Amnesty International UK

BRIEFING

UK-Israel Free Trade Agreement – responding to human rights concerns in keeping with UK's obligations and policies

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1. Key international law issues raised by the conclusion of a Free Trade Agreement (FTA) between the United Kingdom and Israel

1.1 Overview

The UK's trading relationship with Israel carries significant legal and human rights-related risks. These include

- **risks of the UK's complicity in Israel's violations of fundamental principles of international law** enshrined in the UN Charter: namely prohibitions on the use or threat of force (a rule that automatically nullifies any claims of acquisition of territory in this way), and the right of all peoples to exercise self-determination.
- **risks of the UK's complicity in Israel's violations of fundamental principles of international humanitarian law in the territories it has occupied since 1967** (in this briefing paper referred to as "the occupied territories"), including
    - the illegal policies of transferring parts of its civilian populations into occupied territories,
    - forcibly displacing the local population, and
    - engaging in extensive appropriation of land for these purposes (see further Box 1 below).
- **risks of UK complicity in Israel's oppressive policies and practices towards Palestinian people, including legal segregation and control**, and the use of military rule to control, dispossess, and restrict movement and political participation, which amount to the crime of apartheid under international law.
- **risks of facilitating growth in business activities that cause or contribute to human rights abuses**, such as settlement business activities, or spy and surveillance technologies that are used to violate people's human rights, within the territory of the trade partners and more broadly (see further section 4.4 below).

Box 1: What are the legal obligations of occupying states under international humanitarian law?

The obligations of occupying states under international humanitarian law are set out in the Hague Regulations of 1907 and the 1949 Fourth Geneva Convention relating to the protection of civilians in time of war.

These instruments lay down the standards of international law aimed at:
• safeguarding the local population from abuse;
• protecting their assets from being pillaged;
• ensuring the continuation, as far as possible, of the pre-conflict way of life, which includes respecting the local population's cultural rights, and preserving their territorial habitat and its demographic order.

Under international humanitarian law, **occupying powers have responsibilities to protect the well-being of the occupied population**.

International humanitarian law prohibits an occupying power from transferring its own civilians into a territory that it occupies. It also prohibits an occupying power from forcibly transferring protected persons from occupied territory.

As protected persons, **members of the local population must be treated humanely and must be protected from violence and from degrading treatment.**

Resources of the occupied territory are treated as public property being held in trust for the benefit of the local population. As a consequence, there are limits under international law on the extent to which land, natural resources and other property may be economically exploited by the occupying power. **Re-purposing appropriated property for civilian residential or commercial use by the occupying State's nationals, or transferring it to their possession and control, are clear violations of international law**.

These rules have acquired the status of jus cogens norms in international law: this means that they are accepted as **fundamental principles of international law** by the international community, from which **no exception or derogation is permitted**.

See further: **Amnesty International, 'Think Twice: Can Companies do business with Israeli settlements in the Occupied Palestinian Territories While Respecting Human Rights?'**, (Amnesty, 2019), https://www.amnesty.org.uk/files/2019-03/Think%20Twice%20report.pdf?VersionId=BrN9N0VX3RkzTJROuKYC46LE43hCPtTu, chapter 1.

As explained further below (see esp. section 2), **ensuring that the UK-Israel FTA is applied *only to territory that falls within Israel's pre-1967 borders* – and in such a way that the UK neither facilitates nor acquiesces in Israel's violations of international law – is fundamental to the mitigation of the first, second, and third set of risks mentioned above**.

Box 2: Serious breaches of international law

The gravity of Israel's breaches of international law is further underlined by numerous international statements and legal instruments. The **UN Security Council has described Israel's settlement policy as having "no legal validity"**, and constituting **"a flagrant breach of international law"**. The **UN Security Council has also declared Israel's annexations of East Jerusalem and the Golan Heights to be "null and void"**. Both the UN Secretary General and the UN High Commissioner for Human Rights have condemned Israel's plans to annex parts of the occupied West Bank as amounting to **"a most serious violation of international law"**.

UN experts have recently found that Israel's occupation of Palestinian territory constitutes apartheid, urging Israel to comply with international human rights and humanitarian law, including the International Convention on the Elimination of All Forms of Racial Discrimination.

The crime against humanity of apartheid under the Apartheid Convention, the Rome Statute and customary international law is committed when any inhuman or inhumane act (essentially a serious human rights violation) is perpetrated in the context of an institutionalised regime of systematic oppression and domination by one racial group over another, with the intention to maintain that system.

1.2 The UK's duty of non-recognition and its policy positions on Israel's ongoing occupation of Palestinian and Syrian territories

Under international law, all States have obligations not to recognise as lawful a situation which has been created by a serious breach of international law.

Accordingly, with respect to Israel's ongoing occupation of Palestinian and Syrian territories, the UK:

- refuses to recognise the occupied territories as being part of Israel;
- maintains as its official policy that it will not recognise any changes to the pre-1967 borders, including with regard to Jerusalem, other than those agreed by the parties to the Israel-Palestinian conflict.

