

December 2018

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Fernando Dias Simões

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Recommended Citation

Fernando Dias Simões, *Assessing the Impact of Trade and Investment Policies: Toward an Era of 'Enlightened' Policymaking?*, 86 U. Cin. L. Rev. 1211 (2018)

Available at: <https://scholarship.law.uc.edu/uclr/vol86/iss4/3>

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ASSESSING THE IMPACT OF TRADE AND INVESTMENT POLICIES: TOWARD AN ERA OF ‘ENLIGHTENED’ POLICYMAKING?

*Fernando Dias Simões**

Abstract

One of the sharpest ideological frictions that characterises modern societies is the one that opposes supporters and opponents of trade and investment liberalisation policies. The existence of mixed empirical findings underscores the importance of avoiding general assertions about the benefits of such policies. Policymaking processes need to take into account the economic, social, and environmental costs of trade and investment policies. Evidence-based approaches encourage governments to draw on scientific knowledge and replace ideology with more rational decision-making mechanisms. Sustainability Impact Assessment studies, a sophisticated and comprehensive tool designed by the European Commission, marked a turning point in the way international trade negotiations are conducted. They allow for a discussion between a broad range of stakeholders about a variety of societal concerns that was not included in the traditional trade agenda. However, there are many factors bearing on the trade policymaking process besides scientific knowledge. Policymaking is an essentially political process that seeks to balance competing interests. Impact assessment studies are meant to inform the policymaking process, not to replace political judgment. In the end, the influence of trade impact assessment studies in the formulation of new policies is in the hands of negotiators and governments.

* Associate Professor, Chinese University of Hong Kong; PhD, University of Santiago de Compostela; LLM, University of Glasgow; LLB, University of Coimbra.

I. A PERENNIAL CHASM

Over the last few decades policies for the promotion and protection of free trade and foreign investment have been shaping the world economy profoundly. Legal rules and principles have been put in place to govern cross-border transactions with the stated purpose of conducting to economic growth and social prosperity. Despite their sway on the economic, political, and social fabric of modern societies, the conformity of these policies with the laws of economics is not universally accepted. The existence of a causal link between trade and investment liberalisation policies and economic development has been the object of ceaseless discussions both inside and outside academic circles. While there are middle-ground, nuanced positions, participants in this debate can be divided into two groups: those who are optimistic about the contribution of free trade and investment policies for economic development; and those who are sceptical. Both sides of the dispute have been untiringly seeking for evidence to support their claims.

As regards trade liberalisation, ‘optimists’ point to empirical evidence demonstrating that these policies contribute significantly for economic growth.¹ From this perspective, free trade policies are an engine of economic progress, even if in some cases they produce undesired side-effects that need to be mitigated.² Differently, ‘sceptics’ claim that there is no sound empirical evidence on free trade as an instrument of economic development.³ The fragility or sheer inexistence of a link between trade liberalisation and economic improvement leads some to characterise free trade policies as an ideology,⁴ a dogma,⁵ a faith,⁶ or

1. See, e.g., Tarlok Singh, *Does International Trade Cause Economic Growth? A Survey*, 33 THE WORLD ECON. 1517 (2010); David Dollar & Aart Kraay, *Trade, Growth, and Poverty F22-F49* (World Bank Pol’y Res., Working Paper No. 2615, 2001), https://papers.ssrn.com/sol3/papers.cfm?abstract_id=632684; David Dollar & Robert H. Wade, *Trade Liberalization and Economic Growth: Does Trade Liberalization Contribute to Economic Prosperity?*, in CONTROVERSIES IN GLOBALIZATION: CONTENDING APPROACHES TO INTERNATIONAL RELATIONS 1-39 (Peter M. Haas & John A. Hird eds., 2013); HENDRIK VAN DEN BERG & JOSHUA J. LEWER, INTERNATIONAL TRADE AND ECONOMIC GROWTH (2007); DOUGLAS IRWIN, FREE TRADE UNDER FIRE (4th ed. 2015).

2. See JOSEPH E. STIGLITZ & ANDREW CHARLTON, FAIR TRADE FOR ALL: HOW TRADE CAN PROMOTE DEVELOPMENT (2005); Arvind Panagariya, *Miracles and Debacles: an Extension*, in HANDBOOK OF TRADE POLICY FOR DEVELOPMENT 417 (Arvid Lukauskas, Robert Stern & Gianni Zanini eds., 2013).

3. See, e.g., Francisco Rodriguez & Dani Rodrik, *Trade Policy and Economic Growth: A Skeptic’s Guide to the Cross-National Evidence*, 15 NAT’L BUREAU OF ECON. RESEARCH 261 (2001); EMMA SAMMAN, HUMAN DEVELOPMENT REPORT 2005, OPENNESS AND GROWTH: AN EMPIRICAL INVESTIGATION (2005); IAN FLETCHER, FREE TRADE DOESN’T WORK: WHAT SHOULD REPLACE IT AND WHY (2nd ed. 2011).

4. Robert Benson, *Free Trade as an Extremist Ideology: The Case of NAFTA*, 17 U. OF PUGET SOUND L. REV. 555 (1994); LEONARD GOMES, THE ECONOMICS AND IDEOLOGY OF FREE TRADE: A

even a myth⁷.

The existence of a causal relationship between foreign investment and economic development is also hotly debated. A number of scholars argue that policies for the promotion and protection of foreign direct investment can stimulate investment flows⁸ and contribute considerably to the host country's economic progress⁹. Contrarily, some commentators argue that the available empirical evidence does not suggest a significant association between these policies and investment flows¹⁰ or economic growth.¹¹

HISTORICAL REVIEW (2003); CRAIG BERRY, GLOBALISATION AND IDEOLOGY IN BRITAIN: NEOLIBERALISM, FREE TRADE AND THE GLOBAL ECONOMY (2011). *See also* KENNETH R. HOOVER, ECONOMICS AS IDEOLOGY: KEYNES, LASKI, HAYEK, AND THE CREATION OF CONTEMPORARY POLITICS (2003).

5. Inge Ropke, *Trade, Development, and Sustainability – a Critical Assessment of the Free Trade Dogma*, 9 ECOLOGICAL ECONOMICS/ECON. 13 (1994).

6. G. BRUCE DOERN & BRIAN W. TOMLIN, FAITH AND FEAR: THE FREE TRADE STORY (1992); Margaret Atwood, *Blind Faith and Free Trade*, in THE CASE AGAINST FREE TRADE: GATT, NAFTA, AND THE GLOBALIZATION OF CORPORATE POWER 92 (Ralph Nader ed., 1993).

7. RAVI BATRA, THE MYTH OF FREE TRADE: A PLAN FOR AMERICA'S ECONOMIC REVIVAL (1993); RAVI BATRA, THE MYTH OF FREE TRADE: THE POORING OF AMERICA (1996); GRAHAM DUNKLEY, FREE TRADE: MYTH, REALITIES AND ALTERNATIVES (2004); SHERROD BROWN, MYTHS OF FREE TRADE: WHY AMERICAN TRADE POLICY HAS FAILED (2006); GLOBALIZATION AND THE MYTHS OF FREE TRADE: HISTORY, THEORY, AND EMPIRICAL EVIDENCE 2007 (Anwar Shaikh ed., 2006); HA-JOON CHANG, BAD SAMARITANS: THE MYTH OF FREE TRADE AND THE SECRET HISTORY OF CAPITALISM (2008).

8. *See* Eric Neumayer & Laura Spess, *Do Bilateral Investment Treaties Increase Foreign Direct Investment to Developing Countries?*, 33 WORLD DEV. 1567 (2005); Matthias Busse, Jens Königer & Peter Nunnenkamp, *FDI Promotion Through Bilateral Investment Treaties: More than a Bit*, 146 REV. OF WORLD ECON. 147 (2010); Jennifer L. Tobin & Susan Rose-Ackerman, *When BITs have Some Bite: The Political-economic Environment for Bilateral Investment Treaties*, 6 REV. OF INT'L ORG. 1 (2011).

9. *See, e.g.*, EDWARD GRAHAM, FIGHTING THE WRONG ENEMY: ANTIGLOBAL ACTIVISTS AND MULTINATIONAL ENTERPRISES (2000); FOREIGN INVESTMENT IN DEVELOPING COUNTRIES (H.S. Kehal ed., 2004); THEODORE H. MORAN ET AL., DOES FOREIGN INVESTMENT PROMOTE DEVELOPMENT? (2005); THEODORE H. MORAN, HARNESSING FOREIGN DIRECT INVESTMENT FOR DEVELOPMENT: POLICIES FOR DEVELOPED AND DEVELOPING COUNTRIES (2006); ANTHONY BENDE-NABENDE, GLOBALISATION, FDI, REGIONAL INTEGRATION AND SUSTAINABLE DEVELOPMENT (2002).

10. *See, e.g.*, Mary Hallward-Driemeier, *Do Bilateral Investment Treaties Attract Foreign Direct Investment? Only a Bit... and They Could Bite*, World Bank Pol'y Res., Working Paper No. 3121, at 19 (2003), <http://documents.worldbank.org/curated/en/113541468761706209/pdf/multi0page.pdf>; Jason Webb Yackee, *Do Bilateral Investment Treaties Promote Foreign Direct Investment? Some Hints from Alternative Evidence*, 51 VA. J. INT'L L. 397 (2011); Henrik Hansen & John Rand, *On the Causal Links Between FDI and Growth in Developing Countries*, (World Inst. for Dev. Econ. Res., Research Paper No. 2005/31, 2005); Abdur Chowdhury & George Mavrotas, *FDI and Growth: What Causes What?*, 29 THE WORLD ECO. 9 (2006); United Nations Conference on Trade and Development, *The Role of International Investment Agreements in Attracting Foreign Direct Investment to Developing Countries* (2009); THE EFFECT OF TREATIES ON FOREIGN DIRECT INVESTMENT: BILATERAL INVESTMENT TREATIES, DOUBLE TAXATION TREATIES, AND INVESTMENT FLOWS (Karl P. Sauvant & Lisa E. Sachs eds., 2009); Manuchehr Irandoust, *A Survey of Recent Developments in the Literature of FDI-Led Growth Hypothesis*, 11 THE J. OF WORLD INV. & TRADE 275 (2010); Axel Berger et al., *Do Trade and Investment Agreements Lead to More FDI? Accounting for Key Provisions Inside the Black Box*, (Kiel Inst. for the World Econ., Working Paper No. 1647, 2010).

The assumption that there is a correlation between trade and investment liberalisation and economic growth has come under attack on its theoretical and empirical foundations. Ha-Joon Chang claims that the postulation that free trade is the key to global progress is an imagined history with no correspondence to reality.¹² Liberalisation policies are seen as part of a political agenda aimed at expanding the profits of multinational corporations.¹³ After the suspension of the Doha Development Round negotiations, Carin Smaller stated emphatically:

The contradictions between the promised benefits at the global level and the empirical evidence on the ground are harder and harder to explain. People around the world are aware of how the liberalization of trade and finance is affecting their daily lives and are refusing to accept the current approach . . . WTO members can no longer pretend that this new evidence does not exist. We know a lot more than we did 10 years ago when the WTO began.¹⁴

Since there are also mixed opinions about the advantages of investment liberalisation, it is surprising that states conclude international investment agreements so often.¹⁵ The reason for this apparently unfounded behaviour may be that states feel compelled to demonstrate that they offer an investor-friendly environment through the conclusion of investment treaties.¹⁶ Trade and investment liberalisation policies seem to be decided and implemented based on theoretical

11. See Liesbeth Colen, Miet Maertens & Johan Swinnen, *Foreign Direct Investment as an Engine for Economic Growth and Human Development: A Review of the Arguments and Empirical Evidence*, in FOREIGN DIRECT INVESTMENT AND HUMAN DEVELOPMENT: THE LAW AND ECONOMICS OF INTERNATIONAL INVESTMENT AGREEMENTS 70 (Olivier De Schutter et al. eds., 2013); Liesbeth Colen, Miet Maertens & Johan Swinnen, *Determinants of Foreign Direct Investment Flows to Developing Countries: the Role of International Investment Agreements*, in FOREIGN DIRECT INVESTMENT AND HUMAN DEVELOPMENT: THE LAW AND ECONOMICS OF INTERNATIONAL INVESTMENT AGREEMENTS 116 (Olivier De Schutter et al. eds., 2013); Amrita Chaudhuri & Hassan Benchechroun, *The Costs and Benefits of IIAs to Developing Countries: an Economic Perspective*, in IMPROVING INTERNATIONAL INVESTMENT AGREEMENTS 93 (Armand de Mestral & Céline Lévesque eds., 2013).

12. Ha-Joon Chang, *Kicking Away the Ladder: The "Real" History of Free Trade*, in GLOBALIZATION AND THE MYTHS OF FREE TRADE: HISTORY, THEORY AND EMPIRICAL EVIDENCE 23, 23 (Anwar Shaikh ed., 2007).

13. Robin Broad, *Introduction*, in GLOBAL BACKLASH: CITIZEN INITIATIVES FOR A JUST WORLD ECONOMY 13, 17 (Robin Broad ed., 2002).

14. See *WTO Talks Breakdown – Opportunity for a New Approach*, THE INST. FOR AGRIC. AND TRADE POL'Y, <https://archive.commondreams.org/scriptfiles/news2006/0724-11.htm> (last visited March 1, 2018).

15. Marie-Claire Segger & Andrew Newcombe, *An Integrated Agenda for Sustainable Development in International Investment Law*, in SUSTAINABLE DEVELOPMENT IN WORLD INVESTMENT LAW 99, 116 (Marie-Claire Cordonier-Segger et al. eds., 2011).

16. *Id.* at 117. See also Andrew Guzman, *Why LDCs Sign Treaties that Hurt Them: Explaining the Popularity of Bilateral Investment Treaties*, 38 VA. J. OF INT'L LAW 639 (1998).

assumptions that are not unequivocally supported by evidence. Discussing the eventual ratification of the Anti-Counterfeiting Trade Agreement (ACTA) by Australia, Senator Scott Ludlam observed:

For something such as this, it is not enough to simply proceed on some kind of blind ideological faith that all forms of trade agreement are uniformly good for all people in all countries, and that was the proposition that seemed to be advanced . . . with nothing to back it by way of formal or quantitative evidence.¹⁷

Also apropos the ACTA, Australian scholar Rimmer argued:

The secretive origins of the Anti-Counterfeiting Trade Agreement 2011 highlights the need for greater transparency and information-sharing about treaty negotiations; the necessity of democratic participation in policy formulation and development; and the demand for evidence-based policy making informed by independent, critical research on the economic, social, and political costs of treaties.¹⁸

According to Van Harten,¹⁹ the absence of clear evidence or of contradictory finding also brings about the need to rethink whether it makes sense to accord foreign investors the benefits of the investor-state dispute settlement mechanism.

