Written evidence from Friends of the Earth[1] (SIT 15)

Public Administration and Constitutional Affairs Committee
The Scrutiny of International Treaties and other international agreements in the 21st century inquiry

Summary

International treaties have potentially far-reaching domestic and international implications. It is therefore important that they are effectively scrutinised and their potential implications for domestic policy widely and transparently debated.

However, there are five main issues with existing UK treaty scrutiny processes:
1) Parliament has no role in mandate-setting prior to treaty negotiations.
2) There are no requirements for transparency or full parliamentary engagement during negotiations.
3) There is no formal role for civil society, businesses or members of the public.
4) There is no guarantee of a debate or vote after a treaty is agreed.
5) Votes on new trade agreements are not meaningful.

To have a democratic and transparent trade process, Parliament must be given formal powers with respect to mandating, negotiating and approving future trade agreements, alongside improved transparency and opportunities for civil society engagement. The government should provide:

- Immediately: a clear overall vision on the UK's aims for and approach to international treaties, including trade policy.
- Before negotiations: public consultation, alongside a debate and vote for MPs on the government's negotiating objectives.
- During negotiations: guaranteed updates and privileged access to negotiating texts for relevant Select Committees tasked with scrutinising deals.
- After negotiations: a vote in both Houses on a final deal, prior to ratification.
- Mandatory sustainability impact assessments on the impact of the new trade deal on the environment, public health, human rights and global development.
- During the operation of the agreement: regular monitoring of the impacts of implementation and potential to secure improved social and environmental outcomes, with engagement from specialised parliamentary committees and civil society.
- Throughout the process: civil society engagement opportunities and consultation with devolved authorities.

Further detail

1) Role and purpose of international treaties/agreements

[1] Friends of the Earth England, Wales and Northern Ireland was established in 1971. We have local groups in around 130 neighbourhoods, and support more than 260 Climate Action groups. We are part of an international network of 75 national groups, counting over 2 million members and supporters globally. Friends of the Earth supports strong environmental standards, and alternative approaches to trade which put the needs of local communities and our environment at the forefront.

By signing up to treaty agreements, the UK is both setting out its ambition and direction of travel on the global stage, and committing to put international commitments into practice domestically. Therefore, the implementation of international treaties and agreements, including trade deals, has the potential to dramatically influence UK domestic legislation.

These treaties also have the potential to influence action taken by and within other countries – and in tandem with other diplomatic activities and support, can embed and entrench environmentally damaging activities or assist in the transition to a greener society. If not carefully managed, new trading relationships could undermine the UK's progress against existing environmental and climate targets, outsource negative impacts, or damage the competitiveness of industries seeking to innovate in the provision of low-carbon, ecologically sustainable goods and services.

Currently, the UK Parliament's role in the negotiation and ratification of Free Trade Agreements (FTAs) is outdated, and considerably weaker than systems in the US, EU and Japan. It is also weaker than other dualist systems such as Sweden, Barbados and South Africa, which require the approval of Parliament for many international treaty actions. Parliamentarians do not have a guaranteed vote on trade agreements or a legal right to see negotiating objectives, and there are no legal requirements on the government to provide updates on negotiations. These weaknesses in the scrutiny process increase the risks of both environmentally damaging trade agreements being agreed and opportunities being missed.

Because of the far-reaching domestic and international implications of international treaties, it is important that they are effectively scrutinised and their potential implications for domestic policy widely and transparently debated.

2) Constitutional relationships

There is a clear tension between the sovereignty of Parliament and the ability of the government to sign treaties that require or constrain future legislative changes. Proponents of the system established under the Constitutional Reform and Governance (CRAG) Act often suggest that treaties, even if ratified, do not become part of domestic law unless Parliament passes implementing legislation. This implies that scrutiny of implementation is built into the current system. However, signing an international agreement confers an international obligation[2] not to defeat the object and purpose of an agreement. Parliament is therefore expected to legislate – or desire to legislate – compatibly with the UK's international agreements, including those contained within treaties that have not yet been incorporated into national law.

Thus, the Court of Appeal has held that ratifying an unincorporated treaty can give rise to a legitimate expectation that the executive would act compatibly with obligations under the unincorporated treaty.[3] The European Charter of Human Rights was ratified without scrutiny in 1951 and remained unimplemented in legislation until 1998. Yet 33 adverse legal judgments between 1975 and 1994 obliged the government to introduce or amend legislation or rules in 23 instances to bring UK legislation into conformity[4].