UK government guidance (see 'Overseas business risk: the Occupied Palestinian Territories', updated 24 February 2022) states that "[s]ettlements are illegal under international law, constitute an obstacle to peace and threaten a two-state solution to the Israeli-Palestinian conflict."
https://www.gov.uk/government/publications/overseas-business-risk-palestinian-territories/overseas-business-risk-the-occupied-palestinian-territories

These policy positions and public statements demonstrate the UK's clear commitment to meeting its international law obligations of non-recognition of situations created by Israel's grave and ongoing breaches of international law with respect to the occupied territories.

However, the effectiveness and credibility of these policy positions and statements may be undermined by inconsistent action in the trade sphere.

The UK's approach to trading with Israel, and the terms of any renegotiated FTA, need to take account of the possibility that **recognition by a State of a situation created by a serious breach of international law can be implied as well as explicit**.

Box 3: How might the terms of a trade agreement lead to implied recognition of a state of affairs that is illegal under international law?

In addition to setting out the manner in which trading barriers will be reduced and the terms on which this will take place, trade agreements also include provisions aimed at facilitating smooth movement of goods (and increasingly provision of services) across borders.

To this end, trading parties may be required to give legal recognition or effect, under their own domestic legislation, to certain activities and situations taking place under the authority of the other party. Such provisions will also set out the basis on which trading partners can (and must) rely on the other party's interpretation and implementation of the trade agreement, including determinations regarding which goods, activities and situations fall within the scope of the agreement, and which do not. All bilateral trade agreements concluded by the UK contain provisions of this nature.

All trade agreements require, to some degree, mutual reliance of the parties on the determinations legally made by each other under the agreement. A relationship of mutual trust

and reliance, based on FTA provisions of this kind, has obvious benefits for the smooth implementation and operation of any trade agreement.

However, in the context of the trade relationship between the UK and Israel, **there is a danger that FTA provisions that require the UK to rely on judgments of Israeli authorities as to the correct implementation of the trade agreement could be taken to indicate the UK's acquiescence in (and hence implied recognition of) an internationally illegal state of affairs**, contrary to the UK's own international law obligations if, for instance

- insufficient effort has been made by the UK, in the course of preparing for and negotiating the revised trade agreement, to identify, analyse and take account of matters such as
    i. the legal framework, laws, and institutional practices that mandate, enable, or which serve to institutionalise grave breaches of international law;
    ii. laws, institutions and practices relevant to the organisation by Israel of its internal and external commerce; and
    iii. the commercial exploitation by Israeli nationals of property in the occupied territories that has been unlawfully expropriated and purposed specifically for their use and benefit.
- inadequate attention has been given to the above in the design of those aspects of the trade agreement relating to trade facilitation as well as to the implementation of the Agreement's provisions (e.g. in terms of checks, information-exchange, monitoring and accountability);
- relevant UK authorities are unable (e.g. for reasons of lack of access to timely and accurate information) to effectively implement and enforce relevant UK legislation (i.e. those aimed at ensuring correct implementation of the trade agreement consistent with the UK's international law obligations), which may be indicated by placing exceptional or unusual burdens on UK customs authorities and/or importers in an attempt to mitigate these problems unilaterally.

2. What changes are needed to the trading arrangements between the United Kingdom and Israel to (a) ensure that the United Kingdom is able to meet its ongoing international legal duties of non-recognition, (b) to help address its risks of complicity in grave human rights abuses, and (c) to ensure the effectiveness of its existing policies?

2.1 Confirmation of the UK's policy position with respect to non-recognition and clarity with respect to the FTA's territorial scope

To fulfil its international law obligations towards the maintenance of international peace and security and the upholding of human rights (see section 1 above), the UK needs to ensure that its trading relationship with Israel is established and maintained in such a way that the UK neither facilitates nor acquiesces in Israel's illegal annexation policies or plans, or Israel's unlawful exercise of powers reserved for legitimate sovereigns in any part of the occupied territories.

To achieve this, the UK *at a minimum* will need to include in its renegotiated Free Trade Agreement (FTA) with Israel*:*

- A **clear, explicit and unambiguous statement emphasising the UK's non-recognition of the occupied territories as being part of the State of Israel** and making it clear that all of the provisions of the FTA must be interpreted in this light.
- A **definition of territorial scope that explicitly and unequivocally excludes the occupied territories from the scope of the agreement**; and
- A mutually agreed regime on preferential Rules of Origin (RoO) that **prevents products originating in the occupied territories from being designated as originating in Israel** (see further comments under section 2.2 below).
- A mutually agreed regime of non-preferential origin designation and indication that enables the UK to ensure that
    - the benefits of trade facilitation measures (whether unilateral, or agreed with Israel under the FTA) are not extended to any goods that have been wholly obtained or substantially worked or processed by Israeli commercial undertakings utilising unlawfully appropriated land in the occupied territories; and
    - UK policies on consumer protection and product information are effectively implemented.

Box 4: Why are goods originating in the occupied territories being wrongly designated as originating in Israel? And why is this problematic?

The legal and political background is complex, but the most serious difficulties encountered by the EU in implementing its customs, tariff and quota rules with respect to its trading arrangements with Israel stem from the omission, from the terms of trading agreements concluded between the EC/EU since 1975, of a mutually agreed specification of the agreement's territorial scope.

