

Written evidence from the UK Trade Policy Observatory¹ (SIT 07)

Public Administration and Constitutional Affairs Committee

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

Our focus is on international trade and investment agreements and we give a fuller response to questions 1, 4 and 5. We build on the reports of four recent Select Committee inquiries (see references) that called for greater transparency in treaty making as well as expanded roles for Parliament and the devolved institutions.

Recommendations:

1 Role and purpose of international treaties/agreements

1.1 Given the increasing impacts of international trade agreements, the UK needs to establish due constitutional process to scrutinise trade negotiations and the implementation of these agreements.

2 Constitutional relationships

2.1 There is an urgent need to progress with the review of the roles of Parliament, Government, the devolved governments, the Crown Dependencies and Overseas Territories in treaty making via a collaborative and democratic process.

3 The effectiveness of current scrutiny mechanisms

3.1 Given the increasingly key role of Select Committees in the scrutiny of trade agreements, their role should be reviewed, particularly in regard to cooperation amongst committees in both Houses as well as interparliamentary cooperation.

3.2 Information provision on trade agreements should be set out in a White Paper, and ultimately in legislation, for all stages of the treaty making process.

4 The role of the House of Commons

4.1 Parliament should periodically receive and debate strategy statements for international trade and international trade agreements.

4.2 Parliament should receive and debate the draft negotiating mandate for any trade negotiation and receive the final mandate. These mandates should be concrete and specific and not limited to statements of high-level ambition.

4.3 The draft mandate should be accompanied by analytical material such as on the agreement's likely effects. This should be interrogated in the appropriate Committees, drawing on technical expertise.

¹ Submitted by Professor L. Alan Winters, Dr Minako Morita-Jaegar and Chloe Anthony.

The UK Trade Policy Observatory (UKTPO), a partnership between the University of Sussex and Chatham House, is an independent expert group that initiates, comments on and analyses trade policy proposals for the UK and trains British policy-makers, negotiators and other interested parties through tailored training packages.

The UKTPO is committed to engaging with a wide variety of stakeholders to ensure that the UK's international trading environment is reconstructed in a manner that benefits all in Britain and is fair to Britain, the EU and the world. The University of Sussex has the largest collection of academic expertise on the world trading system in the UK, with specialists on trade policy, trade law and trade politics and European law and economy. The team includes experts in economics, international relations and law.

- 4.4 The appropriate Committee of each House should receive and discuss periodic updates on negotiations. Parts of this process may require confidentiality arrangements, but these should be minimised.
- 4.5 Parliament should see the draft text of a treaty before signature, with time to debate it and vote 'yes' or 'no' on it. The appropriate Committees should interview ministers and officials on the details of the agreement and its negotiation in time to inform the Parliamentary debate.
- 4.6 Parliament should continue its formal ratification of trade agreements, but if the previous steps have been undertaken this should be more or less only a formality.
- 4.7 Naturally, Parliament should continue to treat any resulting primary legislation in the usual manner and also, when considering any resulting secondary legislation, be informed that the Government's proposal emanates from the trade agreement.

