

Securing democracy in UK trade policy

Developing a transparent and democratic approach to trade agreements

- A Trade Bill has been introduced but provisions to make trade policy accountable to Parliament are currently lacking and need to be incorporated.
- As the law currently stands, the Government has unchecked powers to negotiate and ratify trade agreements in secret without public or Parliamentary oversight. This huge democratic deficit must be corrected.
- Modern trade agreements affect many aspects of public policy, including jobs, the environment, health, development and inequality.
- At present MPs would have less say on an EU-UK trade deal than MEPs in the European Parliament, and less say on a potential US-UK deal than the US Congress.
- Provisions must be included in the Trade Bill to ensure that the public is consulted and Parliament's consent is secured when developing new trade policy, that the highest level of transparency is maintained throughout trade negotiations, and that trade agreements are subject to a debate and a vote in Parliament with a role for the devolved administrations, prior to ratification.

The impact of Brexit for UK trade policy

The UK's decision to leave the EU will have wide-ranging political and economic impacts in the UK for the foreseeable future. Brexit will result in dramatic changes to the way the UK is governed and how its public policy is developed. A key feature of the post-Brexit political landscape will be the return of trade policy to UK Government competence. This means that for the first time in 40 years, the UK Government will be directly responsible for developing an independent trade strategy and will need to establish new trading arrangements with partner countries across the world.

Historically, trade agreements were used to regulate the transfer of goods between countries and were limited to the regulation of trade tariffs. However, since the end of World War Two these agreements have expanded substantially. Today, modern trade agreements have widespread impacts on public policy in the UK and in partner countries, including countries in the global south. These agreements touch on most sectors of the economy and can reduce environmental protections, undermine human rights and labour rights standards and have implications for the way our public services are managed. Many trade agreements include an investor to state dispute settlement mechanism (ISDS), which gives investors the power to sue governments in private tribunals over actions that threaten their profits.

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Both trade rules and ISDS significantly restrict governments' regulatory power and could prevent future UK and developing country governments from making domestic policy decisions that are in the best interests of the public.

Modern trade agreements have a great impact on the UK's domestic policy space. As such, parliamentary sovereignty demands that parliamentarians have the powers to scrutinise and vote on trade agreements. Yet the existing procedure for the negotiation and ratification of trade agreements gives the Government unchecked powers to negotiate trade agreements in secret and to ratify these agreements without a vote in Parliament. This procedure sidelines MPs and provides no right of input for the public or civil society.

To be consistent with fundamental democratic principles, trade negotiations must be opened up to legislative and public scrutiny. The Government has introduced a Trade Bill to enable its independent trade policy after the UK leaves the EU, but at present it lacks any provision to make trade policy accountable to parliament. The Trade Bill must include a new procedure for negotiating and ratifying trade agreements that guarantees:

- The right of Parliament to set a thorough mandate to govern each trade negotiation, with a remit for the devolved administrations;
- The right of the public to be consulted as part of setting that mandate;
- Full transparency in negotiations;
- The right of Parliament to amend and to reject trade deals, with full debates and scrutiny guaranteed and a remit for the devolved administrations; and
- The right of Parliament to review trade deals and withdraw from them in a timely manner.

What are the current procedures for trade agreements...

...in the UK

Under existing UK rules, trade agreements are entirely negotiated under the Royal Prerogative.¹ Using its prerogative powers, the Government is able to:

- decide when and who to start negotiations with;
- decide its own priorities and objectives;
- conduct negotiations, usually in great secrecy; and
- conclude and sign the eventual deal.

UK Procedure for Trade Agreements

- Step 1** Under its prerogative powers, the Government initiates, negotiates and then signs a trade agreement. It may then be provisionally implemented.
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- Step 2** The Government lays the signed trade agreement before Parliament, along with an explanatory memorandum. The trade agreement sits before Parliament for 21 sitting days, in which time it cannot be ratified.
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- Step 3** If the Commons does not object to the trade agreement, it is ratified and then enters fully into force in line with its provisions.
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- Step 4** If the Commons does object to the trade agreement, by agreeing a motion on the floor of the House, the Government can resubmit it to Parliament for an additional 21 days. This process can be followed an unlimited number of times. Parliament cannot outright reject an agreement.

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Under the current procedure there is no requirement to consult the public and civil society and no role for Parliament. There is no requirement for Parliament to scrutinise the text of trade agreements, and indeed these are often kept entirely secret until ratification. There is no guarantee that there will be any Parliamentary debate on trade agreements.

