

Written evidence from the Keep Our NHS Public (SIT 05)

Public Administration and Constitutional Affairs Committee

The Scrutiny of International Treaties and other international agreements in the 21st century inquiry

1. Introduction

1.1 Keep Our NHS Public (KONP) is a civil society group concerned to restore and protect the NHS as a comprehensive, publicly provided and publicly accountable health service, funded from public taxation and free at the point of delivery.

1.2 We very much welcome this inquiry and the opportunity to present evidence. Our submission to the Committee focuses on trade agreements and largely comes from a concern that contemporary trade deals have significant implications for many public policy areas, including the National Health Service (NHS).

1.3 Recent governments have made repeated assurances that the NHS will not be ‘on the table’ in post-Brexit trade deals^{1 2} but have been unprepared to support amendments to draft legislation (such as the Trade Bill) that would have ensured this. Indeed, despite government assurances, the recently signed Trade and Co-operation Agreement (TCA) between the European Union (EU) and UK failed to reserve a wide range of NHS services from the treaty’s provisions.

1.4 We believe that, in general, there needs to be greater transparency and increased democratic oversight of trade negotiations, not least because meaningful Parliamentary scrutiny offers the most promising way of protecting public services like the NHS in future.

2. Question 1: The role and purpose of international treaties/agreements

What roles and functions do treaties and international agreements perform in the 21st century?

2.1 Trade deals are often promoted as a formal expression of intergovernmental cooperation: “Governments relinquish their sovereign rights to choose their own trade (and other) policies in exchange for similar concessions by others”.³ Our view is that, increasingly, trade agreements function less in the interests of intergovernmental cooperation and more to the advantage of global corporations. In the fast growing area of digital trade, for example, big technology companies have significantly shaped the digital trade rules used in United States (US) trade negotiations to their own advantage, and are now strenuously lobbying the World Trade Organisation to have these same rules applied on a global scale.⁴

2.2 Trade agreements can also be used to further a government’s domestic agenda. For example, trade deals potentially facilitate the privatisation of public services where there is already some degree of commercial involvement (as with the NHS). Where a government aims to increase the role of the private sector, once a public service has been opened up to the market, liberalisation can become fixed by a trade deal, preventing the return of that service to public provision, or any reversal of decreased standards or protections, whatever the views of future governments.

2.3 That said, trade agreements can play a more positive role where the negotiating mandate calls for democratically controlled trade and investment policies that ensure human rights, and where public welfare is prioritised over the interests of corporations.⁵

3. Question 2: Constitutional relationships

Where should the balance of power lie between Parliament and Government in developing, agreeing and implementing international treaties?

3.1 The current balance of power between Parliament and Government is almost entirely weighted towards the Government. Because the negotiation and agreement of trade agreements fall under the royal prerogative, the Executive is free to act without the approval of Parliament at almost every step in the negotiation process.

3.2 As the House of Lords Select Committee on the Constitution observed, the powers available to Parliament are “anachronistic and inadequate” and in need of reform.⁶ We believe that reform should include constitutional change: removing the royal prerogative that allows Ministers the executive powers to make and ratify treaties is central in fully addressing the current democratic deficit. Given that such constitutional change is unlikely to happen for the foreseeable future, we make a number of suggestions in our answer to Question 4 [see Section 5.3] for interim improvements at different stages of the treaty making process.

4. Question 3: Effectiveness of current scrutiny mechanisms

Does Part 2 of the Constitutional Reform and Governance Act 2010 (CRAG) enable effective parliamentary scrutiny of international treaties and other agreements?

How effectively are constitutional conventions, such as remaining aspects of the Ponsonbury rule on making time for treaty debates and informing Parliament of non-treaty international agreements, operating alongside CRaG?

4.1 Part 2 of CRaG relates to the ratification of treaties and in effect, excludes Parliament this role. This is in contrast to the ratification process followed by the EU, for example, where the EU Parliament has to approve trade deals, and if a trade deal involves mixed competencies, it additionally needs ratification by the Parliaments of EU member states.⁷ In the US, both House and Senate must approve a treaty for it to be implemented.⁸

4.2 Section 20 of CRaG states that a treaty cannot be ratified unless a Minister of the Crown has laid a copy of the treaty before Parliament; and that, subsequently, 21 sitting days have passed without either House resolving against ratification. This means that, once a trade deal is laid before Parliament, there is little time for Parliament to scrutinise, debate and vote on it.