While trade and investment policies have always been contentious, currently it can be said that they are under fire. In an age of accelerated globalisation, International Economic Law is at the centre of political and academic debates. The existence of inconclusive or mixed evidence underscores the importance of avoiding general assertions about the benefits of current laws and policies. The profound chasm between optimists and sceptics can only be attenuated through a reanalysis of theoretical assumptions and an unbiased reassessment of empirical findings. This exercise is vital to ensure that trade and investment policies, more than making sense on paper, do in fact work in a real life context. If it is concluded that trade and investment policies fail to

17. Scott Ludlam, *Speech on the ACTA Report of the Joint Standing Committee on Treaties* (June 27, 2012), <https://greensmps.org.au/articles/speech-acta-report-joint-standing-committee-treaties>

18. Matthew Rimmer, *A Submission to the Joint Standing Committee on Treaties on the Anti-Counterfeiting Trade Agreement 2011 (#ACTA)*, QUEENSLAND U. OF TECH. 1, 69 (2012). Rimmer added: “[I]t is disturbing that the *Anti-Counterfeiting Trade Agreement 2011* has been driven by ideology and faith, rather than by any evidence-based policy making.” *Id.* at 6.

19. Gus Van Harten, *Reforming the System of International Investment Dispute Settlement*, in, ALTERNATIVE VISIONS OF THE INTERNATIONAL LAW ON FOREIGN INVESTMENT. ESSAYS IN HONOUR OF MUTHUCUMARASWAMY SORNARAJAH 103, 110 (C.L. Lim ed., 2016).

achieve their stated purpose – promoting economic growth, creating jobs, and increasing the overall welfare of citizens – it is necessary to reconsider them and contemplate other alternatives.

II. MOVING FROM BELIEF TO REASON

Laws and policies on trade and investment liberalisation have a profound impact at the national and global level and cannot be based on erroneous theoretical assumptions or – even worse – conviction, wishful thinking, or faith. Commentators have been emphasising the need to adopt policymaking procedures that incorporate sound, reliable information on the real economic and social benefits and costs of policies.²⁰ Current knowledge about the effects of trade and investment policies is incomplete and imprecise. It is necessary to avoid ‘leaps of faith’ by putting greater emphasis on quantitative and qualitative studies that provide a thorough knowledge about the real-life effects of policies. This rational approach would allow to design new policies that take into due account the relative advantages and drawbacks of trade and investment policies and reshape them when they do not yield the intended effects.²¹ It would also allow for the management of the diverse expectations of different stakeholders and the reduction of discontent with the regime.²² The idea is to move the debate from ideological differences to a more rational appraisal of the competing arguments.²³

This approach argues that governments and policymakers need to pay more attention to robust, methodologically accurate empirical evidence. The decision-making process should be evidence-based, that is, it should be informed by an empirical assessment of the likely consequences of proposed policies.²⁴ The *ex ante* appraisal of trade proposals offers objective information that negotiators can incorporate into the discussion in order to address societal concerns.²⁵ Furthermore, the *ex*

20. See, e.g., Susan D. Franck, *Managing Expectations: Beyond Formal Adjudication*, in PROSPECTS IN INTERNATIONAL INVESTMENT LAW AND POLICY: WORLD TRADE FORUM 371, 372 (Roberto Echandi & Pierre Sauvé eds., 2013); Matthew Rimmer, *Trick or Treaty? The Australian Debate over the Anti-Counterfeiting Trade Agreement (ACTA)*, in ACTA AND THE PLURILATERAL ENFORCEMENT AGENDA: GENESIS AND AFTERMATH 1, 18-19 (Pedro Roffe and Xavier Seuba eds., 2014); Directorate General for Internal Policies Policy Department A: Economic and Scientific Policy, EUR. PARL. DOC. PE 578.992, 51 (2016).

21. Franck, *supra* note 20, at 372; Directorate General for Internal Policies Policy Department A: Economic and Scientific Policy, *supra* note 20, at 51.

22. Franck, *supra* note 20, at 371.

23. Clive George, Tomasz Iwanow & Colin Kirkpatrick, *Sustainability Impact Assessments Applied to Regional Integration*, in THE REGIONAL INTEGRATION MANUAL: QUANTITATIVE AND QUALITATIVE METHODS 247, 247 (Philippe De Lombaerde et al. eds., 2011).

24. *Id.*

25. See Clive George & Colin Kirkpatrick, *Trade and Development: Assessing the Impact of*

post assessment of policies can provide policymakers and governments with valuable information on the actual effectiveness of measures.²⁶

In this day and age, ‘evidence-based policymaking’ is a buzzword²⁷ frequently articulated by academics and policymakers. It is also commonplace in the media vocabulary.²⁸ Even though it may seem self-explanatory,²⁹ its definition is – like any good catchphrase – quite elusive. Rather elliptically, evidence-based policymaking denotes that policymaking should be based on or determined by scientifically rigorous evidence.³⁰ More precisely, the concept refers to the systematic appraisal of different forms of empirical research to be incorporated into the policymaking process.³¹ In the words of Philip Davies, evidence-based policymaking is an approach that “helps people make well informed decisions about policies, programmes and projects by putting the best available evidence from research at the heart of policy development and implementation”.³² This movement represents an ‘anti-ideological turn’ in policymaking by claiming that interventions should be grounded on empirical evidence of effectiveness instead of political beliefs.³³

The historical roots of this approach can be found in the ‘evidence-based medicine’ movement that developed since the 1980s.³⁴ The underlying argument of this theory is that research studies show that many common medical interventions are ineffective or even damaging to patients. As a result, practitioners should only implement treatments whose effectiveness has been evidenced in suitable clinical tests.³⁵ Some authors go even farther, claiming that

Trade Liberalisation on Sustainable Development 34-35, (Inst. for Dev. Pol’y and Mgmt., IARC Working Paper No. 5, 2004).

26. George, Iwanow & Kirkpatrick, *supra* note 23.

27. Brian Head, *Reconsidering Evidence-based Policy: Key Issues and Challenges*, 29 POL’Y AND SOC’Y 77, 78 (2010).

28. PAUL CAIRNEY, *THE POLITICS OF EVIDENCE-BASED POLICY MAKING* 1 (2016).

29. Greg Marston & Rob Watts, *Tampering With the Evidence: A Critical Appraisal of Evidence-Based Policy-Making*, 3 THE DRAWING BOARD: AN AUSTL. REV. OF PUB. AFF. 143, 144 (2003).

30. Carolyn Heinrich, *Evidence-Based Policy and Performance Management: Challenges and Prospects in Two Parallel Movements*, 37 AM. REV. OF PUB. ADMIN. 255, 255 (2007).

31. Marston & Watts, *supra* note 29; MARK BEVIR, *KEY CONCEPTS IN GOVERNANCE* 82 (2009); John Hoornbeek, *Evidence-based Policy*, in 1 INT’L ENCYCLOPEDIA OF POL. SCI. 860, 860 (Bertrand Badie, Dirk Berg-Schlosser & Leonardo Morlino eds., 2011).

32. Philip Davies, *Address at the Campbell Collaboration Colloquium: Is Evidence-Based Government Possible?* (2004), <http://citeseerx.ist.psu.edu/viewdoc/download?doi=10.1.1.545.364&rep=rep1&type=pdf>, at 3.

33. RAY PAWSON, *EVIDENCE-BASED POLICY: A REALIST PERSPECTIVE* 2 (2006).

34. Hoornbeek, *supra* note 31, at 861; DAVID BYRNE, *APPLYING SOCIAL SCIENCE: THE ROLE OF SOCIAL RESEARCH IN POLITICS, POLICY AND PRACTICE* 43 (2011).

35. Bevir, *supra* note 31, at 82; MARTYN HAMMERSLEY, *THE MYTH OF RESEARCH-BASED*

the evidence-based policymaking movement is a re-affirmation of the principle, which underpinned the 18th century ‘Age of Enlightenment’, according to which public policies should be based on reason.³⁶

The last few decades witnessed growing interest in the development and use of ‘evidence-based policymaking’ in a wide range of public policy areas such as criminal justice, education, the environment, housing, or social welfare.³⁷ Evidence-based approaches also became increasingly common regarding the creation and implementation of legal rules.³⁸ The Organisation for Economic Co-operation and Development (OECD) has been advocating the use of evidence-based policymaking to achieve the Millennium Development Goals.³⁹ The United Nations also considers evidence-based decision-making processes crucial for the development agenda.⁴⁰ In the European Union (“EU”), evidence-based rulemaking is presented as an essential part of the European Commission’s drive for ‘Better Regulation’.⁴¹ Key legislative proposals and cross-cutting policy proposals undergo an integrated impact assessment.⁴² These

POLICY AND PRACTICE 1, 2 (2013). See also David Sackett et al., *Evidence Based Medicine: What it is and What it Isn't*, 312 BRITISH MED. J. 71, 71 (1996).

36. Hoornbeek, *supra* note 31, at 860; Ian Sanderson, *Making Sense of 'What Works': Evidence Based Policy Making as Instrumental Rationality?*, 17 PUB. POL'Y AND ADMIN. 61, 61 (2002); Michael Heazle, John Kane & Haig Patapan, *Good Public Policy: on the Interaction of Political and Expert Authority*, in POLICY LEGITIMACY, SCIENCE AND POLITICAL AUTHORITY: KNOWLEDGE AND ACTION IN LIBERAL DEMOCRACIES 1, 8 (Michael Heazle & John Kane eds., 2016).

37. See STEPHEN BOCKING, NATURE'S EXPERTS: SCIENCE, POLITICS, AND THE ENVIRONMENT 21 (2004); Adrian Cherney & Brian Head, *Evidence-Based Policy and Practice: Key Challenges for Improvement*, 45 AUSTL. J. OF SOC. ISSUES 509, 510 (2010); Sandra M. Nutley, Isabel Walter & Huw T.O. Davies, USING EVIDENCE: HOW RESEARCH CAN INFORM PUBLIC SERVICES (2007); Ian Shemilt et al. eds., EVIDENCE-BASED DECISIONS AND ECONOMICS: HEALTH CARE, SOCIAL WELFARE, EDUCATION AND CRIMINAL JUSTICE (2d ed. 2010).

38. See, e.g., J.C. Oleson, *Risk in Sentencing: Constitutionally Suspect Variables and Evidence-Based Sentencing*, 64 S.M.U. L. REV. 1329 (2011); Bernard Trujillo, *Patterns in a Complex System: an Empirical Study of Valuation in Business Bankruptcy Cases*, 53 UCLA L. REV. 356 (2005); Timothy Stoltzfus Jost, *Our Broken Health Care System and How to Fix it: An Essay on Health Law and Policy*, 41 WAKE FOREST L. REV. 537 (2006); Stephanie M. Stern, *Residential Protectionism and the Legal Mythology of Home*, 107 MICH. L. REV. 1093 (2009).

39. ORGANISATION FOR ECONOMIC CO-OPERATION AND DEVELOPMENT, BEYOND THE MILLENNIUM DEVELOPMENT GOALS: TOWARDS AN OECD CONTRIBUTION TO THE POST-2015 AGENDA, [http://unstats.un.org/unsd/broaderprogress/pdf/POST-2015%20Overview%20Paper%20\(OECD\).pdf](http://unstats.un.org/unsd/broaderprogress/pdf/POST-2015%20Overview%20Paper%20(OECD).pdf).

40. Dep't of Econ. and Soc. Affairs of the UN Secretariat, *The Millennium Development Goals Report 2015* (2015), [http://www.un.org/millenniumgoals/2015_MDG_Report/pdf/MDG%202015%20rev%20\(July%2015\).pdf](http://www.un.org/millenniumgoals/2015_MDG_Report/pdf/MDG%202015%20rev%20(July%2015).pdf).

41. See European Commission, *Communication from the Commission to the European Parliament, the European Council and the Council: Better Regulation: Delivering Better Results for a Stronger Union*, COM (2016) 615 final (Sept. 14, 2016).

42. See ANNE CLAARTJE MARGREET MEUWESE, IMPACT ASSESSMENT IN EU LAWMAKING (2008).

studies are seen as an instrument to address the lack of evidence-based decision-making processes in the development of policy proposals.⁴³

Just like evidence-based medicine, evidence-based policymaking seeks to address a perceived gap between evidence and practice. The idea is that policymakers do not understand or sometimes even ignore the existent evidence.⁴⁴ In order to address this problem, this approach seeks to modernise and rationalise the policymaking process.⁴⁵ The use of the best available evidence can increase the quality of the process of policy development, implementation, and evaluation.⁴⁶ By making use of ‘scientific’ or ‘scholarly’ knowledge, policymakers can learn from previous successes and failures and choose the most rational, effective policies.⁴⁷ Policymakers are seen as neutral “managers” who identify a problem and find the most effective way of addressing it.⁴⁸ This appeal to rationality explains the popularity of the evidence-based policymaking movement, endowing it with an aura of scientific authority.⁴⁹

The concept of evidence-based policymaking has an intuitive, common sense logic,⁵⁰ some say even a ‘bewitching’ effect.⁵¹ Most people would agree that policies ought to be planned according to the best available information.⁵² There should be a direct, clear link between the existent evidence and policy choices.⁵³ The policymaking process needs to be designed in a way that enables the incorporation of the best data so as to identify rational alternatives and outcomes. This rational approach will illuminate the decision-making process, steering it from opinions and beliefs to sound, reliable evidence. Scientific knowledge should be put at the service

43. *Id.* at 3.

