



Advancing Human Rights in Asia through Trade after Brexit

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Introduction

1. Throughout the period of the United Kingdom's membership in the European Union (EU) and under the status quo, the EU possesses exclusive competence of its Common Commercial Policy. It therefore does not have to consult the UK when developing trade agreements, and the UK's part in these processes is defined by its role within the EU. The UK alone does not determine the existence, scope, or terms of trade relationships with third countries. However, after exiting the EU, the United Kingdom will exercise more substantial, and ultimate, decision-making power over the nature of trade with external partners. This creates an opportunity for the development and evolution of new, direct trading relationships with countries beyond the EU—relationships that are likely to have increasing significance in the UK economy after withdrawal and over time. As Prime Minister Theresa May recognised in a speech in Florence:¹

Our relations with countries outside the EU can be developed in new ways, including through our own trade negotiations, because we will no longer be an EU country, and we will no longer directly benefit from the EU's future trade negotiations.

Many aspects of these agreements are open to negotiation, creating new possibilities for the UK to expand its influence in a variety of areas, and to address particular challenges faced within the borders of trading partners.

2. The negotiation, establishment, and development of new trading relationships must respond to a wide range of factors, and in particular to the particular contexts, needs, and interests of potential trading partners. Approaches to international trade, including the UK's independent international trade policy post-BREXIT, must weigh and balance this plethora of factors, demanding approaches in Bangladesh that might differ substantially from those adopted in engaging with Bulgaria. Frameworks that are well-suited for Spain are not necessarily appropriate in Sri Lanka, and what works in relations with Portugal might not translate effectively in Pakistan or the Philippines. However, particular challenges might still be shared across relatively large groups of countries. In the context of Asian States generally, a set of common variables can be identified that impact on the dynamics, as well as the repercussions, of international trade. These nations already have a significant place in UK trade, and the upwards trajectory of Asian economies in this space, likely to be boosted by the UK's exit from the EU, makes their potential future importance for UK trade substantial. This in turn makes considering the particular requirements of engaging in trade with Asian states critical as the UK considers its independent international trade policy beyond the EU.

3. Many factors must be accounted for in considering and advancing trade relationships with third countries generally—issues that extend beyond direct economic and financial

¹ Theresa May, 'PM's Florence Speech: A New Era of Cooperation and Partnership between the UK and the EU' (GOV.UK, 22 September 2017) <<https://www.gov.uk/government/speeches/pms-florence-speech-a-new-era-of-cooperation-and-partnership-between-the-uk-and-the-eu>> accessed 21 May 2019.



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elements to encompass core values, cultures, and politics. International economic law continues to face criticism for its connection to human rights violations and its historical failure to address these in a meaningful way. International trade and the advancement of human rights globally have become increasingly intertwined as a response to this criticism. Thus, a crucial factor that ought to be considered in developing new trade instruments is the protection of human rights (including fundamental labour rights) within the borders of trading partners. In the regional context of Asia, the inclusion of human rights in trade agreements is particularly important given historical patterns in the international and domestic legal frameworks for human rights and the patterns of human rights abuse reported for the region. The approach taken to trading with the region in the future therefore demands the UK grapple with the human rights implications of its international commerce.

4. The importance of situating human rights in trade after the UK exits the EU has been recognised by the Department for International Development, noting:²

The Government is fully committed to ensuring the maintenance of high standards of consumer, worker and environmental protection in trade agreements. High standards and high quality are what our domestic and global customers demand, and that is what we should provide. Our standards can also ensure that consumers are able to have confidence in choosing products which conform to UK values...

Human rights should be a key concern in shaping the UK's independent trade policy in relation to Asia for two key reasons. First, because of a general commitment to human rights globally, the UK should grasp the opportunity to advance human rights in a region historically weak in this area, utilising the full range of available mechanisms. The UK's bargaining power in the international marketplace is one such tool, and one which speaks not only to the moral obligations of Asian States, but to their economic interests. After the UK exits the EU, possibilities to introduce and shape human rights protections through new agreements and schemes will arise beyond the boundaries of EU trade.³ Second, advancing human rights on the ground in the territory of trading partners should be considered a responsibility of the UK, given the benefits derived from trade with that State. In particular, human rights abuses in the supply chains of goods imported to the UK should be seen as a key area in which the UK has a moral duty to act, because of the close relationship between UK importers and consumers, and potential abuses. The UK's commitment to eradicating modern slavery in global supply chains signals the need to address abuses at the source of products that ultimately reach the UK or that produce profit for beneficiaries in the UK, and a

² Department for International Trade, 'Preparing for Our Future UK Trade Policy' (October 2017), <https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/654714/Preparing_for_our_future_UK_trade_policy_Report_Web_Accessible.pdf> accessed 21 May 2019, 29.

³ See *ibid.*



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beacon for approaches to the protection of human rights in global supply chains more generally.⁴

5. In recent years, attempts to advance human rights through trade mechanisms have gained traction, and now manifest in multiple forms. They occur in the context of different kinds of trade agreements and schemes, positioned in various ways in relation to central trade agreements, with a range of approaches to enforcement, and evidencing divergent procedures and practices in negotiation and application. These diverse features can be seen in existing global practice in several different combinations, each with its own strengths and weaknesses, influenced by the contexts in which they operate. The EU in particular has situated human rights and sustainable development at the core of trade policy, with human rights considerations increasingly incorporated in bilateral free trade agreements (FTAs), unilateral preferences, and export controls policy.⁵ After exiting the EU, and with growing demand for the establishment and expansion of trade relationships, the UK will similarly be faced with pressure to address human rights in this context.

6. In light of a history of action around human rights in trade, and the pressure to retain some degree of consistency of approach with the EU,⁶ the UK can learn from existing practice to develop a new, evidence-based approach to the advancement of human rights within the borders of its trading partners, particularly in those areas traditionally weak in protecting the human rights. This need is especially acute in the Asian context, where historical resistance to human rights and large international markets for UK trade coalesce. The UK government therefore cannot ‘promote and support labour protections, the environment, human rights, anti-corruption, animal welfare and other important factors which support sustainable trade and development across the world’⁷ without paying attention to the particular demands of the Asian context. Developing a clear framework for delivering on this is crucial to deliver advances in human rights in practice, and to avoid a key criticism on the UK’s international policy in this space—namely, that UK ambitions in Asia have been ‘thick with description and thin on the main question: the dialectic between the country’s aims and its ability to meet them’.⁸

⁴ See for instance the Call to Action launched by UK Prime Minister Theresa May and other world leaders at the 72nd session of the United Nations General Assembly. ‘Call to Action to End Forced Labour, Modern Slavery and Human Trafficking’ (GOV.UK, 20 September 2017) <<https://www.gov.uk/government/publications/a-call-to-action-to-end-forced-labour-modern-slavery-and-human-trafficking>> accessed 17 April 2019.

⁵ European Commission, ‘Trade for All: Towards a More Responsible Trade and Investment Policy’ (European Commission, October 2015) <http://trade.ec.europa.eu/doclib/docs/2015/october/tradoc_153846.pdf> accessed 21 May 2019, 30.

⁶ See Department for International Trade, above n 2.

⁷ Department for International Trade, above n 2, 30.

⁸ Oliver Turner, ‘Subcontracting, Facilitating, and Qualities of Regional Power: the UK’s Partial Pivot to Asia’ (2019) 17(2) *Asia Europe Journal* 211.



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Context

7. Increasing economic relationships with countries outside Europe has been a central element of BREXIT rhetoric, both during ‘Leave EU’ campaigning and since the referendum.⁹ However, the implications of the UK exiting the EU for UK-Asia relations are mixed. On the one hand, new opportunities to forge deeper connections with countries beyond Europe have the potential to enrich economic ties between the UK and Asia. On the other hand, the loss of the UK’s position as a ‘gateway to Europe for Asian businesses’¹⁰ and as ‘one of Europe’s primary diplomatic and economic “hubs”’¹¹ decreases the UK’s negotiating power in the context of Asian States. The loss of influence in Asian States resulting from the UK’s exit from the EU was recognised by the Japanese Prime Minister, Shinzō Abe in 2016:¹²

Japan’s priority is negotiating trade deals with Europe – with the EU, a large trade area rather than individual states in Europe. Britain has a greater voice in trade negotiations because it is part of the EU.

The UK’s reduced bargaining power in international trade relations with Asia was also recognised by Indonesian Trade Minister, Thomas Lembong in 2016, noting that the UK would have to offer better terms in FTA negotiations than would be accepted from the EU, and that Indonesia would be willing to make greater concessions for a ‘big trophy like the EU’ than it would for a single State.¹³

8. As a region, Asia is a significant trading partner for the EU, and as a consequence of membership of the EU, the UK.¹⁴ In 2018, half of the EU’s top ten external trading partners

⁹ Ibid.

¹⁰ Foreign and Commonwealth Office, ‘Foreign Secretary’s Speech on the UK in Asia Pacific’ (GOV.UK, 30 January 2015) <<https://www.gov.uk/government/speeches/foreign-secretarys-speech-on-the-uk-in-asia-pacific>> accessed 21 May 2019.

¹¹ Turner, above n 8.

¹² Prime Minister’s Office, ‘PM Statement at Press Conference with Japanese Prime Minister Abe’ (GOV.UK, 5 May 2016) <<https://www.gov.uk/government/speeches/pm-statement-at-press-conference-with-japanese-prime-minister-abe-5-may-2016>> accessed 21 May 2019.

¹³ Maomi Canton, ‘Indonesia to Use EU Template for Post-Brexit UK FTA, Says Jokowi Advisor’ (Asia House, 30 September 2016) <<https://asiahouse.org/indonesia-use-eu-template-post-brexit-uk-fta-says-jokowi-advisor/>> accessed 19 May 2019.

¹⁴ For the purposes of this report, countries considered as constituting the Asian region align with United Nations classifications, and encompass the 48 countries of: Afghanistan, Armenia, Azerbaijan, Bahrain, Bangladesh, Bhutan, Brunei Darussalam, Cambodia, China (including Hong Kong and Taiwan), Cyprus, Democratic People’s Republic of Korea, Georgia, India, Indonesia, Iran, Iraq, Israel, Japan, Jordan, Kazakhstan, Kuwait, Kyrgyzstan, Lao PDR, Lebanon, Malaysia, Maldives, Mongolia, Myanmar, Nepal, Occupied Palestinian Territory, Oman, Pakistan, Philippines, Qatar, Republic of Korea, Saudi Arabia, Singapore, Sri Lanka, Syrian Arab Republic, Tajikistan, Thailand, Timor-Leste, Turkey, Turkmenistan, United Arab Emirates, Uzbekistan, Viet Nam, and Yemen. United Nations Department of Economic and Social Affairs, ‘Classification and Definition of Regions’ (United Nations Department of Economic and Social Affairs) <<https://esa.un.org/MigFlows/Definition%20of%20regions.pdf>> accessed 16 April 2019.



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in merchandise trade were from Asia, and Asia held a 50% share of total imports into the EU.¹⁵ The EU's total trade in goods with Asia is worth €1.4 trillion,¹⁶ and it currently has some form of bilateral trade agreement in place with eight Asian countries; agreements partly in place, pending, being updated, or in negotiation with an additional seventeen; and continues to pursue a region-to-region agreement with ASEAN States.¹⁷ That over 60% of the agreements currently being negotiated by the EU on the subject of trade are with Asian States highlights their future significance in Europe's global trade, and are a likely marker for their potential significance for UK trade after BREXIT.

9. The UK's global trade represents the equivalent of over 50% of the country's GDP, with imports and exports accounting for the equivalent of 30%.¹⁸ As of 2017, the UK's top trading partners by rank were: the United States, Germany, Netherlands, France, China, Ireland, Spain, Belgium, Italy and Switzerland.¹⁹ Other than China, Asian markets are not among the UK's top trading partners.²⁰ However, as a collective, Asian States accounted for \$96.7bn (USD) worth of UK exports, and \$149bn in imports in 2017 (approximately 25% of both exports and imports).²¹ Furthermore, 90% of global economic growth over the next ten to fifteen years predicted to be generated beyond Europe,²² and commitment to look beyond Europe in forging an independent trade policy,²³ the UK is increasingly likely to move beyond these partners in its international commerce. The upwards trajectories of many Asian economies—demonstrating stronger import demand and rapid expansion—makes them likely candidates for new UK trade relationships. Labelled the 'world's most dynamic region', East and South Asia accounted for almost 50% of world gross product growth in 2017, while 'emerging Asia' contributed 60% of the growth in global merchandise imports from January

¹⁵ European Commission Directorate General for trade, 'Client and Supplier Countries of the EU28 in Merchandise Trade (value %)' (*European Commission*, 15 March 2019)

<http://trade.ec.europa.eu/doclib/docs/2006/september/tradoc_122530.pdf> accessed 16 April 2019.

¹⁶ Jean-Luc Demarty, 'EU-Asia Trade – The Bright Future Ahead' (*Friends of Europe*, 29 May 2018)

<<https://www.friendsofeurope.org/publication/eu-asia-trade-bright-future-ahead>> accessed 16 April 2019.

¹⁷ European Commission, 'Negotiations and Agreements' (*European Commission*)

<http://ec.europa.eu/trade/policy/countries-and-regions/negotiations-and-agreements/#_being-negotiated> accessed 16 April 2019.

¹⁸ Department for International Trade, above n 2, 6.

¹⁹ UK Department for International Trade, 'UK Trade in Numbers' (2019)

<assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/791972/190402_UK_Trade_in_Numbers_full_web_version.pdf>

²⁰ *Ibid*, 12-13.

²¹ The Observatory of Economic Complexity, 'United Kingdom' (*OECD*, 2017)

<<https://atlas.media.mit.edu/en/profile/country/gbr/>> accessed 21 May 2019.

²² European Commission, 'Trade for All: Towards a More Responsible Trade and Investment Policy' (*European Commission*, October 2015) <http://trade.ec.europa.eu/doclib/docs/2015/october/tradoc_153846.pdf> accessed 21 May 2019, 8.