Parliament becomes involved for ratification, but in practice the procedure is a nominal one. This is defined by the Constitutional Reform and Governance Act 2010 (CRaG Act).² It is a no objection 'negative' procedure, in which the Government lays the trade agreement before Parliament for 21 days and if there is no objection it is ratified (see box). In theory, Parliament does have the right to object to trade agreements and if the objection comes from the Commons the Government must give an explanation before it can bring the agreement back to Parliament. Thus it is conceivable that the Commons could block ratification by passing repeated resolutions each time a trade agreement is submitted. Yet, in practice it is not clear how this could be done.

Firstly, ensuring that trade agreements are debated and voted on in Parliament is not straightforward. The Government has little incentive to present trade agreements for debate, as it would risk losing a vote. This means that objections to these agreements would need to be made during an opposition day debate. However, only 20 days per session are allocated for opposition day debates, meaning that an opposition day debate may not be scheduled during the 21 day period in which a trade agreement is submitted to Parliament.

If an opposition day debate is scheduled during the period that a trade agreement is tabled there is still no guarantee that the agreement will be brought to a Parliamentary vote. Given that the opposition has limited opportunities to table issues for debate, it may choose to prioritise other policy issues. If the opposition does bring a trade agreement to a vote and the Commons votes against the agreement, the Government can lay the original unrevised agreement before Parliament an unlimited number of times, granting the Government the effective power to force through ratification by default.

To make matters worse, in "exceptional cases" the CRaG Act gives the Government the power to bypass Parliament completely and to ratify trade agreements without consulting Parliament. The Government must provide an explanation for why a case is exceptional. However, the legislation does not provide a definition or guide for what exceptional cases may involve.

There is a clear democratic deficit in this procedure. Parliament and the public are sidelined throughout trade negotiations and in the approval and ratification of trade agreements. This means that the government has the power to develop trade agreements that have widespread effects on the UK economy and public policy development and management with essentially no oversight or accountability.

It also means that without significant legislative reform, the UK may find itself in a situation in which Brexit reduces rather than increases democratic control over trade policy. After leaving the EU, MPs will have less oversight of trade agreements than UK MEPs currently do in the European Parliament; and the UK public will have fewer opportunities to input into trade policy than our European counterparts.

...in the EU

In the EU, the negotiation and ratification of trade agreements is governed by Article 207 of the Treaty on the Functioning of the European Union.³

Under the EU procedure⁴, before negotiations begin the European Commission holds a public consultation and scoping exercise. 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. With this mandate, the Commission then negotiates trade agreements on behalf of Member States.

The Commission is required to ensure the European Parliament is "immediately and fully informed at all stages".⁵ This information must be provided in sufficient time to take the Parliament's views into account.⁶

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Once EU trade agreements have been negotiated and the European Council has decided to sign the agreements they are then submitted for approval. The procedure for this differs between agreements that only address issues of EU competence and ‘mixed agreements’ that include issues falling under both EU and Member States’ competence. For agreements that are limited to EU competence, first the European Parliament must give its consent, and then the European Council must agree to conclude the agreement. For mixed agreements, in addition, all EU Member States must complete domestic ratification procedures prior to the agreement being ratified at the EU level.

The Commission may also conduct additional public consultations on trade policy. Beyond this, 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.

After criticism of the lack of transparency during the TTIP negotiations with the USA, the EU improved its transparency requirements throughout trade negotiations by:

- making more negotiating texts public;
- providing all MEPs with access to additional restricted documents in a secure reading room;
- reducing the number of restricted documents so that MEPs have access to more information outside the secure reading room; and
- 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.⁷

The EU’s *Trade for All* strategy built on these measures, committing to disclose negotiating mandates immediately after their adoption and to make public final trade agreement texts in advance of the legal revision being completed.⁸

Although flawed, the EU procedure for negotiating and ratifying trade agreements includes greater transparency and accountability requirements than the existing UK procedure. This means that rather than strengthening parliamentary sovereignty, Brexit will concentrate power in the hands of Government MPs, and leave the UK Parliament and public with fewer opportunities to influence and approve trade agreements. This must not be allowed to happen. EU transparency and accountability mechanisms must be used as a baseline and the Government must, at an absolute minimum, ensure that the UK’s negotiation and ratification procedure does not provide fewer opportunities for Parliament and the public to scrutinise, amend and approve trade agreements than is available as a member of the EU.