5 Information and resourcing requirements

- 5.1 Generally, the Government should produce a White Paper on strategy for international trade policy – in quite concrete form – and have it fully debated in Parliament. There should be facility for consultation on the paper.
- 5.2 The draft mandate should indicate which Department(s) has substantive responsibilities, include analytical material on the likely effects of the agreement, be reviewed by expert panels at technical meetings, and made available to appropriate Committees.
- 5.3 The appropriate Committees and Parliament should have periodic reports on the progress of negotiations, have access to draft treaty texts and explanatory memoranda, and be able to feed their views to negotiators.
- 5.4 The explanatory memorandum stage should be advanced to the draft treaty stage so that ratification documents can be less detailed, except where circumstances have changed between signature and ratification.
- 5.5 Parliament and appropriate Committees should be engaged in the ex post evaluation of free trade agreements. There should be a requirement for DIT, and the relevant Department(s), to undertake ex post monitoring and evaluation assessment of each agreement with consistent and detailed terms of reference, no later than five years after treaty implementation.
- 5.6 The International Trade Committee, the International Agreements Committee and other relevant Committees should be able to meet in private to receive confidential information on negotiations. They should be able to share these with their clerks and with members of a set of approved experts, who should also be bound by confidentiality. Legal requirements for transparency would better reflect the impactful nature of trade agreements and support representative, inclusive and legitimate process.
- 5.7 On new treaties, the draft and final mandates should be published. There should be periodic brief accounts of the state of various negotiations. The public should see the final text shown to Parliament prior to signature (not just at the ratification stage).
- 5.8 Trade agreements are long, complex and wide-ranging. Parliament and the Committees need to be adequately resourced to carry out their responsibilities.

1) Role and purpose of international treaties/agreements

The purpose of international treaties/agreements is to foster peace and prosperity. They provide a legal framework for international cooperation that helps to ensure actions are

coordinated across parties and commitments to action are credible. This may involve creating or developing instruments of global governance. Existing treaties and international arrangements cover a wide range of areas, including economic relations, environment, health, culture, labour rights, human rights, immigration, security and terrorism. Areas of cooperation are likely to expand further in the 21st century.

International trade agreements cover WTO agreements, free trade agreements (FTAs), and sector-specific deals, such as bilateral/plurilateral digital trade agreements. The main role of international trade agreements is to provide legal predictability and certainty for trade and investment activities and legal assurance for existing cross-border economic activities. Countries can also strengthen economic and diplomatic relations through international trade agreements. The fundamental principle of international trade agreements is fairness and is enshrined in the form of non-discrimination clauses – the most-favoured-nation and national treatment principles – in international trade agreements.

The role of FTAs in the realm of international trade agreements has been expanding since the late 1990s and the trend is likely to continue unless WTO reforms successfully take place. While the WTO system has struggled over the last two decades, mainly due to an institutional failure to respond to evolving economic environment and political needs, many countries have turned to creating bilateral or plurilateral FTAs. The number of FTAs in the world increased from 50 in 1995 to 400 in 2021 (WTO notification base, February 2021).

The coverage of many FTAs is more comprehensive than the WTO agreements, including investment, competition and digital trade rules. They also include so-called ‘non-trade policy areas’, such as environment, labour standards, and gender equality. Further, the level of commitments is often much deeper than WTO agreements. Notably, recently concluded FTAs, such as the CPTPP (Comprehensive and Progressive Agreement for Trans-Pacific Partnership), USMCA (United States-Mexico-Canada Agreement), EU-Canada CETA (Comprehensive Economic and Trade Agreement) and the UK-Japan CEPA (Comprehensive Economic Partnership Agreement), are considered ambitious because they aim at deep integration beyond trade.

The economic and social impact of the rules embedded in FTAs on a signatory country is far-reaching. Two issues should be noted in this regard. First, depth: ambitious FTAs try to achieve deep economic integration that directly impacts domestic regulatory policy in certain sectors. For example, recent FTAs, such as the CPTPP and USMCA, the UK-Japan CEPA and the EU-UK TCA (Trade and Cooperation Agreement), include digital chapters of varying degrees of comprehensiveness, providing rules on free data flow with some exceptions for safeguarding government intervention for public policy objectives (e.g. privacy, consumer protection and security). For this reason the coherence between domestic policy and FTAs needs to be properly scrutinised. Second, breadth: ambitious FTAs cover a wide range of non-trade policy areas and this impacts not only on business activities but societies as a whole. We should recall that one of the major concerns about the WTO system was the possible expansion of WTO rules to non-trade policy areas coupled with the lack of transparency in its policy-making processes. Since the coverage of ambitious FTAs is much wider than the WTO, they similarly introduce significant impacts on domestic firms and people and raise concerns over their democratic legitimacy. Democratic political

authorisation and multi-stakeholder policy engagement should become a norm when creating the ambitious FTAs of the 21st century.

