

Written Submission to the Constitution Committee's Inquiry on Parliamentary Scrutiny of Treaties

**The Trade Justice Movement
November 2018**

The Trade Justice Movement is a UK-wide network of seventy civil society organisations, with millions of individual members, calling for trade rules that work for people and planet. Our members include trade unions, NGOs, consumer groups and faith organisations. Together we are calling for trade justice, where the global system of trade ensures sustainable outcomes for ordinary people and the environment.

The Trade Justice Movement has deep concerns about the level of democracy and scrutiny in UK trade policy. We believe the committee's Inquiry is important and timely. Preparations for the UK's departure from the European Union has not only highlighted to many the democratic deficit in scrutiny of trade deals, but also means that the UK will have an independent trade policy for the first time in over forty years. We are grateful for the opportunity to respond to the Inquiry and will answer the questions listed on the Inquiry's website in turn, focusing particularly on trade agreements rather than other forms of international treaties, since this is our area of expertise.

1) How effective is Parliament's current scrutiny of treaties in both holding the Government to account and helping it get the best agreements possible?

Parliament's current scrutiny of trade agreements fails to effectively hold government to account, which in turn has a negative impact on the content of resulting agreements. Parliament is not involved in setting a mandate for trade agreements, is excluded from the negotiation process and is only given a say (including any votes) after treaties have been agreed. This undermines the role of Parliament and is of particular concern given the wide-ranging implications of trade agreements on domestic policy.

The constitutional theory behind the UK's dualist system is that foreign policy is the remit of the Executive - including the power to make international treaties - but it cannot alter domestic legislation or the UK constitution without parliamentary consent.¹ However the nature of modern trade agreements is that they affect huge swathes of public policy, including consumer and workers' rights, environmental legislation, health standards and public services.²

There are five main ways in which the current system fails to hold governments to account:

¹ House of Commons Library, Briefing: 'Parliament's role in ratifying treaties', February 2017
<https://researchbriefings.parliament.uk/ResearchBriefing/Summary/SN05855>

² The Trade Justice Movement, Report: 'Securing democracy in UK trade policy', 2017
https://www.tjm.org.uk/documents/reports/TJM_SecuringDemocracyInUKTradePolicy_2017_web.pdf

1. No involvement of Parliament in setting the mandate for beginning negotiations

Under the current system, negotiating objectives are not laid before Parliament, there is no debate and no vote before the government begins negotiations. This is a result of the UK's dualist system, which allows the Executive to use the Royal Prerogative to begin negotiations. Debate about the appropriate use of this power rose to the fore prior to the triggering of Article 50, leading to the Miller case. As discussed later on, the Miller case sets a precedent for the idea that Parliament should be consulted prior to negotiations for international agreements which significantly affect rights.

Since Parliament is not consulted prior to negotiations, this means that there is no formal process to ensure that the views of MPs and their constituents are taken into account in shaping trade deals. It means that Opposition parties have no formal way of challenging the Government's mandate and negotiating priorities, despite their potential wide-reaching public policy implications. This severely impacts the ability of Parliament to hold the government to account for its actions, and also means that the content of trade deals is less likely to reflect Parliamentary or popular consensus.

2. No requirements for transparency during negotiations

Similarly, Parliament has no formal role during the negotiation of treaties: currently the only provision is that that government will "update both Houses on the progress of negotiations."³ Although it would be unrealistic to expect Parliamentarians to be involved with the negotiation itself, there are no requirements for transparency during negotiations, and MPs and Lords are not guaranteed any updated on the progress or content of negotiations. This makes it difficult for Parliament to scrutinise or challenge the government's actions, or raise constituents' concerns about the progress of trade agreements. There are models of transparency in other institutions, such as the EU, which ensure that both the legislature and general public are kept informed about the progress of negotiations - discussed in more detail later in this response.

Recent negotiations around Brexit, and also the TTIP and CETA trade negotiations, have demonstrated that there is strong public and Parliamentary interest in the progress of negotiations. Under the current system, the entire negotiation process can be conducted by civil servants and agreed by the executive, with no formal structure of democratic accountability.