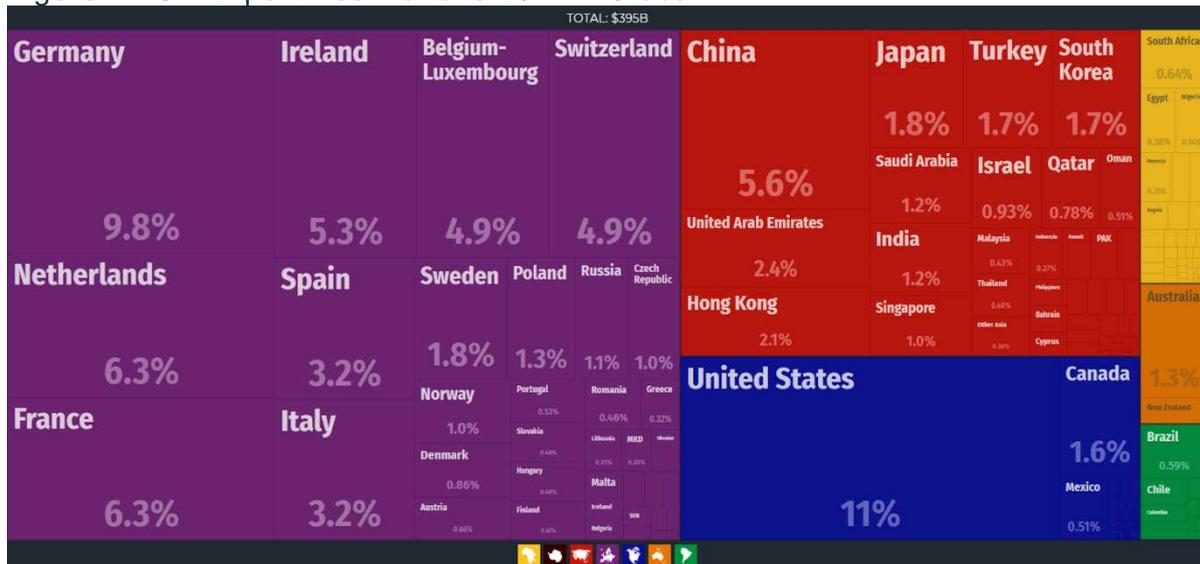
²³ Department for International Trade, above n 2.



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to August.²⁴ Although the Asian region has experienced substantial economic growth, the benefits of this are not distributed equally between countries or between groups of people within them.²⁵

Figure 1. UK Export Destinations 2017 – Global²⁶



²⁴ See United Nations, ‘World Economic Situation and Prospects: 2018’ (2018)

<https://www.un.org/development/desa/dpad/wp-content/uploads/sites/45/publication/WESP2018_Full_Web-1.pdf> accessed 21 May 2019.

²⁵ Department for International Development, ‘Asia Regional Profile’ (GOV.UK, July 2018)

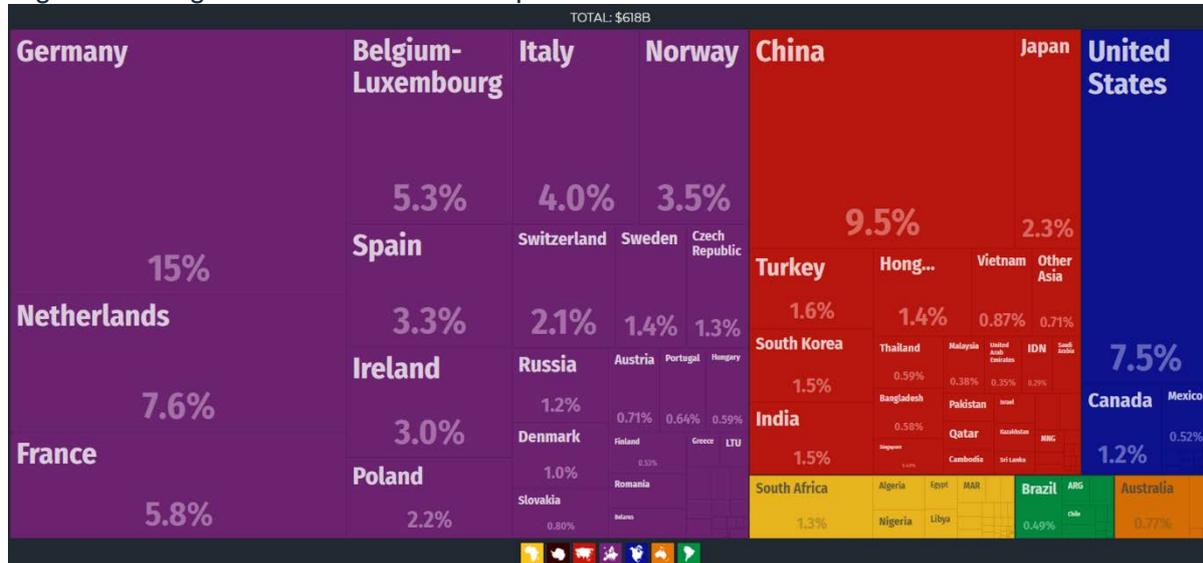
<https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/723079/Asia-Regional-July-2018.pdf> accessed 21 May 2019, 1.

²⁶ The Observatory of Economic Complexity, above n 21.



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Figure 2. Origin Countries of UK Imports 2017 – Global²⁷



10. Asia’s high profile in international trade with Europe and the UK does not translate into other key areas subject to international negotiation and scrutiny, and the region has a relatively weak record in the recognition and protection of human rights. Although movement has occurred in the recognition and advancement of human rights in Asian States, ‘Asian values’ continue to be employed as a justification for resistance to universal human rights.²⁸ This resistance, presented in the Bangkok Declaration signed in 1993, suggests that historical contexts and shared ‘Asian values’ warrant interpretations and applications of human rights and democracy that diverge from those advanced by Western States.²⁹ Thus, the attempt to advance human rights in the Asian context must grapple with the criticism that the values broadcast are a reflection of Western hegemony, creating barriers not only to their uptake in the first instance, but to their implementation and internalisation in practice.

11. On the whole, Asia demonstrates a lower level of participation in the international human rights regime than other regions, with fewer countries ratifying international human rights instruments and no developed, region-specific human rights framework. The Asian region has ratified an average of 73% nine core international human rights instruments, compared to a global average of 78% and an average for all non-Asian countries of 79% (see Figure 3).

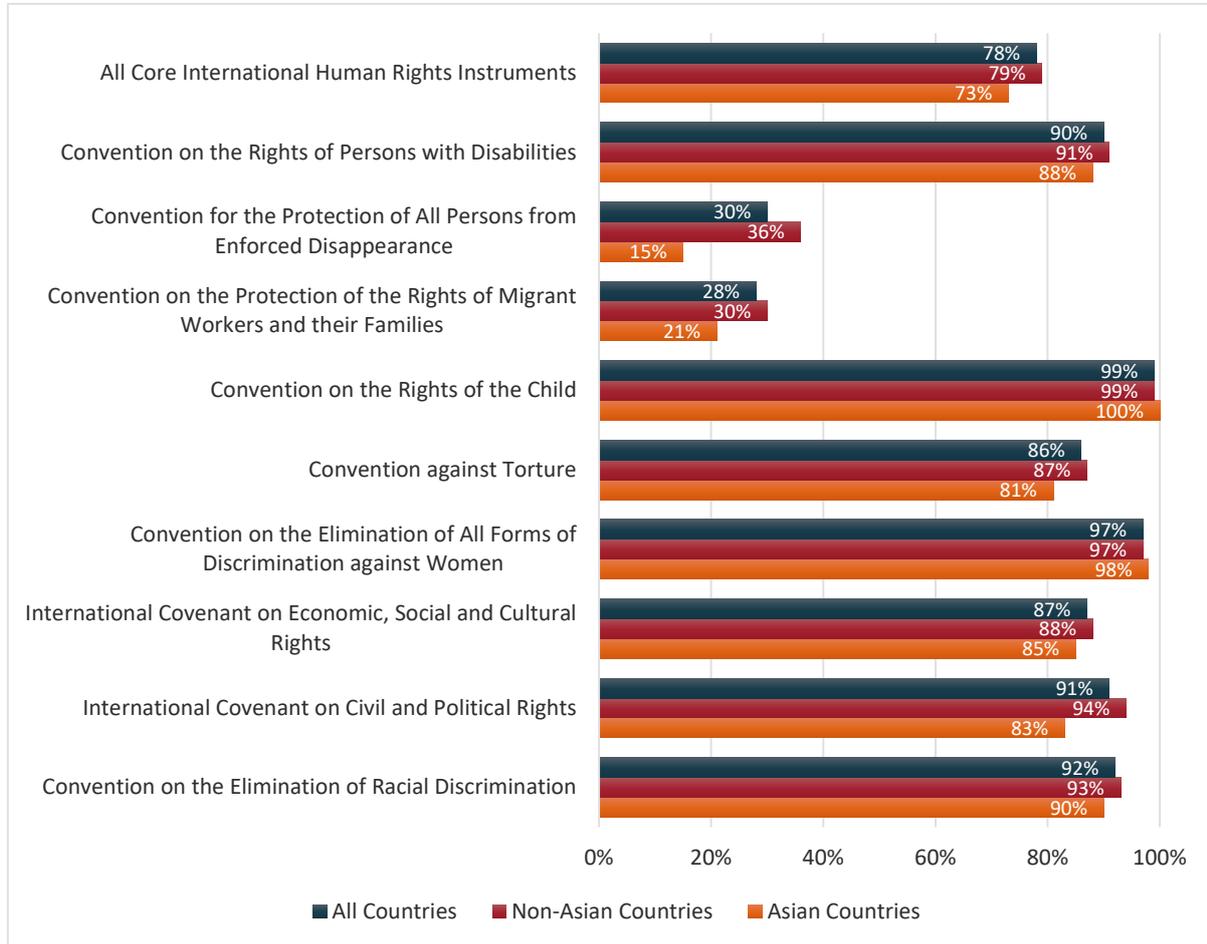
²⁷ Ibid.

²⁸ See Leena Avonius and Damien Kingsbury, *Human Rights in Asia: A Reassessment of the Asian Values Debate* (Palgrave Macmillan 2008); Visone Tommaso, ‘The “ASEAN Way”: A Decolonial Path Beyond “Asian Values”?’ (2017) 9(1) *Perspectives on Federalism* 1; William de Bary, *Asian Values and Human Rights: A Confucian Communitarian Perspective* (Harvard University Press 1998);

²⁹ Joseph Chan, ‘Asian Values and Human Rights: An Alternative View Democracy in East Asia’ in Larry Diamond and Marc F Plattner (eds), *Democracy in East Asia* (Johns Hopkins University Press 1998) 28, 28.

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Figure 3. Ratification of Core Human Rights Instruments³⁰



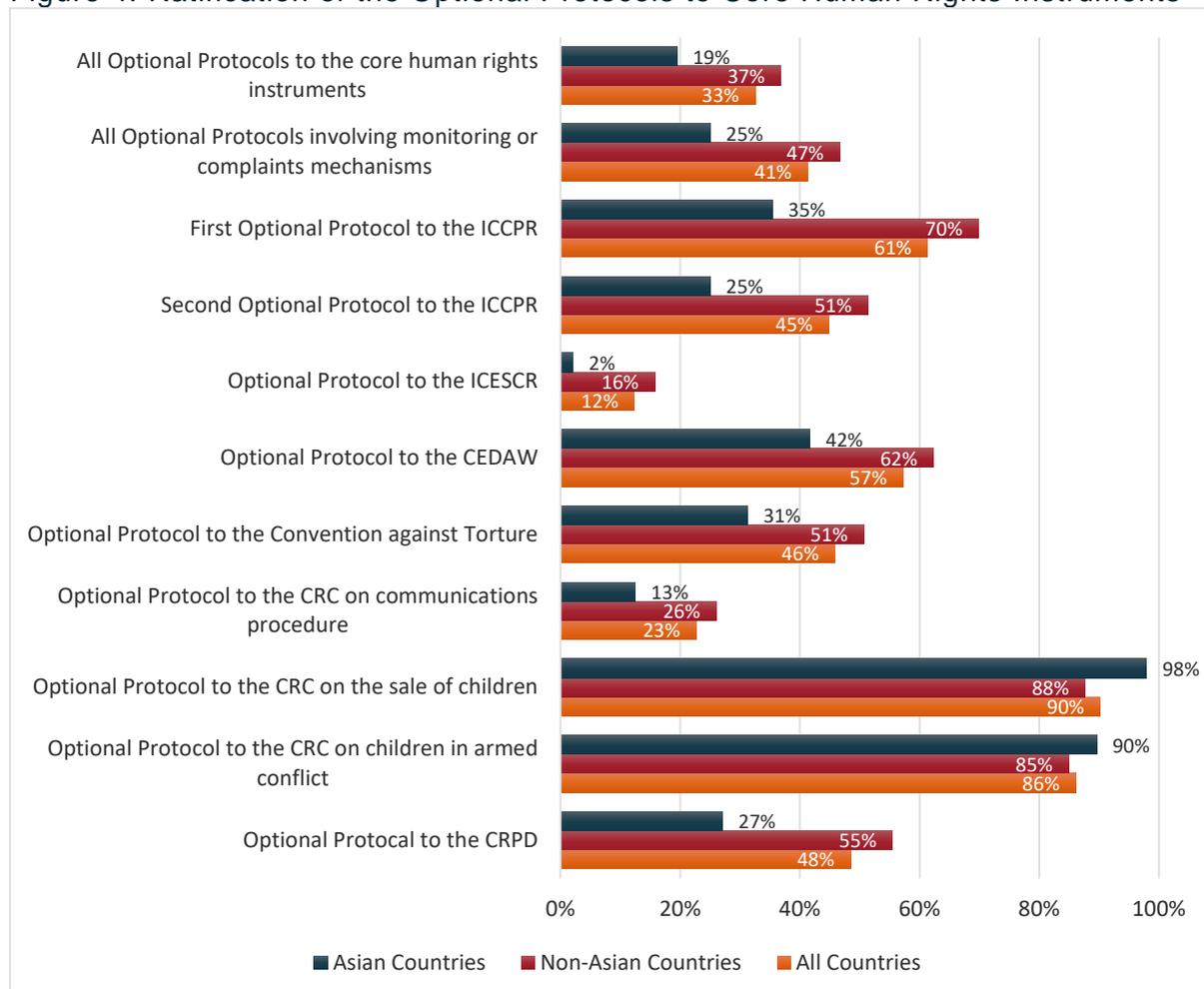
12. The divergence in the proportion of Asian countries that have ratified these instruments, compared to non-Asian States, has decreased in recent years. Asian nations have increasingly acceded to and ratified the nine core human rights treaties, reducing the