44. CAIRNEY, *supra* note 28.

45. Marston & Watts, *supra* note 29, at 144-145; Heazle, Kane & Patapan, *supra* note 36, at 2; Paul Burton, *Wicked, Diabolical or What? Responding Rationally in a Turbulent Environment*, in *RESPONDING TO CLIMATE CHANGE: LESSONS FROM AN AUSTRALIAN HOTSPOT* 5, 7 (Paul Burton ed., 2014); Michael Howlett & Sarah Giest, *The Policy-making Process*, in *ROUTLEDGE HANDBOOK OF PUBLIC POLICY* 17, 20 (Eduardo Araral Jr. et al. eds., 2013); Sue Mayer, *Using Evidence in Advocacy*, in *RESEARCH SKILLS FOR POLICY AND DEVELOPMENT: HOW TO FIND OUT FAST* 254, 254 (Alan Thomas & Giles Mohan eds., 2007).

46. Head, *supra* note 27, at 77.

47. Marston & Watts, *supra* note 29, at 144-145.

48. Howlett & Giest, *supra* note 45, at 20.

49. Bevir, *supra* note 31, at 82.

50. Marston & Watts, *supra* note 29, at 144.

51. CAIRNEY, *supra* note 28, at 2.

52. *Id.*; Marston & Watts, *supra* note 29, at 144; Mayer, *supra* note 45, at 254.

53. CAIRNEY, *supra* note 28, at 2.

of the policymaking process.⁵⁴

III. ASSESSING THE IMPACT OF TRADE AND INVESTMENT POLICIES

‘Evidence-based’ has become the new credo⁵⁵ or mantra⁵⁶ in the area of policymaking. The popularity of this approach has also stretched into the trade and investment realm. In the late 1990s, governments and international organisations started carrying out impact assessment studies to soothe civil society’s apprehension about the negative consequences of trade liberalisation.⁵⁷ In the context of the World Trade Organisation, trade impact assessment studies emerged for the first time in the run-up to the 1999 ministerial conference in Seattle.⁵⁸ Similar studies were conducted by the European Commission’s Directorate-General for Trade for the Doha Development Round negotiations.⁵⁹ The public protests that engulfed the Seattle meeting and the debacle of the negotiations for a Multilateral Agreement on Investment (MAI) persuaded the Commission to conduct impact assessment studies of all new measures proposed in international trade negotiations.⁶⁰ There now

54. Hoornbeek, *supra* note 31, at 861.

55. Directorate-General for Research, European Commission, *Report of the Expert Group of Science and Governance to Science, Economy and Society Directorate: Taking European Knowledge Society Seriously*, 1, 77, EUR 22700 (2007).

56. Cherney & Head, *supra* note 37, at 2.

57. Clive George, Rachid Nafti & Johanna Curran, *Capacity Building for Trade Impact Assessment: Lessons from the Development of Environmental Impact Assessment*, 19 *IMPACT ASSESSMENT AND PROJECT APPRAISAL* 311, 311 (2001); Colin Kirkpatrick & Clive George, *Assessing the Sustainability of Trade Policies and Agreements*, in *CONDUCTING SUSTAINABILITY ASSESSMENTS* 119, 120 (Organisation for Economic Co-Operation and Development ed., 2008); Clive George & Colin Kirkpatrick, *Sustainability Impact Assessment of Trade Agreements: From Public Dialogue to International Governance*, 10 *J. OF ENVTL. ASSESSMENT POL’Y & MGMT* 67, 68 (2008); Lisa Alf et al., *Towards a Transatlantic Dialog on Trade and the Environment: A Comparison of Approaches to Environmental Impact Assessments of Trade Agreements in the US and EU*, at 1, 45 (Apr. 2008), http://ecologic.eu/sites/files/event/2013/transatlantic-lunch-jan-08-final_report.pdf.

58. Paul Ekins & Tancrede Voituriez, *Overview and General Introduction*, in *TRADE, GLOBALIZATION AND SUSTAINABILITY IMPACT ASSESSMENT: A CRITICAL LOOK AT METHODS AND OUTCOMES* 1, 1 (Paul Ekins & Tancrede Voituriez eds., 2009); Clive George & Colin Kirkpatrick, *Creation of Processes: Sustainability Impact Assessments*, in *THE POLITICS OF TRADE: THE ROLE OF RESEARCH IN TRADE POLICY AND NEGOTIATION* 55, 55-56 (Diana Tussie ed., 2009); Markus Gehring, Sean Stephenson & Marie-Claire Cordonier Segger, *Sustainability Impact Assessments as Inputs and as Interpretative Aids in International Investment Law*, 18 *J. OF WORLD INV. & TRADE* 163, 168 (2017).

59. EUROPEAN COMMISSION, *HANDBOOK FOR TRADE SUSTAINABILITY IMPACT ASSESSMENT* (2d ed., 2016), http://trade.ec.europa.eu/doclib/docs/2016/april/tradoc_154464.PDF.

60. Thomas F. Ruddy & Lorenz M. Hilty, *Impact Assessment and Policy Learning in the European Commission*, 28 *ENVTL. IMPACT ASSESSMENT REV.* 90, 94 (2008); Colin Kirkpatrick & Clive George, *Methodological Issues in the Impact Assessment of Trade Policy: Experience from the European Commission’s Sustainability Impact Assessment (SIA) Programme*, 24 *IMPACT ASSESSMENT & PROJECT APPRAISAL* 325, 325 (2006); Gehring, Stephenson & Cordonier Segger, *supra* note 58.

seems to be a consensus that policymaking in the area of trade agreements should start and end with impact assessment.⁶¹ Over the last years, several international organisations such as the United Nations,⁶² the Organisation for Economic Co-operation and Development,⁶³ and the Asian Development Bank⁶⁴ have been conducting this type of studies.

We are living in the ‘age of assessment.’⁶⁵ The propagation of impact assessment studies signals a shift towards an ‘evidence-based’ approach to trade policymaking⁶⁶ and is a reflexion of the so-called ‘knowledge society.’⁶⁷ These studies are now a well-established instrument to inform trade negotiators and policymakers and steer their decision-making processes.⁶⁸ Quantitative and qualitative data on the relationship between proposed trade policies and their potential effects is collected in a scientific fashion.⁶⁹ The goal is to calculate the probable positive or negative consequences of a selection of alternative measures.⁷⁰ This information may contribute to adjust existing policies, generate new ones, or change the way

61. MICHAEL PLUMMER, DAVID CHEONG & SHINTARO HAMANAKA, *METHODOLOGY FOR IMPACT ASSESSMENT OF FREE TRADE AGREEMENTS* 1, 1 (2010).

62. See UNITED NATIONS ENVIRONMENT PROGRAMME, *REFERENCE MANUAL FOR THE INTEGRATED ASSESSMENT OF TRADE-RELATED POLICIES* (2001).

63. See Organisation for Economic Co-operation and Development, *Guidance on Sustainability Impact Assessment*, (2010), <https://www.oecd.org/greengrowth/46530443.pdf>; Organisation for Economic Co-operation and Development, *Conducting Sustainability Assessments* (2008); *ibid.*, <http://www.oecd-ilibrary.org/docserver/download/9708071e.pdf?expires=1520015023&id=id&accname=ocid43008851&checksum=FA45BC96D8E953EFA3113C68E8F5855A>; Organisation for Economic Co-operation and Development, *Assessing the Environmental Effects of Trade Liberalisation Agreements: Methodologies’ Methodologies* (2000), http://www.oecd-ilibrary.org/environment/assessing-the-environmental-effects-of-trade-liberalisation-agreements_9789264180659-en.

64. See Asian Development Bank, *How to Design, Negotiate, and Implement a Free Trade Agreement in Asia* (2008), https://aric.adb.org/pdf/fta_manual.pdf.

65. Steve Rayner, *Democracy in the Age of Assessment: Reflections on the Roles of Expertise and Democracy in the Public-sector Decision Making*, 30 *SCI. AND PUB. POL’Y* 163, 163 (2003).

66. Kirkpatrick & George, *supra* note 57, at 124.

67. Matthew Cashmore & Lone Kornov, *The Changing Theory of Impact Assessment*, in *SUSTAINABILITY ASSESSMENT: PLURALISM, PRACTICE AND PROGRESS* 18, 18 (Alan Bond, Angus Morrison-Saunders & Richard Howitt eds., 2013).

68. George, Iwanow & Kirkpatrick, *supra* note 23; Stephen White & Jakub Koniecki, *How Informed Should Decisions Be?*, in *SUSTAINABLE DEVELOPMENT, EVALUATION AND POLICY-MAKING: THEORY, PRACTISE AND QUALITY ASSURANCE* 129, 129 (Anneke von Raggamby & Frieder Rubik eds., 2012); Alf et al., *supra* note 57, at 1.

69. Kirkpatrick & George, *supra* note 57; George & Kirkpatrick, *supra* note 58.

70. Tom Bauler, *The Commission’s Impact Assessment Process: Handling the External Dimensions of Sustainability*, in *THE EUROPEAN UNION AND SUSTAINABLE DEVELOPMENT: INTERNAL AND EXTERNAL DIMENSIONS* 277, 278 (Marc Pallemarts & Albenaz Azmanova eds., 2006).

problems are identified and policies are formulated.⁷¹ This helps to rationalise and even facilitate the negotiating process by maximising the benefits and reducing the potential drawbacks of trade policies.⁷²

Furthermore, trade impact assessment studies also inform the general public about the potential effects of projected policies by including mechanisms for public participation and consultation.⁷³ Public participation is a key element of the process.⁷⁴ Consultation with stakeholders and experts can shed light on relevant issues that are frequently overlooked during negotiations.⁷⁵ The involvement of other agencies or departments may also add expertise in specific areas, particularly in relation to the environmental and social dimensions of trade policies.⁷⁶ This open, participatory debate about the consequences of international agreements might help policymakers to integrate societal concerns such as sustainable development more fully into trade policies.⁷⁷

Since trade impact assessment studies have been developed by different actors – national governments, international organisations, and non-governmental organisations – with diverse scopes and under different designations, there is no single methodology for conducting them.⁷⁸ Within the European Union, these studies are known as Sustainability Impact Assessment (“SIA”).

The European Commission describes SIA as follows:⁷⁹

71. See J. Ivan Scrase & William R. Sheate, *Integration and Integrated Approaches to Assessment: What do they Mean for the Environment?*, 4 J. OF ENVTL. POL’Y & PLAN. 275, 275 (2002).

72. George, Nafti & Curran, *supra* note 57, at 312; Ekins & Voituriez, *supra* note 58, at 9.

73. Kirkpatrick & George, *supra* note 57, at 120; George & Kirkpatrick, *supra* note 57, at 69; Gerald Berger, *Sustainability Impact Assessment: European Approaches*, in CONDUCTING SUSTAINABILITY ASSESSMENTS 15, 19 (Organisation for Economic Co-Operation and Development ed., 2008).

74. Markus Gehring & Marie-Claire Cordonier Segger, *Overcoming Obstacles with Opportunities: Trade and Investment Agreements for Sustainable Development*, in INTERNATIONAL INVESTMENT LAW AND DEVELOPMENT: BRIDGING THE GAP 93, 103 (Stephan Schill, Christian Tams & Rainer Hofmann eds., 2015).

75. *Id.*

76. Gehring, Stephenson & Cordonier Segger, *supra* note 58, at 175.

77. George & Kirkpatrick, *supra* note 58, at 58; Kirkpatrick & George, *supra* note 57; Kirkpatrick & George, *supra* note 60, at 327; Clive George & Bernice Goldsmith, *Impact Assessment of Trade-related Policies and Agreements: Experience and Challenges*, 24 IMPACT ASSESSMENT & PROJECT APPRAISAL 254, 254 (2006); See also Hussein Abaza & Robert Hamwey, *Integrated Assessment as a Tool for Achieving Sustainable Trade Policies*, 21 ENVTL. IMPACT ASSESSMENT REV. 481 (2001).

78. George, Iwanow & Kirkpatrick, *supra* note 23.

79. European Commission, *Sustainability Impact Assessments*, http://ec.europa.eu/trade/policy/policy-making/analysis/policy-evaluation/sustainability-impact-assessments/index_en.htm (last visited February 25, 2017); See also EUROPEAN COMMISSION, *supra* note 59, at 5 (“SIAs are independent *ex ante* assessments carried out by external consultants during major trade negotiations. They feed into and steer the negotiations, assessing the changes that are likely

The Sustainability Impact Assessment (SIA) is a DG Trade-specific tool for supporting major trade negotiations. SIAs provide the Commission with an in-depth analysis of the potential economic, social, human rights, and environmental impacts of ongoing trade negotiations.

These assessments are an opportunity for stakeholders in both the EU and in the partner countries to share their views with negotiators.

SIAs have several purposes, including:

- feeding information into and helping steer the negotiations
- assessing the changes that are likely to be caused by a trade agreement
- helping to identify possible trade-offs
- ensuring that the related policy choices are optimized.

SIAs contribute to sound, evidence-based and transparent trade negotiations.

The European Commission has been carrying out SIAs on all trade agreements negotiated since 1999. By the end of 2016, 25 SIAs had been conducted in support of bilateral and multilateral trade negotiations, and three were ongoing.⁸⁰ SIAs complement the initial impact assessment conducted by the Commission before negotiations are launched.⁸¹ Despite the use of the word ‘sustainability’, SIAs go beyond the mere assessment of environmental impact, also gauging the economic, social, and human rights consequences of trade agreements.⁸² Furthermore, these studies calculate the effect of trade agreements not only in the European Union, but also in the partner country and in developing countries,⁸³ thus making a significant contribution to regional and global governance.⁸⁴ In the words of the Commission:⁸⁵

to be caused by the trade agreement, helping to identify possible trade-offs, and ensuring that the related policy choices are optimised.”).

80. European Commission, *supra* note 79. A list of all completed and ongoing SIAs can be accessed at the same webpage: <http://ec.europa.eu/trade/policy/policy-making/analysis/sustainability-impact-assessments/>.

81. EUROPEAN COMMISSION, *supra* note 59, at 7.

82. Kirkpatrick & George, *supra* note 60, at 325.

83. EUROPEAN COMMISSION, *supra* note 59, at 5.

84. Kirkpatrick & George, *supra* note 60, at 325.

85. EUROPEAN COMMISSION, *supra* note 59, at 5-6.

SIA's consist of two equally important and complementary components:

(i) a robust analysis of the potential economic, social, human rights and environmental impacts that the trade agreement under negotiation could have, in the EU, in the partner country(ies) and in other relevant countries;

(ii) a continuous and wide-ranging consultation process which ensures a high degree of transparency and the engagement of all relevant stakeholders in the conduct of the SIA inside and outside the EU.

