 2019/217 of 28 January 2019.

²²⁶⁵ European Parliament, Preferential Tariffs to Help Western Sahara to Develop, 16 January 2019, available at: <http://www.europarl.europa.eu/news/en/press-room/20190109IPR23018/preferential-tariffs-to-help-western-sahara-to-develop>

²²⁶⁶ Guillaume van der Loo, ‘The Dilemma of the EU’s Future Trade Relations with Western Sahara: Caught between strategic interests and international law?: Policy Brief’, CEPS, 20 April 2018.

²²⁶⁷ Opinion of Advocate General Wathelet, *Front Polisario* (above, n. 716).

²²⁶⁸ Kube, ‘The Polisario case: Do EU fundamental rights matter for EU trade policies?’ (above, n. 748).

²²⁶⁹ Reid, *Balancing Human Rights, Environmental Protection and International Trade* (above, n. 2208), p. 89.

10.2.3.1 Action for annulment

An action for annulment can be brought by privileged parties on any of the grounds listed in Article 263 (2) TFEU. As especially the European Parliament often speaks out in favor of environmental and human rights protection and calls on the European Commission to assess the human rights impacts of its decisions, it is not unthinkable that the EP brings actions of annulment against delegated or implementing Commission acts on the ground that they violate human rights.²²⁷⁰ Member States are also privileged parties and can challenge an EU act, for example arguing that the impacts of human rights on its citizens were not adequately considered. Possible – but more difficult to imagine – is a situation where an EU Member State challenges an act because human rights impacts on distant strangers are not adequately taken into account.²²⁷¹

Therefore, the relevance of IAs as an instrument to raise awareness of human rights also depends on the involvement of non-privileged (external) actors, including affected or interested parties. However, the challenging question is to what extent natural or legal persons from within and outside the EU have standing. This is because the Treaty establishes additional admissibility elements: “Any natural or legal person may, under the conditions laid down in the first and second paragraphs, institute proceedings against an act addressed to that person or which is of direct and individual concern to them, and against a regulatory act which is of direct concern to them and does not entail implementing measures.” (Article 263 (4) TFEU). This clause is interpreted narrowly by the ECJ, and the direct challenge of the legality of EU norms by non-privileged applicants is extremely difficult.²²⁷² While standing does not per se depend on citizenship or residency,²²⁷³ it is generally even more difficult for distant strangers to challenge the legality of EU norms directly before EU courts as will be discussed in the following. Applicants who are not the addressee of an onerous EU act must prove that they are individually and/or directly concerned (Art. 263 (4) 2nd and 3rd limb of the TFEU).

10.2.3.1.1 Individual concern

A first requirement of the second limb of Article 263 (4) TFEU is that the act is of individual concern. Under case law established in the (in)famous *Plaumann* decision, natural or legal persons satisfy the requirement of individual concern “only if the contested act affects them by reason of certain attributes which are peculiar to them or by reason of circumstances in which they are differentiated from all other persons, and by virtue of these factors distinguishes them individu-

²²⁷⁰ Similar Ibid., p. 91. In the case of legislative acts, the European Parliament is now a co-legislator with almost equal rights, so that its approval is necessary in the first place: it would amend, not judicially challenge legislative acts.

²²⁷¹ Bartels, ‘The EU’s Human Rights Obligations in Relation to Policies with Extraterritorial Effects’ (above, n. 12), p. 1090.

²²⁷² Craig, *EU Administrative Law* (above, n. 1389), p. 306

²²⁷³ For example: ECJ, Judgment of 3 October 2013, Case C-583/11 P, *Inuit Tapiriit Kanatami I*.

ally just as in the case of the person addressed.”²²⁷⁴ While the Plaumann test is narrow in many regards, it is especially difficult to pass when the protection of universal interests is at stake.²²⁷⁵

In the case of EU development cooperation law, Schmalenbach convincingly argues that it is less problematic for EU-funded development projects if the underlying legal act, such as the EU’s Development Cooperation Instrument (DCI), requires environmental screening and thus differentiates and distinguishes those individuals who are significantly affected by the project, as they enjoy certain procedural rights which those not affected do not have.²²⁷⁶ But what about other policies with external human rights effects? This is much more difficult. In *Inuit I*, the General Court and the ECJ did not recognize the individual concerns of the applicants to place seal products on the EU market as the contested Basic Regulation is “worded in general terms and applies indiscriminately to any trader falling within its scope.”²²⁷⁷

In the *UPA* case, AG Jacobs referred to the paradox of widespread affectedness already discussed above (see section 9.2.4), namely that the greater the number of persons affected, the less likely it is that judicial review under Article 263 (4) second limb will be granted.²²⁷⁸ In *UPA*, an association of farmers brought an action for annulment against a Regulation which modified the organization of the olive oil market²²⁷⁹. AG Jacobs analyzed the restrictive interpretation in light of the right to effective judicial protection. He, in particular, convincingly argued that the indirect challenge of an EU act via the preliminary proceedings is, from such a rights-based perspective, insufficient.²²⁸⁰ AG Jacobs therefore urged the ECJ to replace the Plaumann test. Instead, a person should be regarded as individually concerned where the EU act has a “substantial adverse effect on his interests.”²²⁸¹ The Court of First Instance in *Jégo-Quéré*, a judgment rendered shortly after

²²⁷⁴ Ibid., para 72; ECJ, Judgment of 29 April 2004, Case C-298/00 P, *Italy v Commission* (2004), para 36; ECJ, Judgment of 9 June 2011, Joined Cases C-71/09 P, C-73/09 P and C-76/09 P, *Comitato ‘Venezia vuole vivere’ and others*, para 52; ECJ, Judgment of 15 July 1963, Case 25/62, *Plaumann*.

²²⁷⁵ Reid, *Balancing Human Rights, Environmental Protection and International Trade* (above, n. 2208), p. 91. This has already become clear in the *Greenpeace* case which concerned a Commission decision to grant funding to the construction of power stations. The applicants challenged the Commission decision i.a. on the grounds that no environmental impact assessment was conducted. Advocate General Cosmas argued in favor of a broadened interpretation of the individual concern requirement: “Therefore, protection should be afforded to natural persons who had previously secured, perhaps even over a long period of time, a quality of life which is likely to be particularly severely affected by the act of the Community institution”: Opinion of Advocate General Cosmas of 23 September 1997, Case C-321/95 P, *Stichting Greenpeace Council* (1997), para 108. The ECJ did not address this issue in any detail and held that the Commission decision did not directly concern the applicants: ECJ, Judgment of 2 April 1998, Case C-321/95 P, *Stichting Greenpeace Council*, para 27 et seq.

²²⁷⁶ Schmalenbach, ‘Accountability: Who is judging the European Development Cooperation?’ (above, n. 735), p. 180.

²²⁷⁷ ECJ, *Inuit Tapiriit Kanatami - I* (above, n. 2273), para 73.

²²⁷⁸ Opinion of Advocate General Jacobs of 21 March 2002, C-50/00 P, *Unión de Pequeños Agricultores v. Council*, para 59; similar already: Opinion of Advocate General Cosmas, *Stichting Greenpeace Council* (above, n. 2275), para 102.

²²⁷⁹ Opinion of Advocate General Jacobs, *Unión de Pequeños Agricultores v. Council* (above, n. 2278)

²²⁸⁰ Ibid., 37 et seq.; Craig, *EU Administrative Law* (above, n. 1389), pp. 309–310.

²²⁸¹ Opinion of Advocate General Jacobs, *Unión de Pequeños Agricultores v. Council* (above, n. 2278), para 60.

AG Jacobs had delivered his Opinion, also applied a broader interpretation of individual concern.²²⁸²

The ECJ, however, rejected such a substantial-effect test in its UPA judgment²²⁸³ – and has done so ever since.²²⁸⁴ A substantial-effect test would have brought the admissibility criteria more in line with the emerging principle of affectedness and the EU's IA-guidelines which, as self-commitments, require to assess significant impacts on human rights and interests inside and outside the EU. Under the Plaumann test, it remains very difficult for applicants whose rights are affected by an EU norm to contest the legality of that norm and to thus enable the European courts to indirectly review the respective HRIAs. In other words: the ECJ's interpretation of standing requirements – and not structural reasons inherent in any impact assessment, as a comparison with domestic IA law indicates – makes it particularly difficult to effectively enforce compliance with HRIA norms at the EU level through judicial review.

A rule of law argument supports this criticism of the narrow approach. The ECJ justifies the *Plaumann* formula by emphasizing that it was for the Member States to have in place a system of effective legal remedies.²²⁸⁵ Against this background, the European courts should cooperate with national courts and thus ideally establish an effective multi-level system of judicial review: Applicants should, under domestic court procedure law, be able to challenge a national act implementing or applying EU law so that the legality of the underlying EU norm can be reviewed in preliminary proceedings before the ECJ.²²⁸⁶ However, there are significant legal and practical reasons for why this type of indirect review of EU acts is incompatible with the right to effective judicial protection. It is not only a lengthy procedure if applicants must first seek recourse to national courts. It is not even guaranteed in all Member States that the case will be referred to the ECJ. More importantly, there may be cases where no challengeable implementing measures exist, or where applicants would have to first break the law in order to provoke a challengeable sanction.²²⁸⁷ This problem will be exacerbated where EU norms cause negative human rights impacts to distant strangers where judicial protection under a national court system might not be available.²²⁸⁸

However, at least the third limb of Article 263 (4) TFEU can help individuals to bring an admissible action for annulment: if the action is brought against a regulatory act which is *of direct concern to them and does not entail implementing measures*. If the act in question is such a “regulatory act”, the applicants do not have to be individually but “only” directly concerned. This will be addressed in the following section.

²²⁸² According to the CFI, it is to ask whether “the measure in question affects his legal position, in a manner which is both definite and immediate, by restricting his rights or by imposing obligations on him.” Based on considerations of effective judicial protection, the Court of First Instance remarked that the “number and position of other persons who are likewise affected by the measure, or who may be so, are of no relevance in that regard: CFI, Judgment of 3 May 2002, T-177-01, *Jégo-Quéré*, para 51.

²²⁸³ ECJ, Judgment of 25 July 2002, C-50/00 P, *Unión de Pequeños Agricultores (“UPA”) v. Council*.

²²⁸⁴ E.g.: ECJ, *Inuit Tapiriit Kanatami I* (above, n. 2273), para 69–71.

²²⁸⁵ ECJ, *UPA v. Council* (above, n. 2283), para 41.

²²⁸⁶ This is the central argument by which the ECJ rejected Advocate General Jacob's call for a substantial-effect-test: *Ibid.*, para 40; see also: Schmalenbach, ‘Accountability: Who is judging the European Development Cooperation?’ (above, n. 735), p. 181.

²²⁸⁷ Opinion of Advocate General Jacobs, *Unión de Pequeños Agricultores v. Council* (above, n. 2278), p. 102.

²²⁸⁸ Schmalenbach, ‘Accountability: Who is judging the European Development Cooperation?’ (above, n. 735), 181 f.

10.2.3.1.2 Direct concern

A requirement common to the second and third limb is that of direct concern. For financing decisions for development projects, this appears an “almost insurmountable obstacle”:²²⁸⁹ an act is only of direct concern if it does not entail implementing measures.²²⁹⁰ A financing decision for development projects will almost always require further implementing measures²²⁹¹ by the beneficiary state, which can therefore not be attributed to the EU. This can be different for (other) policies: Either an act of the European Union directly implies certain consequences without further implementation measures, or a legislative act by the Council and Parliament authorizes the Commission to enact more detailed rules. In this case, an action for annulment against the Commission’s *implementing* act can be admissible under Article 263 (4) third limb of the TFEU.

With regard to extraterritorial human rights impacts, applicants residing in third countries may have standing if they challenge such a “regulatory act” in the sense of Article 263 (4) TFEU. The courts in *Inuit-I*²²⁹² confirmed the narrow Plaumann-definition of individual concern (and on that grounds declared the actions inadmissible). The courts also held that a regulatory act “does not encompass legislative acts”.²²⁹³ In contrast, an implementing Commission Regulation would be such a regulatory act where applicants do not need to show that they are also individually concerned. This question was relevant to the *Inuit-II* cases already discussed above, where the applicants, in the second “round”, challenged the Commission Implementing Regulation.²²⁹⁴ The European courts did not address admissibility issues as the General Court had dismissed the action on the merits without a prior ruling on its admissibility.²²⁹⁵ Still, Advocate General Kokott in *Inuit-II* explicitly confirms the view that such an action should be admissible: “unlike the first proceedings brought by *Inuit Tapiriit Kanatami* and its co-appellants, which were brought directly against the basic regulation, the present proceedings, which are directed against the implementing regulation, do not raise any fundamental problems of admissibility in respect of standing to institute proceedings. It can be argued that the Commission implementing regulation is of direct concern at least to the appellants which themselves market seal products and sell them in the European internal market and requires no further implementing measures in respect of them.”²²⁹⁶ This interpretation extends legal standing to individuals or interest groups in third countries who claim that their rights were directly infringed by an implementing regulation. In the *Inuit* cases, this affects, according to the General Court, only the *legal* situation of those who are active in placing seal products on the EU market, as the implementing regula-

²²⁸⁹ *Ibid.*, p. 180.

²²⁹⁰ Paul P. Craig and Gráinne de Búrca, *EU Law* (Oxford, New York: Oxford University Press, 2015), sixth edition, 527 f.

²²⁹¹ Dann, *The Law of Development Cooperation* (above, n. 4), p. 463.

²²⁹² For a summary of the facts of the case see section 4.7.4.3

²²⁹³ ECJ, *Inuit Tapiriit Kanatami - I* (above, n. 2273), para 112. The term “regulatory act” caused some uncertainty, and it was controversially discussed, inter alia, whether it would also cover legislative acts provided they do not entail implementing measures, or only delegated or implementing acts that do not entail further implementing measures, see: Craig, *EU Administrative Law* (above, n. 1389), p. 316.

²²⁹⁴ See section 4.7.4.3.

²²⁹⁵ General Court, *Inuit Tapiriit Kanatami II*, Case T-526/10 (above, n. 788), para 20–21.

²²⁹⁶ Opinion of Advocate General Kokott, *Inuit Tapiriit Kanatami II*, Case C-398/13 P (above, n. 804), para 26.

tion does not prohibit seal hunting taking place outside the EU.²²⁹⁷ Consequently, the interests of those intervening “upstream or downstream of that placing on the market” are not directly concerned even though the implementing regulation may have *factual* consequences on their economic activities.²²⁹⁸

10.2.3.1.3 The “concern” requirement: Legal or factual effects?

As outlined above, the EU must consider legal and factual human rights consequences, both internally and externally, on the enjoyment of human rights. This does not mean, however, that everyone who can claim that his/her rights are affected has standing rights under Art. 263 (4) TFEU. In the *Inuit-II* case, the ECJ did not further define the scope of applicants who would be “concerned” and thus have standing. Advocate General Kokott states that the implementing regulation is “at least”²²⁹⁹ of direct concern to those who place seal products on the EU market. This leaves room for interpretation. Article 263 (1) TFEU states that the Court has jurisdiction to review acts that are “intended to produce legal effects vis-à-vis third parties.” On its face, this only excludes the review of acts that are not intended to be legally binding on third parties *at all*. However, under European case law, “only measures the legal effects of which are binding on, and capable of affecting the interests of, the applicant by bringing about a distinct change in his legal position are acts or decisions which may be the subject of an action for annulment”.²³⁰⁰ This means that an application would be inadmissible if the applicant can only claim that the contested EU act affects his human rights factually. In addition, it would be necessary to show that the contested legal act also produces legal effects on the applicant.