Having left the EU, the UK is exercising its ‘sovereignty’ over its trade policy. It should be noted that no other country has ever committed itself to such intensive FTA activity within such a short period of time. In addition to rolled-over FTAs, the UK has concluded FTAs with Japan (UK-Japan CEPA), the EU (UK-EU TCA) and EFTA countries (FTA between UK and Iceland, Lichtenstein and Norway), and has an agreement in principle with Australia, all with very limited parliament scrutiny. Currently CPTPP accession negotiations and bilateral FTA negotiations with New Zealand are in progress and renegotiation of the rolled-over FTAs with Canada and with Mexico will start later this year. Currently, the most critical of these recent policy developments is the agreement in principle with Australia that contains several contested issues such as tariff liberalisation in agriculture, food standards and digital trade, which need to be examined in detail. The UK-Australia agreement is different from previous FTAs the UK has concluded since it is a completely new FTA and not modelled on the EU’s FTAs. If the UK-Australia FTA enters into force without appropriate scrutiny, it will become an alarming precedent for the UK’s future FTAs, notably an FTA with the US.

1.1 Given the increasing impacts of international trade agreements, the UK needs to establish due constitutional process to scrutinise trade negotiations and the implementation of these agreements.

2) Constitutional relationships

There is a careful balance to achieve in the roles of Parliament and Government, the devolved governments, and the Crown Dependencies and Overseas Territories, in the treaty making process. These roles should be commensurate with the impact of trade agreements. While the UK was a member of the EU, the EU had competence over most elements included in trade agreements. As an EU Member State, the UK participated in the scrutiny mechanisms that evolved in the context of a legal right to information and a right to veto in certain circumstances.

The role of the devolved governments in all stages of the treaty making processes requires review. Intergovernmental fora with formal mechanisms would provide certainty and continuity, particularly where international treaties affect the interests of the devolved nations, where devolved competencies are engaged, where devolved administrations are largely responsible for implementation and where there are divergent interests or when intergovernmental relations are strained. The role of the devolved governments is not dealt with in detail here, however the need for review of the devolved settlement is understood as critical for treaty making and implementation.

2.1 There is an urgent need to progress with the review of the roles of Parliament, Government, the devolved governments, the Crown Dependencies and Overseas Territories in treaty making via a collaborative and democratic process.

3) The effectiveness of current scrutiny mechanisms

The need to reform current scrutiny mechanisms has been well documented in four Committee reports (see references). The work of the Committees on International Trade and International Agreements is essential. The role of these and other Select Committees is expanding now that EU scrutiny and democratic processes have fallen away.

3.1 Given the increasingly key role of Select Committees in the scrutiny of trade agreement, their role should be reviewed, particularly in regard to cooperation amongst committees in both Houses as well as interparliamentary cooperation.

On trade agreements, we note the Government's 2019 command paper, *Processes for making free trade agreements once the UK has left the EU*, makes several commitments and proposals for public transparency, engagement with the devolved nations and the role of Parliament in scrutinising future FTAs. We also note the Department for International Trade has committed to allow time for Committees to report. These developments are welcome but fall short of obligations to share information and to provide justification for keeping information confidential. The limitations of the CRAG Act have been well documented in Committee reports.

3.2 Information provision on trade agreements should be set out in a White Paper, and ultimately in legislation, for all stages of the treaty making process.

4) The role of the House of Commons

Scrutiny should be conducted by both Houses of Parliament and, as the locus of democratic accountability, the House of Commons should play a significant role in all major elements of any trade agreement.

A useful assessment of the parliamentary scrutiny of trade agreements by Emily Jones and Anna Sands (2020) compares the scrutiny mechanisms at each stage of the treaty making process in the UK, the EU, the US, Canada and Australia (see references). Notably, the legal right to be informed is in place in the EU and the US, but not in the UK.