³⁰ The United Nations Office of the High Commissioner for Human Rights identifies nine core international human rights instruments. Conventions included in this group are: International Convention on the Elimination of All Forms of Racial Discrimination; International Covenant on Civil and Political Rights; International Covenant on Economic, Social and Cultural Rights; Convention on the Elimination of All Forms of Discrimination against Women; Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment; Convention on the Rights of the Child; International Convention on the Protection of the Rights of All Migrant Workers and Members of Their Families; International Convention for the Protection of All Persons from Enforced Disappearance; and Convention on the Rights of Persons with Disabilities. Office of the High Commissioner for Human Rights, 'The Core International Human Rights Instruments and their Monitoring Bodies' (*United Nations Office of the High Commissioner for Human Rights*) <<https://www.ohchr.org/EN/ProfessionalInterest/Pages/CoreInstruments.aspx>> accessed 16 April 2019. Ratification of treaty data drawn from the United Nations Treaty Collection Depository – United Nations, 'Multilateral Treaties Deposited with the Secretary General' (*United Nations Treaty Collection*), Chapter IV: Human Rights <<https://treaties.un.org/PAGES/Treaties.aspx?id=4&subid=A&clang=en>> accessed 25 April 2019.

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ratification gap in this area. On the face of it, this could be interpreted as an indication that Asia is no longer lagging behind the rest of the world in committing itself to human rights. However, ratification of the optional protocols to these instruments continues to evidence Asian States' resistance to the universal human rights agenda. Most notably, many Asian States remain absent from membership in instruments that entail some level of oversight over the implementation of the core human rights instruments (see Figure 4).

Figure 4. Ratification of the Optional Protocols to Core Human Rights Instruments³¹



13. The First Optional Protocol to the International Covenant on Civil and Political Rights, and the Optional Protocols to the International Covenant on Economic and Social Rights, the Convention on the Rights of Persons with Disabilities, and the Convention on the Elimination of Discrimination against Women all establish mechanisms through which individuals can bring complaints to an international forum. This empowers individuals or groups claiming to have experienced violations of their rights to elevate their claims to the international level, in

³¹ Ratification of treaty data drawn from the United Nations Treaty Collection Depository, above n 30, accessed 18 May 2019.



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the event that domestic remedies failure to deliver justice. These Protocols also create inquiry mechanisms, within which international bodies may investigate and report on grave and systematic violations occurring within the borders of States Parties, and make recommendations to the State. The Optional Protocol to the Convention against Torture, although not entailing an individual complaints mechanism, establishes an international inspection system through which States permitted international oversight over their implementation of the Convention. The relatively limited presence of Asian States Parties to these protocols highlights the continued reluctance of these nations to permit international monitoring of their implementation of the commitments contained in the nine core human rights treaties.

14. Despite 83% of Asian States having now ratified the International Covenant on Civil and Political Rights, only 36% have ratified the First Optional Protocol. This against an average for all other States of 94% and 70% respectively. Likewise, ratification of the Optional Protocol to the International Covenant on Economic, Social and Cultural Rights by Asian nations lags behind the rest of the world. Non-Asian States are eight times more likely to have ratified the Optional Protocol than their Asian counterparts (2% against 16%), although ratifications remain relatively low across the board given the recency of the instrument, only adopted in 2008. This trend holds true for each of the Optional Protocols that creates a mechanism for oversight and accountability in relation to human rights abuses committed against citizens. Across the six such instruments, Asian States ratify only 25%, against a non-Asian rate of 47%. It is only in relation to Protocols that do not involve a direct mechanism to monitor implementation that Asian States exceed the global average—namely the Optional Protocols to the Convention on the Rights of the Child concerning the sale of children, and use of children in armed conflict. However, their commitment to the Second Optional Protocol to the International Covenant on Civil and Political Rights concerning the death penalty mirrors the lack of commitment to Protocols with monitoring mechanisms. Thus, in normative commitments too they continue to lag behind other States in key areas.

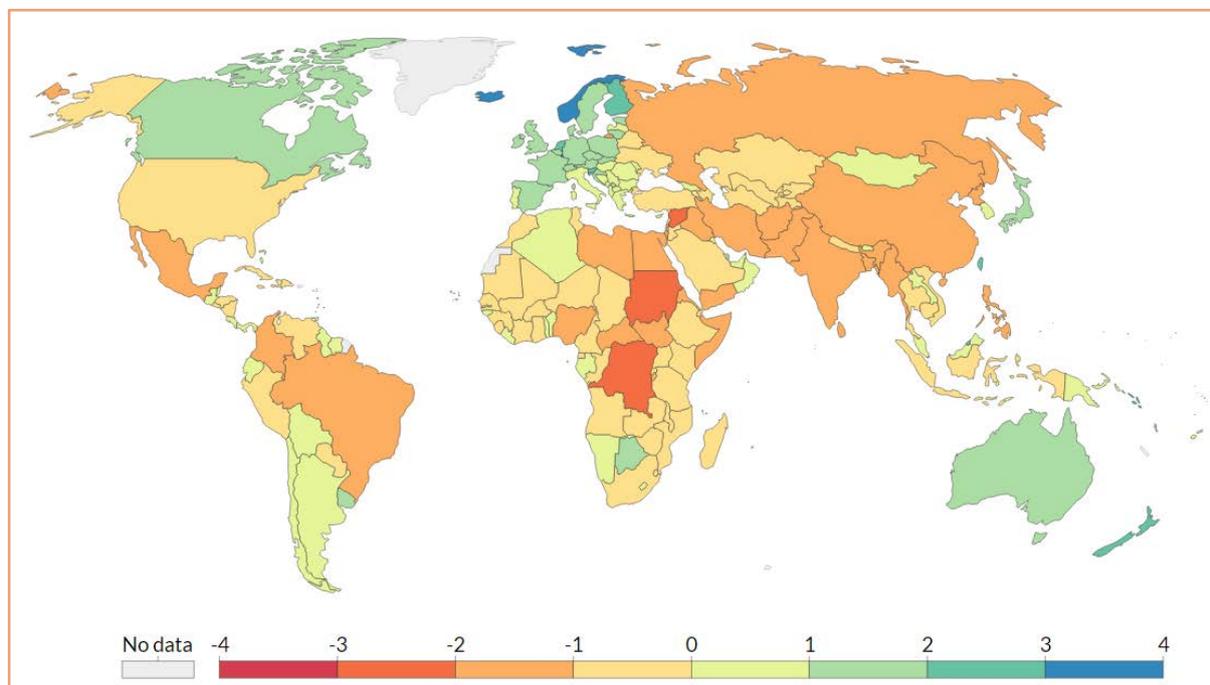
15. Asian States' lack of participation in the Optional Protocols to the nine core human rights instruments when these require the State open itself to direct monitoring and criticism for violations occurring within their borders demonstrates a resistance to international oversight of the implementation of their commitments. Without such mechanisms, the human rights promises made to individuals through the fundamental human rights instruments may only be fulfilled within the boundaries of the State, and with limited space for the international community to interrogate violations committed by the State. Further, where other regions have developed their own human rights systems, including mechanisms for monitoring and enforcement, Asian States have not established an Asian-wide forum for the advancement of human rights. The region thus lacks both mandatory enforcement mechanisms as found in the African, European, and Inter-American systems and a centralised monitoring body.

16. If protection and advancement of human rights occurred only within the confines of international human rights instruments themselves, this failure has the potential to allow impunity for violations committed within the borders of these States. This is true in Asian

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States to a significantly greater degree than in the rest of the world, as a result of both refusal to empower global monitoring mechanisms and the lack of regional human rights mechanisms for monitoring implementation. This is reflected in the relative protection of human rights in the region (see Figure 5). Despite the fact that Asian States make up only 25% of all States globally, 42% of the 50 lowest scoring countries in the human rights protection measure in 2014 were Asian States.³² At the opposite end of the spectrum, only four of the world's 50 highest-scoring countries in protecting against political repression and violations of personal integrity rights were from the Asian region.

Figure 5. Protection from Political Repression and Violations of Physical Integrity Rights – Human Rights Protection 2014³³



Higher values indicate better human rights protection. The human rights scores measure protection from political repression and violations of 'physical integrity rights'

17. Not only are Asian States historically weak in ensuring protection for human rights within their borders, but have demonstrated a correlatively high number of violations (see Figure 6). Accounting for both measures enacted and pressures applied in relation to freedom of the press, civil liberties, political freedom, human trafficking, incarceration, political prisoners, religious persecution, torture, and executions, the Asian region demonstrates relatively high scores in global comparative assessments of human rights. The

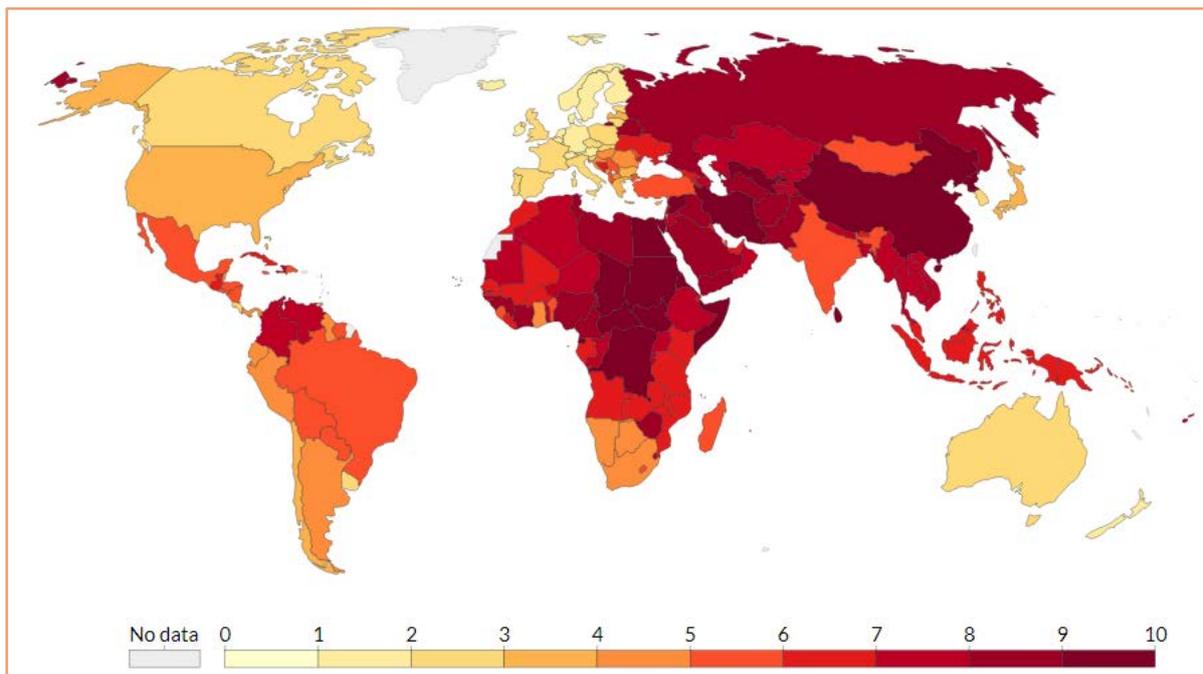
³² Christopher J Fariss and Keith Schnakenberg, 'Latent Human Rights Scores' (*Human Rights Scores*, 2014) <<http://humanrightsscores.org/>> accessed 21 May 2019.

³³ Max Roser, 'Human Rights' (*Our World in Data*, 12 June 2016) <<https://ourworldindata.org/human-rights>> accessed 21 May 2019.

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only other region performing comparatively poorly in this metric are African States. Only three Asian States appear in the 50 countries with the lowest occurrence of human rights violations in this measure, whereas 21 Asian States (42%) appear in the 50 worst countries for human rights violations in 2014.

Figure 6. Fragile States Index – Human Rights Violations 2014³⁴



Human rights violations measured on a scoring system from 0 to 10 (where 10 is worst). This is an aggregated metric on that basis of multiple variables, including: press freedom, civil liberties, political freedoms, human trafficking, political prisoners, incarceration, religious persecution, torture and executions

18. While specialised frameworks are central to advancing human rights globally, other areas of global engagement nonetheless provide opportunities to advocate for their protection. International trade is one area in which human rights are increasingly finding voice, as States utilise their bargaining power in the international marketplace to encourage others to respect, protect, and fulfil human rights. Economic globalisation and respect for universal human rights both seek to improve human welfare in their own ways. Yet, despite sharing a broad objective, human rights and trade law have evolved in substantially distinct ways, with divergent approaches and key conceptual differences.³⁵ Attempts to link the international regimes governing human rights and trade respectively have intensified over time, and States increasingly develop frameworks treating these two international regimes

³⁴ Ibid.

³⁵ Christine Breining-Kaufmann, 'The Legal Matrix of Human Rights and Trade Law: State Obligations versus Private Rights and Obligations' in Thomas Cottier, Joost Pauwelyn and Elisabeth Bürgi (eds), *Human Rights and International Trade* (Oxford University Press 2005) 95.