In April 2016 the Commission published the second edition of its Handbook for Trade Sustainability Impact Assessment.⁸⁶ The new edition seeks to incorporate a range of lessons drawn from the Commission's experience and the requests of stakeholders.⁸⁷ As regards the scope of SIA's, since 2012 they also include an assessment of the potential human rights consequences of trade agreements.⁸⁸ The second edition of the handbook also emphasises the importance of transparency:

Transparency is a central element of SIA's. By relying on a genuine, wide-ranging and continuous consultation of stakeholders, SIA's contribute to fulfilling the Commission's commitment to ensure transparent trade negotiations. They are a prime opportunity for stakeholders to inform EU negotiators of their views on the potential economic, social, human rights and environmental consequences of ongoing trade negotiations.⁸⁹

Furthermore, SIA's are an important tool for integrating sustainable development concerns into the trade policymaking process by measuring the effects and mitigating the tensions between trade and investment policies, climate change, and other sustainable development issues.⁹⁰ The European Commission states:

[T]he European Union is committed to stepping up efforts to see that international trade and investment are used as a tool to achieve

86. EUROPEAN COMMISSION, *supra* note 59. The first edition of the Handbook was published in 2006 – see EUROPEAN COMMISSION, *Handbook for Trade Sustainability Impact Assessment*, http://trade.ec.europa.eu/doclib/docs/2006/march/tradoc_127974.pdf (last visited February 24, 2017).

87. *Foreword by Commissioner Malmström*, in EUROPEAN COMMISSION, *supra* note 59, at 3.

88. EUROPEAN COMMISSION, *supra* note 59, at 5.

89. *Id.*

90. Gehring, Stephenson & Cordonier Segger, *supra* note 58, at 164.

genuine global sustainable development. SIAs contribute to this objective by assessing in depth the potential economic, social and environmental impacts of a proposed trade agreement whilst its negotiation is ongoing; as well as by providing recommendations on the accompanying measures that should be put in place (if a deal is agreed and implemented) in order to maximise likely benefits or mitigate possible negative impacts. SIAs also provide the opportunity for an analysis of the impact of the trade agreement on developing countries, in line with commitments stemming from the EU treaties on policy coherence for development, and particularly in relation to least developed countries⁹¹

In summary, the European Commission claims that SIAs are inspired by six key principles. SIAs are said to be:⁹²

- Integrated: SIAs are based on a comprehensive approach which looks at both benefits and costs; and covers economic, social, human rights and environmental considerations all in a single document.
- Independent: SIAs are carried out by external consultants in a neutral and unbiased manner, under strict rules on the absence of conflicts of interest.
- Evidence-based: SIAs should be based on the best available research, information and data presented in a transparent manner.
- Transparent: SIAs 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.
- Participatory: SIAs 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.
- Proportionate: The scope and the depth of each SIA should be calibrated to the importance and the type of trade measures being negotiated, as well as to the magnitude of the expected impacts.

The trade SIA programme signals an effort by the European Commission to adopt a new policymaking process that incorporates the best available evidence in a systematic way.⁹³ By analysing the expectable impact of policies, SIAs provide important inputs into the

91. EUROPEAN COMMISSION, *supra* note 59, at 5 (footnotes omitted).

92. *Id.* at 6.

93. Kirkpatrick & George, *supra* note 57, at 129.

negotiation process on the nexus between trade, investment, environment, social and human rights.⁹⁴ The focus on the distributive effects of trade policies endows SIAs with an all-inclusive approach that is necessary to achieve such a complex, multifaceted goal as sustainable development.⁹⁵ In the handbook it is recognised that ‘SIAs must provide analysis in more dimensions and based on more evidence than was foreseen ten years ago.’⁹⁶ The SIA model also allows the European Commission to adopt a more holistic perspective on the policymaking process by simultaneously pursuing diverse goals: ‘evidence-based policymaking’, ‘better governance’, ‘sustainable development’, and the need to ‘act globally.’⁹⁷

Trade impact assessment studies have been conducted for almost two decades. This consolidated practice suggests an attempt to move trade and investment policies towards a less ideological, more rational age. The recurrent backlash against trade and investment liberalisation calls for the use of reliable, sound evidence in policy development and implementation. Well informed, transparent decision-making processes may improve the quality of measures and outcomes. The hope is that these studies help to bridge the gap between “knowledge producers” (academics, program evaluators, policy analysts) and “knowledge consumers” (negotiators and policymakers).⁹⁸

What is more, the debate between ‘optimists’ and ‘sceptics’ goes beyond academic and political circles and reaches the community at large through media outlets.⁹⁹ Since they are the final addressees (and potential beneficiaries) of policies, trade impact assessment studies need to take into account the concerns of citizens regarding the interplay between trade liberalisation and sustainable development in a transparent and participatory manner.¹⁰⁰ The Commission’s handbook

94. Gehring, Stephenson & Cordonier Segger, *supra* note 58, at 165. The authors add that, besides their function as an input to the negotiating process, SIAs may also be relevant as interpretative tools. SIAs and the position papers issued by the European Commission in response may arguably be regarded as part of a treaty’s *travaux préparatoires* or the circumstances of its conclusion pursuant to article 32 of the Vienna Convention on the Laws of Treaties. *Id.* at 189.

95. Paul Ekins & Tancrede Voituriez, *Conclusion*, in, TRADE, GLOBALIZATION AND SUSTAINABILITY IMPACT ASSESSMENT: A CRITICAL LOOK AT METHODS AND OUTCOMES 331, 334 (Paul Ekins & Tancrede Voituriez eds., 2009).

96. *Foreword by Commissioner Malmström*, *supra* note 59, at 3.

97. Clive George & Colin Kirkpatrick, *Sustainability Impact Assessment of World Trade Negotiations: Current Practice and Lessons for Further Development* 2-3, (Impact Assessment Research Ctr., Working Paper No. 2, 2003), <https://ideas.repec.org/p/ags/idpmia/30587.html>.

98. KAREN BOGENSCHNEIDER & THOMAS J. CORBETT, EVIDENCE-BASED POLICYMAKING: INSIGHTS FROM POLICY-MINDED RESEARCHERS AND RESEARCH-MINDED POLICYMAKERS 2 (2010).

99. For a recent example, see Andrew Walker, *Is Free Trade Good or Bad?*, BBC NEWS (January 18, 2017), <http://www.bbc.com/news/business-38209407>.

100. Ruddy & Hilty, *supra* note 60, at 102. See PARTICIPATION FOR SUSTAINABILITY IN TRADE (Sophie Thoyer & Benoît Martimort-Asso eds., 2007).

also underlines the importance of “close dialogue with all relevant stakeholders, including the more vulnerable ones” in order to “capture the wider implications of our policy choices and to prevent unintended side-effects. With this prevention-driven approach, we can ensure that our trade policy genuinely works for all.”¹⁰¹

IV. TOWARD AN ERA OF ‘ENLIGHTENED’ TRADE POLICY?

Impact assessment studies are a key instrument in the formulation of sound, transparent, evidence-based trade and investment policies.¹⁰² In abstract, they allow to ‘enlighten’ the policymaking process by rendering it more rational, thus achieving better, scientifically tested outcomes. However, they are faced with serious obstacles. While some of those difficulties are common to any evidence-based approach, others result from the particular nature of international trade negotiations.

A. General limitations of the evidence-based approach

Like other approaches that seek to make the policymaking process more rational, evidence-based policymaking faces several challenges.

First, as the name denotes, evidence-based policymaking is centred on evidence. However, the concept of evidence is vague¹⁰³ and contentious¹⁰⁴. Different types of ‘evidence’ can enter into the policymaking process since there are multiple sources of information and varied ways of assessing it.¹⁰⁵ Not all “evidence is equal, nor equally robust.”¹⁰⁶ There are no clear rules on how evidence should be evaluated nor instructions on how it should be used in different policy fields.¹⁰⁷ Furthermore, the qualification of information as ‘evidence’ is not a neutral, objective judgement, but the result of a decision made by someone in a particular context, for a specific purpose.¹⁰⁸ This assessment is not a purely technical exercise, as personal assumptions

101. *Foreword by Commissioner Malmström, supra note 59, at 3.*

102. EUROPEAN COMMISSION, *supra note 59, at 5.*

103. Bevir, *supra note 31, at 82-83.*

104. Marston & Watts, *supra note 29, at 145.*

105. Bevir, *supra note 31, at 82-83*; Eileen Munro, *Evidence-Based Policy, in PHILOSOPHY OF SOCIAL SCIENCE: A NEW INTRODUCTION* 48, 51-52 (Nancy Cartwright & Eleonora Montuschi eds., 2014); James Meadowcroft & Reinhard Steurer, *Assessment Practices in the Policy and Politics Cycles: A Contribution to Reflexive Governance for Sustainable Development?*, J. OF ENVTL. POL’Y AND PLAN. 1, 5 (2014).

106. Marston & Watts, *supra note 29, at 157.*

107. Bevir, *supra note 31, at 82-83.*

108. Munro, *supra note 105, at 51.*

and value judgements are normally involved.¹⁰⁹ The product of scientific research is only treated as evidence when someone decides that it will support a certain claim.¹¹⁰ As a result, evidence underpinning evidence-based policymaking processes cannot be considered absolutely neutral.¹¹¹

Second, policymakers may find it difficult to sort out the ‘best’ evidence from all the available information since, like policymakers, scientists often disagree.¹¹² Policymakers may also be generalist individuals who lack the necessary expertise to understand the intricacies of the information before them. As a result, they may rely more on the perception of those providing them with evidence than on the evidence itself.¹¹³

Third, policymakers face time constraints. Sound, reliable research requires significant amounts of time, which may not be compatible with policy cycles that require prompt responses. Policymakers are frequently required to address both perceived emergencies and ambitious policy agendas.¹¹⁴ They may decide not to wait for the results of research.¹¹⁵

Fourth, evidence-based approaches to policymaking do not seem to have the same traction in all fields. While they appear to work well in the area of natural sciences,¹¹⁶ it seems difficult to implement the same model regarding social phenomena¹¹⁷. Policymakers require a higher degree of certainty when mulling measures that generate strong opposition.¹¹⁸ Evidence-based approaches seem to be less effective when issues are contentious.¹¹⁹ In such cases arguments tend to become politicised,¹²⁰ with parties arguing that research findings are biased and lack objectivity.¹²¹ Different factions engage

109. Marston & Watts, *supra* note 29, at 157; Richard Tarasofsky, *Report on the Workshop Methodologies for Environmental Assessment of Trade Liberalisation Agreements*, in *ASSESSING THE ENVIRONMENTAL EFFECTS OF TRADE LIBERALISATION AGREEMENTS: METHODOLOGIES* 11, 12 (OECD, 2000).

110. Marston & Watts, *supra* note 29, at 157.

111. *Id.*

112. Hoornbeek, *supra* note 31, at 862.

113. *Id.*

114. *Id.*

115. Marston & Watts, *supra* note 29, at 146.

116. Bevir, *supra* note 31, at 84.

117. Munro, *supra* note 105, at 58.

118. Michael Heazle, *Rationality under Uncertainty: Why Politics Matters*, in *RESPONDING TO CLIMATE CHANGE: LESSONS FROM AN AUSTRALIAN HOTSPOT* 15, 19 (Paul Burton ed., 2014).

119. Brian Head, *Evidence-based Policy-making for Innovation*, in *HANDBOOK OF INNOVATION IN PUBLIC SERVICES* 143, 153 (Stephen Osborne & Louise Brown eds., 2013).

120. *Id.* at 145; Head, *supra* note 27, at 81.

121. Head, *supra* note 27, at 81.

in a debate about who has the ‘real science’¹²², leading to the ‘scientization’ of controversies.¹²³

Finally, commentators have expressed serious reservations about the possibility of effectively incorporating scientific evidence into policymaking processes given the deep interconnection between policymaking and politics. In the field of policymaking, science cannot be totally separated from politics.¹²⁴ Sarewitz talked about the ‘myth of authoritativeness’, arguing that it is an illusion to think that science can offer a ‘rational’ solution to political debates.¹²⁵ Quite ironically, there is little evidence of the impact of evidence in policymaking processes.¹²⁶ While vast amounts of money are invested in policy analysis, its results do not seem to be used by policymakers to make better decisions.¹²⁷ Just because information, data, or even sound ‘evidence’ has been brought to light, one should not automatically assume that it will be endorsed or implemented by policymakers. Policymakers and political leaders are often influenced by many other factors besides scientific findings.¹²⁸ Value judgements, political preferences and assumptions all play a role in most policymaking processes.¹²⁹ Additionally, policymakers may not be neutral or competent to assess the available evidence.¹³⁰ Like everyone else, policymakers and politicians are subject to cognitive biases.¹³¹ The policymaking process is thus marked by bounded rationality.¹³²

Furthermore, political leaders are permanently worried about maintaining support from their allies and the general public, responding to questions from the media and managing political risks.¹³³ Policy choices have to pass the technical challenge (will they work?) but also

122. MICHAEL HEAZLE, UNCERTAINTY IN POLICY MAKING: VALUES AND EVIDENCE IN COMPLEX DECISIONS 72 (2010).

123. Daniel Sarewitz, *How Science Makes Environmental Controversies Worse*, 7 ENV'TL SCI. & POL'Y 385, 399 (2004).

124. See, e.g., SHEILA JASANOFF, THE FIFTH BRANCH: SCIENCE ADVISORS AS POLICYMAKERS (1990).

125. DANIEL SAREWITZ, FRONTIERS OF ILLUSION: SCIENCE, TECHNOLOGY AND THE POLITICS OF PROGRESS 85 (1996).

126. BOGENSCHNEIDER & CORBETT, *supra* note 98, at 27.

127. See Nancy Shulock, *The Paradox of Policy Analysis: If it is Not Used, Why do we Produce so Much of it?*, 18 J. OF POL'Y ANALYSIS & MGMT. 226 (1999).

128. Head, *supra* note 27, at 80; Head, *supra* note 119, at 144.

129. Mayer, *supra* note 45, at 254; Munro, *supra* note 105, at 59; NATIONAL RESEARCH COUNCIL, USING SCIENCE AS EVIDENCE IN PUBLIC POLICY 14-15 (2012).