This omission has allowed Israel unilaterally to apply a territorial definition derived from its own domestic legislation, which specifically applies Israel's law and administration to occupied East Jerusalem and the occupied Syrian Golan Heights, and extends the application of particular areas of its domestic law, jurisdiction and administration into the West Bank.[1] Israel has applied the EU-Israel Agreement's protocols on "rules of origin" (or "RoO") accordingly, and certifies the eligibility of goods originating in the occupied territories for preferential treatment under the Agreement on this basis.[2]

The omission of a mutually agreed definition of territorial scope in the EU-Israel Agreement similarly ensures that Israel's customs authorities implement their administrative cooperation and assistance obligations to EU member state customs authorities on the basis of Israel's own definition of territorial scope.

[1] Israel's Area of Jurisdiction and Powers ordinance 29 of 1948 mandates the application of Israeli law and administration to any part of the territory of historic Palestine outside the State of Israel that Israel's Minister of Defence proclaims to be 'held by' its armed forces. While such a proclamation has never been issued, the ordinance remains in effect and provides both a doctrinal and legal basis for the above-mentioned legislation. Israel based its legislation annexing the Golan Heights on other 'imperatives' of the State.

[2] Note that the provisions on administrative cooperation and assistance set out in those agreements' protocols on origin specifically mandate their implementation by Israel 'in accordance with its domestic law'. See EC-Israel Association Agreement, Protocol 4, Article 18, and Annex III; Protocol 5, Articles 4 and 7.

However, this approach is at odds with the laws of EU and member states, under which goods originating from the occupied Palestinian territories are precluded from receiving preferential tariff and quota treatment under agreements concluded with Israel. While EU-Israel trade agreements have obliged EU authorities to give legal effect to the determinations and related administrative practice of Israel's authorities regarding goods exported by Israel, this is only to the extent that those determinations are 'legally made' both under those agreements and under EU law.

In 1986, the European Council issued a decision establishing a unilateral preferential import regime for products originating in the occupied Palestinian territories. In its decision, the European Council made it clear that such products were not eligible for preferential treatment under the EC-Israel trade agreement then in effect. Moreover, the decision confirmed that EU law required relevant national authorities not to give legal effect to proofs of origin issued under an EU-Israel agreement covering goods originating in the occupied territories, notwithstanding Israel's entitlement under that agreement to issue them.

This unsatisfactory states of affairs carried on until 1997-8, at which point the Commission signalled its desire for any "violations of rules" under the EU-Israel Interim Association Agreement to be "brought to an end".[3] Israel responded that it was applying the Agreement to the occupied territories and issuing preferential proofs of origin to products originating in them in accordance with its national law, arguing that, with no mutually agreed geographic specification of the "territory of the State of Israel" written into the agreement, the EU could not now impose its own geographic specification on Israel.

This created further practical problems for member states' customs authorities that required resolution. They could not rely on Israel's implementation of the Agreement's provisions on administrative cooperation to determine the true origin of goods that were being preferentially exported by Israel under the Agreement and refuse preferential treatment to goods originating in the occupied territories. Furthermore, Israel's customs authorities refused to provide responses to verification requests launched under those provisions that would involve distinguishing the occupied territories from Israel.

With no definitive political solution in sight, EU member states began refusing tariff and quota preferences indiscriminately to goods exported by Israel under the agreement. Thousands of verification requests were issued (creating an extraordinary administrative burden for the relevant domestic authorities). When Israel's customs authorities failed to provide the requested information, preferences were refused to significant volumes of Israeli exports that would otherwise have qualified for them. In addition to the regulatory burdens, the situation also resulted in administrative challenges, costs and lost opportunities for EU and Israeli importers and exporters. By 2004, Israel's business community had lobbied successfully for Israel's agreement to a 'legally non-binding' compromise with the European Commission – a 'technical arrangement' that remains in effect today.

Under that arrangement, Israel continues to issue preferential proofs of origin covering goods originating in the occupied territories, but now requires its exporters to enter the Israeli postal codes of the locations where the relevant production operations (i.e. conferring preferential origin on the exported goods) took place on the proofs of origin accompanying the goods. The prescribed formats for presenting the postal code information also require the Israeli exporter to distinguish Israeli settlement postal codes from postal codes inside the green line (see further Box 5 below).

[3] European Commission, IP/98/426, 'EU - Israel: Implementation of the interim agreement in the framework of a strengthened regional cooperation', 13 May 1998.

2.2 Clearer and more robust implementing rules and provisions on administrative cooperation and mutual assistance

The renegotiated trade agreement needs to ensure:

(a) the UK's ability to differentiate goods originating in the occupied territories from goods originating in Israel for the purpose of determining tariff and quota treatment, and to ensure that the latter are not granted, and do not receive, preferential treatment under the UK-Israel FTA; and
(b) that separate trading agreements concluded with the Palestinian Liberation Organisation (PLO) for the benefit of the Palestinian Authority (PA) covering trade in goods originating in the Occupied Palestinian Territories (OPTs) and the UK are respected; and
(c) that the conclusion of further separate trading arrangements with the Palestinian Authority (PA) with regard to goods originating in the Occupied Palestinian Territories (OPTs) is not pre-empted or undermined by the agreement concluded with Israel.