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as interconnected.³⁶ In particular, attempts to advance human rights through international trade negotiations, agreements, and schemes now have established foundations.

19. Despite these developments the place of human rights in international trade negotiations remains contested. The tensions between the values and objectives of the two regimes give rise to criticism of attempts to situate the human rights agenda in the context of trade, suggesting that the two are in fact discrete systems.³⁷ This is exacerbated in the context of the ‘Asian values’ debate where globalising forces may be characterised as the advancement of Western hegemony rather than universal values.³⁸ For instance, former Prime Minister David Cameron was cautioned against pointing the finger at China’s human rights record and the UK’s relationship with China was damaged when he took meeting with the Dalai Lama.³⁹ Further, the potential conflict between international trade and human rights regimes evidences the tensions in marrying the two.⁴⁰ Significant gaps also exist in the norms of international trade. World Trade Organisation (WTO) rules govern international trade instruments established by WTO Member States, including the EU. However, following BREXIT, the UK will be a member of the WTO in its own right and any trade instruments it develops must comply with WTO rules.

20. The WTO currently lacks a robust human rights dimension. The basic governing principle of the regime is the ‘Most-Favoured Nation’ (MFN) principle—that all WTO members must treat other members equally in relation to trading benefits granted—with only limited non-trade exemptions. Any attempt by the UK to advance human rights in Asia through trade after exiting the EU is thus not without its challenges. These challenges include corruption, low development status, and political unwillingness to engage on human rights—often embedded in ideological differences between Asian and Western States. However, a responsive approach to the incorporation of human rights protections into trade agreements that learns from past practice, harnesses bargaining power during negotiations, and continues to monitor and enforce these provisions over time has the potential to return significant improvement to the lives of people in these countries. It also crucially reduces the risk of the UK becoming involved in the perpetration of human rights violations or continuing impunity for abuses through its trade relations. The UK should therefore include human rights in its priorities in future trade negotiations, and seek to achieve greater harmony between the two regimes.

³⁶ Thomas Cottier, Joost Pauwelyn and Elisabeth Bürgi Bonanomi, ‘Linking Trade Regulation and Human Rights in International Law: An Overview’ in Cottier, Pauwelyn and Bürgi (eds), *ibid.*

³⁷ On these tensions, see Sarah Joseph, *Blame it on the WTO?: A Human Rights Critique* (Oxford University Press 2011), 32-55.

³⁸ See above n 28.

³⁹ Oliver Turner, above n 8.

⁴⁰ See Andreas R Ziegler and Betram Boie, ‘The Relationship between International Trade Law and International Human Rights Law’ in Erika de Wet and Jure Vidmar (eds), *Hierarchy in International Law: The Place of Human Rights* (Oxford University Press 2012) 272.



Shaping international trade relationships

21. International trade relationships can be constructed in a variety of ways. Trade agreements and schemes take a number of different approaches to the establishment and regulation of these relationships, evidencing different approaches to membership between unilateral schemes developed by a single party and imposed upon trading partners, and agreements developed through negotiation and mutual consent. Further, agreements might involve a single pair of parties engaged in bilateral negotiations, and later trade, or multiple parties all seeking to build trade relationships within a group of States and to achieve consensus on terms applicable to all parties. Each of these approaches has strengths and weaknesses, and may substantially influence the shape of the trade relationship and the nature of human rights protections within them. These differences must be weighed by the UK in future decisions on developing and evolving trade.

Unilateral schemes

22. One of the most dominant trade instruments in place in Asia is the Generalised System of Preferences—a regime of tariff preferences granted to developing countries with the aim of fostering economic development within their borders. Established in 1971 by the WTO, and replaced in 1979 by an Enabling Clause that governs it, the Generalised System of Preferences is an exemption to the WTO’s MFN clause, allowing developing countries more favourable treatment than might be accorded on the basis of trade interests alone. This system therefore introduces supplementary values into the regulation of international trade relationships, namely the economic development of a particular set of countries. The EU, the US, and Canada, among other WTO members, all grant benefits on the basis of Generalised Schemes, each with their own entry conditions and forms of conditionality. Many Asian countries benefit from these schemes as less developed countries.

23. The approach adopted in the European Union’s Generalised Scheme of Preferences (GSP) echoes the WTO system. The scheme avoids the process of negotiating and obtaining consensus on the terms of a trade agreement by creating a unilateral scheme of benefits applicable to developing countries. By providing a set of benefits to these third States, the GSP incentivises compliance by potential trading partners, whilst avoiding the need to negotiate a specific set of terms with the explicit consent of these partners. The GSP thus gives developing countries access to the EU market and decreases or removes duties on exports to the EU. In exchange for these benefits, trading partners are obliged to comply with the established terms of the Scheme.

24. The GSP allocates benefits to third States on a sliding scale, with different groups of countries eligible for various preferences according to the specific characteristics of that country. Three schemes are set out in the EU’s GSP Regulation: (1) Standard GSP which grants tariff preference to low and lower-middle income countries; (2) GSP+ which grants more favourable tariff preferences for exports conditional upon a developing countries’ compliance with certain norms to vulnerable low and lower-middle income countries; and (3) EBA (Everything But Arms) providing duty-free and quota-free access to the EU market for



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UN-classified least developed countries.⁴¹ This allows the scheme to respond to the divergent needs of countries falling within each band, enabling flexibility and responsiveness in the approach taken to trade, whilst also preserving the generalised unilateral approach. The EU's GSP+ covers Armenia, Bolivia, Cabo Verde, Kyrgyzstan, Mongolia, Pakistan, the Philippines, and Sri Lanka, among others. The EU's GSP EBA covers 49 beneficiaries, including Bangladesh and Cambodia.⁴² Having a triple-layer of GSPs depending on the beneficiary's development status ensures that the GSP complies with WTO rules requiring objective criteria for differentiation, and is a method of reacting to specific development needs of Asian countries.

25. In addition to ensuring that the EU's economic interests are protected through advancing trade relationships with third parties, the GSP aims to promote sustainable development and good governance in developing countries, and to contribute to poverty eradication.⁴³ This is particularly important in countries like Cambodia, where substantial human rights abuses have manifested in the past, and significant concerns remain. Thus, human rights are situated within the GSP, but framed in relation to the interests of the third State rather than simply as obligatory requirements imposed on them solely in the interests of the EU. The GSP does this through conditionality, the prospect of revocation of tariff preferences if a country violates certain standards, including human rights norms, as negative conditionality, and the grant of additional preferences in the GSP+ as positive conditionality (discussed further below).

26. Unilateral schemes avoid the need for consensus between all parties to a trading relationship, instead building on the power of the imposing entity to create a system with terms third countries will accept. Adhering to the terms of the scheme in a general sense becomes the precondition for access to the imposing entity's market. Therefore, the size of that market is likely to determine the relative power of the entity to impose conditions on trading partners. By exiting the EU, the UK reduces the size of its market for potential partners and potentially reduces the degree to which it can advance human rights through a generalised scheme. However, the UK was nonetheless the tenth largest export economy in the world in 2017, and the fifth largest importer in 2017 leaving it in a relatively strong position in the global marketplace.⁴⁴

Bilateral agreements

27. Bilateral trade agreements have formed part of the EU's more recent trade strategy, applicable from 2006, which uses 'Sustainable Development Chapters' within

⁴¹ Commission Regulation (EU) No 978/2012 [2012] OJ L303/1.

⁴² European Commission, 'Report from the Commission to the European Parliament and the Council on the application of Regulation (EU) No 978/2012 applying a Scheme of Generalised Tariff Preferences and repealing Council Regulation (EC) No 732/2008' (COM(2018) 665 final).

⁴³ European Commission, 'Generalised Scheme of Preferences (GSP)' (*European Commission*) <http://ec.europa.eu/trade/policy/countries-and-regions/development/generalised-scheme-of-preferences/index_en.htm> accessed 16 April 2019.

⁴⁴ The Observatory of Economic Complexity, above n 21.



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comprehensive, new generation free trade agreements (FTAs). These new generation FTAs are particularly applicable to Asian countries as they graduate from GSP preference bands into higher middle-income country status, and are likely to be especially prominent in the UK's future trade policy. The EU's relationship with Asian countries continues to expand, with ongoing development of bilateral FTAs seen as building blocks in the eventual negotiation of an EU-Association of East Asian Nations (ASEAN) trade agreement. Bilateral agreements with countries such as Vietnam are currently in development towards this objective.⁴⁵ Asia provides the EU with other potential FTA partners outside of ASEAN, including India, for which benefits would encompass both EU import-dependent firms and Asian exporters.

28. Bilateral trade agreements, unlike generalised and unilateral schemes, allow for a more tailored approach to the challenges of engaging with particular third countries, both with regard to the dynamics of trade itself and in the interest in advancing human rights in these jurisdictions. Given the challenges of establishing a unilateral GSP after exiting the EU, bilateral agreements are increasingly likely to form the cornerstone of the UK's trading relationships with third countries. They further offer the opportunity for direct engagement with States, and the development of context-responsive, bespoke approaches to grappling with human rights challenges in the third State. This is particularly relevant in the Asian context where historical resistance to human rights has an ideological dimension that must be managed carefully and responsively.

Multilateral agreements

29. Multilateral agreements are a feature on the horizon for major trading players such as the EU and the US, each attempting to engage with Asia in ways that would produce beneficial trade. The limited development of these regimes internationally makes assessing the potential involvement of the UK in such after BREXIT difficult. Continued engagement with the EU in the context of trade, or participation in negotiations for alternative multi-lateral regimes may provide an entry point for the UK to influence negotiations, and to shape the positioning of human rights in these contexts. However, the relative power of different parties to the negotiations would present challenges for the UK in advancing specific positions on human rights absent substantive support from major partners in the negotiations.

Integrating human rights into trade

30. Having determined the possible shape of international trade relationships, whether carried out discretely or in combination, the positioning of human rights within the approaches that are adopted must be carefully considered to achieve the greatest potential impact on the lives of vulnerable people. Human rights obligations, standards, and aspirations might be engaged in trade negotiations as a specific term of agreements concluded, or they may serve as an entry point for the conclusion of a trade agreement that

⁴⁵ European Commission, *Trade for all: Towards a more responsible trade and investment policy* (European Union 2015) 32.



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does not speak substantively to the content of human rights. Reflecting the former of these approaches, ‘essential elements’ clauses and sustainable development chapters provide for the integration of human rights within trade agreements. The ‘list approach’ to standards and side agreements, on the other hand, use trade negotiations as a lever to pressure trading partners to sign up to external human rights standards and frameworks. In the Asian context, dialogue and cooperation has not been affiliated with leveraging human rights improvement in countries where there are serious concerns, such as South Korea. On the other hand, conditionality has been used rarely by the EU. The UK’s independent trade policy must be coherent and consistent and recognise the importance of applying pressures on Asian trading partners.

Trade agreements, essential elements clauses and sustainable development chapters

31. Prior to the 2006 EU global trade strategy,⁴⁶ the EU integrated human rights in its bilateral trade agreements through ‘essential elements’ clauses, conventionally stating that human rights would be an essential element of the agreement. Occasionally, these were coupled with non-compliance clauses which then allowed for ‘appropriate measures’ to be taken if a trade partner violated an essential elements clause. This provided flexibility for responses to human rights abuses, although the degree to which the substance of expectations and obligations were clearly delineated remained limited. They were not effectively used to improve human rights, and were particularly ineffective in States with ideological resistance to outside influence in this area, including human rights.

32. After 2006, with the rise of new generation FTAs, a new approach to integrating human rights in international trade surfaced.⁴⁷ As opposed to the simple ‘essential elements’ clauses, agreements now contain entire chapters dedicated to sustainable development, reflecting the importance of human rights within the United Nations larger ambitions of sustainable development. The phrase has become a ‘buzzword’ in trade, allowing for a ‘large political consensus’ to accept the inclusion of human rights in trade agreements despite historical controversy over their incorporation.⁴⁸ This is particularly important in Asia, as it gives legitimacy on the EU’s actions including human rights elements. By connecting the advancement of rights to the global sustainable development agenda, these instruments mitigate the challenges of ‘Asian values’ resistance to Western States’ attempts to expand the reach of human rights.

33. This does not mean Asian countries have been willing to accept all human rights clauses. Difficulties concluding the EU-India FTA illustrate the lack of acceptance in the EU’s

⁴⁶ Commission, ‘Communication on Global Europe: Competing in the World: A Contribution to the EU’s Growth and Jobs Strategy’ (Communication) COM(2006)567 final, 9.

⁴⁷ European Commission, ‘Implementation of Free Trade Agreements’ COM(2017) 654 final, 7.

⁴⁸ L Van den Putte and J Orbie, ‘EU Bilateral Trade Agreements and the Surprising Rise of Labour Provisions’ (2015) 31(3) *The International Journal of Comparative Labour Law and Industrial Relations* 263, 282.



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human rights agenda and the divergence between EU and Indian perspectives.⁴⁹ India's rejection of the human rights elements stems from a concern that the EU's negotiation position would damage India's economic interest, a protectionist fear.⁵⁰ In addition, similar experiences were found in negotiations and conclusion of the EU-Singapore FTA. Here, the EU's values of human rights and linking these to conditionality were an area of contention. There was a side letter recognising Singapore's human rights practices at the time of the agreement, which limited the EU's ability to use conditionality on issues like the death penalty.⁵¹ Taking into account EU experiences of negotiations with Asian countries, it becomes clear that incorporating sustainable development into FTAs is a contentious process. The UK will at times need to adapt policy to the demands of the trade partner. However, care should be taken to avoid devaluing the importance of human rights in so doing.

34. A model for this approach to positioning human rights in international trade, the EU's Sustainable Development Chapters (SDCs) have been described as a 'blueprint' for future EU trade agreements.⁵² The SDCs serve as the touchstone for the adoption or adaptation of this approach by the UK, even after exiting the EU. The UK should account both for the substance and shape of these when designing future trade agreements. By closely analysing the strengths and weaknesses of SDCs in their operation, the UK could take advantage of the opportunity to advance human rights through trade meaningfully. Rather than simply following in the footsteps of existing methods, the UK could take this opportunity to become a world-leader in this space, and develop a new, evidence-based model for structuring SDCs in international trade agreements.

