Amnesty International UK submission to the Department of Business and Trade ('DBT') in response to DBT's call for submissions on a new UK Trade Strategy

Amnesty International is a movement of 10 million people which mobilizes the humanity in everyone and campaigns for change so we can all enjoy our human rights. Our vision is of a world where those in power keep their promises, respect international law and are held to account. We are independent of any government, political ideology, economic interest or religion and are funded mainly by our membership and individual donations. We believe that acting in solidarity and compassion with people everywhere can change our societies for the better.

Amnesty welcomes the opportunity to respond to the UK Department of Business and Trade's call for submissions on how we can achieve long-term sustainable, inclusive, and resilient growth through trade.

Our submission focusses on the implications of the UK's trade strategy on human rights, and makes the following key points.

1. **Pursuing a trade strategy in isolation from other areas of government policy, and in a way that fails to take proper account of the government's priorities in areas such as sustainable growth, justice, health, planning, public services, transport, gender equality, digital rights and privacy, is outdated as well as self-defeating.**
2. **Democratising trade policy by giving Parliament and civil society organisations a more prominent and proactive role can lead to better decision-making, including by helping to flag up, at an early stage, areas of potential tension between trade proposals and other governmental priorities, as well as potential synergies.**
3. **Human rights impact assessment and subsequent monitoring helps ensure that trade policy and agreements remain well aligned with the UK's human rights commitments, obligations and objectives, and that trade agreement terms preserve adequate room to manoeuvre in response to future challenges and needs.**
4. **Trade agreements should be viewed as one part of a broader package of interventions in support of ethical business activity and sustainable growth.**

1. Pursuing a trade strategy in isolation from other areas of government policy, and in a way that fails to take proper account of the government's priorities in areas such as sustainable growth, justice, health, planning, public services, transport, gender equality, digital rights and privacy, is outdated as well as self-defeating

Trade policy has significant implications for the successful implementation of domestic policy goals. Trade agreement provisions on non-tariff barriers have implications for domestic consumer protection, environmental and animal welfare standards and regulation of digital services and technologies. Provisions on access to services for companies wanting to enter the UK market may affect a government's room to manoeuvre with respect to the future regulation of essential services in fields as diverse as health, transport, prisons and public utilities. There might also be implications for equality and non-discrimination in so far as trade agreements can produce economic and employment effects that can worsen social mobility and gender equality.

It is imperative and entirely logical, therefore, that elected representatives have the opportunity to scrutinise trade proposals, including their social, human rights and environmental impacts, much as

they would any other area of domestic policy. The current approach in the UK, in which trade policy continues to be viewed largely as the preserve of the executive arm of government, is a hangover from a time in the past when trade agreements were largely concerned with tariff reduction. As a system for shaping and implementing modern trade agreements, which engage a much broader range of policy areas, it is obviously deficient. In the way it develops trade policy, the UK is also out of step with the approach of other major economies, such as the US and the EU. Better checks are needed to:

- ensure that UK trade policy is fully aligned with, and fully supportive of, UK government strategies on sustainable growth, and the human rights and environmental principles and values that underpin them, and
- to ensure that different arms of government do not pursue policies in relation to sustainable growth, security, welfare or other human rights-related areas, that may prove difficult to reconcile in practice.

Recommendations

1. **Introduce new laws to ensure that Parliament has the opportunity to scrutinise proposals and agree negotiating principles for new trade agreements, as well as scrutinise the social, human rights and environmental impacts of existing ones.**
2. **Enhance the role of parliamentary committees with respect to the scrutiny of trade policy, trade agreements (existing and proposed), in terms of their social, human rights and environmental impacts.**

2. Democratising trade policy by giving Parliament and civil society organisations a more prominent and proactive role can lead to better decision-making, including by helping to flag up, at an early stage, areas of potential tension between trade proposals and other governmental priorities, as well as potential synergies

As indicated above, current UK constitutional arrangements set up a significant risk of policy incoherence between UK trade policy and other policy areas that are relevant to the enjoyment of human rights, such as rights to an adequate standard of living, rights to health and a healthy environment, personal safety, privacy, equality and non-discrimination.

