Global Justice Now—Written Evidence (PST0001)

Summary

1. Modern trade deals are about far more than tariffs. They touch on a wide range of public policy areas. As such, politicians must have proper rights to information, and powers to scrutinise, set guidelines, amend and stop trade deals. Given that many far-reaching changes negotiated in trade deals do not require specific implementing legislation, our current process does not give parliament these powers and leaves a serious democratic deficit when it comes to negotiating and finalising trade deals.

2. The minimum we would expect is that parliament would have the same powers currently enjoyed by MEPs. Most important we propose:
   - a parliamentary mandate for the government and consent for negotiations
   - a presumption of transparency around negotiating texts, and full access for MPs
   - an automatic debate and vote on a trade deal before implementation
   - a clear consent and scrutiny role for devolved administrations

3. The Trade Bill provides one of the few chances parliament has to ensure a proper democratic process around trade deals. Unless parliament takes this opportunity, we fear we will miss the chance to set a precedent, and indeed to begin scrutinising trade talks that are already underway. We have been told that there are no future plans for legislation, only a deeply inadequate process for dealing with post-Brexit agreements. This lack of democratic scrutiny is almost bound to create a ‘TTIP-style’ situation, in which a trade deal without sufficient scrutiny leads to a deeply unpopular trade deal.

4. Trade deals are not commercial contracts. We therefore believe a presumption of transparency should apply to such negotiations, with the onus being placed on the government to explain why papers should not be made public. We also believe the government should conduct comprehensive impact assessments including economic, environmental and social impacts and regional impacts, in advance of negotiations. Public consultations are vital but they are meaningless unless the public can see the government’s mandate and impact assessments in advance. Advisory bodies can be important mechanisms for discussion, but the body set up by the Secretary of State is seriously deficient in that it is biased towards business, chosen by the Secretary of State, and lacking in transparency.

5. Our current processes fall well short of processes for consultation and ratification in the EU and the US, and even in individual EU members
states like Denmark, the Netherlands and Finland, where even within the EU significant forms of scrutiny and accountability are provided. In fact under British procedures, MPs would have substantially less power than MEPs over our future trade deal with the EU.

6. Modern trade deals can have a serious impact on devolved powers. As such, we believe that the devolved administrations should also be given a right to debate and vote on trade mandates, a presumption of transparency during negotiations, and a final vote by the assemblies / parliaments on the agreement, before it is signed and ratified.

Introduction

7. Global Justice Now is a democratic social justice organisation working to create a more just and equal world. We used to be the World Development Movement. We are submitting evidence because of our long history of campaigning for trade justice. Most recently this has been around the proposed EU-US Transatlantic Trade & Investment Partnership (TTIP). We were particularly concerned about the extent to which EU negotiation and ratification of trade deals lacked adequate scrutiny and accountability by democratic authorities, and are even more concerned by the absence of an adequate scrutiny and accountability process in the UK.

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

8. Modern trade deals are about far more than tariffs. They touch on a wide range of public policy including: regulation and regulatory coherence, how a state should treat investors, public procurement, intellectual property and online and offline services. As such, modern trade deals affect everyone in society, in multiple ways, and politicians must have the right to information, and powers to scrutinise, set guidelines, amend and stop trade deals.

9. Unfortunately, the Constitutional Reform and Governance Act 2010 (CRAG) doesn’t provide this level of scrutiny. As things stand, members of parliament do not have the right to see or vote on government negotiating objectives, to see the negotiating papers, which would allow them to scrutinise government positions, to read impact assessments or consultations or to amend or stop a trade deal once negotiated and before it is signed. The government has no duty
to produce comprehensive impact assessments or meaningful public consultations. Given the scope of modern trade deals, we believe this amounts to a serious democratic deficit.

10. While some trade deals do require primary implementing legislation, relying on such legislation for democratic scrutiny has severe drawbacks. The first drawback is that many aspects of trade deals that we are most worried about do not require implementing legislation. For instance the deeply controversial Investor State Dispute Settlement system (ISDS), which allows foreign investors to sue governments for treating them unfairly in secret arbitration, does not require primary legislation. Neither does opening up sectors of the economy (e.g. the NHS) to liberalisation. Currently, changing the rules of imported meat production through mutual recognition also doesn’t require such legislation, yet opening up farmers in Britain to competition with meat produced to lower standards overseas is bound to lead to downward pressure on standards here. What’s more, there is no guarantee that primary legislation would take precedence over an already signed international trade agreement. MPs could well find their attempts to object to a section of a signed deal is ineffective. To our knowledge it hasn’t been attempted before. So we can’t rely on implementing legislation to ensure trade deals are accountable to parliament.