3. No formal role for civil society or members of the public

Parliament offers not just a platform for MPs and Lords to hold the government to account, but also a forum for listening to the views of civil society, businesses and other stakeholders. This is done formally through committee inquiries, but also as MPs meet with interest groups from their constituencies and elsewhere. Currently, civil society input relies on the Department for International Trade deciding to run

³ A promise made by the Secretary of State for International Trade in a statement to the House on the 16th July 2018

public consultations or host stakeholder briefings. This is not a formally guaranteed process; for instance, the Department for International Trade has recently consulted on four post-Brexit trade agreements (the US, Australia, New Zealand and Trans-Pacific Partnership), but has decided against consulting on 'rollover agreements', even though some of these have not been agreed in their entirety (such as agreements with Japan and Canada).

The other concerns about civil service consultations are to do with independence and transparency; since the civil service serves the government of the day, it does not have the same level of independence as Parliamentary committees might. There is currently little clarity regarding how responses to Government consultations are assessed or taken into account, and there are no public hearings or recorded discussions, unlike in Parliamentary committees. It is also unclear how the Department for International Trade decides which civil society voices to prioritise in its advisory groups; for example, one DIT advisory group contains representatives from six private sector companies and just one trade union.⁴ Parliament should play an important role in bringing the concerns of civil society groups, businesses and stakeholders to the fore.

4. No guarantee of debate or vote before treaty is agreed

The current system, under the Constitutional Reform and Governance Act (CRAGA), does not guarantee Parliament a debate or vote before a trade agreement is ratified. This has obvious implications for holding government to account, and is also likely to impact the content of trade agreements if governments know that the agreements do not require Parliamentary approval. This is discussed in more detail below as part of CRAGA, as it is a key area of concern for the Trade Justice Movement.

5. Votes lack meaningfulness

One final concern is that where Parliament does get a vote on proposed trade deals, this vote is not very meaningful as the treaty is already signed and cannot be amended. The terms of the treaty are presented to Parliament as a 'take it or leave it' offer, which can lead to Hobson's Choice facing individual MPs and Lords. It is not hard to imagine treaties which contain lots of controversial or undesirable provisions, but are on balance supported by MPs, and therefore receive approval in their entirety. Indeed, these exact concerns have been raised about the EU Withdrawal Agreement and Future Economic Partnership. MPs won some concessions for a 'meaningful vote', though many are still likely to feel forced to vote in favour of a deal they do not like, but is the 'least bad' option given the alternative of a no-deal Brexit.

A 'take it or leave it' vote does not give MPs or Lords the opportunity to approve parts of the deal they like and reject parts they do not like. This makes little sense considering the breadth of modern trade agreements, which cover wide areas of

⁴ Information passed on by one of TJM's membership organisations

public policy and can contain hundreds of pages worth of provisions. Bills, for instance, often cover an even narrower policy remit, but can be amended by Parliament and are revised by scrutiny at various stages between both Houses. Bills and other motions in Parliament do not have to be accepted or rejected outright. Many trade agreements have an impact on wider policy which is not dissimilar to the legislative impact of public Bills, but the level of Parliamentary involvement - and meaningfulness of any votes - is vastly different.

A Parliamentary vote also has limited value because in theory the Government can choose to bring a treaty back to Parliament after 21 sitting days with an explanatory note.. In theory this means Parliament could delay a treaty from being ratified indefinitely, but in practice this depends on finding Opposition Time to debate and vote on the treaty. This is explored more below in the CRAGA discussion.

How useful are the processes and powers under the Constitutional Reform and Governance Act 2010 and do they strike the right balance between Parliament and government?

The Constitutional Reform and Governance Act (2010) - or 'CRAGA' - formalised a convention called the Ponsonby Rule where treaties are laid before Parliament for 21 sitting days before ratification. Since the Act goes no further than giving the convention statutory effect, it offers little to increase the level of Parliamentary scrutiny over treaties. CRAGA does not give Parliament any more say over treaties than the Ponsonby Rule: Parliament still has no role in setting the mandate of negotiations, texts are still private and not available for Parliamentary scrutiny during negotiations, the Government can sign agreements before they have been laid before Parliament, and can ratify without Parliamentary debate or formal consent.

Although CRAGA, following the Ponsonby Rule, ensures that a signed treaty is laid before Parliament for 21 sitting days before ratification, debates and votes are not guaranteed. Time is only allocated to debate if voluntarily granted by the government, or the Opposition during 'Opposition Time'. However, the government has little incentive to give time to debate controversial treaties as they risk losing a vote on ratification. Whilst the Opposition might force a debate on an Opposition Day, only 20 days per session are allocated for such debates, meaning that an Opposition Day debate may not be scheduled during the 21 sitting days. Even if a treaty does receive a debate in Parliament, this could be restricted to a small number of MPs or Lords in a Delegated Legislation Committee or at a time when few MPs or Lords are present. A debate does not guarantee a vote, and only active rejection by the Commons can delay a treaty's ratification. Finally, 21 sitting days is insufficient time to consider agreements that can stretch to a thousand pages or more.