35. The EU's sustainable development chapters are broad in their scope, encouraging the advancement of values such as 'decent work' and responsible business conduct, rather than enumerating a clearly defined set of rights priorities. The EU FTAs allow scope for manoeuvre of trade partners' commitments to human rights, allowing for state sovereignty, but at the expense of human rights. Such flexibility depends on a country's responsiveness to human rights commitments. In the EU's negotiations on an FTA with India, for example, a hurdle that has been met is that India insists the national Constitution covers labour rights without the need for labour rights in trade.⁵³ The EU-Vietnam FTA's SDC (not yet in force) includes the mere reaffirmation of party commitments to ILO standards and sets an

⁴⁹ J Orbie and S Khorana, 'Normative versus market power Europe? The EU-India trade agreement' (2015) 13(3) Asia Europe Journal 253

⁵⁰ J Orbie and S Khorana, 'Normative versus market power Europe? The EU-India trade agreement' (2015) 13(3) Asia Europe Journal 253, 262.

⁵¹ L McKenzie and K Meissner, 'Human Rights Conditionality in European Union Trade Negotiations: The Case of the EU-Singapore FTA' (2017) 55(4) Journal of Common Market Studies 832.

⁵² Liam Campling and others, 'Can Labour Provisions Work beyond the Border: Evaluating the Effects of EU Free Trade Agreements' (2016) 155 International Labour Review 357, 377.

⁵³ J Orbie and S Khorana, 'Normative Power Europe? The EU-India Trade Agreement' (2015) 13 Asia Eur J 253, 260-261.



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obligation on the parties towards making ‘continued and sustained efforts’ for ratification of core labour standards.⁵⁴ This soft nature is problematic because Vietnam has not ratified all core labour standards. A stronger UK trade agreement might oblige ratification of core human rights standards prior to its entry into force, a form of positive conditionality. This approach has the additional benefit of engaging the compliance mechanisms of the core human rights instruments, shifting some of the burden of human rights monitoring from the trade regime onto these bodies.

36. Implementation of the commitments to human rights contained in international trade agreements has been questioned. Signing up to comply with international standards does not necessarily translate to the protection of human rights in practice. Thus, ratification of core instruments should be seen as an entry point, with implementation on the ground the ultimate goal. As an ongoing process of improvement, this might not be captured in the base conditions for entering an agreement, but should form a central concern in enforcement (considered further below). It has also been noted that the SDCs do not provide adequate responses to concerns in-country, or a lack of cooperation.⁵⁵ These concerns might be met as the UK develops its approach to advancing human rights through trade after exiting the EU.

37. The SDCs bolster the role of the UN and the ILO, integrating law such as the ILO’s 1998 Declaration and thus imposing on the EU’s trade partner an obligation to respect ILO standards. SDC chapters are ‘anchored in multilateral standards’.⁵⁶ This approach, referencing external, universal standards and frameworks is beneficial in establishing the legitimacy and sincerity of human rights commitments in the context of trade. Unlike in previous trade agreements, the SDCs treat human rights on an equal footing with the environment.⁵⁷ Some commentators suggest that this harms the principle of the indivisibility of human rights.⁵⁸ However, in practice, it has allowed for greater engagement on a wider range of human rights issues in the sustainable development framework. The labour protection provisions in the agreements, for instance, have been found to lead to increased enforcement of minimum labour standards, previously limited due to a lack of political will to

⁵⁴ Article 3.2-3.3 EU-Vietnam FTA.

⁵⁵ Commission, ‘Trade and Sustainable Development (TSD) chapters in EU Free Trade Agreements (FTAs)’ (Non-Paper of the Commission services, July 2017) 4-5
<http://trade.ec.europa.eu/doclib/docs/2017/july/tradoc_155686.pdf> accessed 26 April 2019.

⁵⁶ Commission, ‘Trade and Sustainable Development (TSD) chapters in EU Free Trade Agreements (FTAs)’ (Non-Paper of the Commission services, July 2017) 2
<http://trade.ec.europa.eu/doclib/docs/2017/july/tradoc_155686.pdf>

⁵⁷ Commission, ‘Trade and Sustainable Development (TSD) chapters in EU Free Trade Agreements (FTAs)’ (Non-Paper of the Commission services, July 2017) 2
<http://trade.ec.europa.eu/doclib/docs/2017/july/tradoc_155686.pdf>

⁵⁸ L Van den Putte and J Orbie, ‘EU Bilateral Trade Agreements and the Surprising Rise of Labour Provisions’ (2015) 31(3) *The International Journal of Comparative Labour Law and Industrial Relations* 263, 282-283.



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monitor, implement, or enforce labour rights provisions.⁵⁹ UK FTAs should also incorporate SDCs ingrained in an international rights framework.

38. EU SDCs incorporate civil society through continual monitoring, and the creation of an institutional framework for monitoring. For instance, the EU-South Korea FTA provides for the establishment of a joint committee on Trade and Sustainable Development and a Domestic Advisory Group in which national and EU civil society actors participate.⁶⁰ Such dialogue has the potential to increase the 'density of the informational environment', enhance communication, and bring human rights issues to the fore.⁶¹ The UK could influence human rights law reforms through regular, sustained dialogue within such frameworks.⁶² Engagement with the range of stakeholders connected to the issues involved in the trade agreements can improve uptake and implementation by ensuring that contextual issues are identified and appropriately dealt with in a way that responds to local dynamics. Civil society organisations, including trade unions, in particular are critical in ensuring potential challenges to impact are addressed, and vulnerable local populations are represented and advocated for in these contexts.

39. Although promising in their design, institutional frameworks for monitoring created within EU SDCs have been criticised for failing to reach their full potential due to issues like capacity constraints.⁶³ In approaching such frameworks in future trade negotiations, **the UK should therefore couple any efforts at civil society participation in trade instruments with relevant, specific, development cooperation through the UK's Department for International Development.** This would enable a more robust approach to securing and monitoring the human rights impact of trade mechanisms. Their success will also depend on the UK's political will to take dialogues seriously, the extent of human rights on the agenda, the frequency of dialogue and the political context.⁶⁴ These are just a few ways of ensuring greater effectiveness of civil society engagement.⁶⁵

40. Structured dialogues on sensitive issues, joint projects, enhanced interaction with international bodies and dedicated civil society engagements are all aspects that have been

⁵⁹ Billy Melo Araujo, 'Labour provisions in EU and US mega-regional trade agreements: rhetoric and reality' (2018) *International and Comparative Law Quarterly* 233, 244.

⁶⁰ Liam Campling and others, 'Can Labour Provisions Work beyond the Border: Evaluating the Effects of EU Free Trade Agreements' (2016) 155 *International Labour Review* 357, 370.

⁶¹ E Postnikov & I Bastiaens, 'Does Dialogue Work? The Effectiveness of Labor Standards in EU Preferential Trade Agreements' (2014) 21(6) *Journal of European Public Policy* 923, 927.

⁶² *Ibid*, 928.

⁶³ Commission, 'Trade and Sustainable Development (TSD) chapters in EU Free Trade Agreements (FTAs)' (Non-Paper of the Commission services, July 2017) 5
<http://trade.ec.europa.eu/doclib/docs/2017/july/tradoc_155686.pdf>

⁶⁴ L Van den Putte and J Orbie, 'EU Bilateral Trade Agreements and the Surprising Rise of Labour Provisions' (2015) 31(3) *The International Journal of Comparative Labour Law and Industrial Relations* 263, 272.

⁶⁵ See Jeff Kenner, Katrina Peake and Stuart Wallace, 'The EU's Engagement with Civil Society' in Jan Wouters and others, *The EU and Human Rights* (OUP 2019, forthcoming).

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highlighted as best practice in leading to some improvements in labour and environmental conditions in trade partner countries.⁶⁶ **The UK should therefore centre these approaches in its advancement of human rights mechanisms in future trade relationships.**

The EU's GSP Conditionality: a list approach to standards

41. The EU's GSP does not include such a broad 'sustainable development' framework as the FTA SDCs. Instead, they integrate human rights through a simple list approach. For the GSP+, States must ratify and implement a list of 27 international human rights and environment conventions to benefit from the scheme.⁶⁷ Negative conditionality applies through integration of a list of 15 human rights conventions,⁶⁸ including the ILO's core labour standards. Integrating a list of the standards to be respected provides certainty and clarity over the SDC approach. On the other hand, the list for GSP+ beneficiaries is a 'course prix fix menu', without any detailed, more specific application.⁶⁹ Thus, the list approach delivers certainty at the cost of context-responsiveness, and may not deliver the tailored and ongoing approach to change often required in relation to embedded human rights abuses or resistance. An approach more akin to the SDC would give greater flexibility for tailored and broader human rights issues to be addressed in UK trade instruments, and the ratification of selected treaties can be integrated into this approach to deliver the benefits of the list approach whilst still remaining flexible and responsive.

42. The GSP has been noted by the EU to have had a positive impact on social development and human rights in beneficiaries.⁷⁰ Specific impacts have been identified for women through creation of employment opportunities, including in Pakistan and Bangladesh, with the GSP+ propelling developing countries to ratify international conventions and close

Figure 7. GSP+ Conditions

Vulnerability Criteria	Sustainable Development Criteria
<p>Import share criterion: Three-year average import share of GSP imports relative to all GSP countries lower than 6.5%</p> <p>Diversification criterion: seven largest sections of GSP-covered imports represent 75% of total GSP imports by the country over three years</p>	<p>Ratifications: country must have ratified the 27 listed international conventions</p> <p>Reservations: country must not have reservations which are prohibited by these conventions</p> <p>Implementation: most recent monitoring conclusions under conventions must not have identified serious failures in effective implementation</p>

⁶⁶ Commission, 'Trade and Sustainable Development (TSD) chapters in EU Free Trade Agreements (FTAs)' (Non-Paper of the Commission services, July 2017) 3

<http://trade.ec.europa.eu/doclib/docs/2017/july/tradoc_155686.pdf>

⁶⁷ GSP Regulation, Annex VIII, Article 9(1).

⁶⁸ GSP Regulation, Article 19.

⁶⁹ B Wardhaugh, 'GSP and Human Rights: Is the EU's Approach the Right One' (2013) 16(4) Journal of International Economic Law 827, 835

⁷⁰ European Commission, 'Report from the Commission to the European Parliament and the Council on the application of Regulation (EU) No 978/2012 applying a Scheme of Generalised Tariff Preferences and repealing Council Regulation (EC) No 732/2008' COM(2018) 665 final, 5.



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monitoring of the GSP+ that allows for constructive dialogue. For the UK's GSP, it must be assured that GSP+ beneficiaries effectively implement all the GSP+ conventions, if the UK takes on and adds to the EU's list of conventions included for grant of the more favourable tariff preferences.⁷¹ A dialogue and monitoring framework will be vital for ensuring political engagement in the Asian context (see below).

Side agreements

43. Trade negotiations might also incorporate human rights through the development of side agreements directly addressing relevant human rights concerns along with other key issues. This approach involves the negotiation and development of a human rights side agreement in parallel to negotiations for a trade agreement, which states that certain human rights improvements must be undertaken in order for the trade agreement to be adopted. Side agreements are a form of positive conditionality, similar to the GSP+. This approach has seldom been employed by the EU, but is more frequently used by the US. Typically less strong in its human rights' provisions within the trade agreements themselves than the EU, the US tends to produce trade agreements with limited incorporation of human rights standards.⁷² In this context, side agreements can supplement the primary trade negotiations, and enable the advancement of human rights in negotiations without requiring integration in the trade agreements themselves.

44. For example, the Trans-Pacific Partnership (TPP) (now dissolved) consisted of a side agreement between the US and Vietnam,⁷³ which has been regarded as a 'breakthrough' on labour protection.⁷⁴ This side agreement was intended to ensure Vietnam could not join the TPP until it had met the requirements of the agreement with respect to labour rights. These requirements included major changes relating to freedom of association, particularly concerning the establishment of trade unions independent from the official structure, the Viet Nam General Confederation of Labour.⁷⁵ Although the withdrawal of the US from the TPP was detrimental to Vietnam's labour commitments, the side-agreement allowed for a focus on specific labour rights issues incentivising Vietnam's cooperation on the relevant issues.

45. The ability of the US to promote the conclusion of side agreements during trade negotiations successfully is largely a by-product of its economic leverage in trade

⁷¹ European Commission, 'Report from the Commission to the European Parliament and the Council on the application of Regulation (EU) No 978/2012 applying a Scheme of Generalised Tariff Preferences and repealing Council Regulation (EC) No 732/2008' COM(2018) 665 final, 6.

⁷² Billy Melo Araujo, 'Labour provisions in EU and US mega-regional trade agreements: rhetoric and reality' (2018) *International and Comparative Law Quarterly* 233, 239.

⁷³ see <ustr.gov/sites/default/files/TPP-Final-Text-Labour-US-VN-Plan-for-Enhancement-of-Trade-and-Labor-Relations.pdf>

⁷⁴ Ronald C. Brown, 'FTAs in Asia-Pacific: 'New Generation' of Social Dimension Provisions on Labour?' (2016) 26 *Indiana International and Comparative Law Review* 69, 90.

⁷⁵ Jeffrey Vogt, 'The Evolution of Labor Rights and Trade - A Transatlantic Comparison and Lessons for the Transatlantic Trade and Investment Partnership' (2015) 18 *Journal of International Economic Law* 827, 841-842.



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negotiations. Since the post-BREXIT market for the UK is relatively smaller, side agreements may not be as successful a strategy.

