



TRADE WHITE PAPER CALL FOR EVIDENCE

Submission from Amnesty International UK

Amnesty International is a worldwide movement of people who campaign for internationally recognised human rights to be respected and protected. Our vision is for every person to enjoy all of the human rights enshrined in the Universal Declaration of Human Rights and other international human rights standards. Our mission is to conduct research and take action to prevent and end grave abuses of all rights – civil, political, social, cultural and economic.

For further information relating to this submission:

Peter Frankental

Economic Relations Programme Director

Amnesty International UK

17-25 New Inn Yard

London EC2A 3EA

Tel: 020 7033 1599

Email: peter.frankental@amnesty.org.uk

3 December 2010

Summary of Recommendations

Amnesty International urges the UK to take the following steps with regard to developing and implementing a strategy on trade and investment:

Recommendation 1

Ensure that the current focus on trade and investment promotion is not at the expense of human rights.

Recommendation 2

Adopt a strategy that is consistent with and that actively supports the *Draft Guiding Principles* of the UN Special Representative on Business and Human Rights, Professor John Ruggie.

Recommendation 3

Use trade and investment policy to promote multilateral processes that can raise the bar for companies on human rights. There are four current significant inter-governmental processes at UN, OECD and World Bank level that offer opportunities for integration of human rights into trade and investment.

Recommendation 4

Work cross-departmentally on business and human rights issues to a greater extent than at present, so that there is more coherence and consistency of approach. There is the need for all Government departments and agencies relating to trade and investment to consider how the UK can promote stronger international frameworks for governing the human rights impacts of companies through the inter-governmental bodies of which the UK is a member. Trade and investment strategy should reflect the State's duty to protect human rights under international law and the responsibility of companies to respect human rights.

Recommendation 5

Assess the reputational and financial consequences faced by UK companies that fail to respect human rights in their overseas operations, and consider measures to hold these companies accountable for human rights abuses abroad.

Recommendation 6

Promote assessment of the human rights impacts of WTO agreements, and press for the Dispute Settlement Mechanism to take into account the international human rights obligations of any member State that is party to a dispute.

Recommendation 7

Ensure that all treaties underpinning trade and investment that UK is a signatory to, whether Bilateral Investment Treaties (BITs), regional investment treaties, economic partnership agreements or free trade agreements should be framed in a way that does not undermine the international human rights law obligations of any of the States that are party to such agreements.

Background

Amnesty International is submitting evidence to this enquiry, because there are human rights implications arising from the UK's trade and investment strategy and policies. While this submission addresses specific issues of relevance to the UK, it is informed by the broader context of the interface between human rights and international trade and investment.

The integration of human rights into international trade and investment is a topical issue in the light of the growing body of evidence on the ways in which international trade and investment affects human rights, enhancing rights under some circumstances and undermining rights under others.¹ It is a development issue in so far as the integration of the norms, standards and principles of the international human rights system into the superstructure of inter-State trade and investment can influence plans, policies and processes of development.² It also engages general principles of international law and contract law with regard to mechanisms for embedding human rights into international trade and investment agreements and for adjudicating disputes.³

The term 'human rights' is used here to refer to those standards that are guaranteed through international legal instruments, in particular the International Bill of Rights, various regional human rights instruments, customary international human rights law, general principles of international human rights law, case law, and officially documented opinions of the bodies established to monitor the implementation of these rights.