CRAGA allows the Government multiple attempts at laying the treaty before Parliament. This is a problem because the Government could potentially keep reintroducing a treaty, increasing the possibility that it is able to discount the views of parliament and continue to ratification. In "exceptional cases" CRAGA gives the Government the power to bypass Parliament and ratify trade agreements without consulting MPs or Lords. The Government

must provide an explanation as to why a case is exceptional. However, the legislation does not provide a definition or guide as to what constitutes an exceptional case, which means there is a formal (if, in practice, politically difficult) possibility of controversial treaties being ratified with no Parliamentary involvement at all.

There is a clear democratic deficit in this procedure. CRAGA fails to sufficiently address any of the five concerns listed earlier about democratic scrutiny: although it formalises the Ponsonby Rule, the convention was already inadequate in providing democratic scrutiny of international treaties. This is particularly true for trade agreements, which have a direct and significant impact on domestic legislation, including individual rights.

2) What challenges does Brexit pose for Parliament's consideration of treaties?

First, Brexit means that the UK will negotiate its own trade treaties for the first time in forty years. TJM and its members is concerned that there are no provisions for transparency or scrutiny in the development of these treaties. The development of legislation around treaty-scrutiny after Brexit, such as the Trade Bill, has provided no reassurance that this situation will change. Furthermore, the Miller case highlights the lack of Parliamentary engagement in treaty changes affecting rights; and the 'meaningful vote' debate in respect of the Withdrawal Agreement and the UK-EU Future Relationship shows a deeply worrying lack of Parliamentary preparedness for dealing with treaties which have significant impacts on the rights and day to day lives of ordinary people. At the same time, there is clearly a cross-party desire to strengthen the role of Parliament in holding the government to account and the Miller case provides further support for the proposition that parliament should be meaningfully involved in the development of treaties which impact on rights.

Second, post-Brexit trade deals are likely to impact on large areas of public policy. These agreements may contain provisions relating to regulatory cooperation that could weaken Parliamentary oversight of UK regulation in important areas such as the environment and health.^{5 6} UK trade agreements are likely to have implications for the rule of law: the Government currently supports the inclusion of Investor-to State Dispute Settlement (ISDS) mechanisms which allows investors from countries covered by treaties to sue the UK if they feel that a policy or its implementation has harmed the profitability of their investment. Given the debates regarding the jurisdiction of the European Court of Justice it would be highly problematic for Parliament to continue to have no scrutiny of such provisions. The public outcry in response to negotiations on TTIP (the Transatlantic Trade and Investment Partnership - a proposed EU-US deal) demonstrate the strength of public feeling about the possible impact of trade deals in areas such as food standards (chlorinated chicken and hormone-treated beef) and healthcare. There is political pressure for the UK Government to agree new trade deals quickly after Brexit, and UK negotiators will be in a weaker position

⁵ The London School of Economics, 'The Transatlantic Trade and Investment Partnership: International Trade Law, Health Systems and Public Health', 2015
<http://www.lse.ac.uk/business-and-consultancy/consulting/assets/documents/the-ttip-international-trade-law-health-systems-and-public-health.pdf>

⁶ Greenpeace, quoted in Deutsche Welle, 'TTIP: Free trade at expense of the environment?', 2 May 2016, <https://www.dw.com/en/ttip-free-trade-at-expense-of-the-environment/a-18773205>

because the UK carries less diplomatic clout outside the EU. This urgency, created by Brexit, and potential vulnerability of the UK's position could lead to deals being agreed rapidly without sufficient democratic oversight.

Third, Brexit means that the Government plans to 'roll over' some seventy agreements with forty countries to which the UK is currently party due to its EU membership. This poses further challenges for scrutinising treaties. The Trade Bill gives ministers the power to implement so-called 'roll-over' agreements. However this includes Henry VIII powers to make changes to primary legislation where necessary (despite the government's claim that the content of these deals will not change). This effectively means that, if the Trade Bill is passed unamended, MPs and Lords will be voting to give ministers powers over the implementation future treaties without knowing their content. Amendments tabled to give Parliament a vote on rollover agreements, establish a 'sift and scrutiny' committee and conduct impact assessments were all rejected in the Commons stages of the Bill.