This is a significant obstacle for distant strangers to seek an action for annulment in European courts: factual consequences – no matter how substantial – are not enough to grant standing rights.²³⁰¹ In *Commune de Champagne*,²³⁰² applicants from Switzerland challenged an EU Council decision implementing an agreement regarding its effect not only in the EU but also in Switzerland.²³⁰³ That agreement essentially prohibited the marketing of wines produced in the Swiss Commune of Champagne under the name “Champagne”, both in the EU and in Switzerland. As the import of a geographical wine called Champagne was already prohibited before the contested agreement should enter into force, the relevant question here was whether the applicants could bring an action for annulment against the Council decision insofar as the ratified agreement would produce effects in Switzerland.

²²⁹⁷ General Court, *Inuit Tapiriit Kanatami I*, Case T-18/10 (above, n. 790), para 75.

²²⁹⁸ *Ibid.* This statement concerns the ability of affected individuals to bring an action of annulment. It does not, at least not necessarily, define the substantive applicability of human rights. This case law is therefore not in conflict with the factual-effect doctrine justifying the extraterritorial application of human rights discussed in chapter 4.

²²⁹⁹ Opinion of Advocate General Kokott, *Inuit Tapiriit Kanatami II*, Case C-398/13 P (above, n. 804), para 26.

²³⁰⁰ ECJ, Judgment of 6 December 2007, C-516/06 P, *Commission v Ferriere Nord* (2007), para 27 with further references.

²³⁰¹ Ganesh, ‘The European Union’s Human Rights Obligations Towards Distant Strangers’ (above, n. 49), pp. 487–488; Bartels, ‘The EU’s Human Rights Obligations in Relation to Policies with Extraterritorial Effects’ (above, n. 12), 1087 et seq.

²³⁰² CFI, Order of 3 July 2007, T-212/02, *Commune de Champagne*.

²³⁰³ *Ibid.*, para 87 et seq.; Bartels, ‘The EU’s Human Rights Obligations in Relation to Policies with Extraterritorial Effects’ (above, n. 12), p. 1087.

The (then) Court of First Instance rejected their claim. The action for annulment of the contested Council decision is only admissible if it produces “binding legal effects such as to affect the interests of the applicants by bringing about a distinct change in their legal position”²³⁰⁴. The CFI then referred to the principle of sovereign equality under international law and pointed out that acts of the EU may only produce legal effects within the EU territory:

“In that regard it should be pointed out that the principle of sovereign equality enshrined in Article 2(1) of the United Nations Charter means that it is, as a rule, a matter for each State to legislate in its own territory and, accordingly, that generally a State may unilaterally impose binding rules only in its own territory. Similarly, it should be pointed out, as regards the Community that, under Article 299 EC [now: Article 355 TFEU] and the specific arrangements concerning certain territories listed in that provision, the EC Treaty applies only to the territory of the Member States.”²³⁰⁵

The Court concludes that a unilateral act adopted by an EU institution “cannot create rights and obligations outside the territory thus defined. Therefore, the scope of the contested decision is limited to [...] [EU] territory and has no legal effect in the territory of Switzerland”.²³⁰⁶ The applicants were therefore not able to challenge said EU decision. As mentioned, the ECJ recently rejected the application in *Front Polisario* based on a similar logic, namely that “the Liberalisation Agreement must, however, be interpreted, in accordance with the relevant rules of international law applicable to relations between the European Union and the Kingdom of Morocco, as meaning that it does not apply to the territory of Western Sahara.”²³⁰⁷ This case law makes it more difficult for distant strangers than for EU residents to challenge EU norms directly before the European courts.

The reasoning in *Commune de Champagne* is problematic on different accounts. It ignores that the conclusion of international agreements is a “joint act of the contracting parties”.²³⁰⁸ A broad reading of the decision would imply that the EU does not recognize any legal positions in third countries as granting standing, not even human rights. As Eeckhout observes, it would “shake the very foundations of the EU” if it permitted, in an international agreement, another state party “to commit acts of torture” and not allow for judicial review before EU courts.²³⁰⁹ Besides this rather hypothetical scenario, the argument in *Commune de Champagne* - based on the principle of sovereign equality and the limitation of legal effects to the EU territory - is also problematic for a different reason. While there is a presumption that a legal act applies only domestically, states often regulate with extraterritorial effects, for example when exercising jurisdiction over their nationals abroad.²³¹⁰ Moreover, the fact that international or constitutional law prohibits

²³⁰⁴ CFI, *Commune de Champagne* (above, n. 2302), para 88.

²³⁰⁵ *Ibid.*, para 89.

²³⁰⁶ *Ibid.*, para 90.

²³⁰⁷ ECJ, *Front Polisario* (above, n. 769), para 132.

²³⁰⁸ Piet Eeckhout, *EU External Relations Law* (Oxford, , New York: Oxford University Press, 2011), 2nd, p. 292.

²³⁰⁹ *Ibid.*; Bartels, ‘The EU’s Human Rights Obligations in Relation to Policies with Extraterritorial Effects’ (above, n. 12), p. 1088; Schmalenbach, ‘Accountability: Who is judging the European Development Cooperation?’ (above, n. 735), p. 181.

²³¹⁰ Bartels, ‘The EU’s Human Rights Obligations in Relation to Policies with Extraterritorial Effects’ (above, n. 12), p. 1088.

that states or the EU grant rights or duties extraterritorially does not mean that states or the EU will not do this.

Finally, the *Commune de Champagne* decision raises significant rule of law concerns in other constellations. In *Commune de Champagne*, the applicants were arguably not completely without legal protection as they could (subject to Swiss law) contest the Agreement or the ratification decision under Swiss law. Like the ECJ in *UPA*, one could assume that access to national courts should grant sufficient legal protection. However, this argument would not work where distant strangers have no chance to contest an act in their domestic courts. This could be the case where a unilateral EU act (as opposed to a decision in the context of a bilateral trade agreement) affects human rights of distant strangers. This could be EU norms on agricultural subsidies that adversely affect small-scale farmers in developing countries. Similarly, a merger under EU merger control law between two supermarket chains can result in a new entity with monopsony power significantly affecting downstream markets for commodities produced in developing countries depriving small-scale farmers of their ability to survive.²³¹¹ There would be no national act that could be challenged before national courts in third countries.

Similarly, a bilateral agreement may affect citizens whose government or authorized representatives were not involved in the conclusion of the controversial agreement. This concerns constellations like those in *Front Polisario*: the fact that the EU may not approve an international agreement that applies to Western Sahara does not per se prevent the EU from applying the agreement to Western Sahara. Such a *de-facto* application could not be reviewed by European courts on the merits. And indeed, both the Council and Commission had admitted to the General Court that the respective agreement was *de facto* applied to the territory of Western Sahara.²³¹² For example, “the Food and Veterinary Office, which is part of that DG, made a number of visits to Western Sahara to check of compliance by the Moroccan authorities with health standards established by the European Union”.²³¹³

Interestingly, the ECJ did not explicitly address *Commune de Champagne* in *Front Polisario*. It basically held that the General Court erred in law in assuming that the agreement in question produced legal effect on the Western Sahara territory. The ECJ assumed that the “conclusion of the General Court [...] that the Liberalisation Agreement ‘also applies to the territory of Western Sahara’ is based, not on a finding of fact, but on a legal interpretation of that agreement made by the General Court on the basis of Article 31 of the Vienna Convention”.²³¹⁴ Consequently, the ECJ limited its review to a legal interpretation in light of the VCLT. The ECJ did not, at least not explicitly, exclude that the conclusion that the Liberalisation Agreement applies to the territory of Western Sahara could instead be based on a “finding of fact”. A treaty may, in spite of the aforementioned legal principles, “bind a State in respect of another territory if such an intention is apparent from that treaty or is otherwise established.”²³¹⁵ The applicants did not provide sufficient factual evidence to show that the Commission and Council had “tacitly agreed to interpret the words ‘territory of the Kingdom of Morocco’ in Article 94 [of the agreement] as meaning that

²³¹¹ Ganesh, ‘The European Union’s Human Rights Obligations Towards Distant Strangers’ (above, n. 49), p. 478; Feunteun, ‘Cartels and the Right to Food: An Analysis of States’ Duties and Options’ (above, n. 18).

²³¹² General Court, *Front Polisario* (above, n. 746), para 87.

²³¹³ *Ibid.*, para 79.

²³¹⁴ ECJ, *Front Polisario* (above, n. 769), para 81.

²³¹⁵ *Ibid.*, para 98.

that article also included the territory of Western Sahara”.²³¹⁶ This indicated that the outcome might have been different had Front Polisario brought a case challenging more explicitly an intended application of the agreement to the disputed territory.²³¹⁷

However, the ECJ recently made clear that this will not easily be the case. In *Western Sahara Campaign UK*, a preliminary ruling referred by the British High Court, the ECJ again had to decide whether international agreements with Morocco would apply to the territory of Western Sahara (in particular, the EU-Morocco Fisheries Partnership Agreement and the related Protocol).²³¹⁸ Unlike in *Front Polisario*, the Council and Commission now explicitly intended to “extend its scope by agreement in the form of an exchange of letters between the European Union and the Kingdom of Morocco so that Western Sahara would be expressly covered.”²³¹⁹ This is a small but surprising difference. One reason could be that the Council and Commission wanted the Court to confirm the legality of the *de facto* and *de jure* application of the agreements to Western Sahara.²³²⁰

In consequence, Advocate General Wathelet clearly recommended to declare the respective Council Regulations and Decision void in the light of, inter alia, Articles 3 (5) and 21 TEU as they would violate, inter alia, the right to self-determination:²³²¹

“If the application to Western Sahara of an international agreement concluded with the Kingdom of Morocco, the territorial scope of which does not expressly include that territory, would be incompatible with the right of the people of that territory to self-determination, then an international agreement which, like the Fisheries Agreement and the 2013 Protocol, is applicable to the territory of Western Sahara and the adjacent waters and authorises the exploitation by the European Union of the fishery resources of Western Sahara would a fortiori also be incompatible with that right.”²³²²

Nevertheless, in line with its formalistic reasoning in the *Front Polisario* judgment, the ECJ upheld the validity of the contested act, arguing that the respective agreement/protocol “must be interpreted, in accordance with the rules of international law that are binding on the European Union and that are applicable to relations between the Union and the Kingdom of Morocco, as meaning that the waters adjacent to the territory of Western Sahara do not fall within the scope of that agreement and that protocol.”²³²³ Consequently, the ECJ held that, “since neither the Fisheries Partnership Agreement nor the 2013 Protocol are applicable to the waters adjacent to the territory of Western Sahara”, there are no reasons for why the respective EU decision and regulations implementing these agreements could be invalid in the light of Article 3(5) TEU.²³²⁴ At

²³¹⁶ Ibid., 85, 99.

²³¹⁷ Similarly: Gehring, ‘EU/Morocco relations and the Western Sahara: the ECJ and international law’ (above, n. 2262).

²³¹⁸ Opinion of Advocate General Wathelet of 10 January 2018, C-266/16, *Western Sahara Campaign UK*.

²³¹⁹ Ibid., para. 144.

²³²⁰ Anne-Carlijn Prickartz and Sandra Hummelbrunner, ‘EU-Morocco Trade Relations, Western Sahara and International Law: The Saga Continues in C-266/16 Western Sahara Campaign UK’, *European Law Blog*, 28 March 2018.

²³²¹ Opinion of Advocate General Wathelet, *Western Sahara Campaign UK* (above, n. 2318), para 296.

²³²² Ibid., para 145 and 296.

²³²³ ECJ, Judgment of 27 February 2018, C-266/16, *Western Sahara Campaign*, para 83.

²³²⁴ Ibid., para 85.

the same time, the ECJ at least confirmed the option to invalidate EU law in light of Article 3 (5) TEU and thus for failure to adequately examine, *inter alia*, extraterritorial human rights impacts.

10.2.3.1.4 Interim Conclusion: Distant Strangers and Judicial Review

As long as the restrictive interpretation of “direct and individual concern” is not significantly modified, it is difficult for individuals in general and distant strangers in particular to contest EU norms before the European courts.²³²⁵ However, even under current case law, the door for judicial review of EU norms affecting the rights of distant strangers is not fully closed.

First, the option that privileged parties (Article 263 (2) TFEU) bring an action for annulment obviously exists, as was discussed above. Second, the *Inuit*-cases illustrate that an EU norm, such as one establishing a unilateral trade policy, may produce legal effect on distant strangers who are placing their products on the EU markets so that it would be of “direct concern” to them. In that case, applicants can, in particular, contest a regulatory act before the EU courts. In these cases, the almost insurmountable obstacle of individual concern does not apply. This means, by reference to the introductory example: small-scale farmers in developing countries placing their products on the EU market can arguably contest an EU regulatory act that, for example, restricts the imports of these products. Such a restriction would not only *de facto* affect their human rights but also produce a sufficient legal effect to be of “direct concern”. However, the same farmers would not be able to contest an EU decision granting agricultural subsidies that would result in cheap food imports from the EU making it factually impossible for them to compete on global or local markets. Such an EU act would not produce legal effects outside the EU territory.

Moreover, in cases where Member States implement or apply EU law, such a national implementing or enforcing act can be contested before the national courts under national court procedure law. If the validity of the EU act approving an international agreement or a unilateral EU policy norm is questionable, the national court would then have to request a preliminary ruling. Consequently, the ECJ would have to review the validity of that act, for example whether human rights impacts were adequately taken into account. This is what happened, *inter alia*, in the aforementioned *Western Sahara Campaign* case. Similarly, US applicants managed to have the ECJ review, during the course of preliminary proceedings, the validity of EU Directives including certain extraterritorial aviation activities in the scheme for greenhouse gas emission allowance trading.²³²⁶

However, in spite of these alternative routes, the situation is unsatisfactorily from a human rights perspective. The *Plauman* formula regarding individual concern, and the *Commune de Champagne* and *Front Polisario* decisions on extraterritorial legal effects and standing make it extremely difficult for distant strangers to contest an EU norm directly before European courts. It is against this background that the application of a substantial-adverse-effect test, as suggested by Advocate General Jacobs in *UPA*, would allow that, under certain circumstances, even dis-

²³²⁵ In this sense: Ganesh, “The European Union’s Human Rights Obligations Towards Distant Strangers” (above, n. 49), p. 488; see: CFI, *Commune de Champagne* (above, n. 2302).

²³²⁶ ECJ, *ATAA* (above, n. 713).

tant strangers have the chance to contest an EU norm in European courts. This would particularly be relevant where distant strangers would otherwise be *a priori* unable to seek redress before national courts.²³²⁷ Such an interpretation of standing rules would arguably be more compliant with the human right to effective judicial review. In addition, an *effet utile* argument could be made: Judicial review of the EU's compliance with Art. 3 (5) TEU would be important to ensure that the principles enshrined therein are given effect. So far, the EU courts have used *effet utile* arguments vis-à-vis national court procedure law, but not for the interpretation of standing requirements under Article 263 (4) TFEU.²³²⁸ Against this background, and considering the EU's commitment to human rights and rule of law principles, it would be justified to ensure that those who have suffered substantial adverse consequences have access to judicial review.²³²⁹ However, it seems unlikely that the ECJ would take this path any time soon.

