

# Written evidence to the Joint Committee on Human Rights Inquiry on Human Rights in International Agreements



The Trade Justice Movement  
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## Introduction

1. The Trade Justice Movement (TJM) is a UK-wide network of seventy civil society organisations calling for trade rules that work for people and planet. Our members include trade unions, NGOs, consumer groups and faith organisations.
2. This document sets out TJM's written evidence to the JCHR's Inquiry on Human Rights in International Agreements. Since our area of expertise is trade agreements, the evidence focuses on how trade deals affect human rights and how human rights treaties are undermined by trade treaties.
3. Our response looks at three main ways in which trade and human rights interact:
  - I. Transparency and democratic rights
  - II. Investor-State Dispute Settlement (ISDS)
  - III. The primacy of trade agreements over human rights agreements

## I. Transparency and democratic rights

4. The process of negotiating and agreeing trade deals, as well as the content of trade agreements themselves, often limit the right of states to regulate in the public interest. This in turn affects the democratic right of citizens to self-determination, a concept which is increasingly recognised as a key human right.<sup>1</sup> This affects human rights *directly*, insofar as citizens have normative rights to influence domestic policy through democratic processes. Commitments in trade agreements also *indirectly* affect first and second generation human rights, as they may restrict the state's policy space and hinder progression on human rights.
5. There are two main ways in which the right to regulate is affected. The first is that the content of trade agreements often restrict what a government can do and also bind future governments through drawn-out 'sunset clauses'.<sup>2</sup> Similarly, trade deals increasingly include regulatory cooperation, which involves states bilaterally agreeing regulations, often via joint regulatory councils (as in CETA, the EU-Canada trade agreement). These regulatory councils lack democratic accountability and mean that regulations may be difficult for future governments to alter. They may affect human rights, since regulations can concern health standards, labour rights and data privacy. Indeed, these are all areas which modern trade agreements cover.<sup>3</sup> The second way in which the right to regulate is limited by trade agreements is through 'regulatory

<sup>1</sup> See Council of Europe, 'The Evolution of Human Rights' (accessed Jan 2019) on 'Solidarity Rights' <https://www.coe.int/en/web/compass/the-evolution-of-human-rights>

<sup>2</sup> The Trade Justice Movement, Report: 'Securing democracy in UK trade policy', 2019

<sup>3</sup> Ibid.

chill'. This is discussed further in the next section on ISDS.

6. Human rights NGOs such as Amnesty UK have highlighted the right of citizens to access information in the public interest which may be held by governments. In the UK, trade agreements are negotiated in a secretive manner without public or Parliamentary access to negotiations. Indeed, even after agreements have been signed, Parliament has no guarantee of a debate or vote on the agreement, and it is possible for the government to ratify trade deals without any Parliamentary approval. A UN Independent Expert has highlighted this lack of transparency, saying: "although States are bound to observe the public participation clause of article 25 of the International Covenant, they negotiate treaties in secret and exclude key stakeholders, including labour unions, consumer unions, health professionals and environmental protection groups. Sometimes, secret treaties are fast-tracked through parliaments so as to avoid public participation. This renders the agreements democratically illegitimate."<sup>4</sup>
7. Amnesty UK argues further that "Freedom of Information legislation reflects the premise that all information held by governments and governmental institutions is in principle public and may only be withheld if there are legitimate reasons for not disclosing it" and that the UK is committed to FOI through the International Covenant on Civil and Political Rights (1966).<sup>5</sup> In trade agreements, this may give undue influence to corporate actors over citizens. Evidence from Amnesty states: "It is all too easy for officials to decide not to release documents under pressure from Ministers or from corporations. Commercial confidentiality should not become a pretext for withholding information and should not override the public interest."<sup>6</sup>
8. The level of Parliamentary oversight of trade agreements has been strongly criticised. In 2018, a report from Parliament's own International Trade Committee concluded that MPs should be given a 'meaningful vote' on trade agreements, particularly as the UK adopts its own independent trade policy after Brexit.<sup>7</sup> Under the current system, there is no obligation for the government to conduct impact assessments ahead of negotiations, no transparency during negotiations and no guaranteed debate or vote in Parliament. This weakens the democratic right of individuals, especially when trade agreements increasingly cover a broad range of public policy.
9. **Conclusion:** The Government should set out a clear framework for transparency and Parliamentary oversight of post-Brexit trade policy. This should include public access to negotiation documents, involvement of civil society in the creation of trade agreements, and guaranteed debates and votes in Parliament.