However, the EU’s procedure for negotiating and ratifying trade agreements remains deeply flawed. Its transparency mechanisms are vastly inadequate and the European Parliament and public continue to be sidelined in trade negotiations. Even since the transparency reforms, several MEPs have spoken out about their inability to access key negotiating documents, and problems with documents being heavily redacted.¹⁰ An inquiry conducted by the European Ombudsman in 2015 found that the Commission’s transparency reforms did not go far enough and recommended additional action to ensure trade agreement documents are more proactively disclosed and to enhance transparency throughout trade negotiations.¹¹ In spite of this recommendation little action has been taken and the Commission faced fresh condemnation in June 2017 for the lack of transparency in its trade negotiations with Japan.

Given this, if the Government is serious about deepening democracy and strengthening parliamentary sovereignty in post-Brexit UK, it must build on the EU’s negotiation and ratification mechanisms to ensure the democratic legitimacy of trade agreements.

Establishing a democratic procedure for developing trade agreements

Modern trade agreements address an ever-increasing number of policy issues and impinge more and more on the daily lives of citizens in the UK and abroad. These agreements affect most aspects of our lives, from the way our public services are managed to the wages and working conditions we receive, to our access to medicine and healthcare. The current procedure for conducting trade agreements is not suitable for agreements of this nature. New provisions are required to ensure trade agreements are subject to appropriate levels of scrutiny and accountability.

The Government has introduced a Trade Bill intended to provide an “international trading framework for the UK outside of the European Union”.¹² A fundamental component of any international trading framework is a democratic process for the development of trade agreements and this needs to be incorporated into the bill. Historically, trade agreements have been politically controversial.¹³ A democratic set of procedures on mandate, consultation, scrutiny and ratification would ensure that the broadest possible group of stakeholders can input into agreements. This would then result in the development of better trade agreements with greater public support.

Ensuring transparency in trade negotiations

At present, the Government is not required to publicly release any information during trade negotiations. The lack of transparency in trade negotiations has received sustained public criticism in the UK and internationally. This criticism has led to increasing acceptance of the need for transparency in trade negotiations and has resulted in some improvements to international negotiation processes.

In addition to the recent EU reforms discussed above, the WTO now publishes submissions made by member states during negotiations and reports by committee chairs on its website. The USA has also committed to publish negotiation objectives prior to starting trade negotiations, impact assessments for all trade agreements, and negotiating texts before signing trade agreements.

The international push towards transparency in trade negotiations has been welcome. However, there remains substantial room for improvement and there is extensive international precedent for further transparency in international negotiations on other issues. For example, the United Nations Framework Convention on Climate Change publishes negotiating texts and submissions from parties prior to the start of its negotiations. The draft text of the Paris Agreement was released in advance of the Conference of Parties in December 2015. Subsequent versions of the text were then publicly released throughout the negotiations, ensuring all parties had access to information as it evolved.¹⁴ Transparency throughout these negotiations did not hamper government negotiations; rather, it enabled governments to increase their level of ambition, which improved the outcome of the COP.

Transparency is the norm in a wide range of intergovernmental organisations, from the World Health Organisation to the World Intellectual Property Organisation, to the Human Rights Council to the Aarhus Convention. In such organisations 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.

Disclosure of negotiation mandates and draft negotiating texts is one element of transparency in international trade negotiations. However, another aspect is that decisions about what is included in UK trade agreements are influenced by external actors including stakeholders from the business sector, academia, and in some cases civil society. The public has a right to know what consultations the Government is conducting when it is developing its trade policy and which stakeholders the Government is meeting with during these consultations.

Beyond this, best practice requires that impact assessments be carried out as an integral part of conducting trade agreements in order to identify any negative social, human rights, environmental and economic impacts, both in the UK and in partner countries.¹⁵ Such assessments should be carried out when scoping potential agreements in order to inform consultation, debate and decision making. They should also be conducted once the final shape of a draft agreement is known, and periodically when an agreement is in place.

Impact assessments must be published in good time and their findings communicated in non-technical language. To be effective, their findings and recommendations must be taken into account and acted upon. When negative impacts are identified, they must be mitigated and if the impact is too serious to mitigate, then the relevant part of the agreement should cease to be negotiated or implemented.