One of the most influential proponents of the integration of human rights into economic development processes is Amartya Sen. He argues that political liberty and civil freedoms are among the principal means of development as they determine the

¹ S. Aaronson and J. Zimmerman, *Trade Imbalance: The Struggle to Weigh Human Rights Concerns in Trade Policymaking* (2007)

² M. Robinson, 'What Rights Can Add to Good Development Practice' in Alston, P. and Robinson, M. (eds) *Human Rights and Development: Towards Mutual Reinforcement* (2005)

³ J. Hu, 'The Role of International Law in the Development of WTO Law', in *Journal of International Economic Law*, (2002) Vol.13 No.4, p753-814; M. Sornarajah, *The International Law on Foreign Investment* (2010)

capability of human beings to participate in and derive benefits from economic activity.⁴ Amnesty International supports the integration of human rights into international trade and investment on the grounds that human rights are part of general international law and therefore must be taken into account in all rule-making and policy-making processes at national and international levels. This includes those situations where the trade and investment policies of States are put into effect through international organisations, such as the World Bank and the World Trade Organisation. In such contexts, States should take account of their human rights obligations in their decisions and voting behaviour within these multilateral bodies.⁵ The logic behind this is that States' acceptance of human rights obligations requires them to promote universal respect for human rights and fundamental freedoms. In addition many basic principles of human rights have acquired the status of obligations that are binding on the international community as a whole.

A further objective of integrating human rights into the UK's trade and investment strategy is to enable other States, particularly developing and emerging economies, to preserve their policy space to balance trade and investment rules with broader social concerns relating to the protection and fulfilment of economic, social and cultural rights.⁶ This is particularly relevant to WTO member States when there is a potential conflict between their WTO treaty commitments and their ability to meet the needs of their population with regard to food, medicines, education, water and other essential goods and services. There is growing evidence that developing countries want the scope to balance trade rules with other priorities, including those in the human rights sphere.⁷ This is where Amnesty International believes there is scope for co-operation-based measures designed to assist developing countries to meet these objectives.

⁴ A. Sen, *Development As Freedom* (1999)

⁵ S. Skogly, *Beyond National Borders: States' Human Rights Obligations in International Cooperation* (2006)

⁶ See articles in *Putting Development First: The Importance of Policy Space in the WTO and International Financial Institutions*, ed. K. Gallagher (2005)

⁷ J. Harrison, *The Human Rights Impact of the World Trade Organisation* (2007: p176-8)

Role of Government

- Q7 How can the UK make better collective use of resources across Government to pursue trade and investment objectives?
- Q8 To what extent does the existence of differing regulatory systems lead to significant barriers to trade and investment? Are there steps that the UK should take domestically, within the EU or internationally to reduce such barriers?
- Q10 How should the relationship between trade policy, foreign policy and trade promotion operate? To what extent could and should trade agreements be used as tools to encourage other policy goals?

Amnesty International urges the UK government to ensure that the current focus on trade and investment promotion should not be at the expense of human rights.

This reflects the recommendations of the House of Lords and House of Commons Joint Committee on Human Rights (JCHR) in their December 2009 report “*Any of our Business? Human Rights and the UK Private Sector*”. The JCHR drew attention to the need for a UK strategy on Business and Human Rights. Such a strategy would ensure that the UK’s trade and investment policies are consistent with the UK’s international human rights obligations, and with the evolving policies that different Government departments are adopting in the sphere of business and human rights.

Ensuring that human rights is taken account of in the UK’s trade and investment strategy would require the following to be in place:

- a) The FCO should maintain and develop its human rights expertise and focus in Whitehall and within missions.
- b) Country desk officers and staff within missions should understand the human rights context of UK companies operating in their countries. The FCO-initiated Toolkit on Business and Human Rights is an important step in this direction, but it needs to be supported by training and awareness-raising, so that missions can intervene in contexts where UK companies are alleged to be contributing to

human rights abuses, and can engage effectively with companies on these issues. There needs to be more such outreach.

- c) Trade-promotion delegations should be aware of and find ways of raising human rights issues with their hosts, especially when these are relevant to the trade and investment activities of UK companies operating in the host country.
- d) There needs to be joined-up thinking across FCO, BIS, DFID, MoJ and other Government departments and agencies. For example, UK Trade and Investment (UKTI), an arm of the Government that promotes international trade and investment by UK companies, does not address human rights issues in its country briefings. Colombia is described on UKTI's website as '*enjoying a long tradition of economic and political stability*'. Would FCO take a similar view? Human rights are not referred to amongst the challenges for businesses operating in Colombia, despite the many UK companies that have had their reputations tarnished because of associations with human rights violations in that country.