Enforcement

46. While commitment to human rights standards in international relations is crucial in advancing the protection of human rights, implementation of these on the ground is what makes a difference in the lives of vulnerable people. Mechanisms to ensure human rights standards are advanced in practice, and to enforce the obligations set out in trade frameworks in the instance of failure to satisfy these, are therefore critical in securing better protection of human rights in third countries through trade. At present, various approaches for enforcement are adopted, ranging from constructive engagement and the use of 'soft' pressure, to the termination of trade relations. Approaches taken to this context must respond to a range of challenges, accounting in particular for the need to advocate for human rights developments that are achievable in the context and in the timeframes provided for, and that negative externalities (including harms to the very people human rights advocacy seeks to protect) do not result from the application of enforcement mechanisms. The UK must therefore take care in designing enforcement frameworks in the future, to ensure that the objectives of agreements are not undermined in their implementation.

Negative Conditionality

47. Conditionality is a vital element of enforcement of a GSP, ensuring that the standards set are implemented in practice. The EU, US and Canadian GSPs all adopt a negative conditionality approach towards enforcement. This entails the prospect of the granting country initiating a GSP investigation where potential violations exist, which could lead to the withdrawal of tariff preferences. In the EU GSP, negative conditionality is engaged where the EU finds there are 'serious and systematic' violations of standards contained within the list of conventions annexed to the GSP Regulation.

48. Negative conditionality is, ultimately, a sanction. It is therefore politically and economically sensitive. This is especially the case when the trade partner applying the mechanism is a large economy.⁷⁶ Perhaps for this reason, it has rarely been used by the EU. In the past, the EU has exercised negative conditionality on only three occasions, including against Asian countries: (1) Myanmar, in response to forced labour in 1997; (2) Belarus, in response to violations of freedom of association in 2007; and (3) Sri Lanka, in response to human rights violations in the civil war in 2010. The circumstances of these cases, and failures to apply negative conditionality in many others, has resulted in widespread criticism of the EU's consistency in applying sanctions.⁷⁷

⁷⁶ Carnegie Endowment for International Peace, 'Breaking the Labor-Trade Deadlock' (2001) Working Paper No.25, 4.

⁷⁷ Laura Beke and Nicolas Hachez, 'The EU GSP: A Preference for human rights and good governance? The case of Myanmar' (2015) Working Paper No.155, 11



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49. In the Canadian GSP, flaws in the approach to negative conditionality derive not only from the implementation of the GSP, but also from the basic framework of the scheme. There is a lack of clarity in the structure of conditionality and the legislative framework for the removal of preferences is ambiguous. However, preferences have been removed in practice for human rights reasons, including for example against Belarus in 2007.⁷⁸ Uncertainty over the situations in which negative conditionality will be applied creates the potential for inconsistent application, opening the door to criticism and the alienation of trading partners. The lack of a stable 'yard-stick' for measuring compliance undermines efforts to secure human rights advances—if the standards are unclear, constructive engagement with States already resistant to human rights and globalisation becomes more difficult.

50. The US approach to conditionality differs from that adopted by the EU, requiring that GSP beneficiaries must have taken, or be taking, steps to 'afford internationally recognised worker rights'.⁷⁹ This approach leaves open the potential for protectionist criticism and lacks legitimacy because it does not root rights in the international context. This risks crossing the threshold of the WTO's objective criteria requirement, as well as creating ambiguities in the specific requirements placed on beneficiary countries. To avoid similar critique, the potential alienation of trading partners produced by inconsistency, and the degradation of human rights protections contained in trade agreements, the UK should develop a consistent and coherent approach to trade policy and the application of sanctions if using a negative conditionality approach.

51. Including negative conditionality in trade instruments needs to be approached with caution as to its effects. Strict sanctions and negative conditionality can lead to harmful economic and social effects for the population.⁸⁰ As an example, the US previously designed a 'Harkin Bill', which was intended, if enacted, to prohibit import of certain products produced by child labour.⁸¹ The threat of this resulted in the laying-off of tens of thousands of children in Bangladesh, many of whom then turned to more hazardous activities such as prostitution.⁸² Thus, a strategy needs to be designed to ensure that if negative conditionality is included in the UK's future trade regimes, it is coupled with a weighty assessment as to the potential impacts of application in any case under consideration. Instruments such as Sustainable Impact Assessments might be useful to this effect. The time-scale for withdrawal must also be considered. In the EU's GSP Regulation, there is always a possibility of halting

<http://ghum.kuleuven.be/ggs/publications/working_papers/new_series/wp151-160/wp155-beke-hachez.pdf> accessed 07 June 2016.

⁷⁸ Canada Gazette, 'General Preferential Tariff Withdrawal Order (Republic of Belarus)' (Part II, Vol 141, No 17, 2007) <<http://publications.gc.ca/gazette/archives/p2/2007/2007-08-22/pdf/g2-14117.pdf>>

⁷⁹ U.S., 'U.S. Generalised System of Preferences Guidebook' (2017) <https://ustr.gov/sites/default/files/files/gsp/GSP%20Guidebook%20August%202017_1.pdf>

⁸⁰ Elena Fierro, *The EU's Approach to Human Rights Conditionality in Practice* (Martinus Nijhoff Publishers 2003) 103.

⁸¹ M Ewing-Chow, 'First Do No Harm: Myanmar Trade Sanctions and Human Rights' (2007) 5(2) *Northwestern Journal of International Human Rights* 153, 173.

⁸² *Ibid.*



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a lengthy, ongoing process. Even if a decision to withdraw preferences is made, the action does not occur until six months later, and the decision can be reversed in the interim.⁸³ Allowing a longer time frame is useful for Asian developing countries as change in the human rights context will not occur quickly.

52. The Commission retains ‘ample discretion’ in decision-making.⁸⁴ This is valuable as the process involves weighing a number of factors and requires outside engagement with the UN and other institutions in order to be legitimate. The latter is especially important owing to critique that in imposing conditions through the GSP, the EU becomes the ‘prosecutor, judge, jury and executioner’.⁸⁵ The UK could avoid such concerns by integrating within a GSP Regulation the necessity for multilateral engagement, ensuring that decision-making includes the involvement of other authoritative bodies that are considered reliable and credible by the trade partners.

The EU’s GSP and Positive Conditionality

53. The EU’s GSP+, a measure of positive conditionality, is enforced through two mechanisms: a score-card and dialogue. GSP+ monitoring allows for contact with governments and civil society, alongside coordination meetings.⁸⁶ The ‘scorecard’ is a list of ‘the most salient shortcomings’ identified by the ‘respective international monitoring bodies...for each convention’.⁸⁷ Notably, this is not the shortcomings identified by the EU – again ensuring the EU embeds its approach within the international human rights system. GSP+ dialogue includes GSP+ monitoring missions whereby the EU engages with governments over shortcomings and remedial actions.⁸⁸ In making assessments, the EU relies on reports and recommendations from international monitoring bodies, such as the ILO and the UN, including meeting with civil society organisations.⁸⁹ If it is found the GSP+ beneficiary is failing to meet its obligations as such, then it can be downgraded to standard

⁸³ Regulation (EU) No 978/2012 of the European Parliament and of the Council of 25 October 2012 applying a scheme of generalised tariff preferences and repealing Council Regulation (EC) No 732/2008 [2012] OJ L303/1, Article 15(10).

⁸⁴ Orbie J and Portela C, ‘Sanctions under the EU Generalised System of Preferences and foreign policy: coherence by accident?’ (2014) 20(1) *Contemporary Politics* 63, 66.

⁸⁵ P Nherere, ‘Conditionality, Human Rights and Good Governance: A Dialogue of Unequal Partners’ in K Ginther, E Denters and P JIM de Waart (eds), *Sustainable Development and Good Governance* (Martinus Nijhoff Publishers 1995) 291.

⁸⁶ Commission, ‘Report on the Generalised Scheme of Preferences covering the period 2016-2017’ COM(2018) 36 final, 9.

⁸⁷ Commission, ‘Report on the Generalised Scheme of Preferences covering the period 2016-2017’ COM(2018) 36 final, 9.

⁸⁸ Commission, ‘Report on the Generalised Scheme of Preferences covering the period 2016-2017’ COM(2018) 36 final, 9.

⁸⁹ Commission, ‘Report on the Generalised Scheme of Preferences covering the period 2016-2017’ COM(2018) 36 final, 8.



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GSP status,⁹⁰ a less impactful move than withdrawal of the GSP EBA or standard GSP. Most of the EU's GSP+ beneficiaries are Asian countries (see above), which means that this is a scheme which will be attractive if used by the UK. The countries apply for the grant of the GSP+.

54. This approach reflects the difficulties and obstacles of advancement of human rights in lower income countries. This enables a more constructive process that avoids the imposition of hard sanctions and therefore maintains constructive dialogue with countries with more limited capacity. This has additional benefits where resistance is, in part, against the imposition of Western values, rather than the norms themselves. Working together with Asian States in an ongoing manner is likely to be more effective than the unilateral, top-down requirements.

55. In the EU's recent report on the GSP+, it was emphasised there is a need to improve transparency in GSP+ monitoring and better involve civil society in the EU and beneficiary countries.⁹¹ This would involve regular stakeholder consultations with local civil society.⁹² A 2018 GSP report found that there needs to be improvement of the transparency of the EU's GSP+ monitoring, particularly about the list of issues discussed in dialogue.⁹³ Given the UK's continuing commitment to transparent and inclusive trade policy after BREXIT,⁹⁴ greater effort should be made to ensure proper consultation and ongoing collaboration with civil society organisations in the pursuit of human rights advancements in the context of international trade.

The EU's New Generation FTAs and 'Soft' Enforcement

56. The EU's new generation FTAs typically enforce human rights standards through softer enforcement than the negative conditionality mechanism of the GSP. The enforcement represents the EU's 'historically "soft" approach' towards trade and human rights, based on dialogue and cooperation, 'rather than 'hard' prescriptive rules'.⁹⁵ However, there has been critique that engagement 'rarely results in any concrete outcomes except to maintain the

⁹⁰ Regulation (EU) No 978/2012 of the European Parliament and of the Council of 25 October 2012 applying a scheme of generalised tariff preferences and repealing Council Regulation (EC) No 732/2008 [2012] OJ L303/1, Article 10(5).

⁹¹ European Commission, 'Report from the Commission to the European Parliament and the Council on the application of Regulation (EU) No 978/2012 applying a Scheme of Generalised Tariff Preferences and repealing Council Regulation (EC) No 732/2008' COM(2018) 665 final, 8.

⁹² European Commission, 'Report from the Commission to the European Parliament and the Council on the application of Regulation (EU) No 978/2012 applying a Scheme of Generalised Tariff Preferences and repealing Council Regulation (EC) No 732/2008' COM(2018) 665 final, 8.

⁹³ European Commission, 'Mid-Term Evaluation of the EU's Generalised Scheme of Preferences (GSP)' (2018) 10 <http://trade.ec.europa.eu/doclib/docs/2018/october/tradoc_157434.pdf>

⁹⁴ See Department for International Trade, above n 2.

⁹⁵ Billy Melo Araujo, 'Labour provisions in EU and US mega-regional trade agreements: rhetoric and reality' (2018) *International and Comparative Law Quarterly* 233, 239.



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status quo at best and to enrich rogue regimes at worst'.⁹⁶ Thus the strength of this approach in meaningfully advancing fundamental human rights for the citizens of third countries has been called into question. Further, concerns have been raised that too much cooperation and engagement may send a signal that the EU is overly-paternalistic.⁹⁷ In the interests of maintaining diplomatic relationships with Asian countries, these tensions must be carefully navigated in developing the UK's approach to these mechanisms in future trade relations.

57. Under the EU's 'soft' enforcement mechanisms, complaints are taken to a Panel of Experts, which discusses issues highlighted in a trade partner and produces recommendations.⁹⁸ The recommendations are public, and monitoring of implementation occurs.⁹⁹ They are intended to be professional and transparent, theoretically leading to more objective recommendations.¹⁰⁰ However, these recommendations are non-binding, leaving considerable scope for non-compliance. The status of these approaches as enforcement mechanisms has, therefore, been questioned and some have called for trade sanctions to the tune of conditionality, or improvements in implementation such as in training.¹⁰¹ Moreover, the process of the panel of experts has not yet been used in FTAs, even where there have been serious labour rights violations in South Korea, thus the usefulness of dialogue and cooperation are questioned.¹⁰² In considering the development of 'soft' mechanisms for enforcement, the UK should therefore consider whether these are fit for purpose in advancing human rights in Asia. Whilst trade sanctions might not be desirable, they could provide some leverage to ensure cooperation and improvements in human rights standards.

Alternative Approaches: Enhanced Engagement?

58. The EU is increasingly adopting forms of enhanced engagement, such as its response to the Bangladeshi Rana Plaza factory collapse of April 2013,¹⁰³ where instead of negative conditionality, it adopted a soft-law initiative characteristic of experimentalist,

⁹⁶ M Ewing-Chow, 'First Do No Harm: Myanmar Trade Sanctions and Human Rights' (2007) 5(2) *Northwestern Journal of International Human Rights* 153, 154.

⁹⁷ Elena Fierro, *The EU's Approach to Human Rights Conditionality in Practice* (Martinus Nijhoff Publishers 2003) 103.

⁹⁸ References to be added with specific examples of countries with whom there are new generation FTAs.

⁹⁹ Commission, 'Trade and Sustainable Development (TSD) chapters in EU Free Trade Agreements (FTAs)' (Non-Paper of the Commission services, July 2017) 3

<http://trade.ec.europa.eu/doclib/docs/2017/july/tradoc_155686.pdf>

¹⁰⁰ L Van den Putte and J Orbie, 'EU Bilateral Trade Agreements and the Surprising Rise of Labour Provisions' (2015) 31(3) *The International Journal of Comparative Labour Law and Industrial Relations* 263, 268.