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[2] See Article 18, Vienna Convention on the Law of Treaties, 1969

[3] R. v Secretary of State for the Home Department Ex p. Ahmed [1999] Imm. A.R. 22; [1998] I.N.L.R. 570

[4] F. Klug, K. Starmer, and S. Weir, "The British Way of Doing Things: the United Kingdom and the International Covenant of Civil and Political Rights, 1976–94" [1995] P.L. 504 at 506. Cited in The Law Quarterly Review "Neglecting the Treaty Making Power in the UK: The Case for Change" Mario Mendez (2020) 136 L.Q.R. 630

That the potential legal impacts of a specific international agreement are not always immediately apparent is compounded by the fact that they are long term. For example, by entering into trade deals containing Investor State Dispute Settlement provisions, governments constrain the ability of future administrations to develop regulation and policy in ways that react to the climate crisis, where increased regulation might harm the prospective profits of foreign investors. The Energy Charter Treaty, to which the UK is a signatory, contains a 20 year 'sunset clause', meaning that even if the UK were to exit today, multiple future parliaments may be unable to develop laws to respond to future challenges without threat of costly legal action.

Finally, implementing legislation is not always necessary to give effect to commitments contained in international treaties. Changes to statutory guidance, equivalence mechanisms and administrative requirements, for example, require no parliamentary involvement. Where legal changes are required, these increasingly take the form of secondary legislation, often passed via negative resolution.

All of this means that in practice, it is difficult for parliamentarians in Westminster to play an effective role in the scrutiny of treaty implementation or for the courts to hold that a lack of implementing legislation negates overarching international treaty commitments. We provide further detail below on the ways in which these processes might be strengthened.

One further constitutional tension is apparent as we look beyond Westminster. While the government's commitment to engage with the devolved nations in developing the UK's future trade policy is welcome, evidence of full direct engagement of devolved parliaments in the process of negotiating and agreeing recent agreements has been lacking.

In written evidence provided to the International Trade Committee in December 2020, the then Scottish Minister for Trade, Investment and Innovation Ivan McKee wrote: "The UK Government consulted the Scottish Government and other devolved administrations on those sections of CEPA that it considered of relevance to devolved competence. This consultation involved discussions between officials of both governments on the content and progress of negotiations as well as sharing some draft chapter text. While this engagement was useful and appreciated, it fell short of the full engagement that we consider to be necessary and appropriate. The UK Government only provided devolved administrations with the full text of the agreement following Agreement in Principle between the UK and Japanese Governments, once it had been finalised and very shortly before it was published.[5]"

Similarly, on 16 June 2021 the Welsh government stated in relation to the UK-Australia FTA that "although we have engaged with the UK Government throughout the negotiations and have had the opportunity to feed in our views on the potential opportunities and risk for Wales, we have yet to see the exact details of what will be included in the agreement"[6].

Given that the provisions of future FTAs may have significant implications for the environment in each of the devolved administrations, it is critical that all current and

[5] https://committees.parliament.uk/writtenevidence/14870/html/
[6] Welsh Government, Written Statement: UK-Australia Free Trade Agreement, 16 June 2021

future FTAs under consideration are co-designed and co-owned by the four nations of the UK.

3) Effectiveness of current scrutiny mechanisms

The Constitutional Reform and Governance (CRAG) Act 2010 does not enable effective parliamentary scrutiny of international treaties. It provides Parliament with very little say in the development of trade policy – with no involvement in mandate-setting, formalised scrutiny of negotiations or power to vote on new agreements, and many impediments to securing the parliamentary time for full debate.

In 2019, the House of Lords Constitution Committee found that the "current mechanisms available to scrutinise treaties through CRAG are limited and flawed", and "reform is required to enable Parliament to conduct effective scrutiny of the government's treaty actions"[7]. The timetable under CRAG has been found by the House of Lords European Union committee to be a "significant impediment, precluding meaningful consultation of stakeholders and limiting the opportunity for committee Members to engage in informed consideration and discussion"[8].

Yet the government has continued to point to CRAG as an expression of effective parliamentary scrutiny. In 2020, an article in the Law Quarterly Review described the impact of this thus: "Arguably CRAGA has a pernicious effect in creating the façade of additional democratic legitimacy for the assumption of treaty obligations, when in reality it enshrines a model in which parliamentary inaction regarding treaties so laid, the standard practice, effectively gives the government free reign."[9]

Trade deals have changed radically since the government last had competency in this area, nearly 50 years ago. Modern trade agreements impact a vast array of economic and social policy areas, seeking not only to remove tariffs but to align regulation between countries, thus impacting the regulatory landscape of trading partners on agricultural standards, manufacturing, financial services, environmental regulations and healthcare[10]. However, following the UK's departure from the EU, scrutiny processes embedded within the European Council and Parliament have fallen away, while other UK mechanisms previously tasked with scrutiny of the implementation of EU law must adapt to and engage with new processes to scrutinise the actions of the executive. CRAG alone does not offer a suitable replacement for these additional mechanisms. It has never provided for early and thorough engagement of Parliament with negotiating processes. It also fails to lay out systems to govern scrutiny of implementation or indeed termination of treaties.