Amnesty International urges the UK to adopt a trade and investment strategy that is consistent with and that actively supports the *Draft Guiding Principles of the UN Special Representative on Business and Human Rights, Professor John Ruggie.*

- a) The Mandate of the UN Special Representative on Business and Human Rights offers the prospect of bringing about a significant improvement in the human rights impacts of companies globally. The UK should promote and support the Guiding Principles when they are presented to the Human Rights Council in June 2011, as this will help create a level playing field on human rights, ensuring that responsible UK companies are not undercut by laggards operating to lower standards.
- b) The UK should support the creation of a mechanism at the June 2011 Human Rights Council to take forward Professor Ruggie's Guiding Principles, with regard to each of the three pillars of his framework – the Duty of States to **Protect** human rights; the Responsibilities of Companies to **Respect** human rights and the need for victims to have access to **Remedy**.

Amnesty International urges the UK to do more at inter-governmental level, including through trade and investment policy, to promote current multilateral processes that can raise the bar for companies on human rights. There are four significant inter-governmental processes at UN, OECD and World Bank level that offer opportunities for integration of human rights into trade and investment:

- a) The Mandate of the UN Special Representative on Business and Human Rights ends in 2011. The Human Rights Council, of which the UK is a member, will determine what steps, if any, should be taken to operationalise the Guiding Principles for companies and for States that will be put forward by the UN Special Representative.
- b) The revision of the OECD Guidelines for Multinational Enterprises, undertaken by the OECD, is being led within the UK by BIS (UK National Contact Point). There is a real prospect of these Guidelines containing an explicit human rights chapter. We would like to see the UK pressing for a strong human rights framework to be incorporated into these Guidelines.
- c) The harmonisation of social and environmental standards for export credit agencies (known as *The Common Approaches*) is being undertaken at OECD level. The current review provides an opportunity for integration of human rights into the screening procedures adopted by all the export credit agencies of OECD States. The UK is being represented by the UK Export Credits Guarantee Department (ECGD). We would like to see the UK pressing for Professor Ruggie's Guiding Principles to be incorporated into the revised Common Approaches.
- d) The World Bank's private sector lending arm, the International Finance Corporation (IFC), is currently reviewing its Performance Standards for companies that it lends to. The UK as a Shareholder and Board Member of the IFC has an important role to play in pressing for human rights to be integrated into these Performance Standards.

Amnesty International urges the UK to work cross-departmentally on business and human rights issues to a greater extent than at present, so that there is more

coherence and consistency of approach. Different government departments relate to these issues in different ways. There is the need for all government departments and agencies relating to trade and investment to consider how the UK can promote stronger international frameworks for governing the human rights impacts of companies through the inter-governmental bodies of which the UK is a member. Trade and investment strategy should reflect the State's duty to protect human rights under international law and the responsibility of companies to respect human rights.

Investment

Q11 What are the benefits and costs to the UK from inward and outward investment?

Amnesty International urges the UK to assess the reputational and financial consequences faced by UK companies that fail to respect human rights in their overseas operations, and to consider measures to hold these companies accountable for human rights abuses abroad

Outward investment by UK companies that fails to respect the human rights of those individuals and communities affected by the investment does carry costs for the UK. This is particularly the case in areas of conflict, where many UK companies have suffered reputational damage, have experienced significant increases in their operating costs, and in some case have been unable to continue their operations.

Given the number and range of transnational companies based in the UK and the capacity of these companies to have significant impacts on human rights globally, the fact that there is at present only sporadic regulation of the extra-territorial impacts of corporate activity contributes to a serious regulatory failure. There are some spheres of activity in which UK companies are already subject to UK regulations that have extra-territorial effect, such as bribery and corruption, financing of terrorism, and anti-competitive activity. Currently, however, the UK has not taken steps to regulate the extra-territorial human rights impacts of UK companies. Amnesty International believes that the UK must strengthen its regulation of UK companies to ensure greater protection of human rights globally. Moreover, failure to ensure that UK companies

respect human rights in all their operations can leave the poorest and most vulnerable communities exposed to serious and repeated human rights abuses.

