
IHRB Submission to the UK Parliament Joint Committee on Human Rights

The Case for a New UK Facility on Responsible Trade with a Corresponding Parliamentary Mechanism

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Introduction

This submission responds to the Inquiry called by the Joint Committee on Human Rights into whether parliament should set up a specific mechanism to scrutinise international agreements for compliance with human rights and what processes should be followed to ensure adequate scrutiny of compliance with human rights standards in international agreements post-Brexit. As considerable uncertainty remains over UK membership in the European Union, this submission will not take specific positions on various scenarios under consideration, but instead sets out certain broad parameters. Specifically, this submission makes the case for a new UK facility on responsible trade with corresponding parliamentary oversight.

Founded in 2009, the Institute for Human Rights and Business (IHRB)¹ is the leading international think tank on business and human rights and holds non-governmental organisation consultative status with the United Nations.

“International agreements”² is a broad term that covers a wide range of activities – some of which have relevance to human rights, including rules

¹ www.ihrb.org. IHRB’s mission is to shape policy, advance practice, and strengthen accountability in order to make respect for human rights part of everyday business. IHRB’s international programmes focus on migrant workers, and the financial, extractives and ICT sectors. The organisation helped to develop and now hosts the Centre for Sport and Human Rights, and is a founding partner of the Corporate Human Rights Benchmark. IHRB has also established centres for responsible business in Myanmar and Colombia, and has expert staff in a range of global locations. This submission has been prepared by IHRB staff, with research support from IHRB intern Alexander Popper, whose contribution is gratefully acknowledged.

² International agreements create the rules-based framework that enables countries and intergovernmental organisations to operate in the international space in a way that preserves the global architecture, establishes rules about how individuals, organs of society, and governments should function, provides mechanisms to

governing international transport³, to tax policy⁴, international investment⁵ and finance⁶, to other issues as diverse as sports governance⁷. However given that the inquiry is prompted by the UK's potential departure from the European Union, and given the JCHR's interest in *workers' rights*, including the right to be free from servitude and forced labour, and *data privacy*, this submission focuses on the following points:

- (1) Trade agreements and human rights: the case for a new UK facility on responsible trade;
- (2) Migrant workers and their rights, technology and data: specific considerations;
- (3) The need for Parliamentary oversight.

IHRB believes any future UK agreement or negotiation should be at least consistent with EU laws, if not offer even greater human rights protection to individuals and to groups.

deal with disputes and disagreements, and offers remedy to entities that have suffered harm, following due process.

³ For example the International Maritime Organization's policies on stowaways and refugees at sea, IATA's approach to carrier liability legislation and so on.

⁴ According to the OECD, there are now over 3,000 tax treaties in place based on the OECD's own model. Tax policy is, in the OECD's own words, a human rights issue. <http://www.oecd.org/ctp/treaties/tax-treaties-2017-update-to-oecd-model-tax-convention-released.htm>

⁵ Human rights are being invoked within the context of arbitrations relating to bilateral investment treaties, for example: <https://humanrights.freshfields.com/post/102e3g8/human-rights-issues-in-bilateral-investment-treaty-arbitrations>. Another example would be UNTAD's Sustainable Stock Exchanges Initiative.

⁶ The Performance Standards of the International Finance Corporation (IFC) were updated in 2011 to include some human rights considerations. Since then a number of regional financial institutions have also moved in this direction as have export credit agencies under the OECD 'common approaches'.

⁷ Note the recent human rights commitments of the International Olympic Committee, FIFA, UEFA and the Commonwealth Games Federation, as well as international agreements underpinning bodies such as the Court of Arbitration in Sport or the World Anti-Doping Authority.

PART I – Trade Agreements and Human Rights: the Case for a New UK Facility on Responsible Trade

Trade Agreements and Human Rights

Cross-border trade in goods, services, and the movement of people across borders, can all have beneficial impacts for human rights. For the beneficial impacts to be realised and harmful impacts to be mitigated or eliminated, it is important that trade is rules-based. These rules should be consistent with international standards. While in some instances trade liberalisation or restriction measures can have harmful impacts of human rights, these need to be anticipated, assessed, and remedial measures undertaken to mitigate harm.