Brexit means that these controversial new trade deals could be agreed with very limited Parliamentary scrutiny. This will be a lower level of democratic accountability than the UK has as an EU member: the European Parliament has a guaranteed debate and votes on international treaties (including those which the UK Government intends to roll over), with publicly available texts and formal opportunities for stakeholder consultation. The EU's alternative model of scrutiny is discussed further in a later section, but the relevant conclusion at this stage is that the Government has offered no adequate alternative model for democratic scrutiny of post-Brexit trade agreements.

3) What role should Parliament have in the future in scrutinising treaties, from potentially requiring approval for the negotiating mandate through negotiations themselves to treaty agreement, as well as in subsequent treaty actions like amendments, derogations, enforcement and withdrawal? How should this link to Parliament's consideration of treaty-implementing legislation?

Parliament should play a far greater role in the future in scrutinising treaties, and there should be mechanisms in place for civil society and the general public to be consulted on future trade agreements. The following proposals should be considered:

1. Parliamentary mandate for beginning negotiations

Parliament should be able to debate and vote on proposals to enter into formal trade negotiations, and use this to set out and approve the Government's negotiating mandate. This will ensure that there is some degree of democratic consensus prior to a deal being negotiated, and forces the government to be transparent about its negotiating objectives. Transparency about objectives is common practice in the US, and does not hinder negotiations but rather means that the legislature is aware of the potential policy implications of new trade agreements. Furthermore, it adds a layer of accountability, and means that the Government can enter into negotiations knowing that it has some level of democratic support, while also committing to delivering on what has been mandated.

Parliamentary involvement early on in the process would also provide a means for MPs to relay their constituents' concerns about trade negotiations. For example, British farmers might have concerns about beginning negotiations with the US, and seek to ensure that the Government has a clear red line on importing agri-products which undermine British food standards. Similarly, this early involvement of Parliament in the formal process of setting a mandate offers a platform for relevant interest groups to give evidence and offer their opinion on the potential impacts of or priorities for a new trade agreement.

2. Transparency during negotiations

The Government should have a policy of publicly releasing key negotiating texts throughout negotiation. This will mean that the general public, Parliament, civil society and business groups are kept informed of the progress of negotiations and the expected future shape of trade agreements. The Brexit negotiations have received intense scrutiny, putting political pressure on the Government to regularly update Parliament on progress. However there is no formal guarantee that Parliament is provided with these updates for all international agreements, and many MPs have felt left in the dark in Brexit negotiations despite these updates. There is precedent elsewhere for regularly releasing negotiation documents and providing updates to stakeholders on negotiation progress, such as in the EU.⁷ Similarly, the UK Parliament's European Scrutiny Committee has regular access to EU documents and correspondence, which it can sift, scrutinise and refer for debate.⁸

Lack of transparency makes it difficult for Parliament to scrutinise or challenge the government's actions or raise constituents' concerns about the progress of trade agreements. It makes it harder for MPs to respond to questions and concerns constituents may have about the future of trade agreements, and more difficult for civil society and businesses to plan for the future. Recent negotiations around Brexit, and also the TTIP and CETA trade negotiations, have demonstrated that there is strong public and Parliamentary interest in the progress of negotiations. Under the current system, the entire negotiation process can be conducted by civil servants and agreed by the executive, with no role for Parliament during negotiations.

3. A formal role for civil society and full impact assessments

As mentioned earlier, Parliament offers not just a platform for MPs and Lords to hold the government to account, but also a forum for listening to the views of civil society, businesses and other stakeholders - through formal inquiries as well as MPs' surgeries. Civil society should be given a formal role in contributing to the

⁷ The Trade Justice Movement, Report: 'Securing democracy in UK trade policy', 2017
https://www.tjm.org.uk/documents/reports/TJM_SecuringDemocracyInUKTradePolicy_2017_web.pdf

⁸ UK Parliament, Role - European Scrutiny Committee (accessed November 2018)
<https://www.parliament.uk/business/committees/committees-a-z/commons-select/european-scrutiny-committee/role/>

development of new international trade agreement. This can be done through Parliament or through formalised methods of Government consultation.

Additionally, there should be full and independent impact assessments conducted for each proposed trade agreement. These assessments should cover not just the economy but also environmental and social factors. For example, an impact assessment on a trade deal with the US should look at how the deal might affect the standard of food on British supermarket shelves, the welfare of animals, the environmental impact, the effect of regulatory cooperation on workers' rights, and the effect of investment provisions on democracy and scrutiny. This will allow Parliament, civil society and the general public to be fully informed about the benefits and risks of a new trade agreement, and also inform the Government's own cost-benefit analysis.