The lack of opportunities for meaningful stakeholder input under the current UK approach also makes it more difficult for decision-makers to build up a detailed and accurate picture of human rights related issues and risks associated with trade agreements at an early stage of proposal development, and at the point of likely maximum leverage and policy scope to deal with them.

The connection between levels of stakeholder engagement and the legitimacy of trade policy among different sections of the public is explicitly recognised in EU strategy documents. As a recent DG Trade policy briefing puts it, "trade policy is only legitimate if it is transparent and inclusive, and if everyone who is concerned and has a stake can contribute and is heard".

In pursuit of a trade policy that is "the most transparent in the world", the European Commission has taken a number of steps to enhance levels of public participation in the development and implementation of EU trade policy including through:

- publicly available policy briefs on aims and progress of ongoing negotiations which are accessible via an open access website;
- legally mandated stakeholder engagement processes as part of 'sustainability impact assessments' for each new proposal, or adjustments to the terms of trading relationships (Note: this is discussed in more detail in section 3 below);

- creating formal opportunities to participate in ongoing monitoring of social and human rights impacts of trade agreements through domestic advisory groups established under the terms of specific trade agreements;
- integrating stakeholder engagement processes into studies of broader human rights-related themes of relevance to future policy, such as import or export controls; and
- periodic and ad hoc meetings between EU Commissioners and senior policy-makers and relevant business and civil society organisations.

Recommendations

3. **Strengthen the "democratisation" effects of greater parliamentary scrutiny (see section 1 above) with a concerted "transparency drive" to raise public awareness of**
    - **the UK government's trading policy and proposals,**
    - **how they further the government's strategy for sustainable growth,**
    - **the social, human rights and environmental issues they raise and how the government plans to respond to them, and**
    - **opportunities for affected people to make their voices heard, both at national level and in devolved government contexts.**
4. **Explore ways to enhance stakeholder participation in advisory committees established pursuant to specific trade agreements and more broadly.**
5. **Pass laws mandating *ex ante* human rights impact assessment and subsequent monitoring of trade agreements (see further section 3 below), specifying the need for stakeholder engagement as a key element of all impact assessment and monitoring processes.**

3. Human rights impact assessment of trade proposals and subsequent monitoring of impacts helps ensure that trade policy and agreements remain well aligned with the UK's human rights commitments, obligations, objectives and values, and that trading terms preserve adequate room to manoeuvre in response to future challenges and needs

Human rights impact assessment (HRIA) is a process whereby human rights-related issues that may be associated with a trading relationship are properly identified and evaluated.

As noted in section 2 above, HRIA has a strong stakeholder engagement element. It provides an evidence-base:

- for negotiators to use to justify specific demands (e.g. stronger commitments on human rights in trade agreements),
- for other procedural or practical interventions, such as a programme of ongoing monitoring and discussion between trading partners,
- for the identification of suitable flanking measures to help alleviate potentially adverse effects (e.g. targeted help to communities or sections of the community that may find it difficult to access the benefits of new trading arrangements, or who are at risk of 'losing out'), and
- for "future proofing" of trade agreements, by helping to clarify the room for manoeuvre (or "policy space") that might be needed to deliver domestic policy priorities (e.g. UK government strategies for sustainable growth) well into the future, and to ensure that its options to protect human rights (particularly through future regulation) are not limited unnecessarily by a trade agreement's terms (e.g. terms that prohibit, or which may have a chilling effect on, tightening of human rights or environmental standards).

The inclusion of human rights analysis as part of official sign-off processes for trade agreements (with a proper *ex ante* human rights impact assessment process for more complex agreements) formed part

of the recommendations of the UK Parliamentary Joint Committee on Human Rights in 2019. These recommendations echo calls of UN agencies and civil society organisations dating back more than a decade. EU policy on conducting 'sustainability impact assessments' of trade agreements dates back to 1999, with HRIA forming a legally mandated part of this process since 2012. The role of HRIA within the EU's sustainability impact assessment processes was enhanced further, and given greater prominence, following the release of more substantive official guidance in 2015.

HRIA processes (and particularly those conducted *ex ante*) enable governments to identify and evaluate three distinct types of human rights-related risk, i.e.