11. Even inside the EU, the UK’s processes for scrutinising trade deals is poor compared to other European countries and regions. Other countries (like Denmark and the Netherlands) allow their parliaments to have far greater control of their government’s positions on the European Council. Other regions, like Wallonia, can spend many hours debating the impact of trade deals negotiated at a European level. But in the UK, parliament didn’t even have a debate on the Canadian-EU trade deal known as CETA until the British government had already authorised conclusion of the deal, despite parliamentarians requesting such a debate for over 12 months. Perhaps it is little wonder that the British public don’t feel they have any control over important elements of EU policy. But at least EU deals do receive proper scrutiny, including ratification, by the European parliament. Outside the EU, we will need to develop new rules that at least match the power of the European parliament.

12. For this reason we believe the Trade Bill currently passing through parliament should be amended to give parliament proper powers over trade deals. We understand that the Trade Bill focuses on the replacement of EU external trade deals, in order to provide continuity after Brexit. This has been used as a rationale for why scrutiny and accountability questions are unimportant in the Bill, because in effect these deals will ‘replicate the current situation’. But we reject this
rationale, because these deals will almost certainly change in the course of their ‘duplication’, and parliament should have the right to scrutinise this process. But we also reject it because there are no plans to introduce another piece of trade legislation, despite the government’s promise in the Queen’s Speech that a trade bill would establish a process by which the government would negotiate new post-Brexit trade deals.

13. We urgently need a better process because a number of international trade working groups, fourteen to-date, have already been established to discuss trade. The purpose of these groups is undoubtedly to lay the ground for future trade deals. Yet as things stand, neither MPs nor the public have any right to know what is being discussed, when or with whom. We are regularly finding out that meetings have taken place via the media and parliamentary debate. We find it astonishing that webpages don’t even exist for most of these working groups, and that feedback is not welcome or possible. We have received no proper response to freedom of information requests. Indeed, it appears that a freedom of information (FOI) system is barely functioning in the Department for International Trade. Over the last quarter, 48% of FOI requests to the department were completely rejected, only 27% of requests were met in full. Meanwhile the department holds the record for being the least punctual - 34% of requests were not answered in the permitted time period.

14. It cannot be right that a Secretary of State is able to discuss trade strategy with multiple countries in secret. In these circumstances it is impossible for parliament and the public to scrutinise this work or set the framework for it or guide it in a democratic fashion. This lack of democratic scrutiny is almost bound to create a ‘TTIP-style’ situation, in which a trade deal without sufficient scrutiny and debate leads to a deeply unpopular trade deal. We believe it is vitally important that parliament therefore sets a clear precedent in the Trade Bill for how trade deals should be scrutinised.

What challenges does Brexit pose for Parliament’s consideration of treaties?

15. There is a clear expectation on the part of the government that Brexit will give Britain an independent trade policy. Such powers must be accompanied by a greater degree of parliamentary accountability, given that we will be losing the scrutiny and accountability currently existing at an EU level. Given the explicit focus in the EU referendum campaign on ‘taking back control’ of policy areas including trade, we support a world class process for ensuring democracy, accountability and transparency in trade deals. We are pleased to set out (17-21) a number of proposals for what this would look like. The minimum we would expect is that MPs
would have the powers enjoyed by MEPs and members of the US Congress.

16. Dealing with trade deals at this level will be new for the British parliament, and it will take time to develop knowledge of trade policy. We would like to take this opportunity to raise a number of issues that have been widely seen as problematic in trade deals:

- Trade deals create losers as well as winners. We suggest that the government should be required to legislate for compensation and investment to help those who could lose out as a result of greater competition.
- Investor protection has been a particularly contentious element of recent trade deals, with Investor State Dispute Settlement (ISDS) mechanisms becoming a target of public concern because of the chilling effect they have on government regulation. We strongly urge that these parallel legal processes are not included in trade deals.
- Trade deals should always be subservient to government commitments towards human rights, workers’ rights and environmental protection. We suggest that is clearly written into the trade deal itself. Any such trade agreements should include mechanisms that allow citizens, communities and public interest groups to challenge companies or governments in cases where they consider human rights, labour rights or environmental standards to have been undermined as a result of the trade deal.
- The exclusion of public services in trade deals is a subject of great public concern. We suggest public exclusion clauses are crafted to mimic national security exclusions which we know to be water tight, and that so-called ‘standstill’ and ‘ratchet’ clauses are avoided.
- We propose that intellectual property rules are not extended via trade deals (the so-called TRIPS-plus agenda) as these rules can have a devastating impact on the ability of people to access essential medicines.