Our own recommendations are the following for Parliament and the House of Commons:

4.1 Parliament should periodically receive and debate strategy statements for international trade and international trade agreements.

4.2 Parliament should receive and debate the draft negotiating mandate for any trade negotiation and receive the final mandate. These mandates should be concrete and specific, and not limited to statements of high-level ambition.

4.3 The draft mandate should be accompanied by analytical material such as on the agreement's likely effects. This should be interrogated in the appropriate Committees, drawing on technical expertise.

4.4 The appropriate Committee of each House should receive and discuss periodic updates on negotiations. Parts of this process may require confidentiality arrangements, but these should be minimised.

4.5 Parliament should see the draft text of a treaty before signature, with time to debate it, and vote 'yes' or 'no' on it. The appropriate Committees should interview ministers

and officials on details of the agreement and its negotiation in time to inform the Parliamentary debate.

4.6 Parliament should continue its formal ratification of trade agreements, but if the previous steps have been undertaken this should be more or less only a formality.

4.7 Naturally, Parliament should continue to treat any resulting primary legislation in its usual manner and also, when considering any resulting secondary legislation, be informed that the Government's proposal emanates from the trade agreement.

None of these recommendations can be made effective without a formal right to information and parliamentary time in the trade agreement process. A more detailed discussion of our recommendations follows in answer to question (5).

5) Information and resourcing requirements

5.1 The Government should produce a White Paper on its strategy for international trade policy – in quite concrete form – and have it fully debated in Parliament. There should be facility for consultation on the paper.

- **How, and at what stages of the treaty making process, should the Government share information with Parliament?**

We divide the treaty making process into four stages – mandate, negotiation, ratification and implementation – and consider the information requirements needed for effective scrutiny of trade agreements at each stage.

Mandating trade negotiations

Currently, there is no requirement for Government to engage with Parliament before opening trade negotiations.

We recommend that in advance of a potential trade negotiation, Parliament and the devolved legislatures should have a full debate on a draft mandate which would then be followed by publication of a final mandate. It is up to Parliament and the devolved legislatures to ensure that this is specific and granular and not limited to high-level ambitions.

While we presume that the Department for International Trade will take overall responsibility for each trade agreement, the draft mandate should indicate which other Department(s) have substantive responsibilities for the topics included.

The draft mandate should be accompanied by analytical material on the likely effects of the agreement. This material should be open to discussion in appropriate Committees in both Houses and in the devolved parliaments and assemblies. The material should be reviewed by an expert panel at technical meetings and reports of these meetings be made available to the Committees. At this technical meeting one needs experienced trade analysts and, if the documents include modelling results, experts on trade modelling. At the technical meetings the staff who conducted the modelling should appear as well as their superiors in order that technical details can be discussed in an informed way. If the documents are not public, the experts may have to sign confidentiality agreements.

It will be necessary to consider how to incentivise experts to undertake the required work – possibly including a small honorarium, a chance to present evidence to the Committees in public session, a way of publishing their results, etc. There remain a number of agreements that the Government hopes to negotiate or renegotiate, so relying on public-spiritedness is likely to fall short of the volume of input and independent scrutiny required. Private incentives exist for those with material interests at stake in trade negotiations, but not for analysts.

The Committees should also receive a summary of the Government’s consultations with businesses, stakeholders and consumer groups – both who was consulted and a summary of the outcomes. This would help to inform their enquiries and save resources in the Committees’ search for evidence.

Trade negotiations

In its 2019 command paper, the Government has proposed providing Select Committees with information on the basis of confidentiality as well as a mixture of public and private evidence. All trade agreements should go to the International Trade and the International Agreements Committees in the Commons and Lords respectively, but other Committees should be able to consider specific details that lie within their areas, including those in the devolved legislatures.