While increased international trade and investment have led to rapid economic growth and reduction of poverty in many parts of the world, growth which is not underpinned by respect for human rights can create unstable environments and impede international efforts to realise the UN Sustainable Development Goals (SDGs).

Increasingly, countries are relying on trade agreements to advance foreign policy goals, which include promotion and protection of human rights. Recent studies have shown that countries including the United States⁸, Canada⁹, New Zealand, Australia, Chile¹⁰, Japan, and the European Union¹¹ have incorporated clauses and sections in their trade agreements with many countries that support specific goals, in particular implementation of adequate labour conditions and protection of labour rights, transparency and anti-corruption measures, environmental standards, and in some instances,

⁸ United States – is a leader in promoting labour rights, transparency, due process and anti-corruption in trade agreements. Provisions have become more robust with each new 'generation' of trade agreements and anti-corruption measures are now considered to be best practice. As well as including capacity building to strengthen compliance, since 2009 the US has been more active in monitoring and enforcement. However, it has steered clear of promoting universal human rights in its trade agreements.

⁹ Canada – has generally followed the US in progressively strengthening labour provisions in its trade agreements, as well as embedding transparency and anti-corruption measures. Labour rights chapters are legally binding and failure to comply could lead to fines, but others, e.g. for public participation, are weaker. Like the US, Canada has preferred to focus on specific rights rather than promoting universal human rights.

¹⁰ Chile's agreements rely on 'soft obligations'. Its 2006 FTA with China requires both parties to meet obligations on decent work and security. The 2009 FTA with Peru reaffirms commitment to the 1998 ILO Declaration and includes protection of migrant workers in accordance with the International Convention on the Protection of the Rights of all Migrant Workers and Members of Their Families. The 2008 FTA with Panama and the 2009 FTA with Colombia include a consultation mechanism to solve disputes. Its 2011 FTA with Turkey includes a general dispute settlement mechanism of the agreement can be applied to labour matters. And its 2015 FTA with Thailand recognises that it is inappropriate to encourage trade or investment by weakening or reducing labour laws and protections.

¹¹ One of the EU's main tools to promote human rights in third countries is the generalised system of preferences (GSP), granting certain developing countries preferential trade access to the EU market. The EU GSP includes different layers and different levels of conditionality. Many observers argue, however, that the EU has not always applied the GSP scheme consistently and does so at its own discretion in order to pursue economic and foreign policy objectives.

standards with respect to specific commodities whose trade bears an impact on human rights.¹²

Labour rights protections¹³ are often part of bilateral agreements. One study shows that nearly half of the trade agreements signed since 2008 had labour provisions, and over 80% of agreements entering into force since 2013 have had labour provisions.¹⁴ Similarly, more than two-fifths of trade agreements concluded since 2000 have incorporated anti-corruption and anti-bribery components which go beyond WTO rules.¹⁵ Some agreements have also included guarantee for political participation and protection of indigenous and cultural rights.

Human Rights as a Non-Tariff Barrier?

It has been argued that adding human rights-related conditionality to a trade agreement can be viewed as a *non-tariff barrier*¹⁶ and some developing countries have often argued that such conditions impede their ability to attract investments, create jobs, and alleviate poverty. While that argument is not specious, it should be noted that human rights obligations apply to all countries, and developing countries are not exempt from respecting, protecting, and fulfilling human rights, in particular their core minimum obligations.¹⁷

Human Rights and Extra-Territoriality

UK-based companies which are affected by international agreements, including trade agreements, may not have directly caused adverse human rights impacts abroad, but they may have enabled or facilitated abuses by their failure to exercise sufficient due diligence with regard to specific conduct of

¹² International experience shows that labour standards do improve when made part of agreements, such as in the case of the US-Cambodia agreement. <https://carnegieendowment.org/pdf/files/2004-07-polaski-JILP.pdf>