4. Scrutiny Committee - this is discussed in detail in answer to Question 6
5. Guaranteed debates and meaningful vote

There should be a formal process which goes beyond CRAGA to ensure that both Houses of Parliament are given adequate time to debate and vote on trade agreements before they are signed. This will allow MPs and Lords to explore draft agreements in detail, hear conclusions from committee inquiries, debate specific provisions and suggest alternatives. Having this debate before agreements are signed adds democratic legitimacy to the agreement, and ensures that agreements can practicably be changed before ratification. The resolution approving a trade agreement should follow the 'super-affirmative' procedure, where instruments have to be voted on and approved by both Houses.

This means that any final vote on the deal is meaningful, and does not present MPs with a 'Hobson's Choice' between taking or leaving the deal. To ensure meaningfulness, there must be the option of re-negotiating and amending agreements based on Parliamentary consensus. This might sound awkward and inefficient, but if Parliament has been involved throughout the process - from the initial mandate through to the signing - then there is far more likely to be broad Parliamentary consensus in favour of the agreed deal.

6. Treaty withdrawal

There should be a regular review of trade agreements to ensure that they are beneficial to the economy, society and environment. Trade agreements should not imply indefinite or excessively long-term commitments that override Parliamentary sovereignty, but it should be within the power of Parliament to terminate agreements if it wishes. There should be processes in place so that MPs and Lords know how to raise concerns about trade agreements and provision for debates and votes in the Commons or both Houses that can lead to the termination of trade agreements.

4) To what extent, if at all, does the judgment of the Supreme Court in the Miller case on triggering Article 50 have implications for the government's future treaty actions?

The Miller case goes to the heart of why it is important - and constitutional - to have Parliamentary oversight of treaties which affect domestic legislation. The basis of Miller's claim was that triggering Article 50 would effectively nullify a series of Acts of Parliament, which as a constitutional principle should only be nullified by Acts of Parliament. This highlights a tension in the UK's dualist system: although the Executive has competence over international treaties, in practice many of these treaties will lead to a change in primary legislation. In the case of Article 50, this change would have been inevitable, since leaving the EU was bound to impact on primary legislation, which is Parliament's remit. The Supreme Court therefore ruled that an Act of Parliament - and associated debate, scrutiny and approval of both Houses - was required to trigger Article 50.

Britain's relationship with the EU is unique, and it would be an exaggeration to claim that other trade agreements, to which the UK is party, offer a comparably deep political and economic integration. However, there are plenty of examples of agreements which affect primary legislation, and moreover, plenty which affect the kind of rights that the Miller ruling concerned. For example, the Miller judgment highlighted the Working Time Directive (2003), which sets out individuals' rights at work, and mentioned other rights that were dependent on EU law. Interpreted broadly, this could include things like consumer rights, which are linked to regulations around labelling, health and environmental standards. Modern trade agreements, particularly those that include deep regulatory cooperation (such as CETA or CPTPP), often affect workers' rights, privacy (in data regulations), legal rights (such as in ISDS provisions), visa rights (such as Mode 4 in GATT or professional qualifications in CETA), food and health standards.

Crucially, the Miller case demonstrated that it is constitutional to involve Parliament *before* new treaty negotiations begin, so long as future primary legislative changes can be anticipated within the treaty. This informs our understanding of the limits of the UK's dualist system: where treaties affect primary legislation (and namely, rights), one cannot draw a clean divide between the Executive's prerogative and Parliament's remit. Miller does not necessarily give legal precedent to the idea that all trade agreements affecting rights must be approved by Parliament before negotiations begin - this is a matter of legal opinion. However, Miller does appear to create constitutional space for this point to be debated, and the spirit of the Miller case is to give Parliament an early say on these kinds of international treaties. The Government should ensure that processes for future treaty negotiations are conducted in the same spirit.

5) Should different types of treaties be subject to different levels of scrutiny? If so, how should these be differentiated?

The Trade Justice Movement is not in a position to make a comparative assessment between types of treaties. However, as already outlined, trade agreements have particularly far reaching effects on public policy. Whilst trade agreements historically concerned tariffs, they now include provisions affecting public services, regulatory cooperation which affects

consumer, environmental and social rights, ISDS clauses which offer investors sweeping legal protections and a host of other provisions. These have a significant impact on not just primary legislation and domestic regulation, but also the lives of ordinary individuals who might expect Parliament to be able to control these instruments.