## II. Investor-State Dispute Settlement (ISDS)

9. Modern trade agreements often include Investor-State Dispute Settlement (ISDS) mechanisms, which allow investors to sue host states for any actions which harm their profits. This system

<sup>4</sup> UN General Assembly, 'Promotion of a democratic and equitable international order' (2015) p7 [http://unipd-centrodirittiumani.it/public/docs/UNGA\\_70\\_285.pdf](http://unipd-centrodirittiumani.it/public/docs/UNGA_70_285.pdf); this point was also made by the UN's Special Rapporteur on the Right to Food in his report, setting out a human rights-based argument for democratic oversight of trade agreements [http://www.srfood.org/images/stories/pdf/officialreports/20120306\\_hria\\_en.pdf](http://www.srfood.org/images/stories/pdf/officialreports/20120306_hria_en.pdf)

<sup>5</sup> Amnesty International (UK), Submission to International Trade Committee (June 2018) p4

<sup>6</sup> Ibid. p3

<sup>7</sup> House of Commons International Trade Committee Report, 'UK trade policy transparency and Scrutiny (2018) <https://publications.parliament.uk/pa/cm201719/cmselect/cmintrade/1043/1043.pdf>

has been heavily criticised on multiple fronts and has implications for human rights provision.

10. ISDS uses a 'parallel' legal system of private arbitration courts, which unlike domestic courts, are not bound to recognise or take account of states' obligations on human rights. As the UN's Independent Expert concluded, ISDS does "not oblige the arbitrators to give priority to human rights treaty norms."<sup>8</sup> This means that a state could be successfully sued for enacting legislation to protect human rights. For example a challenge was brought by US oil company Burlington against Ecuador for failing to protect the company's interests against violent attack from the indigenous community. The arbitration court did not take into account the fact that the Inter-American Court of Human Rights had already ruled that allowing oil extraction in that area violated the human rights of indigenous communities. The court was not bound to take into account these human rights concerns.<sup>9</sup> But despite the narrow range of factors which taken into account in private arbitration, investors can sue for a very broad range of state action - even when actions are *contra bonus mores*.
11. A second concern around arbitration courts is that they do not meet standards for rule of law.<sup>10</sup> Arbitrators are not independently appointed, there is no appeals system, no transparency in proceedings, and financial barriers to entry are high, benefiting the wealthiest investors. This means that proceedings pose a high cost to the taxpayer even if cases brought against the state are unsuccessful.<sup>11</sup> This has human rights implications, since rule of law underpins democratic stability and the effective exercise of a variety of political and legal rights.<sup>12</sup>
12. A third problem with ISDS is 'regulatory chill', where the perceived threat of legal challenge restricts what governments do. For example, a government might choose not to introduce popular anti-fracking legislation if foreign firms have already invested in fracking in that country, for fear of the financial repercussions. This can also affect human rights legislation: indeed, there are examples of ISDS being used to challenge discrimination laws in South Africa,<sup>13</sup> labour rights in Egypt<sup>14</sup> and health regulations in Australia.<sup>15</sup> These cases are all related to important human rights (nondiscrimination, labour rights and health) which are under threat from ISDS challenges in trade agreements.
- 13. Conclusion:** Together these factors led the UN's Independent Expert to conclude that ISDS is "incompatible with provisions of the International Covenant on Civil and Political Rights and the

<sup>8</sup> UN General Assembly, 'Promotion of a democratic and equitable international order' (2015) p4 [http://unipd-centrodirittiumani.it/public/docs/UNGA\\_70\\_285.pdf](http://unipd-centrodirittiumani.it/public/docs/UNGA_70_285.pdf)

<sup>9</sup> This case is summarised in: CIDSE, 'Ensuring the Primacy of Human Rights in Trade and Investment Policies' (2017) <https://www.cidse.org/publications/business-and-human-rights/business-and-human-rights-frameworks/ensuring-the-primacy-of-human-rights-in-trade-and-investment-policies.html>