With trade policy increasingly tied to domestic policy, robust scrutiny processes are essential to ensure that the interests of the public and businesses are well represented. **While some additional scrutiny opportunities and democratic checks have been offered by the government in recent years, these should be formalised as part of a much-needed overhaul of the UK's international treaty scrutiny processes. This will make them fit for use by a globally oriented and environmentally ambitious UK.**

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[7] House of Lords Constitution Committee, Parliamentary Scrutiny of Treaties, 30 April 2019
[8] House of Lords European Union Committee, 27 June 2019
[9] Law Quarterly Review: "Neglecting the Treaty-Making Power in the UK: The Case for Change" (2020) 136 L.Q.R. 630
[10] Emily Jones and Anna Sands, Ripe for reform: UK scrutiny of international trade agreements, September 2020

There are five main issues with existing treaty-scrutiny processes:

(1) **Parliament has no role in mandate-setting prior to treaty negotiations.** Under CRAG, the government is not obliged to present negotiating objectives to Parliament prior to embarking upon negotiations. Where the government chooses to present such objectives, CRAG does not require a vote in Parliament to approve them before negotiations commence.

This means there is no formal process to ensure that the views of MPs and their constituents shape or constrain the scope of trade negotiations or levels of ambition in other future international treaties. It means there is no guaranteed space for parliamentary debate or challenge, nor for building consensus in relation to the UK's long-term aims and priorities in the trade or international diplomacy space. Opposition parties, and backbench MPs on the government benches, have no formal way to influence the mandate and negotiating priorities of the executive, despite the potential far-reaching implications of treaties for public policy, including UK environmental standards and efforts to reduce carbon emissions.

The government has committed to publishing objectives before negotiations begin and providing updates to the House of Commons[11]. While this has allowed for some debate in the House, it does not offer Parliament the chance to vote for or against the government's approach. And because these commitments are not formalised within legislation, so far a somewhat uneven approach has been taken to fulfil this commitment. For example, no objectives were published in advance for any of the so-called 'rollover' trade agreements, excluding Japan. In the case of the Comprehensive and Progressive Trans-Pacific Partnership (CPTPP), objectives were not published until 22 June 2021, despite a formal request to join having been made in February.

(2) **There are no requirements for transparency or full parliamentary engagement during negotiations.** Updates are provided after negotiating rounds only at the government's discretion, with no standard format and no requirements for any specific level of transparency or detail. This makes it difficult for parliamentarians to scrutinise or challenge the government's actions, or to raise constituents' concerns about the progress of trade agreements.

A combination of parliamentary restructuring and commitments made in a 2019 Command Paper[12] have given parliamentary committees a greater role in scrutinising trade deals. The International Trade Committee in the Commons and the recently established International Agreements Committee in the Lords can see treaty texts before they are published and recommend deals for debate on the floor of the relevant chamber. These committees have also begun to conduct inquiries into new FTAs in which civil society groups are able to give evidence.

However, the opportunity for Select Committees to request a debate does not directly translate to a requirement for government to offer one. There has been no amendment to CRAG, and the Secretary of State has been careful to promise only that "should the International Trade Committee or International Agreements Sub-Committee recommend a debate on the deal, the Government will seek to accommodate such a request subject to

[11] DIT evidence to the ITC inquiry into UK Trade Negotiations, 2020
[12] Processes for making free trade agreements after the United Kingdom has left the European Union

Parliamentary time"[13]. There is no specificity as to the form or duration of any debate that may be offered, nor the levels of information to be provided to Parliament prior to such a debate to allow for meaningful engagement. The government announced an agreement in principle on a trade deal with Australia on 17 June 2021, but so far has not provided any further detail on the provisional text to Committees, beyond that included in initial press releases.

As outlined below, wider public transparency and debate are also lacking – and commitments to freedom of information were recently undermined by the discovery that Department for International Trade (DIT) may not have an objective approach for dealing with Freedom of Information requests[14]. There are models of transparency in other institutions, such as the EU, which ensure that both the legislature and public are kept informed about the progress of negotiations.