The EU's sustainability impact assessments consider social, environmental and human rights impacts of trade agreements, in addition to the economic impacts,¹⁶ although the current assessments have been widely criticised for failing to acknowledge the full impact of trade agreements on human rights and labour rights conditions and environmental standards.

The UK should build on the EU's approach by ensuring that impact assessments are completed by independent experts that are external to DIT and who have access to negotiating texts. Concerns about conflict of interest could be reduced by relocating responsibility for the funding and management of impact assessments to another Government department, DFID being an obvious choice. The UK could also strengthen the impact assessment methodology by following the UN Guiding Principles on Human Rights Impact Assessments for Trade Agreements.¹⁷

Recommendations

The international direction of travel is towards increased transparency. The UK should follow this trend by guaranteeing the highest level of transparency throughout trade negotiations by committing to publish:

- **negotiation objectives and mandates prior to initiating trade negotiations;**
- **comprehensive and independent ex ante impact assessments of all potential trade agreements prior to initiating trade negotiations;**
- **all documents and negotiation texts that are tabled during before and after each round of negotiations; and**
- **comprehensive and independent ex post impact assessments of all trade agreements.**

Establishing a meaningful role for Parliament

Modern trade agreements severely restrict Governments' policy space and regulatory power. At a domestic level Parliament is the body that makes new laws in the UK and Members of Parliament scrutinise public policy throughout all stages of the policy-making process. In contrast, the current procedure for the negotiation and ratification of trade agreements does not even guarantee an affirmative vote for Parliament on trade agreements.

The UK is a dualist state, which means that the ratification of international treaties, including trade agreements, does not automatically result in their provisions being incorporated into UK law. The provisions set out in these treaties are only applicable in the UK once they have been incorporated into UK law. In theory, this means that the Parliament can prevent international trade agreements from being implemented when their provisions are incorporated into domestic legislation. However, when the UK ratifies a treaty it is bound to the terms of the treaty as a matter of international law, irrespective of whether the treaty is incorporated into domestic legislation. The UK respects international law and is therefore committed to transposing international agreements into domestic law in line with its legal obligations. It is also the case that much of the content of trade agreements, including many of the most controversial aspects, such as ISDS, do not require implementing legislation. Given this, it is important that these agreements are subject to adequate scrutiny prior to ratification so that Parliament has oversight of the policy-making process.

Trade agreements can restrict Parliament's legislative rights, so it is essential that Parliamentary sovereignty is maintained through reform of the UK's procedure for the negotiation and ratification of trade agreements.

Parliamentary oversight of trade negotiations

There are differing approaches to the level of Parliamentary oversight of the establishment of a negotiation mandate and the negotiation of trade agreements. A model that could be helpful is that of some EU countries which have domestic procedures that ensure their parliaments have oversight of mandates.

In Denmark, for issues of major significance, including trade agreements, the Danish Government is required to get a mandate from the European Affairs Committee of the Danish Parliament prior to developing positions in the European Council. If this position is revised it must be re-submitted to the Committee for a new mandate. The Netherlands and Finland have similar procedures that are politically rather than legally binding.¹⁸ These provide good examples of how Parliament can oversee and scrutinise trade agreements, which the UK should seek to replicate.

The UK already has a House of Commons International Trade Committee that was established to “examine the expenditure, administration and policy of the Department for International Trade and its associated public bodies.”¹⁹ The Committee does not currently have an official remit to oversee and scrutinise trade negotiations and agreements. However, its remit could be expanded to include similar powers as the European Scrutiny Committee. This would ensure Committee members could meaningfully oversee and scrutinise UK trade policy. Alternatively, a parallel Trade Scrutiny Committee could be established.

The committee, whether it be the expanded International Trade Committee or a parallel Trade Scrutiny Committee, should have a remit to access trade negotiation documents and a responsibility to review, amend and approve negotiating mandates and draft negotiation texts. Adequate time is needed for the committee to scrutinise documents and for the Government to then revise its negotiating position.