The appropriate committees should have periodic reports on the progress of negotiation and be able to feed their views to the negotiators. This process is part of the necessary effort to ensure that the final draft is not rejected, which inevitably causes friction with the trading partner in question. While some parts of these progress reports may be confidential, whatever can be disseminated should be disseminated, not least in order to facilitate UK-wide debates in time to inform the final outcome.

Parliament should see the draft text of a treaty before signature, with time to debate it, and an explanatory memorandum of the sort currently required for ratification. A Committee should be able to interview Ministers and officials and, among other things, demand explanations about why the final outcome falls short of the mandate (as it always will) as well as why public statements during negotiations were not good predictors of the final outcome.

Parliament should not be able to amend the text at this stage, because that would tend to undermine previous negotiations, but they do need to vote up-or-down on it. As noted, it is the prior consultations that should render this final vote straightforward for the Government.

Ratifying a trade agreement

Currently, it is at this stage of the treaty making process that the CRAG Act allows for a vote on finalised treaty texts after signature and before ratification. Treaty approval is subject to negative approval, therefore neither House is guaranteed a vote or a debate on the treaty. Much Committee evidence and commentary argue this process is not fit for purpose and not commensurate with the domestic effect of treaties (see Constitution Committee (2019) para 101, for example).

Parliamentary debate and approval are necessary for ratification. Debate and approval continue at this stage, but these debates can be less detailed than those at the draft treaty stage above if scrutiny and information provision is improved in previous stages. CRAG, section

24, requires every treaty to be accompanied by an explanatory memorandum. This should provide detailed information on parties, the economic, social and environmental impact of the treaty, the aims and obligations, and implementation processes.

Implementation of trade agreements

The Constitution Committee notes that parliamentary scrutiny has 'primarily been of the Government legislation required to implement treaty obligations.' (2019, para 16)

The Trade Act 2021 makes provision for the implementation of 'roll over' EU international and free trade agreements and commits the UK to 'maintaining publicly-funded clinical healthcare services' and 'maintaining UK levels of statutory protection in the protection of human, animal or plant life or health, animal welfare, environmental protection, employment and labour, data protection and the protection of children and vulnerable adults.' (section 2) Devolved authorities are restricted to their existing areas of competence. To date, there is no similar legislation for the implementation of new trade agreements. This is a major omission that should be rectified along with the formalisation of the scrutiny procedures.

In the United States, under section 163(c) of the Trade Act of 1974 the International Trade Commission is required to 'submit to the Congress at least once a year, a factual report on the operation of the trade agreements program.' This is a detailed document (the 2019 edition is 290 pages long) which documents all the interactions, requested modifications, and issues which arose during that year in the operation of the US's trade agreements. This provides detailed information on the ex post operation of each of the agreements, identifies issues and disputes which may have arisen and how they may have been taken forward or resolved. We would strongly recommend that DIT is similarly required to produce an annual report of this nature. This is important as an input into the process of scrutiny and also in the interests of transparency, inclusivity and stakeholder engagement.

In summary, we recommend:

5.2 The draft mandate should indicate which Department(s) has substantive responsibilities, include analytical material on the likely effects of the agreement, be reviewed by expert panels at technical meetings, and made available to appropriate Committees.

5.3 The appropriate Committees and Parliament should have periodic reports on the progress of negotiations, have access to draft treaty texts and explanatory memoranda, and be able to feed their views to negotiators.

5.4 The explanatory memorandum stage should be advanced to the draft treaty stage above so that ratification documents can be less detailed, except where circumstances have changed between signature and ratification.

5.5 Parliament and Committees should be engaged in the ex post evaluation of free trade agreements. There should be a requirement for DIT, and the relevant Department(s), to undertake ex post monitoring and evaluation assessment of each agreement with consistent and detailed terms of reference, no later than five years after treaty implementation.