¹³ The US has free trade agreements with labour rights provisions with 19 countries. The US policy of Generalized System of Preferences is rooted in labour rights protection and labour provisions in US agreements encompass four stages: side agreements (which are not part of the main text), as a chapter in the trade agreement (as in the example of US-Chile FTA), encouraging the partner countries to adopt, maintain, and enforce standards to protect labour rights, and setting out action plans (e.g. US-Colombia FTA). Core principles include commitment to ILO standards, enforcement of laws, non-derogation, acceptable work conditions, and procedural guarantees. Canada has eight agreements, which have been strengthened progressively. (See Aronson, 2017:3)

¹⁴ ILO 2016:22

¹⁵ (Jenkins, 2017: 2).

¹⁶ See, for example, <http://fordschool.umich.edu/rsie/workingpapers/Papers476-500/r499.pdf> and <https://journals.sagepub.com/doi/full/10.1177/0256090915573610>. Also see the summary of arguments for or against including human rights in PTAs, F. van Hees, "Protection v. Protectionism, "The Use of Human Rights Arguments in the Debate for and Against the Liberalization of Trade, Abo 2004, at <http://web.abo.fi/instut/imr/norfa/floris.pdf>.

¹⁷ This point was addressed by the World Trade Organization in an expert opinion given in 2009 by the Secretariat of Director General Pascal Lamy to the Swedish Presidency of the European Union.

their partners, subsidiaries, associates, or suppliers located in other jurisdictions. This understanding is embodied in the UN Guiding Principles on Business and Human Rights as well as the OECD Guidelines for Multinational Enterprises, two standards which the UK Government has strongly supported since their inception.¹⁸

The UK Government already requires companies to undertake human rights due diligence and/or disclosure based on international standards – such as the requirements of the 2015 Modern Slavery Act, the rules governing export credit¹⁹ or new commitments announced relating to those businesses in the government’s own supply chain.²⁰

Existing Laws in the EU and Alignment

Existing EU law requires all policies to promote sustainable development, social justice, labour rights, environmental rights, and human rights. This requires following international standards, enforcing laws, not deviating from the principles that might promote a race to the bottom. It means promoting trade and practices that advance respect for international standards, and maintaining affirmative programmes with least developed countries, in particular preferential trade agreements, “Generalised Scheme of Preferences” (GSP), special incentive arrangements for sustainable development and good governance, and the ‘everything but arms’ programme.²¹

The Case for a UK Responsible Trade Facility²²

The Department for International Trade’s plans for “post-Brexit trade” do not make any mention of human rights. The UK should therefore *create its own responsible trade facility – setting a gold standard for sustainable trade with*

¹⁸ Human rights due diligence involves companies identifying actual and potential risks and impacts of their actions across their operations and their supply chains and services they use. Companies should assess risks; identify their leverage, responsibility, and actions; mitigate risks and devise remedies; and monitor, review, report, and improve performance.

¹⁹ <https://www.gov.uk/government/publications/uk-export-finance-environmental-social-and-human-rights-policy>. IHRB’s CEO, John Morrison, serves on the Advisory Council for UK Export Finance.

²⁰ Announced by the Prime Minister on 3 December 2018. <https://www.gov.uk/government/speeches/pm-g20-house-of-commons-statement-3-december-2018>

²¹ For example, IHRB has recently been in direct correspondence with the EU Trade Commissioner and the UK Foreign Secretary on the issue of human rights in relation to the GSP arrangements for Myanmar following the recommendations of the UN Fact Finding Report.