130. Howlett & Giest, *supra* note 45, at 20.

131. See DANIEL KAHNEMAN, THINKING, FAST AND SLOW (2011).

132. Sandra Nutley & Jeff Webb, *Evidence and the Policy Process*, in WHAT WORKS? EVIDENCE-BASED POLICY AND PRACTICE IN PUBLIC SERVICES 13, 35 (Huw T.O. Davies, Sandra M. Nutley & Peter C. Smith eds., 2000).

133. Head, *supra* note 27, at 80; Head, *supra* note 119, at 144.

the legitimacy challenge (will they be supported)?¹³⁴ In policy fields with a higher public impact like the economy, the second question becomes dominant.¹³⁵ Policymaking is an essentially political process that seeks to balance competing interests.¹³⁶ This exercise of bargaining and negotiation often outweighs ‘rational’ considerations.¹³⁷ In the words of Gary Banks, policy typically results from a “maelstrom of political energy, vested interests and lobbying.”¹³⁸ In the end, the policymaking process seems to be more about persuasion and support than about scientific validity.¹³⁹

Policymakers attach great value to research because it plays a fundamental role not only in policy formulation but also in political argumentation.¹⁴⁰ Scientific knowledge performs a legitimising function, endowing governments with ‘epistemic authority’¹⁴¹ and thus enhancing their legitimacy.¹⁴² The perception that governments make use of reliable, relevant knowledge creates confidence that their decisions are rational.¹⁴³ Furthermore, expert knowledge can lend authority to certain policy positions, helping to validate an organisation or political party’s preferences while undermining others.¹⁴⁴ This way of using evidence is especially relevant in highly contested policy fields.¹⁴⁵

While the evidence-based movement suggests a ‘rational’ approach to the policymaking process, this ideal of a ‘knowledge society’ is detached from the real world.¹⁴⁶ In 2014, Anne Glover, then the European Union’s Chief Scientific Adviser, said that one of the major challenges faced by the European Commission was to disconnect its evidence gathering processes from the ‘political

134. Gerry Stoker & Mark Evans, *Crafting Public Policy: Choosing the Right Social Science Method*, in EVIDENCE-BASED POLICY MAKING IN THE SOCIAL SCIENCES: METHODS THAT MATTER 29, 36 (Gerry Stoker & Mark Evans eds., 2016).

135. *Id.*

136. Meadowcroft & Steurer, *supra* note 105, at 11; Clive George & Colin Kirkpatrick, *Political Challenges in Policy-Level Evaluation for Sustainable Development: The Case of Trade Policy*, in SUSTAINABLE DEVELOPMENT, EVALUATION AND POLICY-MAKING: THEORY, PRACTISE AND QUALITY ASSURANCE 73, 73 (Anneke von Raggamby & Frieder Rubik eds., 2012).

137. Howlett & Giest, *supra* note 45, at 20.

138. GARY BANKS, EVIDENCE-BASED POLICY MAKING: WHAT IS IT? HOW DO WE GET IT? 7 (2009).

139. Brian Head, *Three Lenses of Evidence-Based Policy*, 67 AUSTL. J. OF PUB. ADMIN. 1, 5 (2008).

140. CHRISTINA BOSWELL, THE POLITICAL USES OF EXPERT KNOWLEDGE: IMMIGRATION POLICY AND SOCIAL RESEARCH 7 (2009).

141. RAYMOND GEUSS, HISTORY AND ILLUSION IN POLITICS 38 (2001).

142. BOSWELL, *supra* note 140, at 7.

143. *Id.*

144. Nutley, Walter & Davies, *supra* note 37, at 39.

145. BOSWELL, , *supra* note 140, at 7.

146. Meadowcroft & Steurer, *supra* note 105, at 4.

imperative' driving policy proposals.¹⁴⁷ According to Glover, consultancy companies requested by the Commission to conduct independent scientific studies have little incentive to produce evidence that contradicts the Commission's political agenda because they want to attract more business.¹⁴⁸

The instrumental use of scientific knowledge creates a risk that evidence-based approaches are used by governments and policymakers to legitimise their political and ideological preferences.¹⁴⁹ Science may be used as a rhetorical tool to create the illusion that the policymaking process has been depoliticised.¹⁵⁰ This may result in a shift from evidence-based policy (the rational development of policies on the basis of evidence) to policy-based evidence – the selective use of research to demonstrate that policies have worked, continue to work, and will work in the future.¹⁵¹ Policymakers may engage in cherry-picking, using evidence when it supports their political preferences but otherwise ignoring it.¹⁵² Researchers might be subject to attempts to politicise or silence objective scientific research.¹⁵³ Policymakers and politicians might also try to act as "policy elites," increasing their control over what constitutes knowledge and undervaluing other forms of information and the voices of ordinary citizens.¹⁵⁴ Political debates might escalate into a battle between different policy proposals all claiming to be 'scientifically' and 'rationally' based.¹⁵⁵

B. Trade negotiations: between bounded rationality and scientific legitimacy

International trade and investment agreements are the result of a bargaining process between two or more parties, each of which puts forward an initial position, open to negotiation. This is an intrinsically

147. Frédéric Simon, *EU Twisting Facts to Fit Political Agenda, Chief Scientist Says*, EURACTIVE, (May 27, 2014), <http://www.euractiv.com/section/science-policymaking/news/eu-twisting-facts-to-fit-political-agenda-chief-scientist-says/>.

148. *Id.*

149. See YARON EZRAHI, *THE DESCENT OF ICARUS* 14, 17 (1990).

150. Emma Clarence, *Technocracy Reinvented: The New Evidence Based Policy Movement*, 17 *PUBLIC POLICY* PUB. POL'Y & ADMIN. 1, 4 (2002); Sandra Nutley, Isabel Walter and Huw Davies, *Past, Present, and Possible Futures for Evidence-based Policy*, in *EVIDENCE FOR POLICY AND DECISION-MAKING: A PRACTICAL GUIDE* (1, 21 (George Argyrous ed., 2009)).

151. BYRNE, *supra* note 34, at 5. 99

152. Clarence, *supra* note 150, at 5.

153. See Linda Rosenstock & Lore Jackson Lee, *Attacks on Science: The Risks to Evidence-Based Policy*, 92 *AM. J. OF PUB. HEALTH* 14, 14 (2002).

154. Marston & Watts, *supra* note 29, at 158.

155. Heazle, *supra* note 118.

political process.¹⁵⁶ Trade policies are by nature distributive since they define who benefits and loses with the government's intervention in the market.¹⁵⁷ Vested interests are at the heart of the process.¹⁵⁸ Trade policymaking is almost inexorably skewed since certain interests may triumph over others and even the national interest.¹⁵⁹

Robert Putnam¹⁶⁰ described international trade negotiations as part of a 'two-level game' composed of an international level and a domestic level. In the international dimension, negotiations involve a broad assortment of actors, including national governments, corporations, non-governmental organisations, and consumer groups. All of these entities pursue different interests and seek to influence not only on the outcome of the negotiations but also the way they are conducted.¹⁶¹ Negotiators, as agents for national principals, strive to achieve an outcome in line with the national preference.¹⁶² In the domestic dimension, organised lobby groups, such as political parties, business corporations, trade unions, non-governmental organisations, and local and regional governments, exert strong influence on national governments in an attempt to steer its trade policy.¹⁶³ Different stakeholders, pursuing varying interests, all seek to influence the national negotiating position.

Negotiators in international trade negotiations make decisions based on imperfect information – they are limited by their bounded rationality.¹⁶⁴ They do not know all of the circumstances surrounding the

156. Diana Tussie, *The Politics of Trade: The Role of Research in Trade Policy and Negotiations*, in *THE POLITICS OF TRADE: THE ROLE OF RESEARCH IN TRADE POLICY AND NEGOTIATION* 1, 3 (Diana Tussie ed., 2009).

157. Diana Tussie & Pablo Heidrich, *The Research Challenge in the Context of Permanent Negotiations*, in *RESEARCH AND INTERNATIONAL TRADE POLICY NEGOTIATIONS: KNOWLEDGE AND POWER IN LATIN AMERICA* 21, 37 (Mercedes Botto ed., 2010); William A. Kerr, *Introduction to Trade Policy*, in *HANDBOOK ON INTERNATIONAL TRADE POLICY* 1, 1 (William A. Kerr & James D. Gaisford eds., 2007).

158. Kerr, *supra* note 157, at 1.

159. James Gaisford & Annette Hester, *Why are There Trade Agreements?*, in *HANDBOOK ON INTERNATIONAL TRADE POLICY* 57, 66 (William Kerr & James Gaisford eds., 2007).

160. Robert D. Putnam, *Diplomacy and Domestic Politics: The Logic of Two-level Games*, 42 *INTERNATIONAL ORGANIZATION* 427 (1988). See also *DOUBLE-EDGED DIPLOMACY: INTERNATIONAL BARGAINING AND DOMESTIC POLITICS* (Peter B. Evans, Harold K. Jacobson & Robert D. Putnam eds., 1993).

161. Alice Landau, *Analyzing International Economic Negotiations: Towards a Synthesis of Approaches*, 5 *International Negotiation* INT'L NEGOT. 1, 4 (2000).

162. Stephen Woolcock, *Factors Shaping Economic Diplomacy: An Analytical Toolkit*, in *THE NEW ECONOMIC DIPLOMACY: DECISION-MAKING AND NEGOTIATION IN INTERNATIONAL ECONOMIC RELATIONS* 17, 22 (Nicholas Bayne & Stephen Woolcock eds., 3rd ed. 2011).

163. TUSSIE, *supra* note 156; BERNARD M. HOEKMAN & MICHEL M. KOSTECKI, *THE POLITICAL ECONOMY OF THE WORLD TRADING SYSTEM: THE WTO AND BEYOND* 638 (Oxf. Univ. Press, 3d ed. 2009); Tancrède Voituriez et al., *Making Trade Sustainable Impact Assessment more Relevant to Trade Negotiations*, 24 *IMPACT ASSESSMENT & PROJECT APPRAISAL* 335, 336 (2006).

164. WOOLCOCK, *supra* note 162; John Odell, *Introduction*, in *NEGOT. TRADE: DEV. COUNTRIES*

negotiations, *inter alia*, the future evolution of markets or what deals the other party might be willing to accept.¹⁶⁵ Science cannot foresee such complex scenarios with certainty. As a result, negotiators estimate consequences and put rough values on alternative lines of conduct.¹⁶⁶ Furthermore, negotiators, like all mortals, are subject to common judgement biases that affect the value they place on alternative options and how they respond to negative feedback.¹⁶⁷ The ideas, values or worldviews of negotiators can have significant bearing, especially in situations of uncertainty or when judgement calls have to be made, which is often the case.¹⁶⁸

Trade and investment negotiations are surrounded by controversy. Policies are frequently accused of lacking legitimacy because their contribution to economic and social development is not supported by sound, undisputed empirical evidence. This is reflected, for instance, in the ongoing debate about a seeming legitimacy crisis of international investment law.¹⁶⁹ Much of this criticism is associated with the increase in the number of cases submitted to investment arbitration and the controversial nature of some awards rendered in high-profile cases. Several commentators even cast a shadow of doubt about the legitimacy of the international investment law system.¹⁷⁰

The evidence-based approach to policymaking is attractive for governments because policies need to seem rational in order to have legitimacy.¹⁷¹ Researchers derive their legitimacy from their commitment to rationality.¹⁷² However, while researchers engage in a systematic endeavour to understand natural and social phenomena, policymakers are more concerned with finding practical responses for public policy issues.¹⁷³ Hence, scientific knowledge may play two different roles in the formulation of trade policies. First, it can sustain a state's demand in a trade negotiation. Second, it can operate as a

IN THE WTO & NAFTA 9 (John Odell ed., (Cambridge Univ. Press, 2006).),

165. JOHN ODELL, *NEGOTIATING THE WORLD ECONOMY* 19 (Cornell Univ. Press, 2000).

166. *Id.*

167. *Id.*, at 3.

168. WOOLCOCK, *supra* note 162, at 24-25.

169. STEPHAN SCHILL, CHRISTIAN TAMS & RAINER HOFMANN, *International Investment Law and Development: Friends or Foes?*, in *INT'L INV. L. & DEV.: BRIDGING THE GAP* 27 (in Stephan Schill, Christian Tams & Rainer Hofmann eds., 2015).

170. STEPHAN SCHILL, *International Investment Law as International Development Law*, in *YEARBOOK ON INT'L INV. L. & POL'Y. 2012-2013* 345 (Andrea Bjorklund ed, (2014);), *See also* Charles Brower & Stephan Schill, *Is Arbitration a Threat or a Boon to the Legitimacy of International Investment Law?* 9 *CHI. J. OF INT'L L.* 471, 471 (2009).

171. HEAZLE, *supra* note 122, at 4.

172. HEAZLE, KANE & PATAPAN, *supra* note 36, at 2.

173. *See* Nathan Caplan, *The Two-Communities Theory and Knowledge Utilization*, 22 *AM. BEHAVIORAL SCI* 459, 459 (1979).

legitimising tool.¹⁷⁴ While the first dimension shapes a country's negotiating agenda, the second legitimises the implementation of a trade agenda that is the result of several other forces, often of a political nature.¹⁷⁵ Evidence-based policymaking runs the risk of being used merely as a maquillage of legitimacy to disguise contested political options. Instead of rationalising and informing the policymaking process, research may be used to support prior positions.¹⁷⁶

Within the European Union there are two types of studies concerning the impact of trade policies: trade SIAs and Impact Assessments (IAs). IAs are prepared by Commission services in accordance with the Commission's guidelines and tools. They accompany the decision by the College of Commissioners to request a negotiating authorisation from the Council of the European Union, together with the draft negotiating directives to be issued by the latter.¹⁷⁷ Once the Commission receives the negotiating mandate, a trade SIA is launched. Therefore, while the IA is performed before the negotiating mandate is granted, and examines whether action should be taken; the trade SIA is undertaken after the negotiation process has been launched, discussing how action should be taken and what its likely consequences are.¹⁷⁸ Another difference is that while SIAs are independent assessments carried out by external consultants,¹⁷⁹ with the Commission commenting on their findings via so-called 'position papers';¹⁸⁰ the IA is undertaken by Commission services¹⁸¹ – even though most of the evidence used in the assessment is often drawn from external studies.¹⁸² Finally, whereas trade SIAs are conducted for all major trade negotiations by the European Union, IAs are less frequent. Still, IAs seem to have become more common over the last years.¹⁸³

As a rule, IAs allow for public consultation and full public access to

174. TUSSIE, *supra* note 156, at 6.

175. *Id.*

176. BOGENSCHNEIDER & CORBETT, *supra* note 98, at 2.

177. EUROPEAN COMMISSION, *supra* note 59, at 7.

178. Jaques Pelkmans et al., *EU-US Transatlantic Trade and Investment Partnership: Detailed Appraisal of the European Commission's Impact Assessment*, EUROPEAN PARLIAMENTARY RESEARCH SERVICE 8-9 (Apr. 2014), [http://www.europarl.europa.eu/RegData/etudes/etudes/join/2014/528798/IPOL-JOIN_ET\(2014\)528798_EN.pdf](http://www.europarl.europa.eu/RegData/etudes/etudes/join/2014/528798/IPOL-JOIN_ET(2014)528798_EN.pdf); Jacques Pelkmans et al., *The Impact of TTIP: The Underlying Economic Model and Comparisons*, CENTRE FOR EUR. POL'Y. STUDIES 7 (Oct. 2014) <https://www.ceps.eu/system/files/No%2093%20Appraisal%20of%20IA%20on%20TTIP.pdf>.