Research undertaken by Amnesty International⁸ and its partners in the Corporate Responsibility (CORE) Coalition reveals that UK companies have committed or contributed to human rights abuses in many countries and contexts.⁹ In some cases the company is the primary agent of the abuse, while in other cases it is the company's relationships with third parties, such as governmental agencies and security forces, that has given rise to the abuse.

The UK government, via the UK's National Contact Point under *The OECD Guidelines for Multinational Enterprises* (located within BIS) has declared several UK companies to be in breach of the Guidelines.¹⁰ One of these companies, Vedanta Resources, was recently denied a licence to operate a mine in Orissa, India, and was refused permission to expand its existing refinery there on account of adverse impacts on human rights. The company has admitted that this is having significant consequences. This has been reflected in its share price, which has underperformed the market since these licences were refused. It has also led to concern amongst investors, some of whom have divested their shareholding.

Global Priorities

Q14 Should the WTO take on a larger role in dealing with global issues, such as climate change? What other changes can strengthen the WTO?

Amnesty International takes the view that the WTO regime has impacts on human rights that need to be assessed. In the first instance, WTO members should assess the human rights impacts of agreements that they sign up to or are in the process of considering. With regard to WTO's institutional processes, its

⁸ *Nigeria: Petroleum, Pollution and Poverty in the Niger Delta*, Amnesty International, 2009; *Don't Mine us Out of Existence: Bauxite Mine and Refinery Devastates lives in India*, Amnesty International, 2010

⁹ Five case studies of UK companies were published by the Corporate Responsibility (CORE) Coalition and the LSE in *The reality of rights: Barriers to accessing remedies when business operates beyond borders*, 2009

¹⁰ <http://www.bis.gov.uk/policies/business-sectors/low-carbon-business-opportunities/sustainable-development/corporate-responsibility/uk-ncp-oecd-guidelines/cases>

Dispute Settlement Mechanism should take into account the international human rights obligations of any member State that is party to a dispute.

The WTO consists of member States, few of which have undertaken any kind of systematic human rights assessment of the agreements they sign up to either before, during or after implementation.¹¹ Furthermore, it appears that States might be reluctant to raise human rights issues because of uncertainty over the consequences. This is particularly the case with developing countries in so far as they might fear that if they use compliance with human rights standards as a defence for contravention of a WTO Agreement, this might trigger conditionality-based measures from developed countries. For example, if Ghana was to defend itself against a breach of the Agreement on Agriculture with reference to the need to subsidise cocoa producers as part of a strategy to protect children at risk of bonded labour, then consuming States might feel more justified in inserting labour rights conditionality clauses in their bilateral agreements with Ghana. A further reason why States don't raise human rights in WTO is because there is a lack of clarity as to how their human rights obligations engage WTO law. What incentive do States have to raise a defence that lacks any supporting jurisprudence within WTO because the issue hasn't previously been adjudicated?

An example of the chilling effect of this uncertainty over potential conflict between human rights protection and WTO law arose in the context of the Kimberley Process Certification Scheme (KPCS). This was developed by the international community in response to the issue of 'conflict diamonds', with the aim of ensuring that no such diamonds are traded, thereby depriving rebel groups of a vital source of income for arms procurement. The key measure is to restrict Kimberley participants to certified non-conflict diamonds and to prohibit trade with non-Kimberley participants. On the face of it such measures conflict with the non-discrimination principles of GATT Articles I, XI and XIII in so far as 'like' products would be treated differently and non-Kimberley States would be treated less favourably. What happened in this case was that a waiver was sought from the WTO by the scheme participants to allow exemptions from the relevant GATT clauses. The WTO General Council in granting this waiver acknowledged "*The extraordinary humanitarian nature of this issue and*

