Non paper

Using EU Trade Policy to promote fundamental human rights

Current policies and practices

NB: *This non-paper has been prepared to provide background information only with a view to facilitating discussion with civil society. Any mistakes are those of the author alone.*

Legal Basis.

Article 21(1) TEU provides that: *"The Union's action on the international scene shall be guided by the principles which have inspired its own creation, development and enlargement, and which it seeks to advance in the wider world: democracy, the rule of law, the universality and indivisibility of human rights and fundamental freedoms, respect for human dignity, the principles of equality and solidarity and respect for the principles of the UN Charter and international law*".

Article 207(1) TFU confirms that the EU's trade relations and agreements form part of this framework: "*The common commercial policy shall be conducted in the context of the principles and objectives of the Union's external action*."

The GSP.

The GSP is one of the EU's main instruments for linking human rights and social issues to trade policy. It foresees three types of sub-arrangements: the general arrangement, the special arrangement for sustainable development and good governance (GSP+) and the Everything But Arms (EBA) initiative.

All three GSP arrangements can be temporarily withdrawn from countries where there is evidence of **serious and systematic** violations of the principles contained in the international human rights and labour rights Conventions set out in an Annex to the GSP Regulation, on the basis of conclusions of the relevant monitoring bodies. The GSP Regulation sets out the procedure to be followed.

This is not a step which is taken lightly. In practice, basic GSP has only been withdrawn in two cases, (1) Myanmar because of the systematic use of forced labour and (2) Belarus for the widespread violation of basic trade union rights. In both cases, the EU action followed action initiated by the ILO in the form of launching a Commission of Inquiry[1]. Withdrawal is intended to be a reversible step, so that the affected country retains an incentive to improve the situation.

[1] A Commission of Inquiry is the highest level of investigation by the ILO in terms of a simple hierarchy of condemnation.

GSP+

The additional preferences provided for under GSP+ can be granted to "vulnerable" countries which ratify and "effectively implement" the main international human rights and labour rights Conventions[2] set out in an Annex to the GSP Regulation.

There are currently 16[3] GSP+ beneficiary countries. When a request for GSP+ status is received, the Commission examines it, taking into account the findings of the relevant international organisations responsible for the 27 Conventions.

GSP+ can also be withdrawn if the national legislation no longer incorporates the obligations of the relevant Conventions, or if that legislation is no longer being effectively implemented. In this regard, the Commission monitors the situation in beneficiary countries on an ongoing basis, drawing on material available from the relevant international monitoring bodies (such as the ILO and the UN).

GSP+ was withdrawn from Sri Lanka in August 2010 on the grounds of non-effective implementation of certain human rights conventions. A GSP+ investigation was also launched in respect of El Salvador because of concerns about non-incorporation of ILO standards in national law, but was terminated without withdrawal of GSP+ preferences, as the Commission considered that El Salvador had introduced the necessary reforms to remove the substantial obstacles to the exercise of ILO core labour standards.

The EU has also established GSP+ dialogues with beneficiary countries on issues concerning their implementation of the Conventions, which is intended to further support the process.

The GSP+ scheme has played its role as an "incentive" for applicant countries to ratify the Conventions; for example, the ILO has reported that most GSP+ applicant countries have made substantial changes to their legal systems in order to fully comply with the listed Conventions. GSP+ role in ensuring effective implementation is harder to quantify, not least because of the relative youth of the scheme.

FTAs

Human rights considerations are taken into account in the sustainable development chapter of the EU's FTAs to the extent that the 8 core ILO Conventions[4] can be considered to cover fundamental human rights[5].

Insofar as social issues are concerned, the main aim of the chapters is to engage partner countries in a cooperative process based on constructive dialogue and engagement to strengthen domestic compliance with domestic and international labour standards, particularly those set out in the 8 fundamental Conventions, as well as promoting the development and implementation of the ILO's Decent Work Agenda at national level. This approach is based on the consideration that countries are more likely to engage in substantive commitments (in

[2] Ratification of a number of environmental and good governance conventions is also required; this aspect is not covered by this note.

[3] Armenia, Azerbaijan, Bolivia, Cape Verde, Colombia, Costa Rica, Ecuador, El Salvador, Georgia, Guatemala, Honduras, Mongolia, Nicaragua, Panama, Paraguay and Peru. GSP+ benefits were temporarily withdrawn from Sri Lanka as of 16 August 2010.

[4] On child labour, forced labour, non-discrimination and basic trade union rights.

[5] on the other hand, international instruments such as the Universal Declaration on Human Rights include some other labour rights that so far have not been taken up explicitly in sustainable development chapters.

this case, relating to the ILO standards) in the context of dialogue and cooperation. In recent negotiations, FTA partners have therefore been asked to make commitments which to the extent possible are similar to those assumed by GSP+ recipients (while eliminating the link between trade preferences and social/labour commitments and bearing in mind that the FTA is the result of a bilateral negotiation, whereas the GSP is a unilateral measure). There is no formal obligation to ratify unratified Conventions, but partners are strongly encouraged to do so.