4.3 In addition, there is no requirement for the International Trade Committee (ITC) and International Agreements Sub-Committee (IAS-C) to produce a report to support scrutiny. The only information that the government is legally required to give to Parliament is an Explanatory Memorandum (EM), but CRaG does not set out what this should contain, and until now the information has been disturbingly short on substance.⁹

4.4 There is no requirement for a Parliamentary debate and the Ponsonby Rule gives no indication of how any debate or vote may be triggered: it appears to be “left to the “usual channels” and up to “people to make a noise”.¹⁰ Moreover, any requests for a debate or vote have to be weighed by the government against other demands on Parliamentary time: a debate is “entirely in the Government’s gift”.¹¹

4.5 Even if a debate takes place and a subsequent vote is against ratification, Section 20 also sets out how this can be countered by a Minister of the Crown laying a statement before Parliament explaining why ratification should occur. In effect, Parliamentary approval is not required - a vote against the agreement can only delay ratification, not prevent it.¹²

4.6 Further, Section 22 of Part 2 of CRAg allows a Minister to decide that Section 20 requirements can be dispensed with in certain cases (unless Parliament has already resolved against ratification). This happened, for example, in the case of the EU (Withdrawal Agreement) Act 2020.¹³ It would appear then that, far from enabling effective Parliamentary scrutiny of international treaties, CRAg can prevent this.

4.7 The UK Parliament’s inability to veto a trade deal has been justified on the basis that the prerogative power of the Executive enables UK trade negotiators to speak with a single voice, ensuring that trading partners can trust that the position presented formally in negotiations is the agreed position of the UK.¹⁴ And yet, those countries that allow their Parliament to vote on trade deals do not appear to have a problem with convincing trading partners of the authenticity of their negotiating position.

4.8 Moreover, if Parliament were more involved in the negotiating process from the outset, for instance in shaping the negotiating mandate, trade partners could be assured throughout the process that UK negotiators spoke with the backing of the UK Parliament.

Should scrutiny of treaty making be more integrated with scrutiny of corresponding implementing legislation?

4.9 In countries with monist legal systems, such as the Netherlands, parliamentary approval is required for ratification and once approved, treaty obligations can automatically be incorporated into domestic law: “International law is domestic law – or may even take precedence over it”.¹⁵ However, the UK has a dualist legal system. While treaties may automatically create rights and duties for the government, a treaty’s provisions have to be incorporated into UK domestic law through Parliamentary approval (at least in theory).

4.10 Those who defend the status quo in the UK arrangements argue that it is at this point – the point of domestic implementation - that Parliament has power: if it does not pass the necessary legislation, the treaty will not be brought into legal affect.¹⁶ However, Parliament can only consider the details of implementation: “it does not have the power to approve, reject or amend the treaty itself”.¹⁷ ¹⁸ “On top of which, important elements of a trade agreement may not need implementing legislation, and in some cases implementation only requires secondary legislation that is not subject to Parliamentary debate.”¹⁹

How effectively is the implementation of international treaties, including the decisions of new decision-making bodies, being scrutinised?

4.11 Until recently, the opportunities for effective scrutiny have been scant. This situation has been justified by the Department of International Trade (DIT) on the basis that the UK approach is consistent with that adopted by similar Westminster style democracies such as Canada, Australia and New Zealand.²⁰ Its argument does not carry weight as, in taking this stance, the UK is simultaneously *inconsistent* with approaches adopted by other nations. And simply because the UK originally provided a model for Commonwealth countries does not mean it must forever retain this model itself.

4.12 However, in late 2020, and apparently in response to persistent attempts to amend draft legislation such as the Withdrawal Bill and Trade Bill, the Secretary of State for International Trade announced new arrangements to allow greater transparency and scrutiny.²¹

4.13 These arrangements include

- publishing the objectives and scoping assessments for new Free Trade Agreements at the outset of negotiations; and
- keeping Parliament updated on negotiations as they progress, including
 - close involvement of relevant Select Committees (for example, the ITC and the recently established IAS-C) through public and private briefings with Ministers and Chief Negotiators;
 - ‘Round Reports’ for Parliament and the public on the progress of negotiations; and
 - regular briefings for Parliamentarians and opportunities to ask questions of Ministers;
- allowing the ITC and IAS-C confidential access to the text of a treaty and associated documents at a ‘reasonable’ time (at least 10 days) before a treaty is laid before Parliament for ratification, enabling these Committees to produce a report, should they wish to;
- providing access for Parliamentarians to an independently verified impact assessment covering economic and environmental aspects of a deal.