It is also worth noting that trade agreements do not contain the kinds of sensitive issues that are contained in certain other treaties, such as defence and intelligence, and therefore do not require the same level of secrecy. In this sense, trade agreements should be treated differently to those that have a high degree of sensitivity and there are plenty of examples from other countries (discussed later) of more transparent negotiation processes that the UK could learn from.

6) Is a parliamentary treaties scrutiny committee required to examine government treaty actions post-Brexit? If so, how should it be composed and supported, and what powers should it have? Or would another model be appropriate?

A Trade (or Treaties) Scrutiny Committee with the purpose of scrutinising negotiation texts and conducting inquiries into the impact of a new trade agreements could help address some of the issues around democratic scrutiny. There are various options for the role and powers of this committee: it could be modelled on the Danish Parliament's European Affairs Committee, from which the executive must get a mandate prior to developing positions in the European Council. A weaker model would be the UK Parliament's own European Scrutiny Committee, which has access to EU documents and correspondence, and can refer issues for Parliamentary debate. Either way, it is important to have committees of MPs and Lords who can look at the substance of trade agreements in depth, since this tends to involve a lot of detail and is not always best suited to the floor of the House.

In addition to exploring trade negotiations in detail, a further benefit of a scrutiny committee would be its role in taking evidence from experts and civil society. This would provide a forum for civil society to raise concerns, and would also ensure that Parliament has heard from relevant experts before making important decisions on trade agreements.

In terms of composition, a scrutiny committee should have a large membership to ensure that there is cross party representation, with as many elected representatives as is feasible. We do not think it is necessary to restrict membership of the committee to Privy Councillors, as is the case for the Intelligence and Security Committee. Although documents from trade agreements are often secret, they do not contain deeply sensitive content which affects national security, and indeed we believe their contents ought to be transparent for the national interest. TJM's preference would be for a larger committee, perhaps of similar size to the European Scrutiny Committee, which has a formal role in scrutinising negotiation texts and conducting specific inquiries into the impact of trade agreements.

It is also worth noting that a Trade or Treaties Scrutiny Committee is on its own insufficient in addressing the democratic deficit. The committee must be established in conjunction with the other proposals laid out in our answer to Question (3).

7) What information should the government provide to Parliament on its treaty actions? Should there be a regular reporting requirement during negotiations?

The government should provide regular negotiating texts as early as possible from each round of negotiations, and these should be available to both MPs and the general public. A trade scrutiny committee (discussed elsewhere) ought to have rights to oversight of key documents as and when they are produced. This is a similar model to that of Parliament's European Scrutiny Committee, which regularly reviews official publications and correspondence with the EU.

Similarly, there ought to be regular reports to Parliament. Due to high levels of Parliamentary and media attention on Brexit, various ministers and the Prime Minister herself have provided regular statements to the House and the press on the progress of negotiations. Indeed, many MPs and activists have sought even more regularity and transparency in the Brexit updates. However, when it comes to other trade agreements, the government has been very secretive. For example, it has repeatedly failed to offer clarity on the progress of the rollover of third country agreements, despite evidence that concessions are being sought by South Korea and Chile.⁹ As the UK establishes new trade policy after Brexit, Parliament should not rely on the generosity of ministers or pressure from the media to receive updates on trade negotiations. Instead, it should be an enshrined practice to publish negotiating texts and in particular make them available to Parliament.

8) How might the government and/or Parliament best engage other stakeholders and members of the public during treaty negotiation and scrutiny?

There are various ways to involve stakeholders in negotiations, and some alternative models from other countries are discussed in answer to the next question. Broadly speaking, there are four main ways Parliament should engage stakeholders and members of the public:

1. Full impact assessments

As mentioned earlier, it should be a statutory part of trade policy that potential trade agreements receive full impact assessments, conducted independently, which cover economic, social and environmental factors. To this end, the impact assessments should be produced with opportunities for input and dialogue from relevant stakeholders. For example, if a trade agreement with the United States has the potential to impact on dairy farmers in Northern Ireland, then these groups must be consulted as part of the social aspect of the impact assessment. Similarly, assessing environmental factors should also provide a basis for engaging environmental groups. Furthermore, the Government should ensure that the process for engaging with these independent impact assessments is straightforward, and that there is rigorous methodology for ensuring that all relevant voices are heard.