Recommendations

The Government should broaden the scope of the House of Commons International Trade Committee, or establish a Trade Scrutiny Committee, so that Parliament has a mandate to:

- **review and recommend amendments to negotiating positions in advance of the negotiations;**
- **review impact assessments and make recommendations about whether the Government should proceed with trade negotiations; and**
- **scrutinise and recommend amendments to draft agreements.**

A vote on trade agreements

The existing ratification procedure does not guarantee a Parliamentary vote on trade agreements, meaning that the UK Parliament has less oversight of trade agreements than legislatures of many trading partners. In the EU, trade agreements are voted on by the EP and a majority vote is required for the agreements to be approved. In the USA, under the fast track process, once trade agreements have been agreed they are brought to an ‘up or down’ vote in both chambers of Congress.²⁰

To be effective, Parliament should be able to amend and vote on the agreement. The Government has expressed concerns that giving Parliament a meaningful vote would result in partner countries offering ‘bad deals’. However, it is good democratic practice to guarantee Parliament an affirmative vote on trade agreements. Further, increasing Parliament’s oversight in this way may strengthen rather than weaken the UK’s negotiating position, as negotiators would not have a mandate to concede ground throughout the negotiations.²¹

Recommendations

Given the broad impacts that trade agreements have on domestic policy, the Government should develop a best practice approach to trade agreement ratification that guarantees:

- **all trade agreements are subject to full Parliamentary debates;**
- **Parliament is mandated to amend agreements; and**
- **all trade agreements are subject to an affirmative vote in Parliament.**

Establishing a meaningful role for devolved administrations

The UK's Devolution Acts grant Westminster full power over international trade. However, the domestic impact of many trade agreements extends beyond the competence of Westminster. Devolved administrations have responsibility for a broad range of policy issues including health, education, agriculture, and the environment. Many modern trade agreements include provisions that lower environmental standards, open up public services to privatisation, and expand intellectual property rights, increasing the cost of medicines. These agreements encroach on devolved administrations' policy space, restricting their ability to make public policy in these areas.

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.²² Given this, concerns about the threat of arbitration could result in regulatory chill, constraining devolved administrations ability and willingness to make important policy decisions.

Given this, devolved administrations should be guaranteed an affirmative vote on trade agreements. This would reflect processes in the EU, where

trade agreements that impact on policy areas that fall under member states' competence need to be ratified by each member state in addition to the EC. In Belgium, regional parliaments are guaranteed the right to approve trade agreements under article 167 of the federal constitution. This means that for EU trade agreements that impact on domestic policy in Belgium, all regional governments are guaranteed a vote on these agreements. The UK's devolved administrations should be ensured the same right to vote on trade agreements.

Further steps should also be taken to strengthen devolved administrations' oversight of the UK's 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. A similar committee should also be established to facilitate communication and consultation regarding the UK's trade policy.

Beyond this, the Government should include representatives from devolved administrations in its official negotiating teams, enabling them to oversee and feed into 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.²³ This approach would increase the democratic legitimacy of trade agreements and reduce the risk of these agreements being challenged by devolved administrations during the ratification process.

Recommendations

The Government should ensure a meaningful role for devolved administrations in the development of trade policy by:

- **guaranteeing devolved administrations a vote on all trade agreements;**
- **establishing a Joint Ministerial Committee on International Trade; and**
- **including representatives from devolved administrations as observers in official UK trade delegations.**

Facilitating public and civil society participation

Between October 2016 and March 2017 nine out of ten meetings held by Ministers from the Department for International Trade (DIT) were with business stakeholders.²⁴ Increased access to policy-makers inevitably leads to increased influence over the policy that is being produced. In order to address the imbalance in stakeholder consultation, a transparent consultation process is required that ensures the public and civil society have the same access to DIT, and the same ability to influence UK trade policy as big business lobbies.

Public consultation

A robust procedure for public consultation and input throughout trade negotiations is crucial to build public trust in trade agreements. It will also lead to the development of trade agreements that have better outcomes for the UK public. The broad impact that many trade agreements have on environmental standards and regulation also means that the UK is required to ensure public participation in trade agreement processes under Article 3(7) of the Aarhus Convention, which obliges governments to promote access to information and public participation in international environmental decision-making processes.²⁵

Under existing legislation, the Government is not required to consult the public about its trade policy. DIT may choose to carry out public consultations and has in past months engaged with some civil society groups. However, there is no guarantee that it will continue to do this and there is no framework for how public consultations should be facilitated. Without a transparent consultation procedure that guarantees the public's right of input, there is a clear risk that the UK public will have less ability to input into trade policy after leaving the EU. This will reduce the democratic legitimacy of the UK's new trade policy and increases the likelihood of public backlash against future trade agreements.