179. EUROPEAN COMMISSION, *supra* note 59, at 5, 6 & 9.

180. Pelkmans et al., *Detailed Appraisal*, *supra* note 178, at 9 n.10.

181. EUROPEAN COMMISSION, *supra* note 59, at 7.

182. Pelkmans et al., *Detailed Appraisal*, *supra* note 178, at 9, n.10; Pelkmans et al., *The Impact of TTIP*, *supra* note 178, at 7 n.9.

183. Pelkmans et al., *Detailed Appraisal*, *supra* note 178, at 9.

assessment reports.¹⁸⁴ However, this is not always the case in the field of trade: assessments are conducted internally and access to the reports is generally restricted.¹⁸⁵ Pursuant to the European Commission's guidelines, the Secretariat General's Impact Assessment Unit publishes the final IA report and the executive summary on the Europa IA website along with the proposal and the Impact Assessment Board's opinion. However, in certain cases, such as when information is confidential and sensitive, a decision to restrict or delay the publication may be considered.¹⁸⁶

At a first glimpse, the restriction of public access to the IA seems justified. If the European Union's negotiating position was disclosed publicly, this could weaken the position of negotiators.¹⁸⁷ However, there is a side-effect to confidentiality: the negotiating mandate is not based on an impact assessment conducted publicly.¹⁸⁸ Differently from other IAs that involve public consultation and full public access to assessment reports, trade IAs are normally kept confidential. This seems to break the link between the evidence-base provided by the IA and the negotiating directive proposal, calling into question, to a certain extent, the utility of the IA beyond the closed-circle of individuals with access to the draft mandate.¹⁸⁹ The trade SIA that follows the IA analyses the development of a policy that has already been approved by the Council of the European Union – the launch of negotiations for a new trade agreement. As a result, it is a tool for evaluating how a pre-decided action should be taken.¹⁹⁰ Although the publicly conducted SIA process is intended to inform negotiating positions, it does not define them.¹⁹¹

There is therefore the risk that the trade SIA is used merely to support a predisposition to promote trade liberalisation policies. The European Commission's Directorate-General for Trade's posture has been

184. George & Kirkpatrick, *supra* note 58, at 62.

185. *Id.*

186. European Commission, *Impact Assessment Guidelines* 11 (2009), http://ec.europa.eu/smart-regulation/impact/commission_guidelines/docs/iag_2009_en.pdf.

187. Kirkpatrick & George, *supra* note 60, at 331; George & Kirkpatrick, *supra* note 136, at 78; George & Kirkpatrick, *supra* note 57, at 71; George & Kirkpatrick, *supra* note 58, at 63; Colin Kirkpatrick & Clive George, *The Influence of the European Union's Sustainability Impact Assessment on Multilateral and Regional Trade Negotiations*, IMPACT ASSESSMENT RES. CENTRE 18, <http://citeseerx.ist.psu.edu/viewdoc/download?doi=10.1.1.530.5253&rep=rep1&type=pdf>.

188. George & Kirkpatrick, *supra* note 57, at 71; ELISABETH B. BONANOMI, SUSTAINABLE DEVELOPMENT IN INTERNATIONAL LAW MAKING AND TRADE: INTERNATIONAL FOOD GOVERNANCE AND TRADE IN AGRICULTURE 93 (Edward Elgar, 2015).

189. Pelkmans et al., *Detailed Appraisal*, *supra* note 178, at 10.

190. Ruddy & Hilty, *supra* note 60, at 91.

191. Kirkpatrick & George, *supra* note 60, at 331; George & Kirkpatrick, *supra* note 58, at 63; Kirkpatrick & George, *supra* note 187, at 18.

characterised by some as supporting the free trade ideology¹⁹² and placing free trade over sustainable development¹⁹³. It has been argued that the SIA framework ‘is built on the assumption that growth will be promoted by multilateral trade liberalisation and that this is desirable. As such, a pro-liberalisation bias is built into the analysis from the start limiting consideration of alternative scenarios such as no-further trade liberalisation or trade in a different form.’¹⁹⁴ Thus, some civil society organisations see SIAs as a ‘superfluous bureaucratic exercise’.¹⁹⁵

The two forms of impact assessment used by the European Commission to evaluate trade policies are not incompatible with each other. Whereas IAs contribute to the development of a negotiating mandate, SIAs allows for broader public dialogue which may influence the application of that mandate.¹⁹⁶ Integrating the two impact assessment studies could have some benefits but would require the development of rules striking a balance between the confidentiality needed to protect the Union’s negotiating position and the transparency necessary to make a meaningful contribution to the public debate.¹⁹⁷ While the degree of public participation and consultation during the preparation of trade IAs does not seem sufficient, it should be noted that the European Commission has been allowing for public access to the most recent trade IA reports – namely the one regarding the TTIP¹⁹⁸ – differently from what happened in the past.¹⁹⁹

C. Influence of impact assessment studies on the outcome of trade negotiations

Given the challenges posed to the efficiency of evidence-based

192. OLE ELGSTRÖM & JESS PILEGAARD, *Imposed Coherence: Negotiating Economic Partnership Agreements*, in 49, POL’Y. COHERENCE & EU DEV. POL’Y 49 (Maurizio Carbone ed., (Abingdon, 2009)); OLE ELGSTRÖM, *Partnership in Peril? Images and Strategies in EU-ACP Economic Partnership Agreement Negotiations*, in EXTERNAL PERCEPTIONS OF THE EUR. UNION AS A GLOBAL ACTOR 137-149, 144 (Sonia Lucarelli & Lorenzo Fioramonti eds., (2010)).

193. BEN ROSAMOND, THEORIES OF EUROPEAN INTEGRATION 120 (Neill Nugent et al. eds., 2000); Simon Lightfoot & Jon Burchell, *The European Union and the World Summit on Sustainable Development: Normative Power Europe in Action?*, 43 J. OF COMMON MARKET STUDIES 75, 83 (2005.).

194. Sarah Richardson, *A “Critique” of the EU’s WTO Sustainability Impact Assessment Study and Recommendations for Phase III*, Oxfam GB, WWF-European Policy Office, Save the Children, ActionAid 1, 2 (2000), <http://www.fern.org/sites/fern.org/files/pubs/reports/tradesia.htm>

195. See Ruddy & Hilty, *supra* note 60, at 94.

196. George & Kirkpatrick, *supra* note 57, at 85.

197. *Id.*

198. See European Commission, *Impact Assessment Report on the future of EU-US trade relations*, SWD(2013)68 final 1, 8-9, (2013), http://trade.ec.europa.eu/doclib/docs/2013/march/tradoc_150759.pdf.

199. George & Kirkpatrick, *supra* note 136, at 78.

polycymaking in general and the political intricacies of trade negotiation processes in particular, the key question becomes: do trade impact assessment studies shed any light over the potential pros and cons of trade and investment liberalisation policies? And if so, do they produce any visible influence on the outcome of the negotiation process?

One should start by acknowledging the highly technical nature of trade policies and negotiations.²⁰⁰ This complexity is further augmented by the fact that trade policies increasingly encompass a diverse range of domestic and international issues including intellectual property rights, competition policy, labour rights, investment protection, and government procurement.²⁰¹ Furthermore, impact assessment is by nature complex. Any impact assessment study involves highly technical analysis concerning a wide array of sectors, stakeholders, and economic, social, and political settings that are very difficult to measure. Impact assessment of trade policies presents further challenges, given the range of variables and the international nature of associated decision-making processes.²⁰² In many areas these studies can only identify impacts which may occur at a significant level, rather than making firm predictions.²⁰³ They therefore provide an imperfect, approximate prevue of the potential impact of a trade agreement.²⁰⁴ However, if policies are to be based upon evidence, there is no alternative but to work with estimates.²⁰⁵

Efforts should be implemented to address technical shortcomings so that impact assessment studies can yield a more trustworthy forecast into potential the effects of trade policy proposals.²⁰⁶ Still, even if impact trade assessments were technically fine-tuned to almost perfection, they would not replace political judgement.²⁰⁷ Political decisions always

200. Tussie & Heidrich, *supra* note 157, at 21; HARRY JONES ET AL., KNOWLEDGE, POLICY AND POWER IN INTERNATIONAL DEVELOPMENT: A PRACTICAL GUIDE 109 (The Overseas Development Institute, 2012).

201. See NIGEL GRIMWADE, INTERNATIONAL TRADE POLICY: A CONTEMPORARY ANALYSIS 237 (Routledge, 1996); William Miner, *Modern History of Trade Policy*, in HANDBOOK ON INT'L. TRADE POL'Y. 38-39 (William Kerr & James Gaisford eds., 2007).

202. BONANOMI, *supra* note 188, at 90; Joost Kessler & Hussein Abaza, *United Nations Environment Programme's Approach to Integrated Assessment of Trade-related Policies: Evolution and Recent Progress*, 24 IMPACT ASSESSMENT & PROJECT APPRAISAL 273, 274-275 (2006).

203. George & Kirkpatrick, *supra* note 97, at 27.

204. BONANOMI, *supra* note 188, at 94; Samantha Velluti, *The Promotion and Integration of Human Rights in EU External Trade Relations*, 32 UTRICHT J. OF INT'L & EUROPEAN L. 41, 58 (2016).

205. BONANOMI, *supra* note 188, at 89.

206. See TRADE, GLOBALIZATION AND SUSTAINABILITY IMPACT ASSESSMENT: A CRITICAL LOOK AT METHODS AND OUTCOMES (Paul Ekins & Tancrede Voituriez eds., 2009).

207. Berger, *supra* note 73, at 20; White & Koniciecki, *supra* note 68; MARIALUISA TAMBORRA, *Impact Assessment and Sustainability*, in APPLIED RES. IN ENV. ECONOMICS 72 (Christoph Böhringer & Andreas Lange eds., 2005).

involve value judgements that go beyond technical analysis.²⁰⁸ In the words of the European Commission:

Impact assessment is an aid to decision-making, not a substitute for political judgement. Indeed, political judgement involves complex considerations that are far beyond the anticipated impacts of a proposal. An impact assessment will not necessarily generate clearcut conclusions or recommendations. It does, however, provide an important input by informing decision-makers of the consequences of policy choices.²⁰⁹

Trade SIAs are now firmly established as a standard policy tool within the European Union. Still, the fact is that they are not mandatory.²¹⁰ While this type of studies is mentioned in several documents,²¹¹ none of them establishes an obligation for the Commission to conduct SIAs for trade agreements. In fact, they are mere political declarations of intent.²¹² The European Commission's communication on impact assessment²¹³ is a mere policy guideline. As a result, SIAs are conducted mainly on the basis of a political commitment.²¹⁴ The lack of a legally binding framework for SIAs entails a degree of uncertainty regarding the scope, implementation, and follow-up of these studies.²¹⁵

The influence of trade impact assessment studies on the outcome of the policymaking process generates mixed opinions. Again, there are optimists and sceptics.

Some authors start by recalling that the adoption by the European Commission of trade SIAs was a strategic political decision aimed at reducing civil society opposition to trade liberalisation policies.²¹⁶ From this perspective, it can be argued that SIAs have a positive impact since they engage civil society in a process of consultation and dialogue, thereby contributing to a greater consideration by the Commission of the

208. BONANOMI, *supra* note 188, at 90, 94.

209. European Commission, *Communication from the Commission on Impact Assessment*, COM(2002) 276 final 3 (2002).

210. Alf et al., *supra* note 57, at 6; Gehring, Stephenson & Cordonier Segger, *supra* note 58, at 171.

211. *See, among others*, European Commission, *supra* note 186; European Commission, *supra* note 209.

212. Alf et al., *supra* note 57, at 3.

213. European Commission, *supra* note 209.

214. Gehring, Stephenson & Cordonier Segger, *supra* note 58, at 169.

215. *Id.*

216. George & Kirkpatrick, *supra* note 136, at 84-85.

impact of trade policies.²¹⁷ The Commission comments on the findings of these studies through ‘position papers’ defining points of agreement, responding to disagreements, and considering further actions to be implemented.²¹⁸ Civil society groups and parliamentarians in both the European Union and its partner countries also make use of the findings of SIAs in their submissions to governments, thus seeking to influence the negotiation process.²¹⁹ These studies are also receiving increasing attention from the European Parliament.²²⁰ By offering opportunities for greater transparency and public dialogue, these studies help to build capacity and increase cooperation, thus enhancing the credibility and legitimacy of trade and investment agreements.²²¹

Other commentators are less optimistic, expressing doubts about any meaningful impact of SIAs on the trade negotiating process.²²² The European Commission is not bound by the results of impact assessment studies.²²³ While the Commission responds to the findings and recommendations of SIAs, some commentators regard them as inadequate, criticising the lack of a mechanism to challenge the Commission’s responses.²²⁴ Even if these studies recommend measures to mitigate the negative impact of proposed policies, there is no guarantee that they will be implemented.²²⁵ There seems to be a dissonance between the impact assessment findings and the decision-making process. Trade SIAs have failed to deliver on the expectation that they would facilitate the process of deal-making by bringing more evidence to the negotiating table which negotiators could use to balance

217. *Id.*

218. Clive George, Tomasz Iwanow & Colin Kirkpatrick, *EU Trade Strategy and Regionalism: Assessing the Impact on Europe’s Developing Country Partners*, in *THE EU AND WORLD REGIONALISM: THE MAKABILITY OF REGIONS IN THE 21ST CENTURY* 74-75 (Philippe De Lombaerde & Michael Schulz eds. 2016).