As seen with Brexit scrutiny, the current system does not guarantee impact

⁹ Politico, 'EU trade partners demand concessions for Brexit transition rollover', 2 May 2018 <https://www.politico.eu/article/eu-trade-partners-object-to-brex-it-transition-roll-over/>

assessments of international treaties, but this relies on the goodwill of government or pressure from Parliament. Furthermore, Government impact assessments are not independent, and tend to focus only on economic factors.

2. Guaranteed committee inquiries

It should be regular practice for a newly established trade scrutiny committee (discussed in answer to Question 6) to conduct formal inquiries into proposed new trade agreements. Parliamentary inquiries can be used to hear from particular stakeholders with an interest in trade agreements, as well as policy experts who know about the potential implications for trade in various sectors.

3. Local listening exercises

During TTIP negotiations, BritishAmerican Business and others organised TTIP 'roadshows' across the UK to promote TTIP to local communities, amidst general public backlash and/or disinterest.¹⁰ Although these roadshows had an obvious agenda behind them, the principle of reaching out to local communities and hearing their concerns is a good one. This would not only inform the negotiation objectives and subsequent content of trade deals, but would also mean that any final agreement is more likely to reflect a broad consensus from the wider population. As with any local outreach, it is important to ensure that there is good communication between central government and civil society - not just with local councils, but also local businesses, faith groups, trade unions, schools, local charities and civic action groups.

4. Guaranteed public consultations

There are a number of issues with public consultations on trade agreements run by the Department for International Trade (DIT). Aside from concerns about independence, transparency and methodology, there is no statutory guarantee that the Government will run these consultations. The lack of clarity and guarantee on how much influence consultation responses will have on final policy can put off stakeholders from responding to consultations, since they often seem to be little more than a formality. For example, the DIT recently consulted on new trade agreements with the US, Australia, New Zealand and membership of the Trans-Pacific Partnership. It has not consulted on agreements with Canada and Japan, even though controversial aspects of these agreements (such as the inclusion of ISDS clauses) have not been finalised, and the Government hopes to roll over the agreements after Brexit.

Public consultations are, on their own, insufficient instruments for engaging stakeholders. However, they do offer a formal way for involving the DIT in the consultative process. The DIT also hosts regular stakeholder briefings and runs a

¹⁰ TradeInvest - BritishAmerican Business, 'UK TTIP Roadshows' (accessed November 2018) <http://tradeinvest.babinc.org/ttip/bab-activities/uk-national-road-shows/>

Strategic Trade Advisory Group. Again, these are in principle very good ideas for engaging stakeholders, but there needs to be more clarity on how stakeholders' views are taken into account, how members of these groups are chosen and whether these groups actually change negotiating objectives.

9) What models of treaty scrutiny in other countries are most effective and what might the UK Parliament learn from them?

There are various models of treaty scrutiny in other countries, from which the UK Parliament could learn. These can be divided into models of parliamentary scrutiny, models of transparency and models of civil society consultation.¹¹

Models of parliamentary scrutiny:

European Union:

- Following a consultation on a new trade agreement, recommendations are made to the European Council based on the findings.
- The European Council then agrees the negotiation mandate. This sets out the general objectives that should be achieved through the trade agreement.
- Trade agreements are voted on by the European Parliament and a majority vote is required for the agreements to be approved.
- For mixed agreements, there is a further requirement for member state approval.

United States

- The US's Fast Track procedure has been criticised for not giving the legislature enough say over the process of negotiating and agreeing trade agreements.
- However even under the US's Fast Track process, Congress is guaranteed an 'up or down' vote in both chambers for an agreement to be ratified.

Denmark

- The Danish Parliament's European Affairs Committee has a formal role in scrutinising any EU legislation.
- The executive must get a mandate from the European Affairs Committee prior to developing positions in the European Council.

Models of transparency:

European Union:

- After criticism of the lack of transparency during the TTIP negotiations with the USA, the EU committed to:
 - Making more negotiation objectives public
 - Providing all MEPs with access to additional restricted documents, including negotiating texts, in a secure reading room

¹¹ Citations for all these: The Trade Justice Movement, Report: 'Securing democracy in UK trade policy', 2017

https://www.tjm.org.uk/documents/reports/TJM_SecuringDemocracyInUKTradePolicy_2017_web.pdf

- Reducing the number of restricted documents so that MEPs have access to more information outside the secure reading room
- Publishing a list of the documents shared with the European Parliament and the Commission as well as information about who is being consulted in relations to trade negotiations
- Disclosing negotiating mandates immediately after their adoption
- Publishing final trade agreement texts in advance of the legal revision being completed.