Where FTAs currently go further than the GSP+ is in setting specific mechanisms and structures to monitor the implementation of these provisions involving civil society representatives from both parties in those processes, and a possibility for independent and impartial arbitration by a group of experts, rather than relying on UN and ILO official reports as is the case under GSP+.

The essential elements clause.

Since 1995, the EU has implemented a policy of systematically inserting an "essential element" clause into all political framework agreements (Association Agreements, Partnership and Cooperation Agreements) with third countries stipulating that respect for human rights and democratic principles forms the basis for the agreement. To date, such a clause exists in agreements with over 130 countries.

The Council of Ministers has provided guidance on the use of the essential elements clause in other types of agreement, including trade agreements. Trade agreements are almost always linked to the related framework agreement and, in these circumstances, a separate essential elements clause is unnecessary; it is sufficient that a legal linkage exists between the two agreements.

The essential elements clause provides the legal basis for positive measures, such as human rights dialogues, as well as for restrictive measures in case of serious and persistent violations of human rights. Restrictive measures have been implemented under the human rights clause in framework agreements on some twenty occasions since 1995, most frequently in response to a *coup d'etat*[6], but also for flawed electoral processes[7] and for "violation of human rights"[8]. The clause has, however, never been invoked to justify restrictive trade measures[9].

Sustainability Impact Assessments

Sustainability Impact Assessments (SIAs) are carried out prior to the conclusion of any trade agreement to identify the potential impact of an up-coming trade agreement on various different factors, including human rights, gender equality and social standards. The assessment informs negotiators of the potential pitfalls (as well as the benefits) of the negotiation with the aim of mitigating any negative effects both domestically and in the partner country.

[6] Central African Republic, Comoros, Fiji, Guinea-Bissau, Ivory Coast, Madagascar, Mauritania, Niger, Republic of Guinea.
[7] Guinea-Conakry, Haiti, Ivory Coast, Togo.
[8] Liberia and Zimbabwe, both in 2001.
[9] The 1977 EU-Syria Agreement, some of the trade provisions of which were suspended in September 2011, does not contain the "essential elements" clause.

The use of trade instruments to address specific issues.

The EU recognises, as indeed does the WTO[10], that there are certain cases where a specific trade policy instrument can be helpful in supporting fundamental human rights. These are most often used when implementing CFSP measures/objectives.

The fight against torture and ill-treatment worldwide is a priority of the EU's human rights policy[11]. The **Torture Instruments Regulation** (1236/2005)[12] prohibits the export of import of goods which have no possible use other than for torture or capital punishment, and establishes a licensing system for dual use goods. Member States are required to make information available on a yearly basis about the applications received and whether or not a licence was granted. Europe was one of the main centres of production of such goods and the aim of the measure was to reduce the global trade in torture instruments.

The EU code of conduct in relation to the **export of military equipment**[13] also encompasses human rights considerations. The export of such equipment is subject to a licensing requirement; one of the eight criteria to be assessed when considering a licence application is respect for human rights and international humanitarian law in the country of final destination. The Council publishes an annual report on the application of the Code of Conduct, which indicates the number of refusals of licences under each criterion.

The **Dual Use Regulation** (428/2009)[14] is primarily intended to address the issue of the spread of sensitive goods and technologies having both civilian and military applications (including items that could be used to develop nuclear, chemical or biological weapons). Authorisations for the export of dual use items may be refused on human rights considerations.

The EU plays an active role in the **Kimberley Process** (KP), which imposes extensive requirements on all 49 participants (75 countries with the EU counting as a single participant) to control all imports and exports of rough diamonds and to put in place rigorous internal controls over production and trade to ensure that conflict diamonds cannot enter the legal diamond trade. In a few years, the Kimberley Process has helped to reduce the amount of conflict diamonds to a tiny fraction of world trade in diamonds.

Country-specific policies – the use of trade sanctions.

The EU's Basic Principles on the Use of Restrictive Measures, adopted in 2004, provide that – if necessary – the Council will impose autonomous EU sanctions as a restrictive measure to uphold respect for human rights, democracy, the rule of law and good governance. These Basic Principles were designed to help give some teeth to the CFSP. In this context, trade sanctions have been imposed on – for example – Syria, Iran, Myanmar and Zimbabwe.

[10] GATT Article XX and GATS Article XIV
[11] 2001 EU Guidelines on human rights.
[12] Regulation 1236/2005 concerning trade in certain goods which could be used for capital punishment, torture or other cruel, inhuman or degrading treatment or punishment
[13] Council Common Position 2008/944/CFSP defining common rules governing control of exports of military technology and equipment.
[14] Regulation 428/2009 setting up a Community regime for the control of exports, transfer, brokering and transit of dual use items.