Experiences with the EU-Israel Association Agreement to date (on which the UK-Israel trading relationship is currently based) not only indicate a clear need for an unequivocal territorial clause (see Box 4 above), but also suggest a need for **much clearer and more robust implementing rules and provisions on administrative cooperation**.

A lack of clarity between the EU and Israel (i.e. under their own trading arrangements) as to expectations in this regard has not only undermined the consistency and credibility of the EU's non-recognition policies, it has also placed undue burdens on member states' customs authorities (see Box 4 above), and led to unpredictability in the application of the rules to the detriment of the trading relationship and importers' and exporters' commercial interests (see Box 5 below).

Box 5: Learning from experience: What have been the main burdens on customs authorities and importers as a result of flaws in the EU trading arrangement – and can they be overcome?

EU importers applying for the release of goods onto the internal market are required to submit an importer's declaration. The information on the goods included in each declaration must state their preferential origin if the importer is requesting preferential tariff and quota treatment for those goods. EU member state customs authorities must accept an importer's declaration upon receiving it, unless the information it contains raises doubts as to its validity, or the validity or authenticity of the proofs of preferential origin or certain other documentation (i.e. exporting country certificates) referred to in the declaration.

Prior to releasing goods to the importer, customs authorities also perform infrequent random checks and may select particular import consignments for targeted checks when their risk management systems indicate heightened assessments of risk based on the information provided in the importer declaration and/or other information available to them.

It is only in the context of such random or targeted checks that EU member state customs authorities would inspect the proofs of origin covering goods exported by Israel, and consult the

postal codes placed on those proofs pursuant to the technical arrangement. If a consignment of goods exported by Israel is not flagged for a documentary check based on information already available to member state customs authorities, they never see its accompanying proofs of origin or the postal codes placed on them. In short, **only the information available to them independently of the technical arrangement can 'raise doubt' alerting them to the possibility that particular goods exported by Israel under its FTA actually originate in the occupied territories**.

The main utility of the technical arrangement to EU customs enforcement is realised only once such doubt has been raised. Checking postal codes on the proof of origin and finding a settlement postal code enables member states' customs authorities to refuse preferences summarily, without having to bear the additional administrative burdens of launching a verification procedure with Israel's customs authorities and waiting up to ten months to receive their response. This also reduces the administrative burdens placed on Israel's customs authorities who must respond to those verification requests when member states' customs authorities manage to flag goods originating in the occupied territories that Israel's customs authorities have certified as originating in Israel. **However, what this technical arrangement based on postal codes has failed to achieve is to fortify EU member states' success rates in detecting and refusing preferences to such ineligible goods which have been wrongly certified.**

This technical arrangement may help member states' customs authorities improve their risk assessment and management systems, but only where random documentary checks turn up settlement postal codes unexpectedly. This arrangement also helps mitigate the exceptional expenditures of administrative resources necessary to cope with Israel's continuing export of goods originating in the occupied territories under its Agreement.

The contribution of the technical arrangement to excluding products originating in the occupied territories from preferential market access under the EU/UK-Israel Agreement essentially depends on importers' own diligent checking of the postal codes listed on Israeli proofs of origin, and on those importers not claiming preferences when postal codes indicate that the goods in question originate in the occupied territories. However, under the UK's and EU's customs codes an importer or their agent cannot be held liable for failing to adequately examine and analyse the postal codes, nor for any innocent oversight or error they might make when doing so. At most, the importer may incur a customs debt for the goods in question, or expose him/herself to more frequent checks by customs authorities.

In light of the above, **member states' customs authorities remain largely unaware of the volumes and characteristics of the goods originating in the occupied territories that have escaped their inspection, and for which preferential treatment has been claimed and granted**. As the EU does not have the necessary statistical information available to it, there is also currently no way to detect or determine the extent of any existing enforcement gap.

Outside the EU, the UK now has the opportunity to prevent the flaws of the EU-Israel Association Agreement from being carried forward into its renegotiated FTA with Israel.[4]

[4] Note that the EU has belatedly acknowledged the error of incorporating geographically non-specific territorial clauses in their agreements with Israel. In December, 2012, the EU Council accordingly resolved that "all new EU-Israel agreements must explicitly and unequivocally indicate their inapplicability to the occupied territories".

The UK can do this by including in its new FTA with Israel, as noted in section 2.1 above, a **definition of territorial scope that explicitly and unequivocally excludes the occupied territories from the scope of the agreement**.

Assuming that such a territorial scope clause can be negotiated and included in the revised agreement, it would need bolstering with further provisions to enable and ensure the **swift and efficient detection and resolution of systematic and persistent irregularities and errors**.