Further examples:

- The WTO also publishes submissions made by member states during negotiations and reports by committee chairs on its website
- The US commits to publishing negotiation objectives prior to starting trade negotiations, impact assessments for all trade agreements, and negotiating texts before signing trade agreements.
- The United Nations Framework Convention on Climate Change publishes negotiating texts and submissions from parties prior to the start of its negotiations and as the negotiations progress. E.g. the draft text of the Paris Agreement was released in advance of the Conference of Parties in December 2015.
- For the World Health Organisation, World Intellectual Property Organisation, Human Rights Council and the Aarhus Convention it is routine for draft negotiation documents to be released throughout negotiations processes, and for meetings to be open to accredited observers and event broadcast live on websites.

Models of consultation:

European Union:

- The European Commission holds a public consultation and scoping exercise. This forms part of the EU's formal procedure and consultations must take place before negotiations begin.
- If it decides to go ahead with negotiations, it makes recommendations to the European Council based on the findings of the consultation and scoping.
- The European Council then decides the negotiation mandate. This sets out the general objectives that should be achieved through the trade agreement.
- The Commission is required to ensure the European Parliament is "immediately and fully informed at all stages." This information must be provided in sufficient time to take the Parliament's views into account
- After negotiation, the European Parliament *and* European Council must approve the deal. Mixed agreements (e.g. CETA) which require further member state approval
- Additionally, civil society organisations can engage with trade negotiations through the Civil Society Dialogue, which provides a structured space for information sharing that is recorded and web-streamed.

The United States:

- The public consultation system mandates that public consultations must be carried for 90 days prior to the *initiation* of all trade negotiations

- The USA's advisory committee system is one of the most consultative mechanisms and consists of 28 advisory committees, enabling approximately 700 citizen advisors to gain access to confidential information and comment on draft agreements.
- The Cotonou Agreement (between EU, African and Caribbean countries) sets out a framework for stakeholder engagement, and means that states can include non-government groups/individuals in official delegations
- The EU-ECOWAS (Economic Community of West African States) agreement went even further and included civil society groups in actual negotiating stages - so that these groups were able to put forward alternative market access schemes that offered better development opportunities for West African countries.

It is worth noting that TJM is not advocating any of these models as perfect. The EU, for example, made significant progress on transparency following the TTIP backlash. But this doesn't mean that there is not more the EU could do to improve its model of consultation to better represent civil society. However, the above examples demonstrate that it is possible to have relatively high levels of transparency, scrutiny and public consultation without hampering agreements from being made.

10) What role should the devolved institutions have in negotiating and agreeing treaties?

Devolved administrations should be given a role in negotiating and agreeing treaties, though TJM is open to different models of how this might look in practice. Devolved regions should not be excluded from the process, because international trade can have a significant impact on devolved administrations' ability to regulate and enact policy, without any formal power for devolved administrations to reject, amend or approve trade agreements. Although the UK Parliament retains power in various devolution statutes to legislate on devolved matters, the Sewel Convention requires that it should normally do so only with the consent of the relevant devolved legislature.

Similarly, where agreements include investor to state dispute settlement clauses, the UK Government could be sued for policy decisions made by devolved administrations. The memorandum of understanding between the UK and the devolved administrations states that devolved administrations are responsible for paying any legal fees and tribunal fines that result from policy decisions made in their jurisdictions. Given this, concerns about the threat of arbitration could result in regulatory chill, constraining devolved administrations ability and willingness to make important policy decisions.

Further steps should be taken to strengthen devolved administrations' involvement in UK trade policy. The UK Government has already established a Joint Ministerial Committee on EU Negotiations to facilitate engagement with devolved administrations as it negotiates its withdrawal from the EU. One model would be to establish a similar committee to facilitate communication and consultation regarding the UK's trade policy. Another model would be to include representatives from devolved regions in the UK's negotiating teams, enabling them to oversee and contribute to negotiations. This approach has been partially implemented in

Canada, where the federal Government has the full power to conclude trade agreements but cannot oblige provincial authorities to implement these agreements. During CETA negotiations, representatives from provincial authorities were included in Canada's negotiating team. A similar approach in the UK has the potential to increase the democratic legitimacy of trade agreements and reduce the risk of these agreements being challenged by devolved administrations during the ratification process.

For more information please contact:

David Lawrence

**Senior Political Adviser
The Trade Justice Movement
david@tjm.org.uk**