(3) **There is no formal role for civil society, businesses or members of the public.** Public participation in policymaking relating to the environment is enshrined in the United Nations Aarhus Convention, to which the UK is a signatory[15]. Under the convention, the public must have opportunities for "effective public participation" in relation to policymaking that has environmental implications. Many international treaties, including FTAs, should fall under this definition. It is specifically recognised in the preamble that greater access to information and public participation not only "enhance the quality and the implementation of decisions", but also contribute to improving public awareness and surfacing concerns.

However, currently civil-society input into trade deals relies on the capacity and willingness of DIT. Public consultations and stakeholder briefings are not formally guaranteed - for instance, DIT consulted on four proposed new trade agreements in 2018, but decided against consulting on the implications of rolling over deals held between the EU and third countries. Little information was made available prior to consultation and the online consultation portal asked only high-level questions regarding concerns and opportunities. It is unclear whether or how responses to these consultations influenced direction of travel, nor have further opportunities been provided for the public to comment in light of the new post-EU context.

The government has committed to consult with civil society regarding trade policy, and has set up various stakeholder engagement groups in DIT. However, various concerns have been raised about the effectiveness of these groups, their membership, and the requirement for members to sign restrictive confidentiality agreements. It is also unclear how DIT decides which civil society voices to prioritise in its advisory groups. For example, there are many more DIT advisory groups for businesses than there are for trade unions or charities.

The Trade and Agriculture Commission (TAC) was initially set up in summer 2020 for a 6-month period in response to widespread public concern about trade deals potentially undermining the UK's food and environmental standards, and undercutting the UK's ambition on climate and sustainability. It was tasked with setting out recommendations

[13] Hansard – Liz Truss written statement, 7 December 2020
[14] https://www.thetimes.co.uk/article/email-slip-exposes-cabinet-office-foi-vetting-unit-jqwlw6b76
[15] UNECE Convention on Access to Information, Public Participation in Decision-making and Access to Justice in Environmental Matters (Aarhus Convention)

to guide government trade policy into the future. Since then, a second iteration of the TAC has been established, with the narrower purpose of overseeing the potential impact of individual future trade deals on UK standards. The new TAC will be set up on a statutory footing for 3 years and will produce an impact report that will be laid before Parliament alongside each new trade agreement prior to ratification. However, its input can only be provided at a late stage in the process, when texts are agreed, and can be disregarded.

Article 3 of the Aarhus Convention requires parties to "take the necessary legislative, regulatory and other measures […] to establish and maintain a clear, transparent and consistent framework to implement the provisions of this Convention". In order to comply with this requirement, the government should set out an overall approach to the provision of information, dialogue and consultation across civil society, with full terms of reference and transparent information on membership for all engagement mechanisms.

(4) No guarantee of a debate or vote after a treaty is agreed. The CRAG system does not guarantee Parliament a debate or vote when a trade agreement is signed. Instead, these debates are either granted by the executive or must be sought through Opposition days, which are limited. Trade minister Lord Grimstone recently said that he "cannot envisage" a new FTA proceeding to ratification without a debate first having taken place on it, should one be requested by a relevant committee. To provide full certainty of this scrutiny, the remaining aspects of the Ponsonby rule, alongside the newly evolved Grimstone rule, should be formalised through amendment to CRAG in order to offer a guarantee of time for debate.

(5) Votes on new trade agreements are not meaningful. Where Parliament does get a vote on proposed trade deals, this opportunity lacks meaning - as the treaty is already signed and, unlike domestic legislation passing through Parliament, cannot be amended. The terms of the treaty are therefore presented to Parliament as a 'take it or leave it' offer, with no opportunity to directly challenge particularly controversial or undesirable provisions without voting against the deal in its entirety.

CRAG votes also have limited value because the government can choose to bring a treaty back to Parliament after the 21 sitting day period. While Parliament could theoretically delay a treaty from being ratified indefinitely, in practice it will be difficult to secure a debate without government provision.

Initial scrutiny of treaty-making must be further integrated with the scrutiny of potential implementing legislation. It must consider the potential implications of treaty obligations on UK domestic law – including via statutory instrument or in implementation through guidance.

Oversight of implementation of other international treaties is poor. Ex-post Sustainability Impact Assessments conducted previously by the EU regularly recognise the lack of available data to judge the environmental impacts arising from the implementation of a specific FTA. The UK has not yet chosen to reassess the individual or cumulative impacts of rollover deals, nor set up adequate processes to engage civil society in monitoring.