- **Should Parliament have access to confidential information and, if so, what mechanisms might assure the continued confidentiality of that information?**

The Constitution Committee recommended that 'transparency should be a general principle, rather than a legal requirement; the norm rather than the exception' (2019, p3). Legal requirements for transparency would, however, better reflect the impactful nature of trade agreements and support representative, inclusive and legitimate process. The need for confidentiality may be designed into such obligations, including through requirements to provide confidential information to Committees or panels at certain stages of the treaty making process and to provide explanations when information should remain confidential.

DIT now imposes confidentiality on all its Trade Advisory Groups and Thematic Working Groups and the same procedure should suffice for Parliament, provided that it is strictly limited to the details disclosed in the formal processes of Parliamentary scrutiny rather than acting as a break on all discussion of trade matters. Documents must generally be distributed in time for experts to be consulted.

Concerns over confidentiality are legitimate, but Government should remember that material tends to leak at present because there is little faith that Government will make information available voluntarily. It is understood that the current system is such that the official revelation of material is obligatory only when it is too late for anyone to have an influence on the outcome. If there were regular and open information exchange, there would be much less incentive to break confidentiality.

5.6 The International Trade Committee, the International Agreements Committee and other relevant Committees should be able to meet in private to receive confidential information on negotiations. They should be able to share these with their clerks and with members of a set of approved experts, who should also be bound by confidentiality. Legal requirements for transparency would better reflect the impactful nature of trade agreements and support representative, inclusive and legitimate process.

- **What treaty information should be publicly available in respect of the UK's current treaty obligations and to facilitate scrutiny of new treaties?**

5.7 On new treaties, the draft and final mandates should be published. There should be periodic brief accounts of the state of various negotiations. The public should see the final text shown to Parliament prior to signature (not just at the ratification stage). On current obligations, an overview document would be useful.

In addition, Government should ensure that websites exist for all such treaties with the text, any amendments or questions in Parliament about the treaty, and any supplementary information such as analyses or the explanatory notes that were prepared for Parliament.

- **What sort of expertise does Parliament need to scrutinise treaties?**

Parliament needs time for scrutiny, including for expert groups and stakeholders, to see the proposed text and react to it in hearings. If the full text and analytical documents are not in the public domain, some experts and stakeholders should be provided with them on a confidential basis.

The International Trade Committee and the International Agreements Committee will develop their expertise over time and should provide a report to the floor of the House or a Committee of both Houses for when they discuss the text. To the extent that scrutiny requires attention from other Committees, these Committees also need adequate resourcing in order to support their work on trade agreements.

5.8 Trade agreements are long, complex and wide-ranging. Parliament and the Committees need to be adequately resourced to carry out their responsibilities.

June 2021

References

House of Lords European Union Committee, Treaty scrutiny: working practices (HL Paper 97, 2020) <https://committees.parliament.uk/publications/1826/documents/17747/default/>

House of Lords European Union Committee, Scrutiny of international agreements: lessons learned (HL Paper 287, 2019)

<https://publications.parliament.uk/pa/ld201719/ldselect/lducom/387/387.pdf>

House of Lords Select Committee on the Constitution Committee, Parliamentary scrutiny of treaties (HL Paper 345, 2019)

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

House of Commons International Trade Committee, UK trade policy transparency and scrutiny (HC 1043, 2018)

<https://publications.parliament.uk/pa/cm201719/cmselect/cmintrade/1043/1043.pdf>

E Jones, A Sands, Ripe for reform: UK scrutiny of international trade agreements (Global Economic Governance Working Paper 144, September 2020)

<https://www.geg.ox.ac.uk/publication/ripe-reform-uk-scrutiny-international-trade-agreements>

E Jones, A Sands, 'Parliamentary scrutiny of trade deals: how does the UK measure up?' (UK Trade Policy Observatory, 30.09.20)

<https://blogs.sussex.ac.uk/uktpo/2020/09/30/parliamentary-scrutiny-of-trade-deals/>