To that end, the FTA should include:

- Provisions on customs and administrative cooperation and mutual assistance that
  - (i) **ensure each Party's correct and effective implementation and enforcement of the agreement's RoO and its other trade-related provisions** throughout its area of effective jurisdiction;
  - (ii) set out clear and robust commitments of the trading parties to each other in this regard; and
  - (iii) thereby ensure the UK's accomplishment of the objectives set out in the opening of this section 2.2.
- The designation of a **customs services contact point** by each trade partner to receive complaints directly from the public (including individuals and interested NGOs) about failures by the competent authorities of the exporting country to properly implement or enforce legal requirements that give effect to the UK-Israel FTA's RoO regime.
- A **robust dispute settlement mechanism** for RoO-related issues that cannot be dealt with, or are not successfully resolved, through technical dialogue.
- **Third party rights to participate in dispute resolution processes** in which they have a substantial interest (with third parties defined to include the internationally recognised representatives of the peoples of the occupied territories).
- **Dispute resolution processes in event of a "persistent pattern of failure" to implement or properly enforce legal requirements** to give effect to the UK-Israel FTA's RoO regime which are **capable of delivering an effective remedy**.

2.3 Inclusion of an explicit and clearly worded statement rebutting and excluding any implied acceptance by the United Kingdom of past or ongoing human rights violations on the part of Israel by the fact of having entered into the revised FTA

It is now standard practice for trade agreements to include a statement of the values on which the trading relationship is based, which includes respect for human rights.

Under terms negotiated by the EU and now rolled over to the UK by virtue of the UK-Israel Trade and Partnership Agreement signed in February 2019, "respect for human rights and democratic principles" is stated to be an "essential element" of the agreement (on the implications of this designation, see further section 3.1 below).

Whatever form such a human rights clause might take in the renegotiated agreement, **the UK will want to ensure that its knowledge of the situation of ongoing and grave human rights violations by Israel is not used to undermine the effectiveness of such a clause in future**. Put

another way, the UK will want to make it abundantly clear that the fact of its having signed a trade deal containing such a human rights clause, in full knowledge of the nature and gravity of Israel's violations of international humanitarian and human rights law, cannot be taken to imply any acceptance of, or acquiescence in, Israel's unlawful conduct on the part of the UK.

The renegotiated UK-Israel FTA should therefore include **a "without prejudice" clause establishing that the Parties' conclusion of the agreement does not imply either Party's acceptance of any unlawful conduct or violations of human rights engaged in by the other at the time of the agreement's conclusion, nor that either Party's practice and standard of respect for human rights and international law at the time of the agreement's signing meets the standard of respect to which each obligates itself under the agreement**.

3. What further changes are needed to the trading arrangements between the United Kingdom and Israel to ensure that a renegotiated FTA does not contribute to further erosion of human rights but instead becomes a platform for progressive improvement?

3.1 Human rights conditionality

As noted above, it is now standard practice for trade agreements to include a statement of the values on which the trading relationship is based, which includes respect for human rights. Under the EU-Israel Association Agreement (on which the current UK-Israel trading relationship is based), "respect for human rights and democratic principles" is stated to be an "essential element" of the agreement.

This designation (i.e. as an "essential element") creates the possibility of suspension or termination of the trading relationship on human rights grounds.

Given the seriousness of the human rights violations taking place in the occupied territories, which include violations of international humanitarian law, and the worsening humanitarian situation, there is a compelling case for strengthening the human rights commitments exchanged by the parties in the renegotiated FTA between UK and Israel.

At a minimum, in addition to affirming that the relationship is *based on* respect for human rights, the UK and Israel should both confirm their own obligations under international law to *uphold* human rights, within their respective territories and in any territory they have placed under their effective control, and "*reaffirm their respect for the Universal Declaration of Human Rights and the international human rights treaties to which they are parties"* (n.b. the italicised wording reflecting the language used in the Trade and Cooperation Agreement between the UK and the EU) in both their internal and external action.

Furthermore, **the renegotiated UK-Israel FTA should spell out clearly that violations of human rights committed by either party outside of its territorial boundaries, as well as within them, may be treated by the other as a material breach of the new UK-Israel FTA.**

3.2 Strengthened provisions relating to human rights issues (including labour standards) to enhance the potential human rights benefits of the trading relationship

The inclusion of specialised chapters on social, environmental and human rights issues – in which the parties confirm the values and standards on which their trading relationship is based, and rule out weakening domestic law protections in the name of encouraging trade – is now standard practice among trading partners.

The recently concluded UK-New Zealand FTA includes three such specialised chapters, i.e.

- Trade and Labour.
- Trade and the Environment (or Trade and Sustainable Development).
- Trade and Gender.

The negotiation of a new UK-Israel FTA provides an opportunity for the UK and Israel to modernise its trading arrangement by including new specialised chapters that build on the UK-NZ FTA approach, with the selection of themes to be covered in these chapters, and their detailed content, to be informed by a prior human rights impact assessment (see further section 5.1 below).

To ensure accountability for meeting the standards set out in each of these chapters, the UK-Israel FTA should clearly set out *at a minimum*:

- the institutional arrangements for monitoring progress, compliance and effectiveness of risk mitigation measures.
- the institutional arrangements for encouraging dialogue on areas of concern.
- a robust system of enforcement in cases of non-compliance with relevant commitments.

The gravity of the human rights violations resulting from the occupation (which include serious and systematic discrimination), and UK's international law obligations not to acquiesce in situations that amount to serious breaches of fundamental principles of international law, call into the question the wisdom of simply replicating the relatively weak institutional arrangements developed by the EU for whatever specialised chapters the parties decide eventually to adopt.