The USA's mandatory public consultation system is a model that the UK could replicate in order to guarantee the UK public's right of input. Under this system, there is a much clearer procedure for public consultations, which must be carried out for 90-day prior to the initiation of all trade negotiations. However, there is substantial room to improve on

this system and to guarantee consultations are open and inclusive. For example, in order to redress the disproportionate level of access and influence that business stakeholders have throughout trade negotiations, the Government would also need to ensure that public consultation processes address issues of public interest such as the impact of trade agreements on human rights and labour rights conditions, environmental standards, and public service provisions.

Recommendations

The UK Government should develop a robust procedure that guarantees the public's right of input into trade agreements, including a commitment to:

- **facilitate mandatory public consultations prior to trade negotiations;**
- **publish DIT consultation schedules as well as information on who is being consulted when developing a mandate for trade negotiations; and**
- **publish public consultation reports prior to initiating trade negotiations.**

Civil society consultation and participation

The Government should also develop a transparent and inclusive process to consult with civil society when developing trade policy and throughout trade negotiations. Currently, the Government is not obliged to consult civil society, meaning that the level of engagement is determined by DIT. Without clear guidelines for civil society consultation, there is no mechanism to ensure that civil society has equal access to policy makers as other stakeholders or to ensure that, when civil society is engaged, a broad range of stakeholders are consulted.

Internationally, there are varying levels of civil society participation in the development of trade policy. On paper, the USA's advisory committee system is one of the more comprehensive consultation processes. This system consists of 28 advisory committees, which enables approximately 700 citizen advisors to gain access to confidential information and comment on draft agreements.

Civil society can provide input into trade policy through this system. However, in practice, business interests dominate the advisory committees and a majority of advisory committee members are from private firms.²⁶ Additionally, the recommendations and advice given by civil society representatives is often overlooked, meaning that civil society representatives have few opportunities to input meaningfully into trade policy.²⁷ In the EU, consultations are targeted towards corporate stakeholders and questionnaires provide limited scope to address social and environmental concerns. Further, the civil society dialogue is largely one-way, which severely limits scope for meaningful civil society scrutiny of and input into EU trade policy. These challenges demonstrate the need for full transparency in negotiations to ensure that civil society has equal access to information about trade agreements and the ability to engage with Government departments that are responsible for trade policy.

There are examples of civil society being granted a meaningful role in multilateral and regional negotiations, which demonstrate the benefit of increased civil society consultation and participations. The Cotonou Agreement sets out a legal framework for the participation of non-state actors in trade negotiations.²⁸ This framework led some countries, such as Guyana, Jamaica and Mauritius, to include non-state actors as observers in official delegations, although a majority of these actors were from the private sector.²⁹ ECOWAS took this a step further during the Economic Partnership Agreement negotiations with the EU. Private sector and civil society representatives were included in its negotiating team and actively participated in all elements of the negotiations. Civil society actors were able to use this space to put forward alternative market access schemes that offered better development opportunities for West African countries.³⁰ Outside of trade negotiations, the Aarhus Convention also gives accredited observers the same speaking rights as parties and a mandate to contribute to the development of texts throughout the negotiations.³¹

It is important that civil society groups participating in such processes should not have restrictions placed upon them as to what they can communicate. Civil society must also be able to organise themselves – participation should not be limited to handpicked groups.

Recommendations

The Government should establish an inclusive procedure for engaging civil society in trade negotiations by:

- **establishing an NGO Advisory board that provides an open spectrum of civil society representatives with access to information about, and a remit to scrutinise, UK trade policy, UK negotiating mandates and draft negotiation texts; and**
- **including civil society representatives as observers in official UK trade delegations.**

Enabling the termination of trade agreements

An important element of parliamentary sovereignty is the ability of existing and future governments to review and reverse policy decisions made by previous governments. The right to terminate or withdraw from a treaty is also established in the Vienna Convention on the Law of Treaties.³² Yet, many trade agreements include ‘overhang’ clauses that bind parties for ten or 20 years after they have left an agreement. These clauses guarantee that international investors continue to benefit from the provisions of a trade agreement, even after a country has withdrawn from the agreement. If an agreement includes an ISDS mechanism, for example, public policy decisions made by future governments or devolved administrations that run counter to the interests of international investors could result in lengthy lawsuits and hefty fines.