¹⁰¹ Commission, 'Trade and Sustainable Development (TSD) chapters in EU Free Trade Agreements (FTAs)' (Non-Paper of the Commission services, July 2017) 4-5

<http://trade.ec.europa.eu/doclib/docs/2017/july/tradoc_155686.pdf>

¹⁰² J Harrison and others, 'Labour Standards Provisions in EU Free Trade Agreements: Reflections on the European Commission's Reform Agenda' (2018) *World Trade Review* 1, 11.

¹⁰³ Commission, 'Report on the Generalised Scheme of Preferences covering the period 2016-2017' COM(2018) 36 final, 5; see Chapter 6.



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bottom-up governance—the Bangladesh Sustainability Compact. This has been shown to have some positive impact on labour rights in Bangladesh’s Ready-Made Garment Industry—the primary focus of the mechanism in the aftermath of Rana Plaza.¹⁰⁴ The Compact was a way of responding to international concerns in partnership with the UN and other trade partners, the government and civil society. Given the initial success of this mechanism, the UK should consider pre-emptively developing such initiatives and engaging in similar approaches pioneered by the EU. Industry-specific Asian initiatives like the Compact can be created to address particular problems in Asian countries, and could be rolled out across the UK’s future trade agreements from the outset rather than being introduced *ex post facto* as responsive measures. This may present an opportunity for the UK to lead the way in new approaches to the advancement of human rights through trade, drawing on a range of tools already employed by the EU and other comparable States, whilst also building on promising practices to create a new model for engagement from the outset of negotiations.

59. Enhanced engagement also comes through development cooperation projects and dialogue. The former could involve UK support of human rights projects such as those developed by the ILO as part of the Compact, whilst the latter should always ensure civil society engagement. The EU couples its trade instruments with development support, for example supporting projects strengthening civil society in GSP+ countries.¹⁰⁵ In the context of the UK, working closely with the Department for International Development and connecting programmes with trade may provide a valuable opportunity to deliver such an approach.

A New Model for human rights in UK-Asia trade

A Generalised Scheme of Preferences for the UK

60. In its White Paper on the future of UK trade policy, the Department for International Trade (DIT) affirmed the UK’s commitment to maintaining current access to UK markets for least developed countries, and preferential access for other developing countries.¹⁰⁶ While the emphasis of this paper was on ensuring continuity of access as the UK exits the EU, the place of human rights in this unilateral scheme should also be considered a key priority area. A potential model for a UK GSP building on EU practice, maintaining continuity, and

¹⁰⁴ Jeff Kenner and Katrina Peake, ‘The Bangladesh Sustainability Compact: Global EU Experimentalist Governance?’ (2017) 19 *Cambridge Yearbook of European Legal Studies* 86; Manpreet Ark and others, ‘The EU’s trade, development and human rights policies’ (FRAME Deliverable 9.4).

¹⁰⁵ European Commission, ‘Meeting on the Generalised Scheme of Preferences Plus’ (Civil Society Dialogue, 12/07/2017) 3
<http://trade.ec.europa.eu/doclib/docs/2017/august/tradoc_155993.07.17%20report%20for%20web%20page.pdf>

¹⁰⁶ Department for International Trade, above n 2, 32.



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advancing human rights beyond the status quo might therefore follow the following guidelines.

1) Scheme tiers

61. Accounting for the explicit desire to maintain consistency between current EU trading arrangements and the UK’s independent trade policy, the UK should adopt a triple-tier unilateral trade preference scheme. This will enable it to respond to the varying development statuses of Asian countries, whilst providing additional preferences for those countries that apply for the GSP+, an incentive for complying with human rights. This also maintains consistency with WTO rules by differentiating preferences based on objective criteria, avoiding potential challenge to the scheme. Under the EU scheme, six Asian States currently benefit from standard GSP, six from GSP+, and nine from the EBA (see Table 1).

Table 1. EU GSP Beneficiaries (as of 01 January 2019)¹⁰⁷

GSP	Congo	Cook Islands	India	Indonesia	Kenya	Micronesia	Nauru	Nigeria
	Niue	Samoa	Syria	Tajikistan	Tonga	Uzbekistan	Vietnam	
GSP+	Armenia	Bolivia	Cabo Verde	Kyrgyzstan	Mongolia	Pakistan	Philippines	Sri Lanka
EBA	Afghanistan	Angola	Bangladesh*	Benin	Bhutan	Burkina Faso	Burundi	Cambodia*
	CAR	Chad	Comoros	DRC	Djibouti	Equatorial Guinea	Eritrea	Ethiopia
	Gambia	Guinea	Guinea-Bissau	Haiti	Kiribati	Lao PDR	Lesotho	Liberia
	Madagascar	Malawi	Mali	Mauritania	Mozambique	Myanmar*	Nepal	Niger
	Rwanda	Sao Tome & Principe	Senegal	Sierra Leone	Solomon Islands	Somalia	South Sudan	Sudan
	Tanzania	Timor-Leste	Togo	Tuvalu	Uganda	Vanuatu	Yemen	Zambia

*enhanced engagement countries

Asian

States shaded

62. Under the EU scheme, GSP and GSP+ preferences are granted to low and lower-middle income countries, with the former entailing partial or full removal of customs duties on

¹⁰⁷ European Commission, ‘List of GSP Beneficiary Countries’ (European Commission, 2019) <http://trade.ec.europa.eu/doclib/docs/2019/may/tradoc_157889.pdf> accessed 21 May 2019.



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two thirds of tariff lines, and the latter involving reduction of tariffs to 0% for vulnerable countries in this group that implement the 27 international conventions set out in the scheme. The EBA arrangement for least developed countries provides duty-free, quota-free access to EU markets, with the exception only of arms and ammunition (see paragraph 24). Given the desire to achieve consistency with the current EU regime and to ensure continuity, adopting a similar three-tiered scheme based on development status and, for the GSP+, adherence to a set of entry requirements, is the recommended approach for the UK.

63. The EU's GSP+ has attracted only a small number of beneficiaries, as countries must apply to be part of the scheme and adhere to a set of entry conditions (see below). Any scheme must therefore be attractive enough to beneficiaries to make the benefits of joining, beyond standard GSP preferences, outweigh the cost of adhering to entry conditions. The EU's GSP+ grants full removal of tariff preferences on over 66% of tariff lines.¹⁰⁸ Recognising the lower market power of the UK and the potential interest in expanding or deepening entry conditions, the UK could go further, granting full removal of tariff preferences on up to 80% of tariff lines. This would be more attractive for prospective beneficiaries.

64. In order to pursue the objective of advancing human rights in Asia through trade, the UK should consider engaging in proactive dialogue with Asian States potentially eligible for GSP+ preferences. By encouraging these Asian States to apply for GSP+ preferences, and supporting them in the process of ensuring they adhere to entry conditions through constructive dialogue, the UK can secure buy-in for the human rights and sustainable development agendas in the context of trade.

65. It should also be recognised that some GSP beneficiaries, such as Vietnam, are on the cusp of graduating to higher middle-income status, whereupon they will no longer benefit from the GSP. Graduation periods are a vital part of maintaining trade relationships whilst negotiating for bilateral agreements such as FTAs, and therefore should be articulated in the UK's GSP.

2) Entry conditions and positive conditionality

66. Having affirmed its commitment to sustainable development and human rights in the context of international trade post-BREXIT,¹⁰⁹ the UK must include sustainable development commitments in its GSP. This ensures it has leverage in human rights across Asian beneficiaries prior to any bilateral negotiations commencing, and throughout the process of securing and implementing new trade deals. In the first instance, this can be achieved through the application of positive conditionality, creating a set of entry conditions focused on human rights and development that serve as prerequisites for additional preferences beyond the standard GSP.

¹⁰⁸ Commission, 'Trade Helpdesk' < <https://trade.ec.europa.eu/tradehelp/gsp> >

¹⁰⁹ Department for International Trade, above n 2.



Table 2. GSP+ Conventions¹¹⁰

Core Human and Labour Rights Conventions
1. Convention on the Prevention and Punishment of the Crime of Genocide (1948)
2. International Convention on the Elimination of All Forms of Racial Discrimination (1965)
3. International Covenant on Civil and Political Rights (1966)
4. International Covenant on Economic Social and Cultural Rights (1966)
5. Convention on the Elimination of All Forms of Discrimination Against Women (1979)
6. Convention Against Torture and other Cruel, Inhuman or Degrading Treatment or Punishment (1984)
7. Convention on the Rights of the Child (1989)
8. Convention concerning Forced or Compulsory Labour, No 29 (1930)
9. Convention concerning Freedom of Association and Protection of the Right to Organise, No 87 (1948)
10. Convention concerning the Application of the Principles of the Right to Organise and to Bargain Collectively, No 98 (1949)
11. Convention concerning Equal Remuneration of Men and Women Workers for Work of Equal Value, No 100 (1951)
12. Convention concerning the Abolition of Forced Labour, No 105 (1957)
13. Convention concerning Discrimination in Respect of Employment and Occupation, No 111 (1958)
14. Convention concerning Minimum Age for Admission to Employment, No 138 (1973)
15. Convention concerning the Prohibition and Immediate Action for the Elimination of

¹¹⁰ GSP Regulation, Annex VIII, Part A.



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67. The imposition of entry conditions for a GSP+ tier of a GSP is not without controversy in the context of WTO rules. A

the Worst Forms of Child Labour, No 182 (1999)

single set of conditions must be placed on all nations within the GSP in order to comply with the WTO's requirement of objective criteria. Expansion of this approach to entry conditions could go beyond WTO rules in light of the MFN principle and the requirement for objective criteria in differentiating trade preferences for different groups of States. This also means that particular, responsive conditions cannot be placed on Asian States as a group, or on particular Asian States, in order to address the human rights challenges in these countries. However, careful expansion of the current list approach to standards has the potential to yield human rights gains in Asian States, without breaching the objectivity requirement.

68. Adopting a list approach to the incorporation of human rights standards in the UK's unilateral trade preferences scheme for GSP+, as is done in the EU's GSP+, minimises the risk of new policies conflicting with WTO standards. However, while the EU's current approach has delivered some positive impacts, the degree to which it has secured the implementation of human rights in practice and in context remains limited (see paragraphs 40-41).

69. Of the 27 conventions listed in Annex VIII of the EU's GSP Regulation, fifteen relate specifically to human and labour rights, encompassing six of the nine core human rights instruments (see paragraph 11). The three remaining fundamental human rights treaties are the International Convention on Protection of the Rights of All Migrant Workers and their families 1990 (ICRMW), the International Convention for the Protection of All Persons from Enforced Disappearance 2006 (ICPPED), and the Convention on the Rights of Persons with Disabilities 2008 (CRPD). Given the interest in advancing human rights, the inclusion of all nine fundamental instruments in the list is a natural starting point for potential expansion of the EU's approach. It is worth noting that the UK itself has yet to ratify either the ICRMW or the ICPPED, making the inclusion of these in a UK trade preference scheme more problematic, unless it were to change its own membership status. However, the Convention on the Rights of Persons with Disabilities might be included in the list of core conventions incorporated in the UK's GSP+.

70. Of particular importance in the context of Asia is the lack of inclusion of the Optional Protocols to these core human rights instruments in the entry conditions of the EU GSP+ scheme (see paragraphs 13-15). The lack of a regional human rights court or commission in the Asian region creates an absence of independent, external oversight over States' protection of human rights. Introducing the Optional Protocols into the UK's GSP+ scheme as entry conditions for trade preferences may therefore enable monitoring and enforcement of human rights through existing international mechanisms, reducing the burden on monitoring mechanisms within the trade scheme itself. However, inclusion of the Optional Protocols to the ICCPR, ICESCR, and CRC (concerning communications procedure) may not be a workable recommendation in light of the UK's failure to ratify these instruments. While the UK is party to the majority of Optional Protocols to the nine fundamental human



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rights instruments, it is not party to these significant texts. If it is to take its human rights commitments seriously and secure the advancement of human rights within the borders of trading partners, the UK ought therefore to consider the gaps in its own international commitments. These may affect the potential for the full range of possibilities to be leveraged efficiently in the context of future trade policy. However, in relation to the Protocols as well as the conventions themselves, including the instruments to which the UK is a party could meaningfully expand the scope of human rights in trade. This also makes the list approach more responsive to the challenges of Asian context, without going beyond the boundaries of WTO rules.

71. The requirement in the EU GSP+ sustainable development criteria that serious failures in the implementation of listed instruments by beneficiary States must not have been identified in the most recent monitoring conclusions on the conventions also gains additional strength when beneficiary States are party to the Optional Protocols. The UK should therefore consider incorporating these Protocols in its listed conventions for a GSP+ tier.

72. The UK must adopt a GSP that includes a list of international conventions to ensure that it is ingraining international human rights within the scheme. Positive conditionality can be particularly effective in the context of States historically resistant to the unilateral imposition of Western values, including many Asian countries. Rather than pushing human rights obligations on third countries, this approach draws potential trading partners into human rights commitments—a carrot rather than a stick. Measures therefore are framed in the language of reward rather than punishment.

3) Monitoring implementation

73. While positive conditionality can be an effective measure in the lead-up to States entering the GSP, protection of human rights and development goals must be carried throughout the life of the trade relationship. To ensure that entry conditions continue to be complied with, and the requirements of the scheme are met, implementation monitoring and enforcement mechanisms must be developed. In existing preference schemes these mechanisms have been minimally or inconsistently applied, lacking in robust independent monitoring, opaque, not inclusive, and/or met with local apathy or resistance. Ultimately, this results in the schemes being less effective in securing meaningful change.

74. At the same time as creating stronger entry conditions for the special preferences entailed in a GSP+ (positive conditionality), the UK should pursue enhanced monitoring of implementation of human rights elements in GSP beneficiary countries. In Asian countries with historically weak human rights records and resistance to human rights generally, ensuring implementation of commitments through robust monitoring and enforcement is essential.

75. Mechanisms driven and applied by the UK alone are likely to face increased resistance because of cultural dynamics, a lack of trust, and perceived lack of independence. To minimise these risks, monitoring activities can be deferred to existing



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international monitoring bodies, such as the ILO and UN. This would be assisted by the inclusion of the Optional Protocols to the core human rights treaties in the list of prerequisite conventions, empowering more extensive and direct monitoring activities by the Committees responsible for these instruments. This approach would also have the benefit of reducing the burden of monitoring on the UK.