4.14 These measures appear to give Parliament a more substantive role. However, they are only to apply to a small number of named trade agreements, namely the UK-Japan Comprehensive Economic Partnership (CEPA), the Comprehensive and Progressive Agreement for Trans-Pacific Partnership (CPTPP), and prospective deals with Australia, New Zealand and the US. Other potential deals were “beyond the scope of these arrangements”.²²

4.15 Moreover, these new measures do not fundamentally change the existing, inadequate processes for Parliamentary scrutiny. For example, the new measures do not address the shortcomings of CRaG, while most opportunities for scrutiny lie with Committees such as the ITC and IAS-C: MPs can still only play a minor role. Further, the text of an agreement and a draft EM can only be shared in confidence with these Committees once a deal has been signed, and only then “when circumstances allow”.²³ And although Committees may raise concerns about a treaty with the Executive, the extent to which the Executive takes note of such concerns is unclear: scrutiny can only be deemed effective if it can elicit change when necessary.

4.16 Once the scrutiny Committees have had sight of an agreement, it is at their discretion whether they consult expert witnesses or produce a report to assist MPs in any debate on a trade agreement: there is no requirement for them to do so. In theory, such reports are produced before a deal is laid before Parliament. However, there are already instances where the newly announced scrutiny measures are dispensed with when expedient. Despite the Secretary of State's assurance that the ITC and IAS-C would be given time to see relevant documents before it laid a new trade deal before Parliament, this did not happen in the case of CEPA. Instead, the government gave the Committees no such time and the Committees' reports were hastily produced *during* Parliament's 21 sitting-day period.²⁴

4.17 In the case of the EU-UK TCA, the pace was particularly dramatic. In what has been described as a "constitutional failure",²⁵ the treaty was not only agreed without the House of Commons having a formal debate about the UK's negotiating position, but proceedings for implementing the Bill took place just six days after a treaty was confirmed and less than one day after the Bill was published. While this has been seen as "an abdication of Parliament's constitutional responsibilities",²⁶ it also flags up that the current system allows the Executive considerable power to further manipulate a process that is already heavily weighted in its favour.

5. Question 4: The role of the House of Commons

What role should Parliament and the House of Commons in particular have at different stages of the treaty making and implementation process?

Given that international agreements affect people's lives, how can the House of Commons increase the democratic accountability of international agreements?

5.1 Parliament should have a significant role in all stages of treaty making, not least because trade deals can have major implications for democratic accountability. For example, whether or not an investment protection measure (such as Investor-State Dispute Settlement) is included in an agreement can significantly affect the regulation of public policy in the public interest.²⁷

5.2 The House of Commons' lack of involvement in treaty making "sets it apart from most other national legislatures."²⁸ There is currently no requirement for the government to notify Parliament that it is opening trade negotiations, and, unlike counterparts elsewhere (such as the EU Parliament²⁹ or US Congress³⁰), there is no way for MPs to influence or vote on the mandate for a trade deal: they can only 'opine' upon the outline approach.³¹

5.3 In contrast, we suggest that:

5.3.1 MPs need a voice, including a vote, on developing a mandate and defining negotiating objectives for each trade agreement, reassuring a prospective trading partner that Parliament supports the government's approach to negotiations.

5.3.2 MPs should also have a greater role in scrutinising, debating and shaping trade agreements, both during negotiations and pre-ratification. This should include:

- the legal right for MPs to see initial, published impact assessments and consultation reports at the earliest opportunity, plus
- the legal right to see the agreed text of a deal, in confidence, well in advance

of signature (The US Congress, for example, has 60 days).

5.3.3 During the negotiating process, MPs should have access to regular briefings, with information and analysis of a proposed deal from scrutiny committees, a wide range of civil society groups and others, as well as an independent impact assessment of the agreement prior to any final debate.

5.3.4 The Explanatory Memorandum and impact assessment provided prior to any final Parliamentary debate should be appropriately detailed, and incorporate analysis from a range of independent experts, not just from commerce.

5.3.5 CRaG needs to be reformed to ensure greater time for Parliamentary debate once a treaty has been formally laid before Parliament, with a legal right for MPs to call for an extension if the Executive has not granted the specified time.

5.3.6 MPs should have the legal right to a *decisive* vote on a trade agreement, meaning that ratification does not proceed without MPs' approval. This power would help to ensure that Parliament was kept well informed and on-side throughout the negotiating process.

5.3.7 Finally, only primary legislation should be used when implementing significant policy changes, so giving Parliament more time to scrutinise proposals and allowing more opportunities for public consultation.