The UK should send a much clearer signal about the importance of human rights in its trading relationships with a stronger and bespoke set of accountability arrangements, potentially drawing from accountability mechanisms and strategies being pioneered elsewhere, particularly by the US (e.g. in the UK-Canada-Mexico or "USMCA" agreement, see further Box 6 below).

Features that could potentially be adapted to the context of a renegotiated UK-Israel FTA could include:

- A joint committee to provide a forum for discussion between the trading partners on issues covered by the specialised chapters.
- Consultative bodies to be established by each party which would be responsible for sharing information with, and gathering views from, local actors such as trade unions and non-governmental organisations.

- A mechanism through which individuals and organisations can raise complaints directly with a designated contact point, who would be responsible for then investigating the complaint and referring cases of apparent non-compliance for dispute resolution under the agreement.
- Robust dispute resolution processes for use in cases where non-compliance with the terms of the specialised chapters is established.
- A "rapid response" mechanism to respond to allegations of serious cases of human rights abuses at specific sites.
- Third party rights to participate in disputes resolution and "rapid response" processes in which they have a substantial interest (with third parties defined to include the internationally recognised representatives of the peoples of the occupied territories).

Box 6: New directions in human rights monitoring and accountability within trade relationships

There are many reasons why trading partners may wish to establish procedures or mechanisms for monitoring the human rights implications of their trading relationships, which may differ from setting to setting.

For instance, in some contexts, trading partners may be most concerned with ensuring compliance with human rights-related pre-conditions to the agreement, or human rights commitments agreed to be "essential elements" of the trading relationship (see section 3.1 above). In other contexts, this monitoring will be more driven by risk management concerns (e.g. to ensure that aspects of the trade agreement do not contribute to a worsening human rights situation, see further section 5.1 below).

To date, most human rights monitoring mechanisms in trade agreements have focussed on country-level deficiencies (e.g. lack of implementation of human rights treaties, or poor labour or environmental regulation) or industry-wide practices that may be contributing to systemic human rights problems within the jurisdiction of a trading partner. While these processes are important, they can be slow-moving and incremental, and as such have little (if any) immediate influence on the practices of the commercial actors that are benefiting from the trading relationship.

However, the United States-Mexico-Canada Trade Agreement (USMCA) contains a novel feature under which either the United States or Mexico can request a "fast track" (i.e. expedited) review in response to allegations of breaches of fundamental labour standards (i.e. relating to freedom of association and collective bargaining) *at specific manufacturing facilities.* Importantly, under US implementing legislation, fast track reviews can be triggered by a public petition process through which interested stakeholders (e.g. trade unions) can set out their allegations of labour rights breaches at specific facilities. In situations where these allegations provide the receiving committee with a good faith basis to believe that those breaches are in fact occurring, a review by relevant authorities in the trading partner must be requested, and certain trade-related measures can be imposed pending the completion of that review. If breaches of labour rights at the relevant facilities are indeed confirmed, trade remedies may be imposed, including suspension of preferential tariff treatment for goods produced at those facilities.

3.3 Retention of adequate domestic policy space to ensure that the trading parties can meet their human rights obligations when pursuing business-related policy objectives

Provisions in the UK-Israel FTA on non-tariff barriers, procurement, investment and liberalisation of services markets, will require updating to ensure that they are consistent with the UK's policy objectives with respect to promoting responsible business and value chains, and that they leave space for future regulatory innovation and implementation.

The renegotiated UK-Israel FTA should not close off possibilities for raising the human rights standards of businesses both in the UK and in Israel, and for protecting people from business-related human rights harms, for instance by conditioning access to goods, procurement or services markets on compliance with human rights standards (which may include the performance of human rights due diligence, see further section 5.2 below).

In addition, the UK should seek inclusion of clauses in which the parties clearly and unequivocally:

- Reserve the right to maintain or enact measures necessary for reasons of public policy, which would include measures related to the protection of human rights and the maintenance of international peace and security.
- Affirm the importance of responsible supply chain management, including through the use of human rights due diligence (see further section 5.2 below), reserving the right to condition access to markets for goods and services on the relevant human rights due diligence standards having been met.

4. What additional steps should the United Kingdom take, relevant to the implementation of a renegotiated FTA with Israel, to help guard against the risk that it may be acquiescing in or facilitating grave breaches of international humanitarian law?

4.1 Trade facilitation measures

UK bilateral and unilateral trade facilitation legislation and measures must be applied and implemented in line with the UK's positions and commitments on its non-recognition of Israel's sovereignty over the occupied territories (see section 1 above). Their implementation may not be predicated on, nor give effect to, any de facto application of Israel's law, jurisdiction or administration to the occupied territories, nor recognise any Israeli authority's exercises of competences in the occupied territories that are reserved for legitimate sovereigns.

In order to enable the UK to maintain its own policy consistency and safeguard the effective facilitation of trade in goods originating in the State of Israel as defined in accordance with international law, provisions may need to be incorporated in a renegotiated trade agreement that commit each Party's authorities to designate, declare, certify and indicate the origin of goods exported to the other Party in line with the mandatory origin designation requirements of the importing country.