<sup>10</sup> Bingham Centre, Briefing: 'International Economic Agreements and the Rule of Law – the Case of the Transatlantic Trade and Investment Partnership (TTIP)' (2015)

[https://binghamcentre.biicl.org/ruleoflawexchange/documents/186\\_ttip\\_briefing.pdf?showdocument=1](https://binghamcentre.biicl.org/ruleoflawexchange/documents/186_ttip_briefing.pdf?showdocument=1)

<sup>11</sup> See, for instance, *Vattenfall vs Germany*, which cost the taxpayer an undisclosed amount in settlement even though the case was not successfully brought. <https://isds.bilaterals.org/?case-study-vattenfall-v-germany-i>

<sup>12</sup> See, for instance, UN General Assembly Report 'In larger freedom: towards development, security and human rights for all' (2005) <https://undocs.org/A/59/2005>

<sup>13</sup> See *Foresti v South Africa*, Italian investors challenged a law designed to advantage disadvantaged ethnic groups <http://investmentpolicyhub.unctad.org/ISDS/Details/262>

<sup>14</sup> See *Veolia v Egypt*, French multinational challenged minimum wage laws <https://isds.bilaterals.org/?veolia-loses-isds-case-against>

<sup>15</sup> See *Philip Morris v Australia*, tobacco giant challenged cigarette packaging laws <http://investmentpolicyhub.unctad.org/ISDS/Details/421>

International Covenant on Economic, Social and Cultural Rights.”<sup>16</sup> ISDS should be removed from existing UK trade and investment agreements and form no part of post-Brexit policy.

### III. The primacy of trade agreements over human rights agreements

13. Free Trade Agreements (FTAs) and human rights treaties are both subject to the Vienna Convention on the Law of Treaties. However, the tendency is for FTAs to have far higher levels of bindingness contained within the treaty, whereas human rights agreements often contain vaguer commitments with low levels of enforceability. Where there is conflict between international human rights conventions and human rights agreements, there is no guarantee that human rights will have primacy.<sup>17</sup>
14. An example of this is the UN Guiding Principles, which aim to offer a framework for ensuring corporate actors respect human rights. These principles have not had a tangible impact on trade agreements; as the international NGO CIDSE states in a report: “so far, States have not fundamentally changed their treaty practices. For example, the CETA does not contain any provisions which could be seen as an implementation of the UN Guiding Principles.”<sup>18</sup>
15. The non-bindingness of the Guiding Principles has led to calls for a UN Binding Treaty on business and human rights. This treaty would regulate the relationship between trade agreements and human rights and include human rights impact assessments for FTAs and Bilateral Investment Treaties (BITs). The UN’s Independent Expert that the lack of a binding treaty and requisite tribunal renders the human rights commitments in international law “meaningless”, even though officially agreements like the UN Charter take precedence over other treaties.<sup>19</sup>
16. In addition to the Binding Treaty, the UK should commit to thorough human rights impact assessments of trade agreements. The EU, for instance, conducts ‘sustainability impact assessments’ of all new trade agreements, which assess the economic, environmental and social impact of trade agreements, including on human rights and labour standards.
17. **Conclusion:** Trade agreements must be structured to ensure primacy of human rights and sustainable development. The UK should push for the adoption of a UN Binding Treaty on business and human rights, and in the meantime should guarantee full human rights impact assessments prior to the agreement of trade deals, alongside adequate Parliamentary oversight.

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<sup>16</sup> UN General Assembly, ‘Promotion of a democratic and equitable international order’ (2015) p4 [http://unipd-centrodirittiumani.it/public/docs/UNGA\\_70\\_285.pdf](http://unipd-centrodirittiumani.it/public/docs/UNGA_70_285.pdf)

<sup>17</sup> CIDSE, ‘Ensuring the Primacy of Human Rights in Trade and Investment Policies’ (2017) <https://www.cidse.org/publications/business-and-human-rights/business-and-human-rights-frameworks/ensuring-the-primacy-of-human-rights-in-trade-and-investment-policies.html>

<sup>18</sup> Ibid. p24

<sup>19</sup> UN General Assembly, ‘Promotion of a democratic and equitable international order’ (2015) p7 [http://unipd-centrodirittiumani.it/public/docs/UNGA\\_70\\_285.pdf](http://unipd-centrodirittiumani.it/public/docs/UNGA_70_285.pdf)