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¹ <https://www.thetimes.co.uk/article/nhs-is-not-on-the-table-in-post-brex-it-trade-deal-boris-johnson-tells-us-nt0vw7c3g>

² <https://www.standard.co.uk/news/politics/liz-truss-insists-health-services-not-on-table-as-mps-back-postbrexit-trade-plan-a4446616.html>

³ https://www.princeton.edu/~grossman/Purpose_of_Trade_Agreements_WP.pdf

⁴ https://ourworldisnotforsale.net/2020/PSI_Surrendering.pdf

⁵ <https://www.tjm.org.uk/trade-issues/developing-an-alternative-trading-system>

⁶ <https://publications.parliament.uk/pa/ld201719/ldselect/ldconst/345/345.pdf>

⁷ https://www.geg.ox.ac.uk/sites/geg.ox.ac.uk/files/2020-09/GEG%20WP%20144%20Ripe%20for%20reform-%20UK%20scrutiny%20of%20international%20trade%20agreements_0.pdf

⁸ *ibid*

⁹ <http://data.parliament.uk/writtenevidence/committeeevidence.svc/evidencedocument/constitution-committee/parliamentary-scrutiny-of-treaties/written/93935.html>

¹⁰ <http://researchbriefings.parliament.uk/ResearchBriefing/Summary/SN06688>

¹¹ Gareth Thomas MP, <https://hansard.parliament.uk/commons/2020-11-25/debates/30AFA3FF-1A63-47A9-B3CE-92FE2BC64654/UK-JapanComprehensiveEconomicPartnershipAgreement>

¹² The Secretary of State has said “Ultimately if Parliament is not content with a trade deal, it can raise concerns by resolving against ratification and delay any implementing legislation indefinitely”. Yet as the Minister for Trade Policy in 2018 admitted, “It would be disingenuous of me to agree absolutely that Parliament can indefinitely delay.” <https://publications.parliament.uk/pa/cm201719/cmselect/cmtrade/1043/104303.htm>

¹³ <https://www.legislation.gov.uk/ukpga/2020/1/section/32>

¹⁴ *ibid*

¹⁵ House of Commons Library Briefing Paper Number 5855, 2017, Parliament's role in ratifying treaties. <https://commonslibrary.parliament.uk/research-briefings/sn05855/>

¹⁶ Personal communication with Deputy Bill Manager for the Trade Bill, DIT, 16.10.20

¹⁷ House of Commons Library Briefing Paper Number 5855, 2017, Parliament's role in ratifying treaties. <https://commonslibrary.parliament.uk/research-briefings/sn05855/>

¹⁸ <https://www.hansardsociety.org.uk/blog/parliaments-role-in-scrutinising-the-uk-eu-trade-and-cooperation-agreement>

¹⁹https://www.geg.ox.ac.uk/sites/geg.ox.ac.uk/files/2020-09/GEG%20WP%20144%20Ripe%20for%20reform-%20UK%20scrutiny%20of%20international%20trade%20agreements_0.pdf

²⁰ Personal communication with Deputy Bill Manager for the Trade Bill, DIT 16.10.20.

²¹ <https://questions-statements.parliament.uk/written-statements/detail/2020-12-07/hcws623>

²² <https://questions-statements.parliament.uk/written-statements/detail/2020-12-07/hcws623>

²³ <https://committees.parliament.uk/publications/3380/documents/32381/default/>

²⁴ CEPA was signed on 23rd October and immediately laid before Parliament, so triggering the 21-sitting day period. Both the ITC and IAS-C immediately launched inquiries prior to producing their reports. However, as the ITC Chair admitted, due to the very limited time available, the Committee would be unable to conduct comprehensive analysis of the text. <https://committees.parliament.uk/committee/367/international-trade-committee/news/120289/international-trade-committee-launches-inquiry-into-uk-japan-trade-agreement/>

²⁵ <https://www.hansardsociety.org.uk/blog/parliaments-role-in-scrutinising-the-uk-eu-trade-and-cooperation-agreement>

²⁶ <https://www.hansardsociety.org.uk/blog/parliaments-role-in-scrutinising-the-uk-eu-trade-and-cooperation-agreement>

²⁷ <http://www.irjournal.pl/The-Transatlantic-Trade-and-Investment-Partnership-nDispute-Settlement-Mechanism,124691,0,2.html>

²⁸ Richard Ware, *Parliament and Treaties*, from *Parliament and International Relations*, ed. Carstairs and Ware, 1991.

²⁹ The EU Parliament has the legal right to be informed of a negotiating mandate although this does not extend to being consulted on the mandate or setting the objectives for negotiation. It can however let its views be known so these can be taken into account.

³⁰ The US Congress specifies the negotiating objectives that the Government must follow, while the Government must give Congress 90 days notice before it starts negotiations and consult Congress on the mandate for negotiations.

³¹ <https://publications.parliament.uk/pa/cm201719/cmselect/cmintrade/1043/104303.htm>