Box 7: Challenging Israeli certifications for goods originating in the occupied territories

Imports from Israel, as with imports from other trading partners, will be subject to prevailing UK legal requirements regarding the production of certificates attesting to the absence of certain risks to human health, animal health, plant health. They will also need to comply with relevant UK marketing standards, product labelling and consumer protection legislation.

UK regulatory agencies need to be mindful of the legal implications of the issue of certificates for these purposes by Israeli authorities in relation to goods originating in the occupied territories, and **specifically the risk that acceptance by UK agencies of the legitimacy of such certificates might amount to official recognition (explicit or implicit) of the competence of such Israeli authorities to perform their domestic functions within the occupied territories**, contrary to the UK's international law obligations and the UK's clear policy pronouncements (see section 1.2 above).

4.2 Detecting systemic non-compliance

To encourage rigorous implementation of the RoO regime by relevant authorities in Israel (and with a view particularly to ensuring that goods originating in the occupied territories do not receive preferential treatment under the UK-Israel FTA), UK customs authorities should make robust and proactive use of verification procedures laid down in the RoO regime, and moreover should signal their preparedness to do so. Israel could, for example, be required to inform the UK of the domestic measures it has taken to ensure both its authorised exporters and its general exporting community will not seek to claim preferences under the UK-Israel FTA for goods originating in the occupied territories.

The UK government should also explore ways to further incentivise thorough and diligent implementation by both trading partners of the RoO regime, including through their **regular provision of information and guidance to their importers**, and **providing transparency about situations in which doubts have been raised regarding the true origin of goods**.

4.3 Additional human rights, humanitarian law, and trade considerations

Israel's occupation of the occupied territories is characterised by the extensive appropriation of property, not justified by military necessity, and carried out wantonly and unlawfully for the purposes of transforming the territories' demography, reorganizing its existing regime of property relations, and overriding or extinguishing its protected population's right of self-determination.

Neither UK authorities nor UK consumers are currently able to detect when goods imported into the UK market have been produced or obtained employing property unlawfully appropriated by an occupying power for such purposes.

Goods determined to be originating in Israel under the renegotiated trade agreement's preferential rules of origin may have also been worked or processed, or incorporate materials produced in the occupied territories employing such unlawfully appropriated property.

Since all Israeli settlement-based production is carried out under Israel's authority on unlawfully appropriated land, and supported by service infrastructure constructed on unlawfully

appropriated land, **the UK could also consider the benefits, both for its consumers and for its authorities, of requiring Israel's authorities, under the renegotiated trade agreement, to indicate when such goods have been in part produced under Israel's authority in the occupied territories, both on the goods themselves and on their accompanying documents**.

4.4 Export controls

The involvement of Israeli companies in the development and distribution of spyware has raised international concern. These technologies not only facilitate the abusive targeting of individual journalists, public figures and other human rights defenders, but also embed and exacerbate grave systematic human rights abuses. The Pegasus Project, to which Amnesty International has provided technical support, identified at least 180 journalists in 20 countries who were selected for potential targeting with spyware developed by the Israel-based NSO Group between 2016 to June 2021, including in Azerbaijan, Hungary, India and Morocco, countries where crackdowns against independent media have intensified: https://www.amnesty.org.uk/press-releases/pegasus-project-massive-data-leak-reveals-israeli-nso-groups-spyware-used-target

In November 2021, the Biden administration in the US announced a series of export controls on NSO Group and three other firms "based on evidence that these entities developed and supplied spyware to foreign governments that used these tools to maliciously target government officials, journalists, business people, activists, academics and embassy workers".

In light of the above, **the UK government should review its laws and policies related to the imposition of export controls on products and services posing significant levels of human rights-related risks to ensure that, in cases such as this, appropriate export control measures can be deployed swiftly and effectively**.

5. What other policy measures are relevant to ensuring that increased trade does not come at the expense of human rights?

> *"As I say, the [UK] Government have (sic) always been clear that increased trade will not come at the expense of our values and, specifically, will not come at the expense of our commitment to human rights. We want to have trade relationships with countries around the world, but ultimately the foundation stone on which all Government activity is built is our commitment to human rights."*
>
> The Right Hon. James Cleverly MP, then Minister of State for the Middle East and North Africa, Hansard, Vol. 699, 20 July 2021.

5.1 Human rights impact assessment and monitoring

By conducting a human rights impact assessment in advance of negotiating and signing a trade agreement (see further Box 8 below), trading partners are in a better position to anticipate and

head off potential human rights risks that might be associated with a trading arrangement (and also to capitalise on potential opportunities to enhance human rights), whether through the terms of the agreement itself or through complementary measures. Through subsequent *ex post* monitoring activities (whether on an ongoing basis or through periodic reviews, see Box 6 above) the parties can take stock of their success (or otherwise) at addressing different forms of risk, and make appropriate adjustments.

Amnesty International supports the conduct of human rights impact assessments and subsequent human rights monitoring as a general proposition.

In the case of the proposed UK-Israel FTA, the need for proper human rights impact assessment and monitoring is overwhelming, given the scale and seriousness of human rights violations perpetrated against Palestinians living under its rule in Israel and in the occupied territories and the risks of the UK becoming complicit in those abuses in the course of conducting its foreign policy and implementing its trade policies (see sections 1 and 2 above).