²² The UN Guiding Principles on Business and Human Rights and the OECD Guidelines for Multinational Enterprises both call for policy coherence on issues of business and trade responsibility. A ‘Responsible Trade Facility’ would ideally be a cross-departmental group with a base in the Department for International Trade.

human rights at its core. This would enable and not inhibit the UK's global competitiveness and could encompass a number of aspects²³:

- A UK version of GSPs – which generates millions of jobs for workers in low income countries but also takes a targeted and consistent approach to imposing any penalties when gross violations occur;
- An export credit system (i.e. UK Export Finance) which aligns fully with UK and OECD human rights due diligence standards and not just those of the International Finance Corporation;
- Human rights capacity within future trade missions. Understanding human rights due diligence is increasingly necessary for all UK companies overseas – it should be a pre-competitive issue with ongoing consular assistance;²⁴
- Language for inclusion in future bilateral trade agreements, and capacity building with both businesses and civil society organisations in the partner state to facilitate adherence and accountability;
- Oversight of the UK Government's own application of UN and OECD human rights standards in relation to public procurement building on the existing work of the regional government in Northern Ireland, Scotland and Wales²⁵;
- The provision of an adequate remedy for those affected by trade-related policies building upon the work of the UK National Contact Point under the OECD Guidelines for Multinational Enterprises.

The UK should align and make its own trade agreements consistent with international human rights standards. It should also enforce more strictly specific legislation that has directed sanctions against products that harm human rights.²⁶ The UK should also continue its commitment to preferential trade agreements as well as the 'everything but arms' agreements.²⁷

²³ HRIAs were established in 2001 when the Norwegian Agency for Development Cooperation (NORAD) prepared the "Handbook in Human Rights Impact Assessment. In 2012, the Human Rights Council accepted the *Guidelines for Human Rights Impacts of Trade Agreements*. Article 9 of the *UN Guiding Principles for Business and Human Rights* too recommends impact assessments. The EU's 'Sustainable Impact Assessments' use Computable General Equilibrium (CGE) which maps theoretical reactions in the EU and partner countries on agreements. It has been criticized for its focus on economic gains. Such models often fail to grasp nuances of gender, indigenous, and economic and social rights. While the EU's 'strategic plan' considers human rights, the perspective taken is that of consumers within the EU recognizing 'their right to know' about supply chains of consumer brands.

²⁴ IHRB was the first human rights organisation to take part in a UK trade mission – to Burma/Myanmar in 2012, the first to that country in over 50 years. Many of businesses on the mission appreciated the expertise provided and, in part, this facilitated the creation of the Myanmar Centre for Responsible Business.

²⁵ For example, <https://www.finance-ni.gov.uk/publications/pgn-0318-human-rights-public-procurement>

²⁶ Such as dual-use equipment, products that can be used for torture, or conflict minerals.

²⁷ http://www.legislation.gov.uk/ukpga/2018/22/pdfs/ukpga_20180022_en.pdf

PART II – Migrant Workers and their Rights, Technology, and Data: Specific Considerations

(a) Worker Mobility

Migrant workers are a ubiquitous feature of global supply chains, often vulnerable to exploitation. In 2011 IHRB developed the Dhaka Principles for Migration with Dignity,²⁸ a framework for understanding the human rights challenges and responsibilities around the migration cycle. Without adequate due diligence and policies, companies face the risk of being associated with exploitation including forced labour and trafficking, with serious impacts on brand reputation and relations with customers, clients, investors and governments.

As the Inquiry has raised specific questions about migration and trafficking, this part of the submission deals with key issues on this topic. IHRB would like to draw JCHR's attention to the Global Compact for Migration²⁹ which calls on all governments to create an enabling environment which facilitates business compliance with responsible recruitment in line with the ILO's General Principles and Operational Guidelines for Fair Recruitment.³⁰

In this regard, IHRB's submission to the recent inquiry into the UK Modern Slavery Act is also of relevance.³¹

Working with a number of multinational enterprises and supported by civil society organisations in the Leadership Group for Responsible Recruitment³², IHRB's work in this area is built on a simple but ambitious proposition – changing the model of worker recruitment from worker-paid fees to recruitment based on the 'Employer Pays Principle', which states:

No worker should pay for a job: the costs of recruitment should be borne not by the worker but by the employer.

²⁸ <https://www.ihrb.org/dhaka-principles/>

²⁹ The Compact is a process that began in 2016 and culminated in the final draft being agreed by 164 countries (including the UK) in Marrakesh in December 2018. See <https://refugeemigrants.un.org/migration-compact>. Also see <https://www.iom.int/global-compact-migration>.