10.2.3.2 Action for damages

When actions for annulment are inadmissible due to lack of direct and individual concern, a slightly more realistic option would be an action for damages (Article 268 TFEU) based on a violation of non-contractual liability towards affected individuals (Article 340 (2) TFEU).²³³⁰ This requires, first, a "sufficiently flagrant violation of a superior rule of law" which confers rights on individuals.²³³¹ This could be the case if binding fundamental or human rights are violated,²³³² which – given the extraterritorial scope of fundamental rights obligations under EU law – can also be the case towards people residing outside EU territory. Second, however, it is necessary to attribute the damage caused to the EU institutions. In other words, there must be a direct link between the EU act and the impacts constituting a rights violation.²³³³ Especially the third state's consent can disrupt attribution. In that case, the third state would be primarily responsible to respect, protect and fulfill human rights obligations on its territory. Nevertheless, one way to establish a responsibility of the EU in the sense of Article 340 (2) TFEU would be to a violation of the supervision and monitoring requirements, which could be based now on Article 41 CFR.²³³⁴ Also, the EU could be responsible for complicity with a third state's human rights violation.²³³⁵

²³²⁷ Unlike in the UPA judgment, such an application only in cases where other forms of judicial review are clearly and evidently unavailable would not entail an analysis of national court procedure law (for which the EU courts have no jurisdiction), and would thus not be a problematic intrusion into the Member State's national procedural autonomy, as the ECJ argued in UPA. See also: Craig, *EU Administrative Law* (above, n. 1389), p. 311.

²³²⁸ *Ibid.*, p. 310.

²³²⁹ *Ibid.*, p. 314.

²³³⁰ Dann, *The Law of Development Cooperation* (above, n. 4), p. 463.

²³³¹ ECJ, Judgment of 2 December 1971, Case 5/71, *Aktien-Zuckerfabrik Schöppenstedt*, para 11; Schmalenbach, 'Accountability: Who is judging the European Development Cooperation?' (above, n. 735), p. 182.

²³³² Dann, *The Law of Development Cooperation* (above, n. 4), p. 463.

²³³³ Schmalenbach, 'Accountability: Who is judging the European Development Cooperation?' (above, n. 735), p. 182.

²³³⁴ Dann, *The Law of Development Cooperation* (above, n. 4), p. 463; Schmalenbach, 'Accountability: Who is judging the European Development Cooperation?' (above, n. 735), p. 183 who bases her arguments on a decision by the CFI which held that the Commission had the "duty to ensure that Turkish authorities properly applied the EC-Turkey Association Agreement", Schmalenbach, *ibid.*, with reference to CFI, Judgment of 6 February 2007, Case T-23/03, *CAS SpA v Commission*, para 234; this part of the judgment was strongly confirmed by the ECJ: "In that regard, it must be pointed out that it follows from Article 211

Third, the violation must be “sufficiently flagrant”: the decisive test is whether the EU institution manifestly and gravely disregarded the limits on its discretion.²³³⁶ In cases where the respective EU institution has only considerably reduced discretion – or none at all –, the mere infringement of EU law may be sufficient to establish the existence of a sufficiently serious breach.²³³⁷ This would facilitate the chances for an action for damages. While procedural law guiding the decision-making process can be very specific and non-discretionary, the EU bodies generally enjoy a broad discretion concerning the substantive content of their policies. In particular with regard to trade and development-related policies, this is often unavoidable due to the highly technical, economic, political, and social complexities involved, which may vary considerably from case to case. Consequently, applicants would generally have to prove that the EU institution manifestly and gravely disregarded the limits of its discretion. This is a high threshold.

A similar standard of judicial review applies to customary international law – and therefore if an applicant claims a violation of customary human rights: the applicants can only succeed if EU institutions make “manifest errors of assessment concerning the conditions for applying those principles”.²³³⁸ This is especially difficult to determine where, due to factual and normative uncertainty, the institutions have a relatively broad margin of discretion, as is particularly the case where legal rules are vague and open to interpretation as is especially the case with human rights obligations in general and the scope of extraterritorial human rights obligations in particular. Here, a human rights impact assessments could be a double-edged sword: On the one hand, it can identify potential human rights risks and impacts and require decision-makers to take these impacts into account. IA reports – including the information provided during the consultation – can therefore prove that the responsible organs had knowledge of the human rights risks. Failure to at least adequately consider evident risks could relatively easily qualify as a sufficiently flagrant violation. On the other hand, there are also situations where a half-hearted IA might be counterproductive from a human rights perspective in the sense that it might reduce a “grave disregard” to a “normal disregard” of the limits of discretion defined by substantive norms. Institutions could defend their decisions by simply pointing out that they conducted an HRIA at all and therefore diligently considered human rights impacts. This would indeed not be an unlikely trend: Unless the Commission clearly and evidently ignores the findings, the EU courts, especially in cases of high levels of uncertainty, are often satisfied with the fact that consultations were conducted *at all*, or that certain studies were commissioned and considered *at all*, without always diving into the detailed analysis of whether or not the studies are comprehensive and methodologically sound.²³³⁹

EC that the Commission, as guardian of the EC Treaty and of the agreements concluded under it, must ensure the correct implementation by a third country of the obligations it has assumed under an agreement concluded with the Community, using the means provided for by the agreement or by the decisions taken pursuant thereto.” ECJ, Judgment of 25 July 2008, Case C-204/07 P, *C.A.S. SpA*, para 95.

²³³⁵ On complicity see section 4.7.2.2.

²³³⁶ ECJ, Judgment of 5 March 1996, Joined Cases C-46/93 and C-48/93, *Brasserie du Pêcheur*, para 45.

²³³⁷ ECJ, Judgment of 4 July 2000, C-352/98 P, *Bergaderm*, para 44; Alexander Türk, *Judicial Review in EU Law* (Cheltenham, UK, Northampton, MA: Edward Elgar, 2009), 250 ff.

²³³⁸ Bartels, ‘The EU’s Human Rights Obligations in Relation to Policies with Extraterritorial Effects’ (above, n. 12), p. 1089.

²³³⁹ Insofar critical with regard to *Gowan*: Alemanno, ‘Case C-79/09, *Gowan Comércio Internacional e Serviços Lda v. Ministero della Salute*, Judgment of the Court of Justice (Second Chamber) of 22 December 2010’ (above, n. 1908), p. 1344; a positive exception: ECJ, *Spain v. Council* (above, n. 1231).

10.2.3.3 Opinion of the Court of Justice

Where the human rights impacts of a planned international agreement are concerned, a Member State, the European Parliament, the Council or the Commission can also request an opinion of the Court of Justice as to whether the envisaged agreement would be compatible with EU constitutional law. This is a frequently used mechanism²³⁴⁰ and effective to the extent that, if the opinion of the Court is adverse, the planned agreement may not enter into force unless it is amended or unless the EU Treaties are revised (Art. 218 (11) TFEU). The advantage of the opinion as opposed to an annulment action is that conflicts between EU and international law can be avoided, given that the Court reviews the planned agreement before it enters into force. One way to increase the effectiveness of this type of ex-ante judicial review would be to broaden the right to request an opinion. For example, already a smaller section of the Parliament (e.g. a quarter of MEPs) could be authorized to request such an opinion, or the Ombudsman if he/she has found “instances of maladministration”.

10.2.4 Indirect review of EU Acts in the WTO

Impact assessments of trade policies can also become subject to indirect review in WTO disputes to which the EU can be a party. An example where IAs became relevant concerns the already mentioned trade dispute about import bans on seals products by EU law (“EU seal regime”). The EU seal regime was not only challenged in EU courts – the Inuit-cases were discussed above – but also before the WTO dispute settlement bodies. The EU seal regime restricted the import and sale of certain seals products,²³⁴¹ but makes exceptions with regard to the import and/or placing on the market of seal products in three situations, namely when they result from hunts undertaken by Inuit or other indigenous communities (“IC hunts”), from marine resource management hunts (“MRM hunts”), or for so-called Travellers imports, i.e. products brought by EU citizens for personal use.²³⁴² While the Appellate Body (AB) concluded that the EU seal regime infringes WTO law, it had to review whether such an infringement could be justified under Article XX of the GATT. The AB held that the principal objective was to address EU public morals concerns “regarding seal welfare, while accommodating IC and other interests so as to mitigate the impact of the measure on those interests.”²³⁴³ The AB used the IA-Report and the explanatory memoranda accompanying the respective regulations to identify the true and main objectives of the EU seal regime. The AB then held that animal welfare qualifies as “public morals” concern and can justify trade restrictions, even if the impacts on animal welfare occur extraterritorially. In a similar vein, “human rights” concerns could qualify as “public morals” concerns grounded in Article XX (a) of the GATT. In consequence, IAs can play an indirect role in international adjudication.

²³⁴⁰ Recent examples include: ECJ, *Opinion 1/17 (CETA)*, 30 April 2019; ECJ, *Opinion 2/15 (EUSFTA)*, 16 May 2017.

²³⁴¹ WTO Appellate Body, *European Communities - Measures Prohibiting the Importation and Marketing of Seal Products* (above, n. 1652), 1.1–1.4; for an analysis of this decision: Rob Howse, Joanna Langille, and Katie Sykes, ‘Sealing the Deal: The WTO’s Appellate Body Report in EC – Seal Products’, *ASIL Insights*, 18 (2014).

²³⁴² WTO Appellate Body, *European Communities - Measures Prohibiting the Importation and Marketing of Seal Products* (above, n. 1652), 5.25.

²³⁴³ *Ibid.*, 5.167.

Still, the Appellate Body found that the EU did not design and apply the Seals regime in a manner compatible with the chapeau of Article XX of the GATT as the Inuit exception was framed and applied in a discriminatory manner:²³⁴⁴ According to the AB, the EU seals regime *de facto* privileged indigenous communities in Greenland over communities in Canada.²³⁴⁵ Nevertheless, and this explains the relevance of this decision for IA regimes, the documented legislative history, including impact assessments and explanatory memoranda, was important to identify the *true* objectives of a policy,²³⁴⁶ and the AB referred to the respective documents accordingly. In consequence, the preparatory work and the procedure leading to the enactment of a legislative or regulatory proposal, including the impact assessment, are indirectly subject to judicial review and a source of information for courts and tribunals.

10.3 Political Accountability

A second factor influencing the relevance of IAs is the extent to which political accountability mechanisms beyond judicial review are available and legally ensured.

10.3.1 European Ombudsman

The European Ombudsman is elected by the European Parliament and an independent organ that “combine[s] the instruments of parliamentary scrutiny and judicial control in an original way”.²³⁴⁷ As its decisions are not binding, the role of the Ombudsman will be discussed as a political accountability mechanism. In addition to judicial review, the European Ombudsman may be in a good position to help and resolve disputes between, for example, stakeholders and the Commission about the conduct of an HRIA.²³⁴⁸

10.3.1.1 The Role of the European Ombudsman

The election, competences and general procedure are defined in Article 228 TFEU, which also authorizes the European Parliament to enact regulations and general conditions governing the performance of the Ombudsman’s duties (Article 228 (4) TFEU); these are presently laid down in a Decision of the European Parliament (“Statute”)²³⁴⁹ and an implementing Decision by the European Ombudsman (“Implementing Provisions”).²³⁵⁰ The Treaty and the respective Decisions assign certain investigatory competences to the Ombudsman. For example, the institution concerned shall, after being informed about the investigations, have a “period of three months in which to inform him of its views” (Article 228 (1) TFEU). The investigatory powers are laid

²³⁴⁴ Ibid., para 5.339.

²³⁴⁵ Ibid., 5.333 et seq. The AB concluded that there were several features that indicate that the EU seal regime was applied in a discriminatory manner between countries, and that the EU could not demonstrate compliance with the chapeau of Art. XX of the GATT: Ibid., 5.338 and 5.339.

²³⁴⁶ This point was in particular emphasized by Norway: Ibid., 5.151.

²³⁴⁷ Paul Magnette, ‘Between parliamentary control and the rule of law: The political role of the Ombudsman in the European Union’, *Journal of European Public Policy*, 10 (2003), pp. 677–694, p. 678.

²³⁴⁸ Zerk, ‘Human Rights Impact Assessment of Trade Agreements’ (above, n. 30), p. 26.

²³⁴⁹ European Parliament, *Decision of the European Parliament on the regulations and general conditions governing the performance of the Ombudsman’s duties (“Statute”)* (Last amended in 2008), OJ L 113, 4/5/1994, p. 15.

²³⁵⁰ European Ombudsman, *Decision of the European Ombudsman adopting implementing provisions* (2016/C321/01).

down in the Statute²³⁵¹ and the Implementing Provisions.²³⁵² The mandate of the Ombudsman is to investigate complaints in “instances of maladministration in the activities of the Union institutions”. In the context of external relations law, this could concern a complaint against a decision to fund a development project not in compliance with legal standards agreed in the project agreement,²³⁵³ including compliance with environmental, social and human rights standards. Other relevant complaints concern non-compliance with principles of transparency, a cross-cutting issue relevant for all policy areas and, as discussed above, to ensure effective participation in the IA process. As will be seen, in a recent case, the European Ombudsman held that the failure to prepare a human rights impact assessment for ongoing trade-negotiations with Vietnam was a case of maladministration.

In 2001, the European Parliament adopted a Code of Good Administrative Behavior, which contains different “good administration” principles, and the European Parliament explicitly declared that a violation of these principles could be the subject of a complaint to the European Ombudsman.²³⁵⁴ The Code is not legally binding, and the Ombudsman has no power to enact legally binding recommendations. Still, overlaps with the fundamental right to good administration in Article 47 CFR and the official endorsement by the European Parliament provide additional legitimacy to the review by the European Ombudsman and insofar strengthen his/her position vis-à-vis the European Commission. While the Ombudsman does not have the judicial authorities of a court, its scope of review is much broader, as it also includes soft-law commitments that cannot be directly reviewed before the European courts.

The second question relevant especially for international human rights impacts of EU policies is standing. The Treaty states that the Ombudsman can “receive complaints from any citizen of the Union or any natural or legal person residing or having its registered office in a Member State”, but that it may also conduct investigations on its own initiative (Article 228 (1) TFEU). These standing requirements exclude complaints filed by non-EU citizens residing outside the EU or organizations not registered within one EU Member State. However, standing does not require a party to be affected in individual rights or interests, so that an *actio popularis* on behalf of the interests of people or communities in third states²³⁵⁵ can be admissible.

The procedure before the EU Ombudsman contains many quasi-judicial features: the Ombudsman is independent of the other institutions but reviews their behavior for compliance with principles of good administration. The procedure distinguishes between an admissibility stage and a decision on the merits. The Ombudsman has investigatory powers, the process is marked by adversarial features such as an exchange of factual and legal arguments between applicants and respondents, and the recommendation decision taken by the Ombudsman is structured in a judgment-like manner. Therefore, the role of the EU Ombudsman is best described as a political accountability mechanism with quasi-judicial features.

²³⁵¹ European Parliament, *Decision on the regulations and general conditions governing the performance of the Ombudsman's duties ("Statute")* (above, n. 2349), Art. 3.

²³⁵² European Ombudsman, *Decision adopting implementing provisions* (above, n. 2350), Art. 4.

²³⁵³ Dann, *The Law of Development Cooperation* (above, n. 4), p. 464.

²³⁵⁴ European Parliament, *The European Code of Good Administrative Behaviour* (2001), Art. 26.

²³⁵⁵ Dann, *The Law of Development Cooperation* (above, n. 4), p. 464.