**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?**

17. We have worked with other civil society organisations and businesses over the last two years, to examine processes in other countries and to draw up a world-class framework which would allow proper parliamentary oversight of trade policy. This framework is set out below.
18. Assessments and consultations. At the commencement of trade negotiations, the government should conduct independent scoping and impact assessments and make them available to both MPs and the public, as is done in the EU. This should include social, economic, environmental, human rights, labour and gender impacts both across the UK and, where relevant, in developing countries with whom we wish to negotiate an agreement. These findings must be taken into account in making a decision as to whether to go ahead and how the negotiations should be shaped. The government should carry out a public consultation on the potential trade agreement. Efforts must be made to actively reach out and encourage submissions from those who would be directly affected by the potential deal.

19. Mandate. MPs should be able to set a mandate for the government, outlining ‘red lines’ and priorities. The political declaration recently reached with the EU provides a possible model for such a mandate. The government must return to parliament if they want to change this mandate. This gives clear consent from parliament for the trade negotiations and is similar to processes in Denmark and other European countries where member parliaments set a mandate for their government representatives.

20. Scrutiny. During negotiations, negotiating texts should be transparent wherever possible, unless there is a specific and convincing reason why they should remain secret. Even in these circumstances, it should be possible for MPs to see them. This is now common practice in the EU post-TTIP. Many international negotiation processes, such as the UNFCCC, are far more open. During this time, the government should also establish: a parliamentary scrutiny committee and a joint ministerial committee to involve devolved administrations. The government should also establish a civil society consultation body (see 27).

21. Ratification and review. Once concluded, parliament should have an automatic debate and vote on a trade agreement before it is implemented, via super-affirmative procedure. Of course, if implementing legislation is required, this must be passed separately, but as already stated, on its own this is a poor form of accountability. We also propose that trade deals include review clauses for the agreement to be assessed every five years and reviewed by parliament, which should have the power to propose changes or even withdraw from deals in extreme circumstances.

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?
22. Broadly speaking, the Miller case was an important challenge to the use of royal prerogative in our political system. Although trade deals are unlikely to contain specific details about citizenship, they certainly impinge greatly on areas of public policy which should rightly be subject to parliamentary scrutiny and vote and public debate.

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

**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?**

23. We’re not expert in the powers included in the many different sorts of treaties which currently fall under CRAG procedure, but in so far as a treaty impinges on public policy areas which would normally accrue to parliament, we would expect better parliamentary scrutiny and power than CRAG allows. Many such treaties would traditionally have fallen under the jurisdiction of the EU institutions, which were overseen in our own parliament by the European Scrutiny Committee. But this committee only provided a layer of additional scrutiny to that already being exercised by the European parliament, and in any case was much less than other countries parliamentary systems allow. We therefore believe that substantially beefed up scrutiny and accountability mechanisms should be created post-Brexit to ensure an effective check on executive power as regards most treaties. We see no reason why government mandates, objectives and negotiating positions should not receive, full and on-going scrutiny, given that treaties are not commercial contracts but usually contain policy prescriptions. In the EU, such treaties receive input from a wide range of parliamentary expertise, not to mention the production of comprehensive impact assessments and public consultation. We further believe that all treaties should require the approval of MPs.

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

24. We believe the government should provide parliament with:
- a mandate for debate and approval, including returning to parliament if and when the mandate changes
- full negotiating texts as the negotiations proceed, with a clear presumption of transparency (i.e. all documents will be made available to parliamentarians and to the public automatically unless a specific case is made to withhold them, which must be listed and reported)
- impact assessments including economic, environmental and social impacts and regional impacts, in advance of negotiations
commencing, and impacts on the country we are proposing to trade with, when a poor human rights situation or simply low income mean that the country itself might struggle to produce its own objective assessment

- public consultation submissions and government responses to those consultations
- updates from ministers from time to time on the progress of negotiations

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

25. In July the Secretary of State for International Trade proposed a procedure for consultation with interested parties and the public at large. While we appreciate the length of time that will be given to these consultations, and the existence of a stakeholder group to advise on trade issues, we believe the process is still inadequate for the following reasons.

26. A consultation is meaningless unless the public can see the government’s mandate and impact assessments in advance. Asking whether or not we should conclude a trade deal with the USA, for instance, could entail a very wide variety of relationships. Without any further description of what the government hopes to achieve or what the detrimental side effects could be, the consultation is unlikely to produce much useful information.