Parliamentary committees and domestic advisory fora have been removed from some rollover agreements, thus diminishing opportunities for civil society and Parliament to play a role in

monitoring the implementation of treaties and input into their development over time. These should be reinstated where removed. Where new and rolled-over UK FTAs require a Domestic Advisory Group and/or Civil Society engagement mechanisms to oversee the implementation of sustainability and labour concerns, DIT has yet to set out an approach to these or begin the process of establishing them. And where older EU agreements, which did not contain provisions for parliamentary dialogue and civil society engagement, were rolled over, the opportunity was missed to upgrade them to improve scrutiny of implementation. In agreement with trading partners, the UK government should look to introduce such mechanisms for ongoing scrutiny and engagement into existing deals in future.

4) Role of the House of Commons

The government has established several channels of engagement, including a set of advisory groups and a recently strengthened Trade and Agriculture Commission. Yet the UK is set to fall behind other major trading powers – such as the United States and the European Union – by not offering its parliamentarians a clear yes/no vote on whether to approve a trade agreement. Making sure parliamentarians have a vote would enhance the role of advisory bodies. It would make sure there is a direct link between the signing of trade agreements and the British public who should benefit from them. And it would bolster the UK's international standing, demonstrating that it is committed to the highest levels of transparency and accountability.

The US Congress and EU Parliament are able to shape negotiating mandates, have a legal right to be informed at all stages of negotiations, have access to classified negotiating texts, and must approve the final agreement for it to be ratified. As in the US and EU, parliamentary oversight of trade deals would benefit the UK government, as it would provide leverage in negotiations.

To have a democratic and transparent trade process, Parliament must be given formal powers with respect to mandating, negotiating and approving future trade agreements. This should include:

- Before negotiations: a debate and vote for MPs on the government's negotiating objectives.
- During negotiations: guaranteed updates and privileged access to negotiating texts for relevant Select Committees tasked with scrutinising deals
- After negotiations: a vote in both Houses on a final deal, prior to ratification.
- Mandatory sustainability impact assessments on the impact of the new trade deal on the environment, public health, human rights and global development.
- During the operation of the agreement: regular monitoring of the impacts of implementation and potential to secure improved social and environmental outcomes, with engagement from specialised parliamentary committees and civil society.
- Consultation with devolved authorities throughout the process.

By strengthening the role of Parliament in the formation of trade policy, FTAs can be developed in a way that supports rather than hinders measures to address the climate and nature crisis, alongside the government's plans to "deliver a UK and world economy which is stronger, cleaner, more sustainable and more resilient after this [Covid-19] crisis"[16].

5) Information and resourcing requirements

[16] Cabinet Office, Our plan to rebuild: The UK Government's COVID-19 recovery strategy, 12 May 2020

Effective cross-parliamentary engagement with and scrutiny of international treaties, both formal and informal, will require a more transparent approach to treaty-making. **The government should share, as early and as fully as possible:**

- **A clear overall vision** of the UK's aims for and approach to international treaties, including trade policy.
- **Specific aims** and updates for individual negotiations.
- **Impact assessments** relating to the potential environmental, social and economic impacts of trade deals or treaty obligations.

This information should be shared as far as possible via statements to the whole House, while more detailed information on the progress of specific negotiations may be more suited to private discussion with relevant Select Committees and stakeholder engagement structures, including Domestic Advisory Groups. As in other nations such as the EU and Canada, non-disclosure agreements should not be required as standard during this process.

There may be rare instances where sensitive information regarding negotiations cannot reasonably be provided to a treaty committee – for example, due to national security concerns upon the part of a negotiating partner. On these occasions the government should determine the maximum level of information that can be shared without breaching confidentiality obligations, inform relevant committees of the outcomes of any confidential negotiations at the earliest appropriate opportunity, and explain why confidentiality was required previously.

Current processes rely very heavily on Select Committees, which have to date taken responsibility for the oversight of 40 rollover trade deals, and are expected to play a key role in the scrutiny of new deals, including those with Australia, New Zealand and the wider CPTPP. The length and depth of trade agreements presents a huge challenge to committees, which are limited in their capacity and resourcing – for example, the International Trade Committee and International Agreements Committee have a joint membership of just 23 people.

Expertise is also understandably lacking amongst parliamentarians and the civil service, given the experience of recent decades where UK engagement in negotiations was mediated by the EU. This makes it particularly important that **DIT dedicates capacity to learning from the experiences of other nations, providing briefings and training for parliamentarians to support scrutiny, and ensures that stakeholder groups are able to commission research to investigate the potential and observed impacts of deals.**

The UK cannot effectively fulfil, nor be held to account for failures to uphold, existing treaty obligations, if these are not clearly and transparently communicated to the public. **The government should maintain a publicly accessible repository of all existing international treaties, including links to public data relating to the impacts and implementation of treaty obligations. In relation to the negotiation of new treaties, public consultations must be backed by the publication of information relating to the potential impacts of concluding a new agreement.**

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