10.3.1.2 Case Regarding a Human Rights Impact Assessment for the Negotiations of the Free-Trade-Agreement with Vietnam

In 2015, the EU Ombudsman presented the draft recommendations on a complaint filed by the International Federation for Human Rights (FIDH) and the Vietnam Committee on Human Rights (VCHR). The applicants alleged that the European Commission “wrongly refuses to carry out an HR impact assessment as part of the preparations for an EU free trade agreement with Vietnam. The Commission should conduct a comprehensive and participatory HR impact assessment.”²³⁵⁶ At the time of the complaint, the bilateral trade negotiations were still ongoing. EU trade negotiations with several Asian countries were launched in 2007 as part of a planned EU-ASEAN trade agreement. In 2009, the EU had commissioned a Trade Sustainability Impact Assessment for the EU-ASEAN negotiation, which included a consideration of impacts on core labor standards and related social rights. The Commission did not, however, include an explicit human rights analysis into its SIA. Still in 2009, the multilateral negotiations paused to give way for bilateral negotiations which, in the case of Vietnam, were launched in June 2012. The negotiation mandate also included a new investment chapter. The Commission did not conduct a new impact assessment, as it was of the opinion that the findings in the 2009 SIA were still relevant as regards the “direction and magnitude of economic, social and environmental impacts”.²³⁵⁷

On 26 June 2012, the bilateral negotiations with Vietnam were launched. One day before, on 25 June 2012, the Council of the European Union had enacted its new “Action Plan”, which contained the commitment to “[i]nset human rights in Impact Assessment, as and when it is carried out for legislative and non-legislative proposals, implementing measures and trade agreements that have significant economic, social and environmental impacts, or define future policies.”²³⁵⁸

The central question was whether or not the Commission discharged the obligation to assess human rights impacts by conducting the 2009 Trade SIA, or whether an additional human rights analysis of the planned EU-Vietnam trade agreement was required. The Commission argued that it fully discharged its obligation to assess human rights impacts of the prospective trade agreement by conducting the 2009 SIA for the EU-ASEAN negotiations. It considered impacts on core labor rights, poverty and gender. The negotiations with ASEAN, including Vietnam, were authorized in 2007, and the following bilateral negotiations were conducted “in the framework of the 2007 authorization”.²³⁵⁹ A new assessment was allegedly unnecessary as the “2009 SIA contained sufficient country specific data to allow the Commission to assess the case of Vietnam”²³⁶⁰ - an argument purely reflecting the information model of impact assessments. Even if one assumed, the Commission continues, that the 2009 SIA would not include sufficiently explicit ref-

²³⁵⁶ European Ombudsman, Draft recommendation of the European Ombudsman in the inquiry into complaint 1409/2014/JN against the European Commission, 26 March 2015, (above, n. 157), para 8. The draft recommendation contains more information about the background of the dispute and will therefore also be briefly discussed here.

²³⁵⁷ Ibid., para 15.

²³⁵⁸ Council of the European Union, *EU Strategic Framework and Action Plan on Human Rights and Democracy* (above, n. 1133).

²³⁵⁹ European Ombudsman, Draft recommendation of the European Ombudsman in the inquiry into complaint 1409/2014/JN against the European Commission, 26 March 2015 (above, n. 157), para 14.

²³⁶⁰ Ibid., para 15.

erence to human rights as required by the 2012 Action Plan, a retroactive application of these new commitments would be “unjustifiably burdensome and disproportionate”.²³⁶¹ EU law did not prescribe the conduct of human rights impact assessments, but rather generally required to bring foreign policy in coherence with human rights. Consequently, the Commission argued it enjoyed a wide margin of discretion to determine how to bring commercial policy and human rights into coherence.²³⁶² Compliance with human rights obligations therefore required a broader look beyond the focus on impact analysis, for example the inclusion of the intended Sustainable Development Chapter or the establishment of human rights dialogues.²³⁶³

In the draft recommendations, the Ombudsman almost completely confirmed the complainants’ arguments. The Ombudsman first stated that even absent a specific obligation to conduct HRIA, it would be “in the spirit of [Art. 21 (1) and (2) (b) TEU] to carry out an HR impact assessment”.²³⁶⁴ The 2009 Trade SIA did not comply with this obligation as it only considered the impact on some social rights.²³⁶⁵ Second, the Ombudsman confirms that, in spite of certain links, the ASEAN and Vietnam trade negotiations were different, especially as the new mandate was extended.²³⁶⁶ The Commission has therefore not fulfilled its obligation to analyze human rights impacts. Third, the Ombudsman dismisses the defense of retroactivity on three grounds. The bilateral negotiations with Vietnam were launched on 26 June 2012, which is one day after the enactment of the 2012 Action Plan.²³⁶⁷ Also, on a principled basis and in direct response to the claim that carrying out such a human rights impact assessment would be burdensome, the Ombudsman made clear that “respect for human rights cannot be made subject to considerations of mere convenience”.²³⁶⁸ Finally, in a teleological interpretation, the Ombudsman underlines that the point in time when the EU officially declared to systematically carry out impact assessments is not decisive for the present case; it therefore does not matter whether or not the negotiation mandate was issued before or after that point in time. What matters is that the goal of human rights impact assessments is to “ensure” that the FTA will “have no negative impact on human rights”.²³⁶⁹ It is striking that the standard “no negative impact on human rights” is extremely broad. Normatively, not all negative impacts on human rights are prohibited. In many cases, human rights infringements are unavoidable and justifiable. It is practically impossible to ensure that no negative impacts will occur. Whether such a strict standard will therefore be doctrinally accepted for the human rights impact assessments of EU trade agreements seems doubtful. It appears the term is not used in a doctrinal sense. It is a missed opportunity that the European Ombudsman did not consider more viable legal standards to be applied, in particular standards which could also be applied in judicial proceedings at a later stage.

The Commission did not implement the draft recommendations, and the EU Ombudsman, upholding her opinion, closed her inquiry with a critical remark in 2016. The case seems to confirm all critics who emphasize the weak role of the EU Ombudsman. And indeed, it appears desirable

²³⁶¹ Ibid., para 14.

²³⁶² The EU Commission argued that it had a wide discretion in *how* to implement its human rights responsibilities, and that HR impact assessments were therefore not mandatory Ibid., para 12.

²³⁶³ Ibid., para 15.

²³⁶⁴ Ibid., para 24.

²³⁶⁵ Ibid.

²³⁶⁶ Ibid., para 28.

²³⁶⁷ Ibid., para 27.

²³⁶⁸ Ibid., para 26.

²³⁶⁹ Ibid.

to strengthen its function by granting him/her the right to bring actions against EU decisions under Article 263 TFEU, thereby increasing the effectiveness of EU human rights commitments while resolving the difficulties surrounding standing described above, in particular the concern that the EU courts would be flooded with actions. However, the role of the Ombudsman should not be underestimated. For example, while the European Commission did not implement the recommendation this time, it is likely that it wishes to avoid similar procedures before the European Ombudsman in the future. In addition, the procedure provides a platform for complainants to make their voice heard and to oblige the European Commission to at least formally take a position. So the Commission argued that there is no “retroactive application of a requirement to carry out an HR impact assessment”.²³⁷⁰ While the EU Ombudsman discharged this argument as too formalistic,²³⁷¹ it can nevertheless be interpreted as an official recognition of the Commission that it is not merely good administrative practice but also a requirement to carry out HR impact assessments for new trade initiatives. This might contribute to raise legitimate expectations and could turn political promises into factually or even legally binding self-commitments.²³⁷²

10.3.2 European Court of Auditors

The European Court of Auditors (“ECA”) is the EU’s independent auditor and reviews the EU’s sound budget-related management. In 2010, the ECA was requested to prepare a Special Report pursuant to Article 287 (4) subparagraph 2 TFEU on the Impact Assessment system. The Report analyzed whether and to what extent IAs supported decision-making in the EU.²³⁷³ The period of review concerned the years from 2003 until 2008, i.e. the pre-2015 IA-regime. Methodologically, the review, inter alia, compared specific elements of the Commission’s system with IA systems elsewhere, an “analysis of IA production statistics and of a sample of IA-reports (scorecard analysis related to five DGs and corresponding to around a quarter of all IAs produced during the period audited), and enquiries and surveys with people involved in performing, reviewing and using the commission’s IAs both within and outside the commission”.²³⁷⁴

The review included many aspects of the IA-process, ranging from the selection of initiatives to be accompanied by IAs, the transparency of the process, the analytical methods, the role of stakeholder participation as well as the actual relevance of the IA-report for decision-makers, including the College of Commissioners, the Council and the Parliament. The results were not overwhelming, but even at that time – during the early years of the IA-regime - for example 68 % of the respondents to the Council WP survey said that “the IA reports they had reviewed had a

²³⁷⁰ Ibid., para 14.

²³⁷¹ European Ombudsman, *Decision in case 1409/2014/MHZ on the European Commission's failure to carry out a prior human rights impact assessment of the EU-Vietnam free trade agreement* (26 February 2016), para 13.

²³⁷² See, in general on self-engagement: 3.2.2.2.

²³⁷³ The Report addressed mainly three question, namely to what extent “impact assessments were prepared by the commission when formulating its proposals and the European Parliament and the Council consulted them during the legislative process; the Commission’s procedures for impact assessment appropriately supported the commission’s development of its initiatives; and the content of the commission’s impact assessment reports was appropriate and the presentation of findings was conducive to being taken into account for decision-making”: European Court of Auditors, *Impact Assessments in the EU Institutions: Do they support decision-making?* (above, n. 1312), p. 6.

²³⁷⁴ Ibid., p. 13.

positive effect on the quality of the final act”.²³⁷⁵ More generally, the Court of Auditors observed that the IA procedures are an “integral element of the policy development process and that IA reports are actively used by decision-makers within the commission.”²³⁷⁶ However, the weak point is that IAs are often not systematically updated once amendments have been made, so that the likely and significant impacts of an amended proposal have not been assessed.²³⁷⁷ The report provides not only feedback to Commission staff involved in the conduct of IAs. It also reveals publicly how the Commission, Parliament and Council use IA-reports (see also part 10.3.3).

In addition to such a Special Report focusing exclusively on IAs – which is only a snapshot and should, in order to review potential progress, be re-conducted - the ECA occasionally relies on the analysis contained in IAs to evaluate certain initiatives in the regular or special reports on specific initiatives.²³⁷⁸ However, as the ECA is the guardian for sound financial management, a certain focus seems to be set on economic and financial consequences of decisions and their adequate consideration in IAs. A recent example concerns the Management of Preferential Trade Arrangement. The ECA found that the use of IAs has increased and the quality improved, but that there are, with regard to PTAs, still deficits concerning the assessment of economic impacts.²³⁷⁹ Recently, the ECA has examined public participation in EU lawmaking,²³⁸⁰ the relevance of which has been addressed in a previous chapter.

10.3.3 European Parliament

On a political level, especially the European Parliament often criticizes the Commission for not or not adequately assessing the human rights impacts of its initiatives. Conflicts between Parliament and Commission can also arise where the Commission has the authority to enact delegated or implementing acts. Similarly, conflicts can exist in policy areas where the Parliament has only limited control, such as during the preparation and negotiation of international agreements. In 2014, the European Parliament adopted a resolution in which it “[u]rges the Commission to carry out as soon as possible a Human Rights Impact Assessment, as requested by Parliament in its resolution of 25 November 2010 on human rights and social and environmental standards in international trade agreements, with a view to ensuring ‘comprehensible trade indicators based on human rights and on environmental and social standards’, and in line with the Report of the UN Special Rapporteur on the right to food”.²³⁸¹ Parliamentary resolutions can increase political pressure, especially – as the Parliament reminds the Commission in the same resolution – because its consent to the Free Trade Agreement is necessary.²³⁸²

²³⁷⁵ Ibid., p. 23.

²³⁷⁶ Ibid., p. 45.

²³⁷⁷ Ibid.

²³⁷⁸ Meuwese, *Impact Assessment in EU Lawmaking* (above, n. 267), p. 177.

²³⁷⁹ European Court of Auditors, ‘Are preferential trade arrangements appropriately managed?: Special Report’ (above, n. 1832), p. 33.

²³⁸⁰ European Court of Auditors, ‘Have your say!': Commission’s public consultations engage citizens, but fall short of outreach activities, Special Report 2019, no. 14.

²³⁸¹ European Parliament, *Resolution of 17 April 2014 on the state of play of the EU-Vietnam Free Trade Agreement* (2014), 2013/2989(RSP), para 25.

²³⁸² Ibid., para 1.

As a privileged party (Article 263 (2) TFEU), it can, first, file an action for annulment against a legal act issued by the Commission, for example an Implementing Regulation. During the course of such an action, impact assessments can become indirectly relevant as previously described. Another type of proceedings that could be used by Parliament to review the Commission's compliance with the Treaties is Article 265 TFEU which reads: "Should the European Parliament, the European Council, the Council, the Commission or the European Central Bank, in infringement of the Treaties, fail to act, the Member States and the other institutions of the Union may bring an action before the Court of Justice of the European Union to have the infringement established. This Article shall apply, under the same conditions, to bodies, offices and agencies of the Union which fail to act." As argued above, the Commission's commitment to conduct impact assessments as established in the Interinstitutional Agreement on Better Lawmaking²³⁸³ could be seen as an essential procedural requirement. As it arguably specifies the duty to mutual sincere cooperation under Article 13 (2) TEU, a manifest violation of this commitment in the Interinstitutional Agreement might also constitute a violation of the Treaty-based duty to mutual sincere cooperation. The inter-institutional agreement contains few details about how to conduct impact assessments; review would thus be limited to cases where the Commission fails to produce an IA at all or prepares an IA that is clearly inadequate. The actions under Article 263 (1) and 265 TFEU would mainly make sense where the Commission evidently fails to produce a required impact assessment for non-legislative initiatives, i.e. those acts where the European Parliament is not directly involved. Still, judicial recourse may also be relevant to international agreements even though Parliamentary consent is required at the end. The European Parliament "shall be immediately and fully informed at all stages of the procedure" (Art. 218 (10) TFEU) and "may obtain the opinion of the Court of Justice as to whether an agreement envisaged is compatible with the Treaties" (Article 218 (11) TFEU). If the opinion is adverse, the agreement may not enter into force unless it is amended or the Treaties are revised. Consequently, the European Parliament could request an opinion of the Court of Justice as to whether fundamental and human rights impacts were adequately taken into consideration.

The relevance of Commission HRIAs would lie in the fact that the Commission has the exclusive right to propose legislation (Article 294 TFEU), even though the legislative organs and citizens (Article 11 (4) TEU) can "invite" the European Commission to submit proposals. As the Commission presents the first draft, it has an important role in setting and framing the agenda. The executive can act as the "guardian" of legal values in the preparation of legislation,²³⁸⁴ and a stronger focus on human rights in Commission impact assessments can therefore strengthen human rights considerations at this decisive early stage. However, from a democratic perspective, there is also a potential downside to the increasing use of Commission IAs. First, IAs provide the Commission with additional knowledge about expected impacts and thus increase its *epistemic* authority. Many Members of the Parliament viewed IAs, especially during the first years, as a problematic constraint on political preferences.²³⁸⁵ This corresponds to the broader line of criticism against objective-managerial approaches to decision-making. Second, borrowing from Fritz Scharpf, the very fact that the Commission prepares HRIAs *at all* could increase its

²³⁸³ European Union, *Interinstitutional Agreement on Better Law-Making* (above, n. 1136).

²³⁸⁴ Term borrowed from Terence Daintith and Alan Page, *The Executive in the Constitution* (Oxford: Oxford Univ. Press, 1999), p. 254; Meuwese, *Impact Assessment in EU Lawmaking* (above, n. 267), p. 91.