¹¹ J. Harrison, *The Human Rights Impact of the World Trade Organisation* (2007: p226-227)

*devastating impact of conflicts fuelled by the trade in conflict diamonds on the peace, safety and security of people in affected countries and the systematic and gross human rights violations that have been perpetrated in such conflicts.”*¹² While it is significant that the General Council cited human rights in justification of its decision, it is not a judicial body and its decisions lack the legal status of judgements of the Dispute Settlement Body.

Despite the lack of WTO jurisprudence on a specific human rights issue, there are developments and pressures that might lead to such case law in future. One source of pressure arises from the need of WTO member States for more certainty with regard to their regulatory autonomy and the measures they are entitled to take to protect and fulfil human rights. An authoritative legal source that could be used by States is the UN Committee that monitors implementation of the International Covenant on Economic Social and Cultural Rights (ICESCR). Its General Comments might offer a route for human rights issues to be raised within the WTO Dispute Settlement Mechanism, especially if they provide a basis to differentiate genuine measures from those that are a form of disguised protectionism. These General Comments have been cited in reports of the UN Office of the High Commissioner for Human Rights (OHCHR) addressing three key areas of the WTO system – trade in goods, trade in services and intellectual property protection.¹³ The OHCHR reports draw on the ICESCR Committee’s specification of the human rights obligations that are relevant in the trade law context. Each General Comment sets out the content of the right, in terms of the obligations on States to respect, protect and fulfil the right, its core elements, the level of international cooperation relevant to its implementation, as well as acts constituting violations of the right.¹⁴ The significance of these General Comments is that they provide interpretative tools for States to understand their own obligations in situations where there might be conflict with WTO rules.

Other Developing Countries and Emerging Economies

Q23 What are the key challenges preventing LICs and MICs from benefiting from

¹² Waiver Concerning Kimberley Process Certification Scheme for Rough Diamonds – Decision of 15 May 2003 (WTO/L/518)

¹³ Nine OHCHR reports were published from 2001-2004 covering these and other trade-related issues

¹⁴ Harrison (2007, p131-136)

trade? What are the key constraints preventing trade and investment with LICs and MICs?

Q25 Should the UK's approach be to prioritise Free Trade Agreements (FTAs) with the greatest economic benefits to the UK?

Amnesty International believes that all treaties between States that underpin trade and investment, whether Bilateral Investment Treaties (BITs), regional investment treaties, economic partnership agreements or free trade agreements should be framed in a way that does not undermine the international human rights law obligations of any of the States that are party to such agreements. The UK should ensure that all of its agreements are consistent with this principle, including any investment agreements negotiated by the European Union on behalf of member States.

The human rights implications of all these agreements are related to a particular feature known as the 'stabilisation clause'. From the investor's perspective, the aim of such a clause is to ensure that future changes in the legislation of the host State do not vary the terms of the contract or the basis on which the investment was made. Such clauses are intended to immunise the foreign investor from a range of interventions by the host State that impose costs beyond what was written into the contract. These can arise from a range of matters such as taxation, environmental controls and other regulatory requirements, including those that might be necessary for the protection and fulfilment of human rights. The rationale for such a clause is that the host State's sovereignty gives it the legislative power to alter the effect of the State-investor contract in a way that will undermine the profitability of the investment. It is in the interest of the foreign corporation to neutralise this power.¹⁵

From a human rights perspective, the problem arises when the rights of foreign investors under such agreements come into conflict with the State's duty to protect human rights under international law. The following chart illustrates a few of the circumstances under which a State's human rights treaty obligations might give rise to measures that, under the terms of a trade or investment agreement, the State would be required to compensate the investor for:

¹⁵ M. Sornarajah, *The International Law on Foreign Investment* (2010, p281-282)