76. Civil society engagement is critical to the effectiveness of monitoring mechanisms. Providing a platform for the participation of local non-governmental organisations, including trade unions, in monitoring processes helps to ensure that both the processes and the outcomes are contextually responsive and culturally relevant. This can additionally bridge cultural and ideological divides, and reduce the degree to which efforts to advance and protect human rights are perceived as external impositions. The UK should therefore work with local, national, and regional civil society organisations, including the Asia Foundation, to enhance credibility, foster trust, and ensure appropriate solutions to challenges met.

77. Frameworks for monitoring and enforcement in the UK's GSP should expressly include the UN Sustainable Development Goals (SDGs) to ensure the scheme is placed in the context of international rights, sustainable development, and global priority areas. This also enables existing processes for monitoring action against the 169 SDG targets to be incorporated into monitoring and enforcement within the trade scheme.

78. In connecting the advancement of human rights through trade and the sustainable development agenda, the UK should marry its trade policy with the development agenda and programming. The purpose of a GSP in the first instance is to tie trade policy into global development efforts, an objective explicitly recognised by the UK's DIT.¹¹¹ In line with the expressed intention of 'offering a fully integrated trade and development package which strengthens support to developing countries', DIT undertaking to ensure that foreign aid spend would be used to help break down barriers to trade for developing countries and to work closely with the Department for International Development (DFID) in so doing.¹¹² DFID likewise recognises the critical role of economic development in 'lifting huge numbers of people out of grinding poverty', advanced through international trade.¹¹³

79. The current commitment to an ongoing relationship between trade and development policy lacks a clear framework for how the latter will be used to support the beneficiaries of the UK's future GSP. This presents an opportunity to make the GSP more attractive to beneficiary countries and thereby secure greater engagement from otherwise reluctant States.

80. Working through multi-lateral organisations with strong track records in the region, such as the World Bank, Asian Development Bank, International Labour Organisation, and

¹¹¹ Above n 2, 11.

¹¹² Ibid, 33.

¹¹³ Department for International Development, above n 25.



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the UN Economic and Social Commission for Asia and the Pacific, enhances the credibility of DFID programming with Asian States' governments.¹¹⁴ These organisations should also form the backbone of in-country efforts to advance human rights in the trade context, increasing the likelihood of uptake within beneficiary countries. By working within the context of these multi-national organisations, the UK can also buttress its international power in the context of these institutions—power that may be harmed by BREXIT, but which remains at least formally independent from it.¹¹⁵

81. The UK's position as a 'gateway to Europe' for Asia will be lost, or at least depleted, by its exit from the EU. However, this can be partially offset by strengthening the UK's involvement in international organisations and reinforcing its position as an arbiter of the rules-based international order. Ensuring that trade policy fortifies international organisations, and the UK's significance within them, in turn supports the UK's efforts to retain international influence in the context of trade.

4) Enforcement

82. Monitoring mechanisms are largely meaningless without frameworks for enforcement, whether these involve strict sanctions or 'soft' enforcement. To meet the varying demands and challenges of advancing human rights in Asia, the UK should adopt an integrated approach to enforcement that merges negative conditionality with constructive engagement, enabling responses that are contextually rooted and appropriate in light of the nature and scope of violations identified.

83. Negative conditionality (the removal of trade preferences in the instance of a breach) should be engaged as the starting point for enforcement of human rights standards articulated in the preferences scheme. However, this approach is a blunt tool with limited capacity to adapt to the circumstances of the case or the nuanced needs of States with historically weak human rights records and lower development status. Human rights advancements do not occur instantaneously, nor is it possible to measure them on a binary scale (as met or not met) in all cases. While threshold conditions must be considered, other changes must be incremental and ongoing. The UK should therefore look to alternative mechanisms for working with trading partners to improve the status and implementation of human rights.

84. Learning from the EU's 'soft' enforcement mechanisms and enhanced engagement approaches in the context of FTAs, the UK should adopt this approach within the context of its GSP in the context of violations not reaching the threshold for negative conditionality. Although each engagement model should respond to the particular context of the beneficiary State, although a general framework for the operation of these in the context of a GSP would be required.

¹¹⁴ Ibid.

¹¹⁵ See Turner, above n 8.



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85. The UK should work with civil society and multi-lateral organisations in ‘soft’ enforcement as well as in monitoring implementation, combining the two mechanisms to deliver a more efficient and more effective approach to advancing human rights in the context of Asian States. The UK should therefore consider creating a Panel of Experts for its GSP that can support monitoring activities and make recommendations in response to human rights violations or shortcomings of beneficiary States.

86. While the ‘soft’ enforcement mechanisms identified above are more likely to result in long-term, meaningful change in the context of Asian States than negative conditionality alone, it is important that the removal of trade preferences remains an option in the instance of serious or widespread violations. As Christofer Fjellner, Rapporteur to the European Parliament on the implementation of the GSP Regulation stressed in his 2019 report:¹¹⁶

...the withdrawal of trade preferences should be seen as a measure of last resort applied only in cases of serious shortcomings in the effective implementation of the international conventions and a clear lack of willingness and engagement by the beneficiary country to address them; stresses, at the same time, the conditional nature of the schemes and that this conditionality should be used to preserve the credibility of each scheme and ensure action in cases of severe and systematic violations of the conventions.

87. Although the UK will not wield as much market power as the EU after BREXIT, it nonetheless has a significant market share and the potential to influence trading partners with the threat of, and actual, withdrawal of preferences. Irrespective of the likelihood of withdrawal securing substantial change by trading partners, when it comes to widespread and severe violations in particular, the UK should consider the withdrawal of preferences a necessary moral obligation and fundamental in protecting the position of human rights within the scheme more generally.

88. Learning from flaws and inconsistencies in the imposition of negative conditionality in existing practice (see paragraphs 48-51), the UK should create a clear framework from the outset identifying the relevant threshold for negative conditionality to be triggered. In the EU’s GSP, negative conditionality is triggered in the instance of ‘serious and systematic violation of the principles laid down in the conventions listed’ or ‘export of goods made by prison labour’.¹¹⁷ However, in practice negative conditionality has been little used by the EU in the Asian context (see paragraphs 48-52). To avoid criticism on the application of negative conditionality in practice, the UK should clearly articulate a set of rules for its application in the context of violations reaching a high threshold of severity.

¹¹⁶ Committee on International Trade, ‘Report on the Implementation of the GSP Regulation (EU) No 978/2012’ (2019) *European Parliament* A8-0090/2019, 12.

¹¹⁷ GSP Regulation, article 19(1)(a) and (b).



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89. The UK should also create targeted mechanisms for partial withdrawal in response to violations that are confined to a particular sector or economic actor,¹¹⁸ ensuring that negative conditionality is only imposed where appropriate, and to an extent that reflects and responds to the violations in question. Where withdrawal is partial, it should be accompanied by enhanced engagement and ‘soft’ enforcement to build national capacity to prevent future violations. This will both ensure that human rights are advanced as effectively as possible in the context of the GSP, and reduce negative externalities.

Situating trade in UK-Asia bilateral trade deals

90. While the UK might not be in a position to negotiate a multi-lateral trade agreement in the near future following exit from the European Union, bilateral agreements are a viable and effective option for negotiating and developing trade relationships with Asia. Bilateral agreements also have the benefit of fleetness (entailing less complex negotiations) and context-responsiveness. They are also more likely to maintain a power balance beneficial to the UK, where multi-lateral deals might dilute UK influence. Bilateral agreements might further serve as an entry-point for multi-lateral agreements in the future.

91. FTAs will be particularly relevant for Asian States ineligible for, or likely to be moving out of, the GSP. This notably includes China—one of the UK’s top five trading partners already under the status quo, and many other States that feature in the UK’s top trading partners in the Asian region (see Figures 8 and 9). FTAs will also be particularly relevant for GSP beneficiaries with significant markets for UK exports, given the focus of the GSP on imports into the UK.

Figure 8. UK Export Destinations 2017 – Asia



¹¹⁸ This reflects the recommendation on the application of negative conditionality in the EU’s GSP made by Fjellner, *ibid*, 5.



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Figure 9. Imports to the UK 2017 – Asia



A human rights framework for UK FTAs

92. Integrating human rights into future FTAs will be central to the efforts to advance human rights through trade mechanisms after BREXIT. These agreements allow for a more tailored approach to human rights that differentiates between different countries in ways that cannot be achieved through a GSP because of WTO rules. Nonetheless, the baseline rules established for the GSP are a sensible starting point for FTA entry conditions in the Asian context, and ratification of the core set of human rights instruments and the Optional Protocols should likewise be formulated as prerequisites to future FTAs. This brings positive conditionality into FTA negotiations as well as the GSP, expanding the incentives for third States to make international human rights commitments at the outset.

93. Beyond the ‘list approach’ to human rights standards, the UK can adapt the practice of the EU in integrating Sustainable Development Chapters (SDCs) into FTAs to develop a more effective approach to advancing human rights through trade. One of the key limitations of the EU’s SDCs is the broad scope of the values advanced therein (see paragraph 35). This is generally the result of difficulties in achieving specific human rights commitments in this context, particularly in Asian States. The UK will also face this challenge in negotiating FTAs post-BREXIT, and without the benefit of the EU’s more substantial international market share.

94. Having incorporated specific human rights obligations into FTAs through the inclusion of human rights treaties as entry conditions, the UK would have a more stable foundation for articulating specific human rights obligations in SDCs. These should be firmly rooted in external, multilateral standards to avoid criticisms of Western-values being imposed on Asian States. This in turn supports more comprehensive monitoring of the implementation of human rights obligations in practice, as the mechanisms within the FTA could be developed to complement the monitoring mechanisms of the treaties themselves.



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Monitoring and enforcement

95. Following in the footsteps of EU SDCs, future UK trade agreements should incorporate civil society organisations in monitoring mechanisms. The UK should therefore consider providing for the establishment of joint committees and/or domestic advisory groups for regular and sustained dialogue on human rights in the territory of the trading partner. THE EU-South Korea FTA provides a model for this approach (see paragraph 38) however new mechanisms for UK-Asia trade agreements should be developed in cooperation with local actors and civil society from the outset in each case, to ensure the mechanisms created are contextually responsive and fit for purpose.

96. UK development programmes and funding should be integrated in the context of UK-Asia FTAs on a case-by-case basis to support monitoring and implementation activities. Connecting into existing development programming, as well as international and domestic organisations already operating in the countries, can help to ensure trade mechanisms integrate seamlessly, effectively, and efficiently into structures already in place. This could help to reduce capacity constraints on these mechanisms, avoiding a key criticism levied against EU SDCs.

97. As in the context of a new UK GSP discussed above, in developing new FTAs with Asian countries the UK should consider a combination of enforcement mechanisms for different kinds of abuses. These approaches should combine the positive conditionality of the list approach setting out entry conditions for the negotiation of trade preferences, with tailored negative conditionality in the case of serious violations, and enhanced engagement to build human rights protections incrementally over time in constructive dialogue with local stakeholders.

98. Unlike in the context of the GSP, FTAs enable bespoke enforcement packages to be adopted that respond to the specific challenges, needs, interests, and ideologies of the particular State. In particular, these mechanisms should be responsive to the existing infrastructure and institutions within the State, strengthening these where possible to ensure effective implementation and monitoring of human rights is internally sustainable.

Conclusion and recommendations

99. On the international stage, the United Kingdom often presents itself as a champion of human rights. The value placed on these norms is central to the UK's identity in international relations and internally. Deepening trade relationships with countries that have historically avoided making commitments to respect human rights, that have long records of human rights violations, have failed to implement fundamental norms, and continue to refuse to empower mechanisms for monitoring and enforcement have the potential to jeopardise this.

100. Trade should not be conceived as the primary mechanism through which the UK advocates for the protection of human rights in third countries. However, the potential to turn the UK's market towards the advancement of fundamental human rights abroad should not be overlooked. After exiting the EU, the UK will be faced with the need to develop and adapt



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trade relationships with third parties, including but not limited to the EU. As Asian nations become increasingly significant both in the context of trade with Europe, and in the international marketplace more broadly, the UK will undoubtedly be required to negotiate new trade relationships with Asian States. Yet, in so doing, the UK's international commitment to global human rights will be engaged.

101. As a region, Asia has been historically weak in protecting, respecting, and fulfilling the fundamental human rights of its citizens. Many vulnerable people in the Asian States that are potentially significant future trading partners are at risk of experiencing human rights violations, a range of which relate directly to trade—most notably abuses of fundamental labour rights in supply chains that would reach into the UK. The UK should therefore place human rights at the heart of its international trade strategy, not only in black letter of international agreements and commitments, but in practice and implementation. Learning from the global evidence base on the integration of human rights in trade, and the outcomes (and shortcomings) of different approaches, the UK has the opportunity to lay new ground in this space that builds upon existing approaches. In particular, after exiting the EU, the UK should:

- Combine development cooperation policies with trade policies
- Expand the entry conditions for the UK GSP beyond the list of Conventions included in the EU's GSP, including the Optional Protocols to the core international human rights instruments to respond to the specific monitoring challenges of the Asian context
- Adopt Free Trade Agreements containing positive human rights commitments in comprehensive Sustainable Development Chapters, with greater strength and responsiveness in monitoring and enforcement mechanisms
- Rely on multilateral frameworks (for instance United Nations and International Labour Organisation frameworks) to ensure legitimacy in Asian States historically resistant to the imposition of 'Western' ideas and values
- Secure effective civil society engagement at all stages to provide a local and contextually specific approach to implementation, monitoring and enforcement of human rights standards situated in the context of trade policy and agreements
- Integrate the UN Sustainable Development Goals and international human rights obligations in trade agreements to align trade policy with existing international commitments