²³⁸⁵ *Ibid.*, p. 110.

perceived moral authority as a beneficiary of human rights and democratic legitimacy.²³⁸⁶ Third, constructing a comprehensive impact assessment regime can also strengthen the Commission's *rhetorical* authority, as the Commission itself demonstrated in its 2005 Impact Assessment Guidelines when it encourages the Commission services to "use the IA in the legislative process", stating that "[e]vidence presented in the IA report will help them to argue the merits of the Commission's proposal in the Council and/or European Parliament."²³⁸⁷

This increase of epistemic authority is probably one of the reasons why the European Parliament strengthened its own capacity to review and conduct own impact assessments. To assist Parliamentary committees in undertaking IAs, the "Conference of Committee Chairs" adopted an Impact Assessment Handbook,²³⁸⁸ and in June 2011, the European Parliament "adopted an own-initiative report (Niebler Report) on 'guaranteeing independent impact assessment'".²³⁸⁹ In response to this report, the Bureau of the European Parliament established a Directorate for Impact Assessment and European Added Value (2012), which is now part of the new Directorate-General for Parliamentary Research Services (DG EPRS).²³⁹⁰ The Ex-Ante Impact Assessment Unit automatically checks all incoming Commission-IAs,²³⁹¹ and at the request of Parliamentary Committees provides – when necessary drawing on outside expertise – "detailed appraisals of the quality and independence" of IA-Reports or prepares substitute or complimentary assessments on those aspects which are not adequately dealt with by the Commission. In addition, IAs can be carried out on substantive amendments made by the EP; this is always carried out by external experts, but coordinated by the Ex-ante IA Unit.²³⁹² While Parliament during the first years after the introduction of the IA-regime only carried out very few IAs per year, ²³⁹³ the workload between 2012 and 2014 has increased: "74 initial appraisals of Commission IAs for parliamentary committees, five detailed appraisals, two substitute or complementary impact assessments, and four impact assessments (on one or more) EP amendments, encompassing a total of 21 amendments".²³⁹⁴ However, especially the added value of the initial appraisals can be questionable. One example concerns the potential impact of TTIP on developing countries. The Commission IA was overtly positive in this regard, assuming that "no region is expected to lose in terms of national income from an ambitious trade liberalization between the EU and the US",²³⁹⁵ and the EPRS initial appraisal simply adopted this unreservedly positive prediction and

²³⁸⁶ Scharpf observed the attempt of the Commission to present itself "as a beneficiary of democratic legitimacy": Fritz Scharpf, 'Problem-Solving Effectiveness and Democratic Accountability in the EU' (above, n. 284), p. 17.

²³⁸⁷ European Commission, *Impact Assessment Guidelines* (above, n. 1113), p. 15.

²³⁸⁸ Conference of Committee Chairs, 'Impact Assessment Handbook: Guidelines for Committees'.

²³⁸⁹ European Parliamentary Research Service (EPRS), 'European Parliament work in the fields of Ex-Ante Impact Assessment and European Added Value: Activity Report for June 2012 - June 2014', European Parliament, 2014, p. 7.

²³⁹⁰ *Ibid.*, p. 8.

²³⁹¹ *Ibid.*, p. 9.

²³⁹² *Ibid.*

²³⁹³ European Court of Auditors, *Impact Assessments in the EU Institutions: Do they support decision-making?* (above, n. 1312), p. 6.

²³⁹⁴ European Parliamentary Research Service (EPRS), 'European Parliament work in the fields of Ex-Ante Impact Assessment and European Added Value: Activity Report for June 2012 - June 2014' (above, n. 2389), p. 10.

²³⁹⁵ European Commission, 'Impact Assessment Report on the future of EU-US trade relations: Recommendation for a Council Decision authorising the opening of negotiations on a comprehensive trade and

instead of a critical review simply summarizes the Commission's findings.²³⁹⁶ This is insofar surprising as this analysis is quite different in a study prepared at the same time by the Bertelsmann Foundation, an institution not known to be particularly critical of economic globalization. The analysis of impacts on developing countries reads clearly different in this study: "The main losers from eliminating tariffs are the developing countries. They experience dramatic losses in market share from intensified competition on the EU or US markets. Alternative markets with similar market potential are geographically far apart"²³⁹⁷; the study predicts a change in real per capita income in the tariff scenario of up to -7.6 % among the least developed countries in Africa. It therefore remains to be seen how effective the quality review exercised by the EPRS will be in the future.

10.3.4 The "Court of Public Opinion"

Public participation is not only important to inform or "democratize" decision-making; it is also a potential tool for informal accountability: "[P]ublic scrutiny is as an effective verification mechanism to ensure that IAs address the most relevant issues".²³⁹⁸ As said before, the IA-guidelines require publishing Roadmaps/Inception Impact Assessments, the IA-Report and the RSB-opinions. In addition, Access to Information Regulation (EC) 1049/2001 guarantees that external participants generally have a right to access IA-documents and other relevant material. However, as seen in a previous chapter, especially in the area of international relations, the Access to Information Regulation contains significant exceptions.²³⁹⁹ On the other hand, the ECJ has recently set aside the General Court's judgment which broadly restricted access to draft IA documents during the Commission's impact assessment and decision-making stage.²⁴⁰⁰ The ECJ thus made it easier for interested parties to access IA documents, a shift towards a more analytic-deliberative paradigm recognizing the transformative value of impact assessments.

However, the ECA found that the Commission never consulted on draft IA reports.²⁴⁰¹ While some civil society organizations state that their representatives systematically use IA-documents, others observed that these reports are often rather used by the Commission to justify their decision than as an independent assessment to generate knowledge and transform decision-making.²⁴⁰² Nevertheless, it can be assumed that both the European Commission and non-governmental organizations regard IA-documents as influential: this would explain why the

investment agreement, called the Transatlantic Trade and Investment Partnership, between the European Union and the United States of America' (above, n. 1357), p. 44.

²³⁹⁶ European Parliamentary Research Service (EPRS), 'European Commission proposal to authorise the opening of negotiations on a Transatlantic Trade and Investment Partnership between the European Union and United States of America: Initial appraisal of a European Commission Impact Assessment', PE 507.504, p. 7.

²³⁹⁷ Felbermayr, Heid and Lehwald, "Transatlantic Trade and Investment Partnership (TTIP): Who benefits from a free trade deal?" (above, n. 294), p. 28.

²³⁹⁸ European Court of Auditors, *Impact Assessments in the EU Institutions: Do they support decision-making?* (above, n. 1312), para 29.

²³⁹⁹ See section 7.2.6.

²⁴⁰⁰ ECJ, *ClientEarth v. Commission* (above, n. 1219). See section 7.2.4.2.

²⁴⁰¹ European Court of Auditors, *Impact Assessments in the EU Institutions: Do they support decision-making?* (above, n. 1312), para 30.

²⁴⁰² *Ibid.*, p. 24.

Commission refused to grant access to such a draft IA-report and why *ClientEarth* challenged the refusal in court. This would be unlikely if it was not regarded as a document of significant relevance to decision-making.

10.4 Determinacy of Law

One factor that generally increases compliances is legal determinacy. The previous sections have illustrated that many procedural norms guiding if and how to conduct IAs are now quite specific. In spite of the legal indeterminacy of terms like “significant impact”, binding and non-binding rules and principles specify which initiatives require an impact assessment, when and what information must be published, when and how long external stakeholders are to be consulted, or what minimum requirements an IA report must contain.

Beyond that, substantive principles guiding EU impact assessments are, in large parts, still very indeterminate. Insofar, substantive legal determinacy seems to be the “weakest” among the compliance factors identified in the previous chapter. However, this is neither surprising nor a specific defect of the EU’s IA regime, but mainly a consequence of the very nature of impact assessments as tools to generate knowledge and inform decision-making under uncertainty. For example, the choice of methodologies is (and probably must be) discretionary as there is no single-best methodology suited for all types of HR impact assessments. Moreover, there is a high degree of normative uncertainty,²⁴⁰³ which is largely unavoidable if legislation or regulation is “innovative”. Similar levels of normative uncertainty also exist in domestic law when technological or regulatory innovations are concerned. Here, it is often impossible to determine in substantive terms when exactly an economic reform violates human rights. In consequence, human rights protection in these cases shifted from substance to procedure.²⁴⁰⁴

However, a comparison with domestic EIA law also demonstrates that it is possible to develop at least certain substantive and more specific standards for specific sectors, which must then also be respected during impact assessments. Similarly, it would be possible to further develop more specific human rights standards to be respected for project approvals and policy decisions. And indeed, it is before this background that the Trade HRIA Guidelines contain a reference to EU and UN human rights bodies. While not clearly spelled out, this could be understood as a requirement to interpret fundamental and human rights obligations also in the light of the General Comments which continuously specify human rights obligations.²⁴⁰⁵

Whether it is desirable to enact more specific substantive normative standards is a different question, and it depends on the particular circumstances of the different policy areas. Concerning the human rights impacts of trade and development policy, one such approach could be the increasing use of human rights indicators or benchmarks. To come back to the introductory examples, it would not be unthinkable to establish a presumption rule which states that an ex-

²⁴⁰³ Körtvélyesi, ‘Inconsistency and Criticism: Mapping Inconsistency Arguments Regarding Human Rights Promotion in EU External Relations’ (above, n. 496), p. 239

²⁴⁰⁴ See section 3.2.1.

²⁴⁰⁵ Forman, ‘Can Minimum Core Obligations Survive a Reasonableness Standard of Review under the Optional Protocol to the International Covenant on Economic, Social and Cultural Rights’ (above, n. 1710), p. 564.

pected trade distortion in goods essential for small-scale farmers in developing countries would generally be regarded as significant if it exceeds a certain percentage. This would at least require a “hard look” and ensure that these impacts are thoroughly considered during the IA process. A similar approach is at times used in domestic law as illustrated above by reference to German construction law which states that planning authorities can prohibit major investment projects like shopping malls if they are likely to cause hazardous impacts on central supply areas, such as historically grown inner cities; if similar impacts are likely to occur on neighboring municipalities, specific safeguards apply.²⁴⁰⁶ To determine if the expected impacts are so significant that a project may not proceed, impact assessments analyze *inter alia* how many potential customers the central supply areas or the neighboring municipalities are expected to lose. A part of this assessment is to determine the expected revenue divergence or purchasing power outflows. Case law has established very specific thresholds and, for example, a presumption that a revenue divergence above 10% is generally so significant that the construction may not be implemented.²⁴⁰⁷ Similar tests could be applied internationally, for example when determining the expected trade diversion as a consequence of a new trade agreement or another trade policy in place. If this exceeds the threshold in a sector that is of vital relevance to people in affected areas, it is necessary to adequately consider these impacts - failure to do so could be an abuse of discretion. However, there are also downsides to such an approach: specific thresholds can be arbitrary, and decision-makers might be induced to focus on these impacts only and neglect other impacts that remain below the threshold. However, the point here is not to decide whether more determinate substantive standards are *per se* desirable, but whether they could be developed and applied to increase legal determinacy. This question must be answered in the affirmative.

10.5 Institutional Culture, Learning and Norm Internalization

The relevance of IAs also depends on institutional culture, institutional learning and formal and social norm internalization. This concerns, of course, learning about how to technically conduct impact assessments. However, it also concerns formal and social norm internalization as discussed above in the context of normative and process-oriented compliance theories. The conduct of HRIAs is increasingly governed by (binding and non-binding) rules and principles. Thus, HRIA norms are already *formally* internalized inside the European Commission. In addition, what also matters – according to process-oriented compliance theories – is what has been defined above as *social* internalization or cultural change in an institution.²⁴⁰⁸ This can only to a certain extent be influenced by institutional provisions. However, the institutional context in which IAs are being conducted can incentivize institutional learning and can potentially contribute to the social internalization of HRIA norms. As will be seen, several institutional arrangements in the Commission’s IA regime confirm that conducting adequate IAs is now widely seen as an important element of the Commission’s policy and decision-making procedure.

²⁴⁰⁶ Sec. 34 (3) of the German Federal Building Code.

²⁴⁰⁷ By way of example and with further reference: Higher Administrative Court of Saxony (above, n. 2197), para 50 (*juris*); on the use of quantitative methods and thresholds to determine the significance of these impacts in general: BVerwG (above, n. 2197).

²⁴⁰⁸ See section 9.1.2.1.4.

10.5.1 Cooperative Approach to Impact Assessments

It has previously been pointed out that the IA process is cooperative in the sense that different services within the Commission are involved. This is different from some domestic EIA regimes where the EIA process is supervised by agencies responsible for the development project concerned and not by agencies whose mandate covers environment or social affairs.²⁴⁰⁹ Before this background, the competence and composition of organs in charge of the IA are more than formalistic legal requirements. It determines whose knowledge enters the IA-process. It may also remedy some of the aforementioned biases, in particular the so-called availability bias:²⁴¹⁰ the inclusion of different perspectives decreases the risk that decisions are based on limited subjective knowledge. It may therefore be desirable, in order to give more effect to human rights obligations, to involve “human rights experts” within the Commission as far as possible. This would, in principle, be nothing new: internal coordination has always been an issue in the Commission²⁴¹¹ – and the IA regime can build on these internal coordination mechanisms. However, in particular where the human rights effects of economic policies are concerned, there is the challenge of interdisciplinarity. It is in particular because public institutions as well as private companies generally have functionally divided departments that expertise is dispersed. While it might be true that the human rights experts in a company or public institution are probably more committed to their mandate, they might often lack the technical knowledge in the respective other area concerned. While human rights experts nowadays often have a very good understanding of the human rights implications of specific investment projects, this is generally less so with regard to the human rights consequences of, for example, complex financial products and their regulation.²⁴¹²

10.5.2 Institutional Quality Control and Capacity Building

Different mechanisms within the Commission increase the quality and comprehensiveness of IA-procedures.²⁴¹³ At the same time, these mechanisms indicate that the Commission considers impact assessments to be an important instrument, and that conducting high-quality impact assessments is expected from staff members. As discussed in the previous chapter, some authors observed that one of the obstacles to the effective internalization of environmental and social safeguards in the World Bank is due to the lack of internal incentives World Bank staff has to

²⁴⁰⁹ For example, in Australia, the responsibility for IAs of mining projects falls within the competence of the mining ministry: Pope et al., ‘Advancing the theory and practice of impact assessment: Setting the research agenda’ (above, n. 75), p. 7.

²⁴¹⁰ See section 5.4.4.

²⁴¹¹ On the historical development of internal coordination: Hartlapp, Metz and Rauh, *Which policy for Europe?* (above, n. 1589), 244 et seq.

²⁴¹² On the risks of human rights mainstreaming: see section 2.4.3.2. This problem has been illustrated in the case of human rights due diligence for financial services where CSR departments probably lack the knowledge, especially with regard to “specialised areas of bank activities, particularly in large, complex financial institutions [...] and the more specialized financial vehicles in the shadow banking system”: Mary Dowell-Jones and David Kinley, ‘The Monster Under the Bed: Financial Services and the Ruggie Framework’, in: Radu Mares (ed.), *The UN Guiding Principles on Business and Human Rights*, pp. 193–216, p. 212.

²⁴¹³ Meuwese, *Impact Assessment in EU Lawmaking* (above, n. 267), 75 et seq.

comply with these safeguards. Rather, other factors such as the number and scope of projects implemented influences their career. This may be different in the Commission now that certain oversight mechanisms, such as the Regulatory Scrutiny Board, review impact assessment reports and provide immediate feedback. The assessment of unintended impacts is therefore not just one additional feature but becomes an essential element in the development of legislative and non-legislative proposals, delegated acts or implementing measures. Providing high quality IAs in compliance with the applicable IA guidelines is therefore formally required and, arguably, now “culturally” expected: an important driver for social norm internalization.