- The risk that entry into a trading agreement could cause a State to be in breach of its human rights obligations;
- The risk that implementation of a trading agreement could lead to *a diminution of the ability of people to enjoy their human rights* (for instance, because of implications of the agreement for access to medicines, or food standards, or environmental quality, which might have disproportionate effects according to gender, or levels of poverty or vulnerability); and
- The risk that implementation could make it *harder for a country to progressively realise human rights in future* (for instance, because of economic effects, or because it will be more difficult to change laws to strengthen human rights standards in the future).

Case study: The proposed UK-Israel Free Trade Agreement

An example of a trade agreement proposal that poses risks of the UK being *in breach of* its human rights obligations under international law is that outlined in the UK government's strategic approach document for a future Free Trade Agreement with Israel.

The negotiating objectives set out in that document failed to include the negotiation of a geographically explicit territorial clause that *both* the UK and Israel accept as unequivocally indicating the agreement's inapplicability to the territories occupied by Israel since June 1967, including illegal settlements. As discussed in an Amnesty International UK Briefing Note, this omission was highly problematic from an international human rights perspective given Israel's past unilateral designation of the Occupied Palestinian Territory as part of the territory of the State of Israel for the purposes of its FTA with the EU.

The implications of the UK's potential acquiescence in an illegal situation under international humanitarian law, both under international human rights law in general, and in the context of the UK-Israel trading relationship, are discussed in more detail in the AIUK briefing note, along with the steps that would be needed to alleviate the various legal and other risks.

The fact that the legal risks flowing from ambiguity over the territorial scope of the proposed UK-Israel FTA are (or should be) already well known to the UK government does not remove the need for an HRIA in situations such as these. As well as providing a more structured, predictable and inclusive platform for dialogue on known risks than is presently available, there will inevitably be a wider range of human rights issues and impacts to consider and take into account, as is the case with any proposed FTA.

Compliance by States with their human rights obligations is too important to be left to chance. Yet that is precisely the effect of the UK government's current approach which has for political reasons,

since Brexit, prioritised "quick wins" over proper analysis of the human rights implications of its trading relationships and the identification and implementation of appropriate corrective action.

Recommendations

6. **Supplement new laws mandating HRIA of trade agreements and subsequent monitoring (see recommendation 5 above) with suitable official guidance on assessment and monitoring methodology, including methodologies for meaningful and rights-compatible stakeholder engagement.**
7. **Work with trade partners to improve arrangements for joint monitoring of human rights impacts of trade agreements (and of the effectiveness of efforts to address them) and to reflect these in legally binding terms either in the agreement or associated MoUs.**

4. Trade agreements should be viewed as one part of a broader package of interventions in support of ethical business activity and sustainable growth

The UK government needs to be much bolder and clearer, as well as more strategic, about how it proposes to uphold human rights through trade. At a minimum, the UK government should continue to insist on provisions in trade agreements that confirm that parties' mutual commitments under the agreement are subject to compliance with specified human rights instruments, and that there will be no rolling back of human rights standards within their respective jurisdictions.

The UK government should strive to build on this further by:

- strengthening enforcement of human rights commitments in trade agreements, including through more robust dispute resolution provisions;
- making enjoyment by business actors of benefits under agreements, including access to markets at reduced tariffs, conditional upon compliance with certain minimum standards; and
- making more use of external monitoring (e.g. by the ILO) to verify the progress of State agencies and business actors in other countries towards agreed human rights targets.

However, there are limits to what can be achieved at the level of international agreements between States, particularly as far as the behaviour of individual businesses is concerned. There are potentially more targeted ways of combatting adverse human rights impacts of trade. For this reason, it is important that UK trade strategy does not begin and end with trade agreements themselves, but takes account of the many ways in which domestic-level measures, capable of being developed and implemented unilaterally, can complement inter-governmental agendas and help deliver tangible human rights benefits for affected people and communities, both within the UK and within trading partner countries. This is particularly the case with business enterprises which are the main vehicles for trade and investment, accountable under domestic law in the jurisdictions where they operate, but not directly accountable under trade agreements.