219. *Id.* at 84.

220. *Id.* at 75.

221. Rok Zvelc, *Environmental Integration in EU Trade Policy: the Generalised System of Preferences, Trade Sustainability Impact Assessments and Free Trade Agreements*, in *THE EXTERNAL ENV. POL’Y. OF THE EUR. UNION: EU & INT’L. L. PERSPECTIVES* 191 (Elisa Morgera ed., 2012).

222. Ekins & Voituriez, *supra* note 58, at 9; Ekins & Voituriez, *supra* note 95, at 334-335; Clive George, *Regional Trade Agreements and the Environment: Monitoring Implementation and Assessing Impacts: Report on the OECD Workshop*, OECD Trade & Environment Working Papers, 2011/02, 11 http://www.oecd-ilibrary.org/trade/regional-trade-agreements-and-the-environment_5kgcf7154tmq-en. http://www.oecd-ilibrary.org/trade/regional-trade-agreements-and-the-environment_5kgcf7154tmq-en.

223. Fabiane Baxewanos & Werner Raza, *Human Rights Impact Assessments as a New Tool for Development Policy?*, AUSTRIAN FOUND. FOR DEV. RES. 1, 11, <https://www.econstor.eu/handle/10419/98807>.

224. Fédération Internationale des Ligues des Droit de l’Homme, *Human Rights Impact Assessments of Trade and Investment Agreements concluded by the European Union. Position Paper*, at 12, https://www.fidh.org/TMG/pdf/positionpaperFIDH-HRIA_finalfevrier2008.pdf.

225. Baxewanos & Raza, *supra* note 223, at 12.

the benefits and the drawbacks of trade liberalisation.²²⁶

Similarly to what happens with other types of impact assessment studies, the implementation of trade SIAs is difficult since they are conducted in the context of a markedly political decision.²²⁷ Impact assessment studies in general have been criticised for focusing on justifying the Commission's proposals.²²⁸ Many European Commission officials believe that most impact assessment studies are carried out in order to justify a policy choice already made.²²⁹ Instead of being used by trade negotiators to develop and implement sustainable policies, trade SIA studies may simply provide an appearance of legitimacy that justifies pre-existing trade negotiations.²³⁰ From this perspective, trade SIAs are not designed to restrain the negotiation mandate but to secure public consent.²³¹

Authors have expressed doubts about the Commission's willingness to modify its negotiating position when faced with an SIA with very negative findings.²³² One of the reasons for the apparent low relevance of trade SIAs is that they have a markedly different nature from negotiation processes. While the former are conducted publicly, assess impact on both the European Union and affected countries and are supposed to be impartial; the latter are confidential and principally reflect the European Union's economic interests.²³³ This leads to inconsistencies between SIA recommendations and EU negotiating positions.²³⁴ The Commission is only willing to modify its negotiating position if it 'considers the result [of the SIA] to be robust, otherwise it may not'.²³⁵ While trade SIAs raise public awareness about the potential impact of trade negotiations, thus far they have failed to cause significant changes in

226. Ekins & Voituriez, *supra* note 58, at 9.

227. Hernán Blanco, *Sustainability Impact Assessment of Trade Policy and its Application in the Context of Latin America*, 24(4) *IMPACT ASSESSMENT & PROJECT APPRAISAL* 285, 286 (2006).

228. The Evaluation Partnership, *Evaluation of the Commission's Impact Assessment System*, 6, http://ec.europa.eu/smart-regulation/impact/key_docs/docs/tep_eias_final_report.pdf.
http://ec.europa.eu/smart-regulation/impact/key_docs/docs/tep_eias_final_report.pdf

229. *Id.* at 5.

230. Baxewanos & Raza, *supra* note 223, at 12.

231. *Id.*

232. Jacquie True, *Trading-Off Gender Equality for Global Europe? The European Union and Free Trade Agreements*, 14 *EUR. FOREIGN AFF. REV.* 723, 732-733 (2009).

233. Clive George & Colin Kirkpatrick, *Have Sustainability Impact Assessments of Trade Agreements Delivered on Development Issues? A Reflective Analysis of the Emergence and Main Contributions of Trade SIAs*, in *TRADE, GLOBALIZATION AND SUSTAINABILITY IMPACT ASSESSMENT: A CRITICAL LOOK AT METHODS AND OUTCOMES* 79 (Paul Ekins & Tancrède Voituriez eds., (2009); Zvelc, *supra* note 221, at 193.

234. George & Kirkpatrick, *supra* note 233; Zvelc, *supra* note 221, at 193.

235. George & Kirkpatrick, *supra* note 233.

trade policy.²³⁶ In 2010, the European Parliament underlined the importance of ‘acting in full’ on the results of SIA, urging negotiators to ‘take more account of the priorities and concerns that emerge from these impact studies.’²³⁷

Assessing the influence of SIAs on trade negotiations leads to a qualitative, almost impossible discussion.²³⁸ Since there is no legal provision requiring negotiators to use their findings as basis for their policies, the incorporation of these studies in negotiations is at their discretion.²³⁹ Trade negotiators are expected to participate actively in the SIA process by liaising with the external consultants, briefing them on the negotiations, and taking the results of the impact assessments into account in establishing the European Union’s negotiation position.²⁴⁰ However, they are also bound by the mandate issued by the Council as well as hierarchical orders and decisions. As a result, it is difficult to measure how SIAs are actually incorporated into the policymaking process.²⁴¹

Impact assessment studies are supposed to help in making better decisions by providing more information. However, as discussed above, the policymaking process is marked by bounded rationality. Even if scientific studies provide accurate information that does not guarantee that it will be fully integrated in the formation of policies.²⁴² Negotiators may feel overwhelmed by different sources of information. The guidance provided by SIA studies might therefore not be substantial.²⁴³ The first edition of the Handbook for Trade Sustainability Impact Assessment stated that ‘[m]any stakeholders have criticized the length and format of Trade SIA reports. Consultants must do their utmost to provide concise reports avoiding, for example, long lists of studies or complex descriptions in the case studies undertaken. The main findings and recommendations should be clearly identified.’²⁴⁴ Authors have also claimed that SIA studies only establish weak links to the negotiations itself, presenting

236. Voituriez et al., *supra* note 163, at 335; George & Kirkpatrick, *supra* note 58, at 73.

237. European Parliament, *Resolution of 25 November 2010 on Human Rights and Social and Environmental Standards in International Trade Agreements*, OFFICIAL J. OF THE EUR. UNION 19 (2010).

238. Alf et al., *supra* note 57, at 48.

239. *Id.*

240. Alf et al., *supra* note 57, at 7.

241. *Id.*

242. Ann-Katrin Bäcklund, *Impact Assessment in the European Commission – a System with Multiple Objectives*, 12 ENVTL. SCI. & POL’Y. 1077, 1083 (2009.).

243. Alf et al., *supra* note 57, at 8.

244. European Commission, *supra* note 86, at 26.

rather general discussions.²⁴⁵ Furthermore, there is the risk that negotiators will cherry-pick and only read those parts they are interested in, ignoring possible negative impacts in other areas.²⁴⁶

Civil society organisations have criticised the perceived failure of impact assessment studies to prompt policy adjustments.²⁴⁷ This is essentially a consequence of the role that SIAs perform. These studies are not intended to influence policymaking directly, but rather indirectly through the promotion of public dialogue.²⁴⁸ Several non-governmental organisations have criticised this indirect, secondary role of trade SIAs:

SIAs are being conducted at arms length from policy-making, and policy makers are not sufficiently involved in the SIA process. There must be high-level commitment to, and involvement in, the SIA process. Unless Commissioners, senior officials in the Commission, Member State Ministers, and other senior personnel are committed to and involved in the process, SIA will remain at the periphery of policy-making and rarely go beyond the officials managing the consultants who conduct the research.²⁴⁹

From this viewpoint, the SIA process fails to allow for sufficient consultation from non-corporate stakeholders and civil society organisations.²⁵⁰ The choice of relevant stakeholders has been deemed selective, with those consulted frequently not having the necessary information to make their participation in an effective way.²⁵¹ Furthermore, SIA studies sometimes are made public only at a late stage of the policy implementation process, thus producing little if any influence in the final outcome of the negotiation process.²⁵² Finally, some non-governmental organisations have revealed difficulties in devoting sufficient resources to commenting on the complex and lengthy process of SIAs, leading to a decrease in interest, attention, and resources devoted to this mechanism.²⁵³

Civil society has been calling for measures to enhance the relevance

245. Alf et al., *supra* note 57, at 13.

246. *Id.*

247. George & Kirkpatrick, *supra* note 57, at 69; George & Kirkpatrick, *supra* note 58, at 69.

248. George & Kirkpatrick, *supra* note 57, at 69.

249. *Joint NGO Statement on Sustainability Impact Assessment of EU Trade Policy* (2002), <http://trade.ec.europa.eu/doclib/html/122192.htm>.

250. See Marc Maes, *Civil Society Perspectives on EU-Asia Free Trade Agreements*, 7 ASIA EUR. J. 97 (2009).

251. Baxewanos & Raza, *supra* note 223, at 12.

252. Fédération Internationale des Ligues des Droit de l'Homme, *supra* note 224, at 11.

253. Alf et al., *supra* note 57, at 20.

of impact assessment studies in the formulation of trade policies.²⁵⁴ Greater attention should be devoted to the decision-making process itself.²⁵⁵ The incorporation of the findings of SIA studies in the negotiating process and on flanking measures outside the trade agreement are vital for the credibility of the whole process.²⁵⁶ For SIAs to serve their purpose they must be at the heart of the policy-making process, otherwise they become little more than a ‘bureaucratic exercise in greenwash.’²⁵⁷ Naturally, the lack of a clear legal framework for SIAs weakens the value of recommendations contained in trade SIA studies.²⁵⁸ Without a clear legal mandate to commence SIAs and to ensure that their recommendations are taken into account by negotiators, the value of this tool as an input is debatable.²⁵⁹ The Commission is not bound by the recommendations and there are few legal reasons to take them into account.²⁶⁰ The creation of clear legal requirements in this regard could strengthen the relevance and effectiveness of SIAs.²⁶¹

Additional improvements in terms of public participation should also be made.²⁶² The creation of a proper legal framework on trade SIAs should include specific procedures for public participation.²⁶³ New mechanisms to increase transparency and consultation should be implemented. The European Economic and Social Committee has suggested the creation of a civil society monitoring mechanism including actors from business, trade unions, NGOs, academia and others.²⁶⁴

SIA studies are an important tool because they gather information on the potential impact of trade agreements on diverse dimensions and engage civil society in the discussion of that impact. They are probably best understood as a communication tool, demonstrating to

254. Kirkpatrick & George, *supra* note 60, at 326; Kirkpatrick & George, *supra* note 187, at 3.

255. Kirkpatrick & George, *supra* note 57, at 129.

256. Zvele, *supra* note 221, at 203.

257. *Joint NGO statement on Sustainability Impact Assessments of EU Trade Policy*, *supra* note 249.

258. Baxewanos & Raza, *supra* note 223, at 12.

259. Gehring, Stephenson & Cordonier Segger, *supra* note 58, at 188.

260. *Id.*

261. *Id.*, at 187.

262. See INGMAR VON HOMEYER, MATTHEW COLLINS & WESLEY INGWERSEN, *Improving Public Participation in Sustainability Impact Assessment of Trade Agreements*, in *TRADE, GLOBALIZATION & SUSTAINABILITY IMPACT ASSESSMENT: A CRITICAL LOOK AT METHODS AND OUTCOMES* 189-207 (Paul Ekins & Tancrede Voituriez eds., 2009).

263. Gehring, Stephenson & Cordonier Segger, *supra* note 58, at 188.

264. European Economic & Social Committee, *Opinion of the European Economic and Social Committee on the Role of Civil Society in the Free Trade Agreement Between the EU and India*, OFFICIAL J. OF THE EUR. UNION 9-10, <http://eur-lexwww.eesc.europa.eu/legal-content/EN/TXT/PDF/?uri=CELEX:52011IE1612&from=EN./?i=portal.en.rex-opinions.20331>

critics that civil society's concerns have been taken into account in a transparent and accountable manner.²⁶⁵ By conducting impact assessment studies, the European Commission shows that it accepts input from external stakeholders and communicates likely policy impacts to decision-makers and the wider public.²⁶⁶ These studies are used as a tool to disseminate the rationale for trade policy proposals, inside and outside the Commission.²⁶⁷ Trade SIAs can therefore also be seen as a political instrument rather than a knowledge tool.²⁶⁸

While the direct influence of trade impact assessment studies on the decision-making process seems low, it can be said that they nevertheless contribute to raising public awareness about the broader consequences of trade policies.²⁶⁹ The European Commission's system has at least the merit of exposing the economic, social, and environmental aspects that are implicated in trade negotiations.²⁷⁰ Impact assessment studies force policymakers to collate and evaluate evidence as they make decisions and to produce a statement to explain their options. SIAs allow for a discussion between a broad range of stakeholders about a diversity of issues that would not be included in a traditional trade agenda.²⁷¹ They ensure that empirical data on the diverse components of trade policymaking is taken into account and that multiple alternatives are contemplated.²⁷² Even if they do not bring about more than estimations, they allow to question orthodox assumptions²⁷³ and might even assist in thinking 'outside the box.'²⁷⁴

Still, it should be kept in mind that the object-matter of trade SIAs are trade policies. Assessment studies might be useful as a tool to render policymaking processes more rational and informed – but trade policies have a political dimension, and political questions are always political.²⁷⁵ Despite its politically nonbinding character, impact assessment studies serve as a guiding framework for the political decision making process and to justify policy interventions.

265. Alf et al., *supra* note 57, at 8.

266. Bäcklund, *supra* note 242, at 1082.

267. *Id.* at 1085.