Human rights impact assessment and monitoring provide **vital opportunities for stakeholder engagement on human rights issues** connected with the trade agreement, **improving the quality of governmental and ministerial decision-making** with respect to the specific agreement at hand, and UK trade policy more generally.

The current lack of provision for any proper and systemic human rights impact assessment (and subsequent human rights monitoring) of the new UK-Israel FTA is a serious omission, which places the UK at heightened risk of finding itself in breach of its international law obligations in future.

Box 8: What is human rights impact assessment of trade agreements and why is it important?

Human rights impact assessment of trade agreements refers to a series of activities undertaken to identify and analyse the impacts of proposed or existing trading agreements on the ability of people to enjoy their human rights.

As with human rights monitoring and accountability mechanisms (see Box 6 above), the form it takes, the issues it focusses on and the methodologies used depend upon whether it has been undertaken primarily as a "legal compliance" exercise (i.e. to identify areas where trading terms may lead to breaches of a State's human rights obligations) or as a "risk management" exercise (e.g. to identify the different ways in which the implementation of the trade agreement may improve or diminish people's enjoyment of their rights over time), or both.

Economic analysis and modelling are central to the "risk management" variety of human rights impact assessment, in which "liberalisation scenarios" are evaluated against "baseline scenarios" in order, for example, to try to quantify changes in welfare indicators resulting from changing patterns of production and consumption in different sectors as a result of the trade intervention. Extensive stakeholder consultation (e.g. through surveys, interviews, and meetings) is an essential element of any credible human rights impact assessment process.

Within the EU, human rights impact assessment of trade agreements takes place as part of the broader "sustainability impact assessment" process which also encompasses environmental and social impact analysis. Most assessors adopt a "step by step" process, beginning with "preparation and screening" and ending with "reporting, monitoring and review", which can take many months (and quite often a year or more) from beginning to end.

Human rights impact assessment of trade agreements is important:

- For ensuring that the trade agreement will not cause either trading partner to be in breach of its international legal obligations under human rights law.
- To provide trade negotiators with the information they need to ensure that trading partners retain adequate policy space under the agreement to be able to respond to future human rights challenges (e.g. in situations of conflict or international health-related challenges such as global pandemic, or as a result of environmental disasters or long-term change).
- To assist with the identification of suitable flanking measures (e.g. under domestic regulation) to help protect human rights (e.g. in the context of services markets liberalisation or privatisation) and ameliorate potential human rights-related risks during times of transition.
- To help identify human rights risks associated with or arising under the trade agreement that may require ongoing monitoring, and the best strategies and mechanisms for facilitating this.
- In the interests of evidence-based governmental decision-making.
- For enhancing opportunities for informed public participation in trade policy, in general, and in discussions about the aims and priorities of specific relationships and deals.
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5.2 Human rights due diligence legislation

The policy objectives discussed in this consultation response, including those of encouraging responsible, human rights-respecting behaviour by UK importers and exporters (of both goods and services) and the credibility of UK's policy of non-recognition, can be further supported by legislation requiring UK-based companies to conduct human rights due diligence in relation to their cross-border supply chains.

In recent years, more and more countries have either enacted or have been considering the introduction of **legal regimes mandating human rights due diligence** activities aligned with the broad framework laid down in the **UN Guiding Principles on Business and Human Rights**. In the context of trade with Israel, such measures would be useful:

- as **a platform for closer engagement with UK-based businesses** on the specific human rights issues arising from the UK-Israel trading relationship.
- to ensure a **level playing field** for UK companies engaged in trade with Israel that take seriously their corporate responsibility to respect human rights.
- to **enhance the leverage of human rights-respecting UK companies** with respect to their suppliers in Israel.
- as a way of **enhancing the transparency of supply chains** including the place of origin of goods traded under the FTA, which is of fundamental importance in this particular context.

Box 9: What is "mandatory" human rights due diligence and how does this relate to trade?

Recent years have seen a proliferation of new legal regimes aimed at reflecting the global standard for human rights due diligence set out in the **UN Guiding Principles on Business and Human Rights** as a binding set of standards under domestic law. Many different regulatory models are possible (e.g. in terms of subject matter, human rights themes, geographic scope, sectors covered and enforcement mechanisms) as a comparison of legislative developments in France, Netherlands and Germany shows. The unveiling of proposals by the European Commission earlier this year for an EU-wide regime is a further significant development.

These types of regulations have implications for trade in several different ways:

- as a source of information (for governments, companies and consumers) on the origins of traded products and the conditions they were produced under (see further section 2 above).
- as a source of information about human rights risks associated with the production of traded products that may be used to trigger action (e.g. reviews) under special accountability or monitoring arrangements under the FTA (see Box 6 above) or in the contexts of customs checks and enforcement (see Box 5 above).
- because of the potential use of trade related measures (e.g. in the form of exclusion from access to certain markets) as a sanction for non-compliance with mandatory human rights due diligence regimes.

These potential synergies highlight the need for coherence between the terms of trade agreements, including the UK-Israel FTA, and any future UK regimes mandating human rights due diligence by companies.