In a number of jurisdictions, including the EU, laws have been introduced requiring more detailed reporting from companies about their human rights impacts, and imposing compulsory standards with respect to the conduct of 'human rights due diligence' not only for their own activities but for those businesses that make up the 'value chains' for their products and services. In some jurisdictions (including the EU, but also in the US and Canada), these have been (or are soon to be) accompanied by laws aimed at banning imports of products which may have been made in human rights-abusing ways, and particularly through the use of forced and child labour.

Explainer Box: What kind of new regulation of businesses?

As the main vehicles for trade and investment, businesses should be required to take all reasonable steps to prevent human rights and environmental harm in their operations, subsidiaries and supply chains. This includes conducting 'human rights and environmental due diligence' (HREDD)—a process to identify, prevent, and address adverse human rights and environmental impacts in line with international standards.

A new UK law should be modelled on the 'failure to prevent' model of the 2010 Bribery Act, which reverses the burden of proof, meaning that once it is shown that harm occurred in connection with a business, the burden is on the business to show it took all reasonable steps to prevent it. Failure to provide acceptable evidence could result in civil, administrative or criminal liability. This would reflect various recommendations and options given by the Joint Committee for Human Rights, the Global Resource Initiative and the Law Commission.

Gaps in the current legal framework allow businesses that disregard their impacts on people and the environment to operate with relative impunity and gain unfair competitive advantages. This undermines responsible businesses that proactively address these issues, creating an uneven playing field where it is more challenging for responsible businesses to compete effectively in global markets and participate in international trade.

A 2020 survey by the British Institute for International and Comparative Law (BIICL) found that over 75% of businesses believe current UK laws lack clarity, and more than 68% feel there is insufficient legal certainty on human rights obligations. Nearly three-quarters of UK businesses agreed that stronger regulation would provide benefits by creating more legal certainty, a level playing field and facilitating leverage over suppliers.

If the UK is to avoid becoming a dumping ground for products made in other countries in human rights-abusing ways, which face barriers to being sold elsewhere, the UK government needs urgently to develop its own approach to responsible business laws targeting supply chain management (or "supply chain governance"). While recent EU developments provide a range of possible regulatory models, understanding and making better use of the synergies between trade policy and domestic-level responsible business initiatives may show the way to smarter and more impactful forms of regulation, for instance in the use of trade data and HRIA findings to help target regulatory efforts, or by linking access by companies to benefits under trade agreements to good compliance records under "supply chain governance" laws.

These new forms of business regulation have the potential to make significant inroads into the exploitative commercial practices and business models that blight so many lives, as well as to help create a more level playing field for businesses managing their supply chains in a way that respects the human rights of the people involved in making and producing the goods they buy, use and sell.

However, it is important that regulatory interventions of this kind are not derailed by provisions in some trade agreements giving investors the right to challenge and seek reparations for changes in the law that impact on their profits. A former UN Special Rapporteur on Human Rights and the Environment has called these kinds of mechanisms (known as investor-state dispute settlement mechanisms or ISDS) "a major obstacle to the urgent actions needed to address the planetary environmental and human rights crises". For these reasons, it is our view that abandoning the use of ISDS mechanisms in future UK trade agreements will be an essential part of achieving policy coherence on closely-related questions of trade, responsible business and sustainable growth.

Recommendations

8. **Communicate a clear vision about how the UK proposes to pursue human rights objectives through trade, including the "red lines" that the UK will apply in the negotiation of trade agreements, as far as human rights-related issues are concerned.**
9. **Launch a consultation on ways to strengthen the enforcement of human rights provisions of trade agreements, within the parameters of WTO rules.**
10. **Introduce new laws setting out standards for human rights-respecting management of business activities of UK-based companies (including where carried out through subsidiaries and global value chains), that:**
    - **subject companies to clear legal duties to prevent human rights-related harm, mandating businesses to take all reasonable steps to prevent human rights and environmental harm in their own operations, those of their subsidiaries and in their value chains;**
    - **reverse burdens of proof for the purposes of enforcement, meaning that once it is shown that harm has occurred in connection with a business, the burden is on the business to show it took all reasonable steps to prevent it or face penalties; and**
    - **Make appropriate use of trade-related measures (such as import and export bans) to secure compliance.**
11. **Articulate a clear policy that the UK will not be including investor-state dispute settlement (ISDS) mechanisms in future trade agreements.**

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