27. Advisory bodies can be important mechanisms for on-going discussions, but the body set up by the Secretary of State is seriously deficient in that it: is biased towards business, is chosen by the Secretary of State, does not contain key civil society groups (for example, we understand that the major civil society coordination group on trade, the Trade Justice Movement has been rejected from a position on the body) and lacks transparency, given that members of the body must sign confidentially agreements.

28. The current process falls far short of that in the EU and the US. We believe any process to engage stakeholders must be guided by the following principles: transparency, comprehensive explorations of risks and opportunities, a balanced engagement with stakeholders not beholden to one set of interests. This benefits not only stakeholders but the quality and popularity of any resulting trade agreement. The alternative is not only bad for democratic engagement, it also endangers the potential to reach a trade deal, because the process is bound to be driven by rumour and suspicion. In 2015, the EU Ombudsman, Emily O’Reilly produced a report looking at what was going wrong with the negotiations on the Transatlantic Trade & Pacific
Partnership (TTIP). Despite much greater transparency and scrutiny processes than we have in the UK, the Ombudsman found that:

"Citizens are increasingly aware that TTIP will produce rules that impact on them in a manner analogous to how legislation impacts them... citizens expect and demand the right to know and to participate when it comes to TTIP... The impact [of transparency] is deemed to be overwhelmingly positive, ranging from enhanced legitimacy, heightened trust, an educated debate, and a better agreement in substance."

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

29. Most of our examples in this submission come from the EU and its member states, as the obvious points of comparison with post-Brexit Britain. The EU has an extensive process for negotiating and ratifying trade deals, which has evolved considerably in recent years, though it still regarded as inadequate by civil society and the EU Ombudsman. This process includes:
   - The Commission holding a public consultation and scoping exercise
   - The Council setting a mandate and the Commission having a requirement to keep parliament informed immediately and fully at all stages and to 'take [their views] into account'.
   - MEPs having the right to see all negotiating documents and increasing limits on the ability of the Commission to restrict access to texts.
   - The Parliament and Council giving affirmative consent.
   - A formal dialogue with civil society organisations and businesses. In TTIP this included day long events which happened at each negotiating round, where stakeholders and officials presented updates and concerns to each other.
   - For some trade agreements, all recognised parliaments must ratify too.

30. In Denmark, the Government is required to get a mandate from a parliamentary committee 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.

31. In the USA, the administration must publish its mandate and impact assessments. Congress is guaranteed an affirmative vote on trade agreements even when special ‘fast track’ authority is granted. Without such authority, it is also able to amend deals, and indeed deals have
been passed into effect without fast track authority. Public consultation is mandatory with specific guidelines for how to carry it out.

32. including a very large citizen advisory panel, with access to confidential information.

33. In intergovernmental organisations, negotiating agreements of no less sensitivity or importance than trade deals, extensive transparency is the norm, for example in the World Health Organisation and the World Intellectual Property Organisation. In such organisations it is routine for draft negotiation documents to be released throughout the talks, and for meetings to be open to accredited observers and event broadcast live on websites currently.

34. It is important to note that under the CRAG, British parliamentarians would have substantially less power than MEPs, and, depending on the content of the trade deal, may well have less power than deputies in the Wallonian assembly. We would suggest this is somewhat ironic given the desire of many leave campaigners to ‘take back control’.

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

35. While trade policy itself is reserved, many areas of policy that trade deals may impact on are devolved, including: agriculture, education, human rights, procurement, local government and healthcare. Modern trade deals can have a serious impact on these areas of devolved policy and more broadly on the powers of the Scottish parliament and Welsh and NI assemblies. For instance, a trade deal would allow the UK government to list, or fail to list, devolved public service provision or regulation in its liberalisation or regulatory coherence chapters. What’s more, investor protection chapters would cover devolved areas of responsibility. Yet when it comes to the negotiation and ratification of a trade deal, the devolved administrations currently have no formal powers. This means trade deals can be used to override devolved powers.

36. We believe that the devolved administrations should also be given a consent process, at least in so far as their powers will be affected. This should include as a minimum: a right to debate and vote on the mandate, a presumption of transparency during negotiations so they can scrutinise the talks, and a final vote of the assemblies / parliaments on the agreement at the end.

37. There are clear precedents for such an approach. 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, all
regional governments are guaranteed a vote on these agreements. In Canada, the federal Government has the full power to conclude trade agreements but cannot oblige provincial authorities to implement these agreements. And during the recent CETA negotiations, provincial governments were involved in the negotiations as part of the negotiating team.

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