10.5.2.1 Capacity Building and Reflective Quality Review

The IA guidelines contain detailed guidance on how to conduct impact assessments. They have frequently been reviewed and reformed and are in themselves a source of knowledge to be relied on. Over the past years, more attention was paid to human rights impacts after these had been severely neglected during the first years. These guidelines aim at providing those conducting the IA with the knowledge and expertise about IAs and thus aim at institutional learning. At the same time, they encourage a critical and internal evaluation of the methodologies and strategies applied. In particular, the Guidelines encourage an internal quality assessment of the consultation process “with the view to improve future consultations” and to assess the effectiveness of the consultation strategy by an end-of-process survey.²⁴¹⁴ The Commission has, over the past years, reformed its IA-regime several times, and Commission staff has been involved in this reform process. As mentioned, IA-guidelines can be qualified as meta-regulation, namely norms that regulate internally how public authorities – and to a large extent: Commission staff – shall prepare and make policy proposals. The fact that these IA-guidelines are amended in an open and participatory procedure may increase the perceived legitimacy of these guidelines among Commission staff and thus produce the “compliance pull” identified by process-oriented theories as one factor to increase compliance.

Regarding the relevance of IAs for Policy Coherence for Development, a Commission Report identifies great potential but (at least in the two years after the inception of the 2009 guidelines) only limited relevance: even in the case of initiatives with potential impacts on developing countries only a small number included a respective analysis. In order to respond to these deficits, the Report calls to further raise awareness and strengthen the analytical capacity.²⁴¹⁵ At least judging by the effort dedicated to analyzing impacts on developing countries in general or the human rights impacts – both internal and external – of trade agreements, the IA-regime has made significant progress, both for trade agreements and other areas of trade policies affecting developing countries.²⁴¹⁶

²⁴¹⁴ European Commission, *Better Regulation Guidelines* (above, n. 199), p. 87.

²⁴¹⁵ European Commission, ‘Commission Staff Working Document: EU 2013 Report on Policy Coherence for Development’ (above, n. 583), 4.2.

²⁴¹⁶ This was requested by *Ibid.*, 4.3.

10.5.2.2 The Interservice (Steering) Group (ISG)

An Interservice Steering Group (ISG) must be set up for the preparation of major initiatives which entail impact assessments, stakeholder consultations, evaluations and Fitness Checks.²⁴¹⁷ It is a group comprising “representatives from interested DGs or services who collectively undertake the better regulation processes”.²⁴¹⁸ The goal is to broaden the perspective concerning all elements of the IA – identification of the problems, of options and alternatives, of stakeholders etc. - and enhance policy coherence.²⁴¹⁹ Therefore, two (not mutually exclusive) criteria determine which services are to be involved: First, those whose policies are likely to be affected, and second those that can contribute to the objectives of the initiative – “along with the relevant policy coordination unit of the SG and the Legal Service”.²⁴²⁰

In addition, it is suggested (“should”) to also invite DGs with certain core expertise, ranging from economic analysis and scientific research via social impacts to fundamental rights, to ensure that all relevant expertise within the Commission is used.²⁴²¹ The ISG therefore functions also as a type of peer-review quality control, and for example fundamental rights or development concerns can thus be brought to everybody’s attention at a very early planning stage. The Secretariat-General, however, seems to be aware of the fact that the involvement of the ISG might not always be appreciated by the lead service when it suggests that the ISG should not be regarded as a hurdle but rather a tool to improve the quality of the IA-report and the proposal.²⁴²² As regards the goal to effectively implement the CFR, the Commission called on all “relevant Commission departments [to] actively make available their fundamental rights expertise to these groups in order to ensure that any effects on such rights are systematically identified and analyzed at an early stage of the policy formulation process.”²⁴²³ As is always the case with mainstreaming attempts, there may be the risk that economic interests are mainstreamed into the interpretation of human rights norms and not the other way round.²⁴²⁴ Still, the objective of the ISG, namely to bring together people who work in different areas, can respond to some of the cognitive biases identified above, in particular the availability bias.²⁴²⁵

10.5.2.3 The Commission’s Secretariat-General (SG)

The SG plays an important role in the development and application of IA guidelines as well as in all IA-processes. Not only is it responsible for the development of Better Regulation guidelines,

²⁴¹⁷ European Commission, *Better Regulation Guidelines* (above, n. 199), pp. 12 et seq. and 89; Edward Best, *Understanding EU Decision-Making* (Cham: Springer International Publishing, 2016), 1st ed. 2016, p. 44; on inter-service groups in general: Hartlapp, Metz and Rauh, *Which policy for Europe?* (above, n. 1589), p. 245.

²⁴¹⁸ European Commission, *Better Regulation Guidelines* (above, n. 199), p. 89.

²⁴¹⁹ European Commission, *Better Regulation Toolbox* (above, n. 204), p. 44.

²⁴²⁰ *Ibid.*, pp. 43-44.

²⁴²¹ *Ibid.*

²⁴²² *Ibid.*, p. 44.

²⁴²³ European Commission, *Communication from the Commission: Strategy for the effective implementation of the Charter of Fundamental Rights by the European Union* [2010].

²⁴²⁴ The details on ISGs for evaluations and fitness-checks are laid down in the Better Regulation Toolbox: European Commission, *Better Regulation Toolbox* (above, n. 204).

²⁴²⁵ On availability and other “risk biases” see section 5.4.4.

but also answers questions concerning their interpretation and application.²⁴²⁶ It further chairs the ISG for important or sensitive initiatives (such as those in the Commission's work program).²⁴²⁷ At the SG, in particular unit A2 is responsible for evaluation and impact assessments.²⁴²⁸ The advantage of the involvement of the SG is that the respective units can provide in-depth knowledge and expertise and have a good overview of past and ongoing impact assessments; it is here where the potential not only for Commission-wide coordination but also "institutional learning" from IAs across different services and departments appears promising. At the same time, the SG also gains increasing influence over the decision-making processes across all services and departments, which might not be welcomed by everybody.

10.5.2.4 Regulatory Scrutiny Board (RSB)

The Regulatory Scrutiny Board (RSB) is established by a Decision of the President of the Commission²⁴²⁹ and replaces the former Impact Assessment Board (IAB).²⁴³⁰ The RSB-Decision, which mainly determines the task, functioning, independence, and composition of the Board, is based on Article 22 of the Commission's Rules of Procedure which authorizes the President "in special cases" to set up specific functions or structures to deal with particular matters and to determine their responsibilities and method of operation.²⁴³¹ The RSB serves two functions: it shall, first, control the quality of impact assessments and major evaluations, and second, provide support to the Commission services in particularly challenging assessments/evaluations and methodological issues.²⁴³² The opinions, recommendation and advice shall be granted in accordance with the Better Regulation Guidelines and "other relevant instructions to the services on agreed standards for impact assessment, evaluation, fitness checks and public consultation."²⁴³³ While the meetings are not public,²⁴³⁴ the recommendations and opinions are also published on the Commission's website²⁴³⁵ and accompany the draft when it is circulated to the Commission services and submitted to the College of Commissioners. IA reports and the respective RSB opinions are, subject to the exceptions described above, also covered by the justiciable Access to Information Regulation (EC) 1049/2001 because they are "documents of the institutions"²⁴³⁶.

The role of the RSB has been strengthened compared to its predecessor, the IAB: all draft IAs are scrutinized by the RSB, and a positive opinion is required for an initiative to proceed.²⁴³⁷ This is indeed an interesting and potentially far-reaching modification. The RSB can send a draft-IA

²⁴²⁶ European Commission, *Better Regulation Guidelines* (above, n. 199), p. 4 and 10.

²⁴²⁷ *Ibid.*, pp. 15 et seq.

²⁴²⁸ See: Organizational Chart of the Secretariat General dated May 2020, available at: https://ec.europa.eu/info/sites/info/files/secretariat-general-organisation-chart_en_9.pdf .

²⁴²⁹ European Commission, *Decision of the President of the European Commission on an independant Regulatory Scrutiny Board*, P(2020) 2.

²⁴³⁰ European Commission, *Better Regulation for Better Results - An EU agenda* (above, n. 1121), 3.2.

²⁴³¹ European Commission, *Rules of Procedures of the Commission*, Art. 22.

²⁴³² European Commission, *Decision of the President of the European Commission on an independant Regulatory Scrutiny Board* (above, n. 2429), Art. 2.

²⁴³³ *Ibid.*, Art. 5 (1).

²⁴³⁴ *Ibid.*, Art. 5 (4).

²⁴³⁵ *Ibid.*, Art. 6 (2).

²⁴³⁶ European Union, *Regulation (EC) 1049/2001* (above, n. 1542), Art. 2 (1); ECJ, *ClientEarth v. Commission* (above, n. 1219).

²⁴³⁷ European Commission, *Better Regulation Guidelines* (above, n. 199), pp. 7-8.

report back for further review – and thus oblige the lead service and the ISG to apply a different method or consider additional impacts; while it cannot veto the proposal, it can however significantly influence the IA-report accompanying the proposal and thus indirectly influence how different options are presented. This can be justified in the name of an objective and independent quality review, given that the members of the Board are independent, shall not seek or take instructions and must disclose any potential conflicts of interest.²⁴³⁸ Moreover, the expertise of the RSB members must cover macroeconomics, microeconomics, social policy and environmental policy; this is to ensure that all three pillars of sustainable development are covered.²⁴³⁹ Nevertheless, the RSB is not democratically elected and does not reflect all areas of expertise: While members are selected from the Directorate-Generals which are “most closely associated with sustainable development issues”²⁴⁴⁰, those with a focus on human rights and development, such as DG DEVCO or DG JUST are not represented,²⁴⁴¹ which might imply that the RSB’s focus might be less on human rights or development.²⁴⁴² But not only do the new norms increase the Board’s influence over the IA-process, it might also, indirectly, empower the President of the Commission: it is the President who proposes the Chair of the Board²⁴⁴³ even though the Chair is then appointed by the Commission.²⁴⁴⁴

The European Court of Auditors interviews in its 2010 report revealed that the quality review by the then IAB, the predecessor of the RSB, exerts pressure on DGs to prepare good quality IAs – even without the competence to put the IA-process on hold.²⁴⁴⁵ This means that the RSB can be a powerful mechanism contributing to institutional learning and social internalization alike. Consequently, it could also give more effect to the consideration of human rights impacts. However, this depends on how the RSB is staffed and how important non-financial impacts appear to RSB members.²⁴⁴⁶

²⁴³⁸ European Commission, *Decision of the President of the European Commission on an independent Regulatory Scrutiny Board* (above, n. 2429), Art. 4. In order to increase public accountability and independence of RSB members, their names and CVs must be published on the internet site of the Commission: European Commission, *Regulatory Scrutiny Board: Mission, tasks and staff* (2015), C(2015) 3262 final, p. 4.

²⁴³⁹ *Ibid.*, p. 3.

²⁴⁴⁰ George, ‘Proportionate Impact Assessment: Discretion, Formalism, and the Undefined Responsibilities of European Decision-Makers’ (above, n. 78), 104 f.

²⁴⁴¹ The expertise of the members of the RSB must include macroeconomics, microeconomics, social policy and environment policy”: European Commission, *Regulatory Scrutiny Board: Mission, tasks and staff* (2015), C(2015) 3262 final, p. 3.

²⁴⁴² In general critical of the RSB reform: Corporate Europe Observatory et. al., ‘The Crusade against “Red Tape”: How the European Commission and big business push for deregulation’, Oct 2014.

²⁴⁴³ European Commission, *Decision of the President of the European Commission on an independent Regulatory Scrutiny Board* (above, n. 2429), Art. 3 (2).

²⁴⁴⁴ *Ibid.*, Art. 3 (2).

²⁴⁴⁵ European Court of Auditors, *Impact Assessments in the EU Institutions: Do they support decision-making?* (above, n. 1312), para 31.

²⁴⁴⁶ In the past, these impacts did not seem to be at the heart of their assessment but were not ignored either, for example concerning the IA accompanying the recommendation to open trade negotiations with Myanmar: “The report should also better assess the potential risks of production delocalization, specific impacts on SMEs and any significant (unintended) impacts on other developing countries (such as spill-over or demand-substitution effects)”: European Commission, ‘IAB - Opinion (Myanmar/Burma): DG TRADE - Impact Assessment on a Commission proposal for negotiating directives for an EU-Myanmar/Burma investment protection agreement’, SEC(2014)151, p. 2.

Once the IA-report has received a positive opinion from the RSB,²⁴⁴⁷ the IA-Report, the executive summary sheet and all opinions of the RSB in relation to the IA report are, along with the draft proposal, subject to Inter-Service Consultation (ISC).²⁴⁴⁸ The IA-report and the executive summary will later also be submitted to the College of Commissioners²⁴⁴⁹ which will decide whether to adopt the proposal.

10.6 Ex-post IAs and Legal Flexibility Mechanisms

Decision-making under uncertainty requires to also assess human rights impacts ex-post, i.e. after a final act has been adopted. Therefore, IA guidelines require conducting ex-post impact assessments. In order to give effect to ex-post findings, flexibility mechanisms are necessary to be able to modify a legal act (e.g. a trade agreement) in order to respond to human rights impacts that are only discovered ex-post, i.e. after the act entered into force. The following part will first analyze the obligation to conduct ex-post impact assessments and then illustrate different flexibility mechanisms.

10.6.1 The Obligation to Conduct Ex-Post Impact Assessments

The literature on IAs, but also different guidelines emphasize the importance of ex-post impact assessments. These ex-post IAs can, first, help to reveal unexpected consequences, and second, they allow testing whether the previously made prediction was correct. The EU's IA guidelines therefore require ex-post impact assessments (or evaluations) to look for unintended effects.²⁴⁵⁰ In addition, ex-post impact assessments would also allow reviewing whether and to what extent the findings and recommendations of the ex-ante assessments were considered; they can therefore also help to evaluate the effectiveness and relevance of impact assessments more generally. Already during the analysis stage, the IA-process should consider monitoring and evaluation arrangements.²⁴⁵¹ So it is important to have an idea about how the policy-implementation should look like in the future; and if actual impacts differ from predicted/desired ones, it is necessary to understand whether this is a problem with the policy design, its implementation – or caused by unexpected exogenous factors.²⁴⁵² Where possible, the IA should already develop indicators to improve monitoring.²⁴⁵³

The assessments and evaluations should “continue over a policy's lifetime to ensure it stays fit for purpose”,²⁴⁵⁴ and the Commission should be prepared to reconsider initiatives if there are

²⁴⁴⁷ European Commission, *Better Regulation Guidelines* (above, n. 199), p. 14.

²⁴⁴⁸ European Commission, *Better Regulation Toolbox* (above, n. 204), Tool #8, p. 43 et seq.

²⁴⁴⁹ *Ibid.*, Tool #8, p. 45.

²⁴⁵⁰ European Commission, *Guidelines on the analysis of human rights impacts in impact assessments for trade-related policy initiatives* (above, n. 42), p. 13; European Commission, ‘Handbook for Trade Sustainability Impact Assessment’ (above, n. 212), p. 8.

²⁴⁵¹ European Commission, *Better Regulation Guidelines* (above, n. 199), p. 29.

²⁴⁵² *Ibid.*

²⁴⁵³ *Ibid.*

²⁴⁵⁴ European Commission, *Better Regulation for Better Results - An EU agenda* (above, n. 1121), p. 9.