Table 1: Examples of State action taken to protect or fulfil human rights that might breach a stabilisation clause, thereby triggering a compensation requirement of an International Investment Agreement¹⁶

Sources of law¹⁷	Rights at stake¹⁸	Action by State	Effect on investor
ICESCR Article 7	Right to just and favourable conditions at work	Legislation for a minimum wage	Additional costs to those allowed for in agreement
ICCPR Article 22 ECHR Article 11	Freedom of association	Enactment of new legislation recognising right to strike; failure to intervene to break a strike	Lost revenue because of shut-down of operations arising from labour dispute
ICESCR Article 6	Right to work	Restrictions on industrial water usage because drought and low water table are affecting livelihoods of farmers	Lost revenue because of reduced production capacity; e.g. bottling plant
ICESCR Article 11 ILO Convention 169	Right to housing Right to free, prior and informed consent (FPIC) ¹⁹	Requirement for oil pipeline and other infrastructure to be routed away from indigenous lands	Additional construction and transportation costs not allowed for in agreement
ICESCR Article 12; African Charter on Human and Peoples' Rights Article 16	Right to health Right to remedy	Requirement for chemical company to decontaminate site after gas leak and pay compensation to those affected	Additional costs not allowed for in agreement
ICESCR Article 11	Right to water	Concession to utility company revoked because neighbourhoods in the concession area were denied access to water as a consequence of their inability to pay	Lost revenue, expropriation of assets
ICESCR Article 12; African Charter on Human and Peoples' Rights Article 16	Right to health	Waste incineration plant ordered to shut down temporarily because of excess emissions	Lost revenue

¹⁶ While these are all hypothetical cases, they are indicative of rights affected by business activity

¹⁷ In each case there are also other relevant sources of law

¹⁸ In most cases other rights are also at stake because of the inter-relationships of rights

¹⁹ FPIC applies to decisions affecting the realisation of indigenous rights; it is recognised by the CERD Committee, General Recommendation XXIII

The chart above illustrates that there are many actions that a State could take in furtherance of its international human rights obligations that would have the effect of imposing costs on an investor in breach of a stabilisation clause, for which the State hosting the investment would be required to compensate the investor. This is an inhibiting factor in the willingness of States to implement their human rights commitments. One of the reasons why States allow themselves to be constrained by such clauses is because of the priority they attach to attracting inward investment, and their willingness to make considerable concessions to do so, including entering into inequitable agreements that restrict their capacity to enforce social and environmental legislation.

A research study conducted for the UN Special Representative on Business and Human Rights, analysed stabilisation clauses by region and found that practice differed, particularly between OECD and non-OECD countries.²⁰ The most far-reaching stabilisation clauses, which provide investors with either total or partial exemptions from new laws, are found in Sub-Saharan Africa, the Middle East, North Africa and South Asia.²¹

This raises the question of whether LICs and MICs can benefit from trade and investment under such terms, and whether the UK, amongst other governments, should ensure that its international trade and investment agreements do not constrain other States from giving effect to their international human rights obligations. The UN Special Representative on Business and Human Rights was clear on this point in his 2010 report to the UN Human Rights Council, arguing that Bilateral Investment Treaties should make “adequate allowances for bona fide public interest measures, including human rights, applied in a non-discriminatory manner”.²²

In future, the UK's role in negotiating Bilateral Investment Treaties may be superseded by the European Union as result of the entry into force of the Lisbon Treaty. If the negotiation of future investment agreements is undertaken by the European Union, then the UK should ensure that any such agreements reflect the human rights obligations of all States that are party to them.

²⁰ *Stabilization Clauses and Human Rights* (2008); this paper was the output of a research project conducted for the IFC and the UN Special Representative on Business and Human Rights

²¹ Ibid

²² UN General Assembly, John Ruggie's Report to the Fourteenth session of the Human Rights Council, “*Business and Human Rights: Further steps towards the operationalization of the “protect, respect and remedy” framework*”, 9 April 2010