268. *Id.*

269. George & Kirkpatrick, *supra* note 58, at 69; Kirkpatrick & George, *supra* note 187, at 16.

270. BONANOMI, *supra* note 188, at 94.

271. James Harrison, *Human Rights Impact Assessments of Trade Agreements: Reflections on Practice and Principles for Future Assessments* at 16, http://www.humanrights.ch/upload/pdf/100719_Background_paper.pdf.

272. BONANOMI, *supra* note 188, at 94.

273. Harrison, *supra* note 271, at 15.

274. BONANOMI, *supra* note 188, at 94.

275. Bäcklund, *supra* note 242, at 1084.

²⁷⁶ Furthermore, one should also take into account the power of public pressure. The public disclosure of assessment studies can provide information to civil society groups and feed into their advocacy work.²⁷⁷ If concerns are raised by civil society groups that are refuted without proper justification, they may trigger significant public opposition.²⁷⁸ The sheer existence of impact assessment studies requires negotiators and policymakers to engage in a discussion with the general public, contributing to change the mindset of trade negotiators.²⁷⁹ SIAs are now well established in European trade and investment policymaking, and there seems to be a political consensus to continue conducting them in the future.²⁸⁰ That is already a significant, incremental step when compared with the secretive way trade negotiations were traditionally conducted.

V. CONCLUDING REMARKS

For a long time, international trade and investment agreements were based on classic theoretical assumptions on how to instigate economic development. Trade negotiators operated assuming that liberalisation policies would promote economic growth and that potential negative impacts would be offset. Over the last decades a torrent of scholarly works have suggested the existence of a gap between empirical evidence and traditional assumptions. This gap needs to be addressed by taking the state of the art in economics into due account.²⁸¹ The relationship between trade and investment laws and policies and international development has frequently been clouded by ignorance and mistrust. This looks paradoxical since the two fields seem closely linked.²⁸²

It is crucial to increase the knowledge of politicians, negotiators, and policymakers on the broader impacts of trade and investment liberalisation policies so as to ensure that they succeed in increasing trade, attracting investment, creating jobs, and enhancing the overall welfare of countries. The complexity of trade and investment policies compels policymakers to look for frames of reference and evidence

²⁷⁶ Aranka Podhora, *The Policy-relevancy of Impact Assessment Tools: Evaluating Nine Years of European Research Funding*, 31 ENVTL. SCI. & POL'Y 85, 86 (2013).

²⁷⁷ Alf et al., *supra* note 57, at 48.

²⁷⁸ *Id.*

²⁷⁹ *Id.*

²⁸⁰ Alf et al., *supra* note 57, at 3.

²⁸¹ Anne Van Aaken & Tobias Lehmann, *Sustainable Development and International Investment Law: a Harmonious View from Economics*, in PROSPECTS IN INT'L INV. L. & POL'Y: WORLD TRADE FORUM 338 (Roberto Echeandí & Pierre Sauvé eds., 2013).

²⁸² SCHILL, TAMS & HOFMANN, *supra* note 169, at 3.

to support their policies.²⁸³ The current impasse in multilateral trade negotiations, and corresponding difficulties at the regional and bilateral level, should be perceived as an incentive for governments to reassess the contribution of trade and investment policies to economic and social progress, and to adjust the policymaking process accordingly.²⁸⁴

Over the past decade it has become *de rigueur* for governments and international organisations to underline the need for ‘evidence-based’ policy.²⁸⁵ There is nothing particularly novel about the idea that policy should be based on evidence.²⁸⁶ Policymakers have always made use of evidence to some extent in making decisions and in convincing others that they are making the right choices.²⁸⁷ It seems intuitive that policymakers should try to make informed evaluations about the potential consequences of policies.²⁸⁸ The evidence-based policymaking philosophy encourages policymakers to draw on scientific knowledge when making options, seeking to replace ideologically driven politics with more rational decision-making processes.²⁸⁹ Without evidence, policymakers rely on intuition, ideology, and conventional wisdom – or, at best, theory alone.²⁹⁰ Evidence-based policymaking encourages a more rational, rigorous, and systematic evaluation of policy options.²⁹¹

Still, evidence-based policymaking should not be seen as a magical potion that will remove the stains of political and ideological motivations from the policymaking process. Indeed, it would be naive to believe that policymaking can be reduced to the technical evaluation of benefits and costs of different policy options.²⁹² While this approach strives to provide evidence that is sound, objective, and free from personal bias, that is seldom possible. Furthermore, methods that are efficient in some areas might not be adequate in the more politically chaotic world of social and economic policy.²⁹³ Finally, governments and policymakers frequently invoke the concept of evidence-based policymaking as a stamp of legitimacy for their decisions. While evidence-based policymaking offers a valuable set of professional

283. TUSSIE, *supra* note 156, at 1.

284. Kirkpatrick & George, *supra* note 57, at 128.

285. BOSWELL, *supra* note 140, at 3.

286. Marston & Watts, *supra* note 29, at 145; Clarence, *supra* note 150, at 1.

287. MUNRO, *supra* note 105, at 48-49.

288. Bevir, *supra* note 31, at 83.

289. MUNRO, *supra* note 105, at 48.

290. Banks, *supra* note 138, at 5.

291. *Id.*

292. Marston & Watts, *supra* note 29, at 158. See also Perri Six, *Can Policy Making be Evidence-Based?*, 10 J. OF INTEGRATED CARE 3 (2002).

293. BURTON, *supra* note 45, at 8.

practices and objectives, it is also a rhetorical tool that politicians often use to legitimate their options.²⁹⁴

Evidence-based policymaking is a vague, aspirational term, instead of an apt description of the policymaking process.²⁹⁵ One of the goals of evidence-based policymaking is to ensure that, as far as possible, policies are driven by research.²⁹⁶ While this is seducing in abstract, the truth is that the simple evocation of the principle conceals a variety of issues concerning the nature of evidence and the policymaking process.²⁹⁷ There are many factors bearing on the policymaking process besides scientific knowledge. While the evidence-based movement seeks to raise the profile and importance of evidence in the formulation of policies, other factors such as ideology, professional norms, institutions, expert views, personal experience, media interest and politics, all continue to exert substantial influence.²⁹⁸ In this context, scientific knowledge is rarely situated at the centre of the debate.²⁹⁹ Alternative expressions such as ‘evidence-informed’, ‘evidence-influenced’, ‘evidence-inspired’, or ‘research-shaped’ policymaking seem more suitable to describe the contribution that this movement can make to the policymaking process.³⁰⁰

Still, the evidence-based approach to policymaking has a significant contribution to make by promoting a more analytic approach to decision-making processes.³⁰¹ Its role is not to replace political authority with expert knowledge but rather to reconcile them: politics will guide and direct while expert knowledge serves and enlightens.³⁰² The role of evidence is to inform the policymaking process rather than driving it.³⁰³ While policymakers often use scientific information to support prior beliefs or disguise other motivations, the fact is that, when the debate is based on evidence and data, the role of science in the policymaking process is enhanced, making more space for policy arguments to include scientific

294. Head, *supra* note 27, at 77.

295. CAIRNEY, *supra* note 28, at 1.

296. Cherney & Head, *supra* note 37, at 511.

297. BURTON, *supra* note 45, at 7.

298. MUNRO, *supra* note 105, at 64-65; Nutley, Walter & Davies, *supra* note 150, at 7; Head, *supra* note 119, at 143.

299. Head, *supra* note 119, at 143.

300. National Research Council, *supra* note 129, at 14; MUNRO, *supra* note 105, at 48; Nutley, Walter & Davies, *supra* note 150, at 7; BOGENSCHNEIDER & CORBETT, *supra* note 98, at 4; Cherney & Head, *supra* note 37; Head, *supra* note 119, at 144; Huw Davies, Sandra Nutley & Peter Smith, *Introducing Evidence-based Policy and Practice in Public Services, in WHAT WORKS? EVIDENCE-BASED POLICY & PRAC. IN PUB. SERV. 11* (Huw Davies, Sandra Nutley & Peter Smith eds., (2000).).

301. BURTON, *supra* note 45, at 7.

302. Heazle, Kane & Patapan, *supra* note 36, at 8.

303. Nutley, Walter & Davies, *supra* note 150, at 3.

evidence.³⁰⁴ Despite the challenges that it faces, the evidence-based policymaking movement retains its relevance and importance.³⁰⁵ This approach emphasises the importance of systematic evidence to the policymaking process and – despite the issues raised above – this may be the best kind of process that is available.³⁰⁶ Efforts to improve the quality of the evidence that is incorporated into the decision-making process can contribute to an increase in the quality of policies and outcomes.³⁰⁷

The gap between research and policymaking seems to be reducing in the field of trade and investment.³⁰⁸ Empirical knowledge is playing an increasingly important role in the longstanding debate about competing trade policies.³⁰⁹ According to Botto,³¹⁰ contemporary trade negotiations are marked by a global and national debate in which ‘good procedures’ are not the only thing that matters, but also ‘good causes’. While the former include the importance of institutional reforms and greater transparency, the latter include a growing debate about the real-world impacts of trade liberalisation, which leads to a greater discussion on how to ensure not only economic growth but also greater and more equitable distribution.³¹¹

The assessment of the economic, social, and environmental consequences of trade policies and agreements has been the subject of considerable public and academic interest. There is growing acceptance of the need to evaluate trade proposals as regards their potential consequences. This has been recently acknowledged by Carlos Moedas³¹², the European Union’s Commissioner for Research, Science and Innovation, who stated that ‘trusted scientific evidence’ is increasingly important for politicians and the general public, and that people will not believe in assertions like ‘trade is good’ without further explanation.

304. National Research Council, *supra* note 129, at 38.

305. Ian Sanderson, *Evaluation, Policy Learning and Evidence-based Policy Making*, 80 PUBLIC ADMINISTRATION 1 (2002).

306. Hoornbeek, *supra* note 31, at 862.

307. BURTON, *supra* note 45, at 7.

308. TUSSIE, *supra* note 156, at 1.

309. *Id.* at 2.

310. Mercedes Botto, *Introduction: The Impact of Knowledge on Trade Policy Making*, in RES. & INT’L. TRADE POL’Y. NEGOTIATIONS: KNOWLEDGE & POWER IN LATIN AMERICA 14 (Mercedes Botto ed., 2010).

311. *Id.*

312. Frédéric Simon, “Don’t be Afraid of Science” EU’s Moedas tells Commission, EURACTIV (2017), http://www.euractiv.com/section/public-affairs/news/dont-be-afraid-of-science-eus-moedas-tells-commission/?utm_medium=Social&utm_campaign=Echobox&utm_source=Facebook&utm_term=Autofeed#link_time=1486536485.

Trade SIAs are the most sophisticated³¹³ and comprehensive³¹⁴ form of impact assessment used by the European Commission. They are ‘at the vanguard of holistic impact assessment tools’,³¹⁵ offering the most remarkable,³¹⁶ cutting edge,³¹⁷ trade policy review mechanism worldwide, putting forward a model follow³¹⁸ and marking a turning point in international trade negotiations³¹⁹. Still, several limitations and shortcomings have been identified. Trade impact assessments are a fairly recent instrument and one should not be afraid of adopting a ‘learning-by-doing’ approach.³²⁰ However, if the perception remains that these studies exert little or no influence over trade policies and outcomes, they may be seen as a mere ‘technological fix’. It is necessary to ensure that negotiators and policymakers acknowledge the usefulness of trade impact assessment studies as a tool that illuminates the reasons that bring negotiations to impasse and lead some countries to resist some trade policies.³²¹

A way to enhance the profile and importance of trade impact assessment would be to conduct studies on behalf of the wider international community, rather than being commissioned by one of the negotiating parties.³²² It has been suggested that these studies be commissioned jointly by a group of international bodies, with the World Trade Organisation and other international bodies such as the World Bank and the International Monetary Fund invited to participate as observers.³²³ While the findings of such studies would not be directly binding on the World Trade Organisation, they could have enough credibility in the public arena to influence negotiations indirectly.³²⁴

All things considered, expectations about the novel evidence-based approach to trade and investment policymaking – evinced by the popularisation of trade impact assessment studies – should not be

313. European Commission, *supra* note 86, at 7.

314. Zvele, *supra* note 221, at 191.

315. Markus Gehring, *Sustainability Impact Assessment of Trade Agreements in the Americas: a Tool for Sustainable Development*, CENTRE FOR INT’L SUSTAINABLE DEV. L. 12 (2010).

316. Diane Desierto, *Balancing National Public Policy and Free Trade*, 27 PACE INT’L. L. REV. 549, 594 (2015).

317. Don Flynn & Eleonore Kofman, *Women, Trade, and Migration*, 12(2) GENDER & DEV. 66, 71 (2004).

318. Patrick Reynaud, *Sustainable Development and Regional Trade Agreements: Toward Better Practices in Impact Assessments*, 8 MCGILL INT’L J. OF SUSTAINABLE DEV. L. & POL’Y 206, 232 (2013).

319. George & Kirkpatrick, *supra* note 97, at 27.

320. Kessler & Abaza, *supra* note 202, at 281-282.

321. Ekins & Voituriez, *supra* note 95, at 334-335.

322. Kirkpatrick & George, *supra* note 57, at 128.

323. *Id.*

324. *Id.*

exaggerated. The negotiation of trade and investment policies has always been, and will continue to be, an inherently political process. The regular use of trade impact assessment studies should not be expected to usher a new ‘Age of Enlightenment’ in trade policymaking, with ‘reason’ becoming the primary source of authority and legitimacy. More modestly, this paper argues that trade impact assessment studies contribute to an incremental ‘illumination’ of negotiation processes, expanding the number of actors taking part in the discussion, broadening the issues under debate beyond the conventional agenda, and possibly offering policy options beyond the traditional toolbox.

Trade and investment liberalisation policies are not ends in themselves – they are, possibly, means to promote economic and social progress. Trade impact assessment studies have an informational role to play by systematically, analytically challenging theoretical assumptions. Still, their influence on the formulation of policies is in the hands of negotiators and governments. Trade and investment policies will always be a controversial topic because they are not mere legal devices – they also have a strong political dimension. And science cannot provide a cure for political controversies. The use of empirical studies in the field of trade and investment will not be a panacea, making these policies ‘fully rational’, much less ‘perfect’. However, it should not be labelled a sugar pill either. While the discussion of scientific evidence does not put an end to the debate on trade liberalisation policies, at least it has the merit of launching objective, precise questions for public debate. And that is definitely much better than to leave the discussion in the arena of conviction, ideology, or faith.