“disappointing results and unintended consequences”.²⁴⁵⁵ In particular relevant for international economic law and the principle of affectedness is the ECA’s recommendation in a special report to carry out ex-post assessments for all preferential trade agreements (“PTAs”) with significant economic, social and environmental impacts.²⁴⁵⁶ And indeed, the number of ex-post impact assessments has significantly increased over the past years.²⁴⁵⁷ At the same time, the European Commission also undertakes evaluations for internal policies, such as the Common Agricultural Policy (CAP), and considers extraterritorial impacts and consequences for EU development co-operation objectives.²⁴⁵⁸

Predicting the human rights impacts of economic policies ex-ante is often difficult, in particular when international agreements are concerned. Not only are those agreements often complex, but it is also difficult to determine what direction international treaty negotiations are taking during the course of the negotiations. It is therefore likely that ex-ante HRIAs become quickly outdated during the negotiation process. Ex-post HRIAs can therefore be a powerful tool: they can rely on the legal act as actually in force, and they can rely, for their quantitative and qualitative analysis, on data and experience concerning an existing and not only a planned initiative. However, whether or not ex-post IAs are effective and able to lead to more compliance with human rights depends on the type and degree of flexibility of the respective legal act.

10.6.2 Flexibility Mechanisms to adapt to Ex-Post Findings

Once the legal act establishing a new policy – a trade agreement, legislative or implementing act - is in force, it is more difficult to respond to new findings in ex-post HRIAs. While it might already be difficult, for political reasons, to amend a unilateral act, this is generally more difficult, for legal reasons, for international agreements. So even where the Commission and the EU legislature are willing to modify a policy to avoid human rights impacts discovered in an ex-post HRIA, they may be unable to do so because the policy in question is laid down in an international agreement: At least formal amendments would generally require the other parties’ consent. The following part will therefore focus on flexibility mechanisms for international agreements.

So far, no international agreement concluded by the EU contains an explicit clause on how to integrate the findings of an ex-post impact assessment. It remains therefore necessary to take recourse to general flexibility mechanisms (See section 9.1.2.1.5). As regards formal flexibility mechanisms, a measure of last resort, a termination clause, is generally included in the EU’s international agreements.²⁴⁵⁹ However the denunciation of an agreement is an all-or-nothing option and therefore an unlikely mechanism to be triggered in response to findings in an ex-post

²⁴⁵⁵ Ibid.

²⁴⁵⁶ European Court of Auditors, ‘Are preferential trade arrangements appropriately managed?: Special Report’ (above, n. 1832), p. 42.

²⁴⁵⁷ The ex-post impact assessments/evaluations are regularly published by the Commission, for example by DG Trade: <http://ec.europa.eu/trade/policy/policy-making/analysis/policy-evaluation/>.

²⁴⁵⁸ European Commission, *Better Regulation Toolbox* (above, n. 204), p. 269 et seq.

²⁴⁵⁹ For example: Article 244 (3) of the Economic Partnership Agreement between the CARIFORUM States, of the one part, and the European Community and its Member States, of the other part, L 289/I/3 (“EU-CARIFORUM Agreement”); Article 114 of the Economic Partnership Agreement between the European Union and its Member States, of the one part, and the SADC EPA States, of the other part, L 250/3 (“EU-SADC Agreement”).

HRIA. The human rights clauses which the EU generally includes into its agreements are important but arguably insufficient. An example of human rights clauses the EU uses in many trade and cooperation agreements demonstrates this:

“Respect for democratic principles and human rights, as laid down in the Universal Declaration of Human Rights and other relevant international human rights instruments, as well as for the principle of the rule of law, underpins the internal and international policies of both Parties and constitutes an essential element of this Agreement.”²⁴⁶⁰

The human rights clause does not express any legal consequences. The idea behind these types of clauses was rather to create “a set of circumstances that, if they changed, would enable the EU to invoke *rebus sic stantibus*.”²⁴⁶¹ The clause therefore, in conjunction with general principles of international law, enables the suspension or termination of the treaty in case of serious human rights violations. The main problem is that it does not provide a suitable formal mechanism for fine-tuning. In particular, it is not able to remedy negative human rights impacts caused by the agreement itself. Bartels therefore suggested a modification of the human rights clause as follows:

“If one of the Parties considers that the other Party has failed to fulfil an obligation under this Agreement **or that a provision of the Agreement restricts its own ability to meet its human rights obligations** it may take appropriate measures. Before doing so, it must supply the [...] within 30 days with all the relevant information required for a thorough examination of the situation with a view to seeking a solution acceptable to the Parties” (emphasis added).²⁴⁶²

This would be a formal flexibility mechanism allowing to respond to human rights effects that emerged after the agreement entered into force.

Under existing agreements, in particular informal flexibility mechanisms are relevant. Even the human rights clauses applied so far can be used as a basis for informal adaption, in particular through an interpretation of the agreement in light of human rights. This is generally required under international law (Article 31 (3) (c) VCLT). It is specifically necessary if the respective agreement *itself* explicitly contains human rights commitments. In addition, some treaties explicitly require such an interpretation, for example in a clause which states that “the application of this Agreement shall fully take into account the human, cultural, economic, social, health and environmental best interests of their respective population and of future generations”.²⁴⁶³

International agreements concluded by the EU often provide for policy dialogues which may include dialogues about human rights. Similarly, many agreements establish social committees. Social committees are likely to also deal explicitly or at least implicitly with human rights impacts of the agreement, even though an explicit human rights mandate or an independent human

²⁴⁶⁰ Example from: Art. 2 of the EU–Iraq Partnership and Cooperation Agreement.

²⁴⁶¹ Bartels, ‘A Model Human Rights Clause for the EU’s International Trade Agreements’ (above, n. 2249), p. 12.

²⁴⁶² Ibid., p. 30.

²⁴⁶³ Article 3 (2) lit. a EU-CARIFORUM Agreement.

rights committee would likely increase the effectiveness of this mechanism. There are different types of committees, such as permanent or ad-hoc committees, bilateral parliamentary committees etc.²⁴⁶⁴ For example, the EU-CARIFORM Agreement establishes a Trade and Development Committee (Article 230 EU-CARIFORUM Agreement) which is composed of representatives of the parties. One of the many functions is to “monitor and assess the impact of the implementation of this Agreement on the sustainable development of the Parties”. At least insofar as human rights and sustainable development-objectives are intertwined, the Trade and Development Committee can assess the potential human rights impacts of the implementation of the Agreement and make recommendations. And even though these are not binding, they can be regarded as a source of interpretation for the Agreement. Other participative procedures and institutions, for example for environmental and social aspects, are also established.²⁴⁶⁵

Often, however, policy dialogues are used by the EU as an instrument to push authorities in third countries to respect and protect human rights²⁴⁶⁶ and therefore less as a self-restraint mechanism to mitigate the effects of the international agreement itself or to refrain from pursuing potentially harmful EU policies that have impacts on third countries. Still, committees could be used as a valuable mechanism of reflexive regulation in order to fine-tune international agreements and make sure that they are interpreted and applied in a manner that reduces negative human rights impacts. Another weak point is that dialogues are often not transparent, and it is difficult to ensure that participants in a dialogue are truly committed to bringing an agreement into “more compliance” with human rights obligations. So when the European Commission referred to the planned “dialogues” with Vietnam during the EU Ombudsman’s investigations as a defense for not conducting an ex-ante HR impact assessment, NGOs pointed out that it is difficult to control to what extent the parties will actually give effect to confront negative human rights impacts.²⁴⁶⁷ Still, following the procedure before the European Ombudsman, the Commission organized a roundtable with stakeholders on human rights and sustainable development, and committed itself to prepare and publish a detailed paper to develop the issues discussed during that workshop.²⁴⁶⁸

Another flexibility mechanism can be demarchés, statements or common declarations, for example as the result of a policy dialogue. They can change legal interpretation and might be used by courts or agencies as normative guidance for interpretative purposes. An example previously discussed is the 2001 Declaration on the TRIPS Agreement.²⁴⁶⁹

²⁴⁶⁴ For an overview of different committee types see: Lorand Bartels, ‘The European’s Parliament’s Role in Relation to Human Rights in Trade and Investment Agreements’, European Parliament, EX-PO/B/DROI/2012-09, Feb 2014.

²⁴⁶⁵ Articles 5, 189 and 195 EU-CARIFORUM Agreement; see also, by way of example, the Trade and sustainable development chapter (Art. 6 et seq.) of the Economic Partnership Agreement between the European Union and its Member States, of the one part, and the SADC EPA States, of the other part, L 250/3.

²⁴⁶⁶ Jan Wouters and Marta Hermez, ‘EU Guidelines on Human Rights as a Foreign Policy Instrument: An Assessment’, Leuven Centre for Global Governance Studies and others, in: Working Paper No. 170, February 2016, p. 12.

²⁴⁶⁷ European Ombudsman, *Decision in case 1409/2014/MHZ on the European Commission’s failure to carry out a prior human rights impact assessment of the EU-Vietnam free trade agreement* (above, n. 2371), 20.3.

²⁴⁶⁸ European Commission, *Human Rights and Sustainable Development in the EU-Vietnam Relations with specific regard to the EU-Vietnam Free Trade Agreement*, SWD(2016) 21 final.

²⁴⁶⁹ WTO, *Declaration on the TRIPS Agreement and Public Health* (above, n. 2080).

EU agreements can also involve specialized international organizations, such as the International Labor Organization (ILO) where labor-issues are at stake. This is a flexibility mechanism insofar as it authorizes a third party to provide advice on social and environmental issues, or to interpret the agreement in light of social and environmental norms. For example, Article 195 (3) EU-CARIFORUM Agreement states:

“the Parties may agree to seek advice from the ILO on best practice, the use of effective policy tools for addressing trade-related social challenges, such as labour market adjustment, and the identification of any obstacles that may prevent the effective implementation of core labour standards.”

In addition, any party may request a consultation with the other Party on matters concerning the interpretation and application of the Articles on “social aspects”. In this context, any Party may seek independently advice from the ILO.²⁴⁷⁰ This increases the relevance of this flexibility mechanism as it can be unilaterally triggered. These provisions therefore provide the necessary flexibility to embed ex-post impact assessments. However, the ILO can only provide advice and not render any binding decision.

The EU-CARIFORUM Agreement also provides for unilateral flexibility mechanisms in the sense of escape clauses, namely a modification of the Article XIX GATT safeguards regime.²⁴⁷¹ Article 24 (2) exempts the developing member states from safeguard measures implemented by the EU: the European Union shall “exclude imports from any CARIFORUM State from any measures taken pursuant to Article XIX of the GATT 1994, the WTO Agreement on Safeguards and Article 5 of the Agreement on Agriculture”; a similar provision exists under Article 33 (2) of the EU-SADC Agreement. Article 25 of the EU-CARIFORUM Agreement modifies the procedure concerning the application of safeguard measures and requires, inter alia, the involvement of the “CARIFORUM-EC Trade and Development Committee”.

Many trade agreements are intertwined with development agreements, and the European Commission emphasizes the “mitigating” role of development cooperation. It has been stated above that mitigation measures are, under domestic EIA law, arguably no excuse for failure to conduct impact assessments: one objective of IAs is to analyze, in a participatory manner, what type of mitigation measures are required.²⁴⁷² The perspective here, however, is on the role of mitigation measures as flexibility mechanisms. For example, the EU claims to respond to negative social – or human rights – impacts of trade agreements with development instruments. In a broader sense, development cooperation could therefore respond to the findings of ex-post human rights impact assessments, even though this is not a flexibility mechanism in the strict sense. Still, development cooperation can theoretically be a mitigating measure and help to establish necessary social safety nets in the sense of embedded liberalism.²⁴⁷³

In conclusion, there are many flexibility mechanisms that *can* effectively be used to respond to human rights impacts identified ex-post. However, the effectiveness of these mechanisms still depends – due to the limited role of independent judicial review – largely on the willingness of

²⁴⁷⁰ Article 195 (4) EU-CARIFORUM Agreement.

²⁴⁷¹ See also section 9.1.2.1.5.

²⁴⁷² See, on mitigation measures under domestic EIA law, above section 6.2.2.2.

²⁴⁷³ Ruggie, ‘International Regimes, Transactions, and Change: Embedded Liberalism in the Postwar Economic Order’ (above, n. 618), p. 392.

all state parties to take these findings seriously into account. For example, the Commission's impact assessment on EPAs warned of the negative consequences from lost tariff revenue for ACP countries and the negative impacts of increased competition from EU exports.²⁴⁷⁴ Still, the EU insisted on the inclusion of an MFN clause.²⁴⁷⁵ Therefore, more robust ex-post HR impact assessments combined with more robust enforcement mechanisms to ensure that these HR impacts are adequately taken into account are necessary in order to give effect to the range of flexibility mechanisms identified above. One approach might be to grant standing to the European Ombudsman to bring an action for failure to act (Article 265 TFEU) if the European Commission does not comply with its human rights obligations.

10.7 Interim Conclusion and Outlook

Do HRIAs matter? This chapter tried to answer this challenging and important question from one particular angle. It used insights from compliance theories and a comparison with domestic EIA law to identify factors that would generally increase the ability of institutionalized IAs to influence decision-making. It then analyzed the institutionalization of HRIAs in EU decision-making through the lenses of these factors. In essence, there are several factors – formal accountability, political accountability, institutional learning, etc. – that can increase the influence of HRIAs and compliance with HRIA norms. It became clear that these mechanisms are more effective if human rights impacts occur in the EU and not extraterritorially: individuals or organizations in third states have only under very limited circumstances standing rights before the EU courts. It is also more difficult to mobilize voters against impacts occurring abroad than against impacts occurring domestically – in the former case, the court of public opinion would be weaker. Nevertheless, there are important developments. In spite of procedural obstacles, the EU courts held that, under certain conditions, the human rights impacts occurring in third countries must at least be taken into account. Even though the ECJ later quashed the judgment due to lack of legal standing, the General Court has, in its *Front Polisario* judgment, identified principles that constitute a broad normative framework for HRIAs in the context of trade agreements. As the Council failed to impartially examine the extraterritorial human rights impacts of the trade agreements with Morocco, the General Court annulled the challenged Council Decision in part. Other cases discussed above confirm that the failure to take all relevant impacts into account can constitute an abuse of discretion, even in legislative proceedings. This is a basis for the indirect judicial review of impact assessments. Also, the potential for political accountability has not yet been exhausted. During the proceedings before the European Ombudsman, for example, the European Commission confirmed its commitment to conduct HRIAs for future trade agreements. Whether this is only a political statement or, as I have argued, one that may raise legitimate expectations in a legal sense remains to be seen. Similarly, the institutional reforms in the Commission have increased the relevance of impact assessments and established robust proceedings and internal review mechanisms that are expected to contribute to the social internalization of IA commitments. Finally, this chapter has analyzed flexibility mechanisms in international agreements. If the EU's commitment to conduct ex-post impact assessments is taken seriously, it

²⁴⁷⁴ PWC, 'Sustainability Impact Assessment of the EU-ACP Economic Partnership Agreements: Final Report', May 2007.

²⁴⁷⁵ Samantha Velluti, 'The Promotion and Integration of Human Rights in EU External Trade Relations', *Utrecht Journal of International and European Law* (2016), pp. 41–68, p. 60.

is necessary to establish and apply flexibility mechanisms in order to be able to accommodate the findings of ex-post human rights impact assessments accordingly.