CETA provides a clear example of this. Article 30.9 includes a ‘sunset clause’ on investment protection, which ensures that all investments made prior to the termination of an agreement would continue to be subject to the provisions of the agreement for 20 years.³³ CETA was provisionally applied in the UK on 21 September 2017. Under provisional application the UK would not be bound by these conditions. However, if CETA is fully ratified prior to Brexit, the UK will continue to be subject to CETA’s investment provisions in spite of its withdrawal from the EU.³⁴

Recommendations

The Government should ensure that new trade agreements do not lock-in future governments to certain policy decisions, restricting their policy-making capacity and regulatory power. To do this it should:

- only conclude trade and investment agreements that include termination clauses;
- exclude long notice periods and sunset clauses for investment protection measures; and
- exclude ISDS clauses.

Conclusion

As the UK withdraws from the EU, the Government must ensure that it addresses public concerns about the lack of transparency and democracy in EU institutions by taking steps to deepen democracy in the UK. The UK's current procedure for the negotiation and ratification of trade agreements is threadbare and gives the Government unchecked powers to develop trade agreements in secret without parliamentary or public oversight. This democratic deficit must be addressed before the UK leaves the EU and begins to develop its independent trade policy, yet, under the Trade Bill as currently published, nothing will change. The Trade Bill must outline a democratic and transparent procedure for the development of trade agreements that guarantees a meaningful role for Parliament, devolved administrations, civil society and the public. Without reform, the UK Government will simply take the place of the European Commission – negotiating far reaching trade agreements in secret, with no oversight or accountability.

References

- ¹ House of Commons Library (2017) *The royal prerogative*. Briefing paper number 03861. UK Parliament. <http://researchbriefings.parliament.uk/ResearchBriefing/Summary/SN03861>
- ² Constitutional Reform and Governance Act (2010) c. 25. <http://www.legislation.gov.uk/ukpga/2010/25/data.xht?wrap=true>
- ³ European Union (2007) *Treaty on the Functioning of the European Union*. <http://eur-lex.europa.eu/legal-content/EN/TXT/?uri=celex%3A12012E%2FTXT>
- ⁴ European Parliamentary Research Service (2016) *A guide to EU procedures for the conclusion of international trade agreements*. http://www.europarl.europa.eu/RegData/etudes/BRIE/2016/593489/EPRS_BRI%282016%29593489_EN.pdf
- ⁵ European Union (2007) *Treaty on the Functioning of the European Union*. 218(6) <http://eur-lex.europa.eu/legal-content/EN/TXT/?uri=celex%3A12012E%2FTXT>
- ⁶ European Union (2010) *Interinstitutional agreements: Framework agreement on relations between the European Parliament and the European Commission*, §24. <http://eur-lex.europa.eu/LexUriServ/LexUriServ.do?uri=OJ:L:2010:304:0047:0062:EN:PDF>
- ⁷ European Union (2015) European Commission publishes TTIP legal texts as part of transparency initiative. <http://trade.ec.europa.eu/doclib/press/index.cfm?id=1231>
- ⁸ European Union (2015) *Trade for all: Towards a more responsible trade and investment policy*. http://trade.ec.europa.eu/doclib/docs/2015/october/tradoc_153846.pdf
- ⁹ Sven Giegold, "The promised 'transparency' around TTIP has been a sham" *Guardian*, 31 August 2015, <https://www.theguardian.com/commentisfree/2015/aug/31/transparency-ttip-documents-big-business>
- ¹⁰ Corporate Europe Observatory, *Black-out on tobacco's access to EU trade talks an eerie indication of TTIP threat*. 26 August 2015, <https://corporateeurope.org/international-trade/2015/08/black-out-tobaccos-access-eu-trade-talks-eerie-indication-ttip-threat>
- ¹¹ *Decision of the European Ombudsman closing her own-initiative inquiry OI/10/2014/IRA concerning the European Commission*, 6 Jan 2015, <https://www.ombudsman.europa.eu/en/cases/decision.faces/en/58668/html.bookmark>
- ¹² Queen's Speech (21 June 2017). <https://www.gov.uk/government/publications/queens-speech-2017-background-briefing-notes>
- ¹³ For a case in point see the North American Free Trade Agreement, which was controversial throughout the 1990s and has come to the fore again under the Trump Administration.
- ¹⁴ The Paris Agreement (2015). http://unfccc.int/paris_agreement/items/9485.php
- ¹⁵ Harrison, J., (2013) *Human Rights Impact Assessment: Potential and Challenges in the Development Context*. <https://www2.warwick.ac.uk/fac/soc/law/research/centres/chrp-old/projects/humanrightsimpactassessments/trade/>
- ¹⁶ European Union (2016) *Handbook for trade sustainability impact assessment 2nd edition*. http://trade.ec.europa.eu/doclib/docs/2016/april/tradoc_154464.PDF
- ¹⁷ United Nations General Assembly (2011) UN Document A/HRC/19/59/Add.5. http://www.ohchr.org/Documents/HRBodies/HRCouncil/RegularSession/Session19/A-HRC-19-59-Add5_en.pdf
- ¹⁸ Sargeant, J., Runswick, A., Clarke, S (2017) *A Democratic Brexit: Avoiding Constitutional Crisis in Brexit Britain*. <http://www.unlockdemocracy.org/publications/a-democratic-brexit-report>
- ¹⁹ UK Parliament, *Role – International Trade Committee*, <https://www.Parliament.uk/business/committees/committees-a-z/commons-select/international-trade-committee/role/>
- ²⁰ European Parliamentary Research Service (2016) *Role of the US Congress in trade agreements: The 'Fast Track' procedure*. [http://www.europarl.europa.eu/RegData/etudes/IDAN/2016/577999/EPRS_IDA\(2016\)577999_EN.pdf](http://www.europarl.europa.eu/RegData/etudes/IDAN/2016/577999/EPRS_IDA(2016)577999_EN.pdf)
- ²¹ Sargeant, J., Runswick, A., Clarke, S (2017) *A Democratic Brexit: Avoiding Constitutional Crisis in Brexit Britain*. <http://www.unlockdemocracy.org/publications/a-democratic-brexit-report>
- ²² *Transatlantic Trade and Investment Partnership: Scotland: Written question – 31198*, 15 March 2016, <https://www.parliament.uk/business/publications/written-questions-answers-statements/written-question/Commons/2016-03-15/31198/>