³⁰ This includes (1) Increased harmonisation and transparency of regulations, policies, and administrative processes governing the recruitment and deployment of migrant workers; (2) Improved regulation of labour recruiters, prohibiting the charging of fees to workers, and improved enforcement within and across jurisdictions; and (3) Enhanced collaboration between governments and private sector actors to incentivize responsible recruitment policy and practice through, for example, reduced administrative burden for companies with a proven record of compliance with government.

³¹ https://www.ihrb.org/uploads/general-uploads/IHRB_Submission,_UK_Modern_Slavery_Act,_Sep_2018_progress.pdf

³² <https://www.ihrb.org/employerpays/leadership-group-for-responsible-recruitment>

Adopting this conditionality in the UK's future trade agreements will enable the UK to meet its objective of preventing modern slavery. The UK has already taken steps in this regard, through an agreement with the US, Australia, Canada, and New Zealand.³³

(b) Data Protection

The ubiquity of the Internet and its wide spread has enabled speedier transmission of information and brought about many efficiencies. The Internet's functionality is improved and enhanced through data storage, but it has raised profound concerns on human rights grounds, including who owns the data, who can exchange it, who should store it, can it be traded, and if so, how, and what steps need to be taken to ensure compliance with human rights principles.

Since 2013, there have been several instances of significant data breaches which have made individuals vulnerable. Internet companies have been fined for those breaches, but the architecture remains vulnerable. Consumers are being targeted with focused advertising to change their consumption patterns, and increasingly, political preferences and votes before elections.

UK Finance³⁴ and TechUK reports have called data 'the driver of growth.' The report points out the economic benefits of keeping UK policies aligned with the EU's General Data Protection Regulation (2016/679)³⁵. Should the UK leave the EU, UK-based companies will still have to comply with the GDPR, given the extraterritorial nature of the Act, which would include any UK firm that stores EU citizens' data. The UK should reach an 'adequacy agreement' with the EU as 'a third country' which, if accepted, would mean personal data can flow from the EU and EFTA to that third country (i.e. UK) without further safeguards being necessary. Retaining this provision is essential, because US data laws run counter to several provisions of the EU's GDPR, and some US provisions undermine privacy provisions in the GDPR. Another cause of concern is that individuals involved in immigration disputes are unable to obtain their information from the home office in the UK.³⁶ This can affect all individuals who are not UK nationals and threaten the adequacy agreement.

³³ <https://www.gov.uk/government/news/uk-agrees-principles-for-tackling-modern-slavery-in-supply-chains>

³⁴ <https://www.ukfinance.org.uk/wp-content/uploads/2017/11/No-Interruptions-Options-for-the-future-UK-EUdata-sharing-relationship.pdf>

³⁵ <https://ico.org.uk/for-organisations/guide-to-data-protection/guide-to-the-general-data-protection-regulation-gdpr/individual-rights>

³⁶ See <https://www.gdpr.associates/new-uk-data-protection-rules-cynical-attack-immigrants/> and Data Protection Act 45(4)(a/b). Also see <https://www.theguardian.com/commentisfree/2018/feb/05/brexit-data-protection-rules-immigrants>

PART III – The Need for Parliamentary Oversight

The case for UK Parliamentary oversight of human rights protections contained in international agreements contemplated by the UK is overwhelming whether or not a responsible trade facility is established (although such a facility would make oversight that much more effective). International trade and support for international human rights standards are two of the key “selling points” for the UK abroad – both are essential and neither should undermine the other.

Such agreements are often devised by technical staff focused on specific issues relevant to the department, with limited regard to broader UK commitments on human rights, transparency, and the environment. Objectives of companies and industry associations may not always align with broader human rights goals of a government. Scrutiny by a parliamentary committee is therefore essential, as has been the case for EU trade agreements. Consulting with specialised civil society groups, the academic community, and human rights groups is a necessary step. Open consultations to develop policies are essential, and where appropriate, public hearings are critical. An existing, or new, parliamentary committee should take up this role – one enjoying parliamentary privilege with sufficient resources and convening power to undertake the work.