PART VI: CONCLUSION

In an interconnected world, decisions taken by a state or the EU can have far-reaching impacts on the human rights of people who are not involved in the making of the decisions, because they are non-citizens residing in third countries (“distant strangers”)²⁴⁷⁶. Against this background, I have argued that there is an emerging legal principle of affectedness that obliges public authorities to at least take human rights impacts into account when making policy decisions, irrespective of where these impacts occur. Human Rights Impact Assessments (“HRIA”) are one legal instrument to operationalize such a principle of affectedness, and they are increasingly used in a formal and institutionalized manner by public institutions. The focus here was on the institutionalization of HRIAs in EU policy- and decision-making as the EU’s IA regime is one of the most advanced, both normatively and institutionally. While HRIAs can restrict the exercise of public authority, they can also be a tool of epistemic institutional empowerment and would themselves need to be legitimized: IAs are tools of knowledge generation, often based on complex scientific analysis; they possess an epistemic authority, can “govern by persuasion”²⁴⁷⁷ and influence human rights discourses. Therefore, I have argued that the conduct of institutionalized HRIAs is – and should – be regulated by public law. Legal principles and rules, binding and non-binding, already determine if and how HRIAs are to be conducted. Law and legal institutions, including judicial and quasi-judicial review, can help to ensure that HRIAs are carried out at all, that they are conducted in compliance with certain principles – for example in a participatory, transparent, and non-discriminatory manner -, and that the findings are adequately taken into account by decision-makers. It is in this sense that institutionalized HRIAs were conceptualized as meta-regulation,²⁴⁷⁸ namely norms that regulate (to a large extent internally) how public institutions – in the case of the EU mainly the European Commission - shall prepare legislative and non-legislative policy proposals.

The first and second part of this book (chapters 1 to 3) defined the concept of HRIAs, the meaning of institutionalization and meta-regulation, and the role of public law. The third part (chapter 4) questioned whether there is an obligation to assess human rights impacts irrespective of where they occur. Drawing on cosmopolitan political theory, this part identified such an obligation as reflected in an emerging legal principle of affectedness. Such a principle exists because sovereignty must be reconstructed in light of humanity, considering the increasing interconnectedness of the world and the fact that acts of public authority can have far-reaching impacts on distant strangers. It is against this background that other-regarding duties in environmental law, human rights law, economic law and development cooperation law are not just isolated exceptions, but rather an expression of such a principle of affectedness that modifies the scope of sovereignty and the responsibilities of public authorities beyond national borders. While such a principle is recognizable in international law, in particular EU law contains a strong manifestation thereof. This includes the duty to take human rights impacts into account, at least as constitutional policy objectives (e.g.: Articles 3 (5), 21 TEU). It is controversial, however, to what extent human rights also apply extraterritorially as *entitlements*. In the context of the *Front Polisario* case, the General Court seemed to assume that all fundamental rights of the Charter of Fun-

²⁴⁷⁶ See above Fn. 49. This conclusion summarizes the previous analysis and findings. Detailed references can therefore be found in the respective chapters.

²⁴⁷⁷ See section 3.2.1.3 for reference.

²⁴⁷⁸ See section 3.2.

damental Rights of the European Union (“CFR”) could also apply extraterritorially, whereas AG Wathelet only referred to *jus cogens* and *erga omnes* obligations under international law. Considering that the CFR does not contain a territorial jurisdiction clause, there is no compelling reason to restrict its scope territorially. However, certain doctrinal corrections might become necessary in order to make sure that legitimate political discretion is not excessively limited.

Does the obligation to assess impacts on human rights and interests also include an obligation to conduct formalized impact assessments? I have argued that human rights duty-bearers possess a margin of appreciation on how to implement the obligation to take impacts on human rights into account. Formalized HRIAs are one, but not the only, way to comply with this obligation. It requires significant efforts for public institutions to establish an efficient IA regime. However, the margin of appreciation can be reduced if a general IA regime has already been established – like in the EU since the early 2000s. In this case, it would arguably not be justified to only consider, for example, economic and environmental impacts and exclude human rights impacts from the impact assessment procedure.

The institutionalization of HRIAs, however, raises many follow-up questions, in particular how to implement such an obligation in everyday decision-making procedures. These follow-up questions are, inter alia, caused by high levels of factual and normative uncertainty. It is often, factually, unclear what impacts an initiative would have, and even where impacts are predictable, it is normatively uncertain how to evaluate these impacts in human rights terms. Some of these questions were addressed in the fourth part of this book, which analyzed legal rules and principles that determine *how* to conduct institutionalized HRIAs. HRIAs are one instrument to deal with uncertain human rights impacts. This means that uncertainty is not only a central challenge for impact assessments, but also their *raison d’être*: Without uncertainty, lawmakers and regulators could enact more command-and-control regulation and would not have to rely so much on tools like impact assessments. Insofar as human rights risks are concerned, institutionalized HRIAs can protect human rights through organization and procedure.

Drawing also on a comparison with EIA law, I have argued that IAs in general and HRIAs in particular are guided by similar rules and principles of public law. These determine if and how IAs must be conducted, and to what extent the assessment results must be taken into account. Against this background, part IV of this book (chapters 5 to 8) focused, first, on cross-cutting issues, namely on the underlying concepts of uncertainty, risk and knowledge generation (chapter 5). This chapter illustrated different causes of uncertainty, and, drawing inter alia on risk theory, identified three different ideal-type paradigms that describe how institutions should deal with uncertainty. The objective-managerial paradigm emphasizes the role of neutral, objective scientific expertise and regards participation mainly as a source of information. Impact Assessments based on such a paradigm follow what has been called an “information model”. At the other end of the spectrum, the subjective-pluralistic paradigm reflects deep skepticism against science and expertise and rather regards participation as the essential element: IAs should primarily be a platform for bargaining and negotiation; IAs would consequently serve to accumulate individual preferences. While - not surprisingly - institutionalized IAs hardly reflect such a paradigm, some IA tools developed and used by NGO favor, for example, community-based IAs, and could fall under this category. The third analytic-deliberative paradigm combines analytical and deliberative elements, based on discourse between experts and laypersons, between public authorities and external actors. In consequence, impact assessments based on such a paradigm

should not only inform decision-makers (like information models), or provide a platform for negotiations (like preference-accumulation models), but rather transform the policy- and decision-making process. They have therefore been described as “transformation models”. It is through the lenses of these paradigms and ideal-type models that rules and principles guiding the conduct of HRIAs were analyzed and evaluated. I have concluded that the EU’s IA regime mainly reflects the analytic-deliberative paradigm, even though at times some of the rights ensuring informed deliberation – such as the right to inspect documents – had to be litigated in court.

The fifth chapter also identified several cognitive biases that affect decision-making under uncertainty; being aware thereof can help to design HRIA law in a way to mitigate the risk that decisions are influenced by these cognitive biases. The final part of the fifth chapter addressed how law guides institutional knowledge generation and discussed the main types of internal and external knowledge sources used by public institutions. Institutionalized HRIAs do not only provide information and knowledge; rather, those in charge of conducting HRIAs do and must, as the EU case demonstrates, use both internal and external knowledge sources for their assessments.

Chapter 6 addressed the first follow-up question the principle of affectedness raises, namely how to determine which particular initiatives require an in-depth impact assessment. As HRIAs consume time and money, it would neither be possible nor desirable to conduct HRIAs for every single initiative. While EIA-law at times defines certain categories of initiatives that always require an impact assessment (“mandatory IAs”), in most cases, a screening process is necessary. In a nutshell, IAs are required where an initiative is likely to produce significant impacts on protected rights and interests. Likelihood and significance are also the core element of risk concepts, another reason why IA-law can be analyzed through the perspective of risk law. Consequently, those in charge of conducting the IA must predict the *likely* impacts of an initiative and evaluate whether they are *significant*. This is largely a technical and thus discretionary exercise. Still, as experience from domestic EIA law demonstrates, there are underlying legal principles that guide the identification of “likely significant impacts”. The correct application of these rules and principles can, to a certain extent, be subject to judicial review. For example, law can determine the scope of the interests and rights an IA-regime protects - a precondition for significance. Law also establishes a normative hierarchy: evident human rights infringements would, for example, generally be significant impacts requiring an in-depth analysis in order to determine whether the infringements can be justified. Law can also contain presumptions and define *types of initiatives* that per se require an in-depth IA. Law can also determine that certain *types of impacts* – for example impacts on indigenous peoples – are *per se* significant requiring closer analysis. Drawing largely on domestic EIA case law, chapter 6 has also analyzed other legal criteria that guide the identification of significant impacts. It has been shown that law determines, for example, how to identify the relevant geographical scope and the correct baseline scenario, whether mitigating measures may already be considered during the screening stage, and how to deal with cumulative and irreversible impacts or with conflicting scientific evidence.

Nevertheless, the determination of significance remains a largely subjective exercise, which is why it is important to also implement procedural safeguards to ensure decision-makers can be held accountable if they fail to conduct the screening and scoping in good faith. These procedural safeguards define whose views and perceptions shall be considered when determining likeli-

hood and significance. The EU's Impact Assessment regime requires to extensively use different internal knowledge sources. Also, the involvement of external stakeholders is generally required to provide information and (potentially not yet considered) opinions. For example, Roadmaps and Inception Impact Assessments must be published and thus enable stakeholders to provide feedback at an early stage of the IA and policy-making process. Existing rules on participation therefore also determine whose knowledge and whose opinion matter for the evaluation of the likelihood and significance of impacts. Also, the duty to give reason for why certain impacts are not regarded as significant functions as such an accountability mechanism: it forces authorities to explicitly justify a "finding of no significant impact".

The next two chapters focused on two core elements of impact assessments: participation and impact analysis in the narrow sense. Chapter 7 analyzed the relationship between participation and impact assessments. Participation is widely regarded as a core element of HRIAs. It is at the same time also a principle recognized in different sources of domestic and international public law. In spite of this broad consensus in the abstract, significant disagreement about the adequate modalities of participation exists at the operational level. As the different risk paradigms and IA models illustrate, participation can be an auxiliary source of information (information model), the central tool to determine preferences (preference-accumulation model), or necessary to critically review empirical/analytical results in a deliberative manner (transformation model). In other words: Participation can serve (primarily) instrumental or (also) inherent functions. The goal and the object of the impact assessment – i.e. the initiative to be accompanied by an IA – influence the choice of participation modalities. Based on this assumption, different participation modalities were discussed, in particular continuum models and information flow models. I have argued to combine these models and apply, based on human rights principles, a participation proportionality test for HRIAs. Recognizing the inherent value of participation, there would consequently be a rebuttable presumption in favor of more inclusive participation modalities. Still, less inclusive modalities of participation can be justified. Such a participation proportionality test therefore recognizes that public authorities need discretion in choosing an adequate participation model for each initiative at hand, but that they are also obliged to justify in every case why they applied a less inclusive modality. I have argued that this approach is reflected in the ECJ's *ClientEarth* judgment concerning the right to inspect draft IA documents.

The remainder of chapter 7 looked at the role of participation in the EU Impact Assessment regime. The different IA guidelines emphasize both the inherent and instrumental value of participation. Roadmaps, Inception Impact Assessments and IA Reports are published, and – in conjunction with Regulation (EC) No 1049/2001 – individuals generally have a judicially enforceable right to access these documents even before publication. This section has also outlined the different types of participation, ranging from online-consultation via expert groups to targeted consultation. A critical issue is the Commission's involvement of external actors as experts and interest representatives. While expert committees are important sources of external knowledge generation, the design of these committees has not remained without criticism. This is particularly problematic because the representation is often unbalanced, privileging for-profit representation. As the *Stichting Corporate Europe Observatory* judgment illustrated, the international relations exception in the Access to Information Regulation (EC) 1049/2001, as interpreted by the European courts, implies that appointed experts may in principle have unlimited access to documents while others, including many NGOs, would not.

Chapter 8 focused on the structured analysis stage in the narrow sense which is “at the heart” of impact assessments. This analysis is one element that distinguishes IAs from pure consultation or participation. In general, it is necessary to identify the policy objectives, different options to achieve the policy objectives, to analyze the impacts of each of the relevant policy options and, finally, to compare these different impacts. The analysis of impacts as such is generally a technical exercise so that the choice of methodologies is largely discretionary; law is thus largely deferential to agency and expert judgment. However, law contains, as I have illustrated, different principles that may apply, depending on the IA regime, to guide the choice of methodologies. For example, law can prescribe to what extent quantitative and qualitative methods must be used, or how to deal with residual risks.

The role of law is also important for the comparison between the different impacts of each policy option. If an option turns out to be not legally viable, it should – at least under the transformation model reflecting the analytic-deliberative paradigm of the EU Impact Assessment regime - be discarded at an early stage. This is a compliance mechanism that often works unnoticed: an option that would, for example, evidently violate human rights should therefore never even reach the decision-making stage. However, it may often be difficult to determine options that are clearly not legally viable, in particular absent specific legal thresholds or benchmarks. An evaluation of the impacts in absolute terms is therefore generally impossible. Thus, the comparison between different options – as required under HRIA regimes - enables decision-makers to evaluate impacts at least in relative terms. From a public law perspective, this is an expression of the principle of proportionality.

In addition, this chapter looked at the challenge of impact analysis under uncertainty. It outlined certain basic decision rules that can be applied to decision-making under uncertainty. For example, legal rules can prescribe to consider – or even rely on - best-case and/or worst-case scenarios. Another risk decision guideline is the precautionary principle, which - as I have argued - is also applicable to deal with human rights risks beyond environmental law. I have illustrated that such a human rights precautionary principle can provide guidance on how to evaluate decisions that pose human rights risks. The chapter concluded with a discussion of the legal nature and minimum content of the IA-report. This is insofar important as the IA-report encompasses the findings of the IA and is thus a source used by the EU legislature and external stakeholders to inform themselves about expected consequences. The IA report is, therefore, a knowledge source that may further influence the decision-making process. It has no binding legal force but may exert epistemic authority to influence decisions. This means, through the lenses of the public law approach, that the institutionalization of HRIAs does not only legitimize acts of public authority but can in itself be an act of authority that requires legitimization.

The final part V of this book (chapters 9 and 10) addressed the ability of institutionalized HRIAs to influence decision-making in order to render decisions “more compliant” with human rights. I have used insights from compliance theories as well as regulation theory, in particular by comparison with domestic EIA-law, to identify factors that can increase the relevance of institutionalized HRIAs. By “relevance”, I refer to the ability to increase compliance with and give effect to, first, the procedural requirements governing the conduct of HRIAs (“if” and “how”), and second, the obligation of decision-makers to adequately take the findings into account. For rationalist theories, mainly sanctions in the form of judicial review or reputational costs would ensure compliance with HRIA-law. In addition, incentives for an organization’s staff to comply with

HRIA-requirements may also produce the desired effect. However, this chapter also identified several deficits of rationalist compliance theories and discussed the basic features of normative and process-oriented theories. Chayes and Chayes, Franck and Koh, among others, found that sanction mechanisms are necessary but insufficient to explain compliance. They identified additional factors that determine compliance, including legal determinacy, legitimacy, and norm-internalization. Studies on the effectiveness of domestic EIAs have identified similar parameters that affect the ability of EIAs to advance environmental objectives. Against this background, I have focused on five factors that can increase the relevance of HRIAs: first, the availability and scope of formal accountability mechanisms (judicial review), second, the availability of political accountability mechanisms, third, the degree of legal determinacy, fourth, the degree of norm internalization and institutional learning, and finally, the availability of flexibility mechanisms to accommodate ex-post findings. Chapter 10 used these five factors to evaluate the role of institutionalized HRIAs in EU law. Through the lenses of these factors, chapter 10 identified several obstacles (such as the ECJ's narrow interpretation of legal standing), but also various aspects that help to ensure that institutionalized HRIAs are adequately conducted – an important precondition for effective human rights protection through procedure.

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