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²³ Paquin, S (2013) Federalism and the governance of international trade negotiations in Canada: Comparing CUSFTA with CETA, Canada's Journal of Global Policy Analysis. http://www.ceim.uqam.ca/ecoledete/IMG/pdf/paquin_federalism_and_the_governance_of_international_trade.pdf

²⁴ Global Justice Now (2017) *Big Business Britain: How corporate lobbyists are dominating meetings with trade ministers*. http://www.globaljustice.org.uk/sites/default/files/files/news_article/dit_meetings_briefing_online.pdf

²⁵ United Nations Economic and Social Council (2005) ECE/MP.PP/2005/2/Add.5. <http://www.unece.org/fileadmin/DAM/env/documents/2005/pp/ece/ece.mp.pp.2005.2.add.5.e.pdf>

²⁶ Christopher Ingram & Howard Schneider, *Industry voices dominate the trade advisory system*. 27 Feb 2014, <http://www.washingtonpost.com/wp-srv/special/business/trade-advisory-committees/>

²⁷ Public Citizen (2000) *On Procedures for Obtaining Trade Policy Advice from Non-Governmental Organizations*. <https://www.citizen.org/article/procedures-obtaining-trade-policy-advice-non-governmental-organizations>

²⁸ The Cotonou Agreement (2000). http://www.europarl.europa.eu/intcoop/acp/03_01/pdf/mn3012634_en.pdf

²⁹ The European Centre for Development Policy Management (2001) *A User's Guide for Non-State Actors*. <http://ecdpm.org/wp-content/uploads/cotonou-nsa-guide-chapter-4.pdf>

³⁰ Trommer, S (2013) "Legal Opportunity in Trade Negotiations: International Law, Opportunity Structures and the Political Economy of Trade Agreements", *New Political Economy*, <http://www.tandfonline.com/doi/abs/10.1080/13563467.2012.753520>

³¹ United Nations Economic Commission for Europe, *Promoting Public Participation in International Forums: A Snapshot on the Almaty Guidelines to the Aarhus Convention*. http://www.unece.org/fileadmin/DAM/env/pp/ppif/Leaflet_PPIF_final_EN.pdf

³² *Vienna Convention on the Law of Treaties*, 1969, http://legal.un.org/ilc/texts/instruments/english/conventions/1_1_1969.pdf

³³ Comprehensive Economic and Trade Agreement (2014). https://trade.ec.europa.eu/doclib/docs/2014/september/tradoc_152806.pdf

³⁴ Global Justice Now (2017) *EU accused of trying to push through 'toxic' trade deal ahead of Brexit*. <http://www.globaljustice.org.uk/news/2016/jul/4/eu-accused-trying-push-through-toxic-trade-deal-ahead-brexite>



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