ClientEarth, Woodland Trust and Friends of the Earth England, Wales & Northern Ireland—Written Evidence (PST0005)

About ClientEarth, Woodland Trust and Friends of the Earth England, Wales and Northern Ireland:

1. ClientEarth is a non-profit environmental law organisation based in London, Brussels and Warsaw. Using the power of the law, ClientEarth develops legal strategies and tools to address major environmental issues. Woodland Trust is the country’s largest woodland conservation charity with over 500,000 members and supporters and more than 1,000 sites, covering over 26,000 hectares, all over the UK. Friends of the Earth is the biggest grassroots environmental campaigning community in the world with over 2 million members and supporters worldwide and 5000 local activist groups, covering 75 countries. While together we recognise the unique moment that Brexit offers for the UK to lead on global action to protect and enhance our natural world, we are also acutely aware of the potential for international agreements to negatively impact the environment both directly and indirectly.

2. Our work includes ensuring that current environmental protections and obligations are effectively upheld in the UK after exit day, including through monitoring the development of systems aimed at securing the UK’s future compliance with international environmental agreements, advocating for a transparent and sustainable trade policy and ensuring that future treaty negotiation and ratification includes direct consideration of environmental needs and ambitions.

Summary:

3. We welcome the opportunity to submit evidence to this very timely inquiry. As the UK leaves the EU, the limits and deficiencies of our current system of Parliamentary scrutiny will be thrown into sharp relief – at the same time as the number and range of treaties requiring this scrutiny will rise exponentially.

4. Wide ranging engagement in the negotiation of future treaties will be vital to ensuring that a post-Brexit UK benefits from all available expertise to ensure that environmental action is both ambitious and practical. Conversely, opaque, rushed or inappropriate scrutiny arrangements will leave us vulnerable to designing and entering into arrangements that, at best fail to deliver on the Governments’ stated ambition to leave the environment in a better state for the next generation – and at worst present serious challenges to current environmental protections.

5. Effective scrutiny is particularly important for the environment because so many forms of international agreement have the potential to have a great impact on the UK’s domestic policy space and have implications for issues such as food standards and environmental regulation. Provisions in trade agreements can make it more difficult for governments to regulate in the public interest for the sake of promoting regulatory convergence (often referred to as regulatory chill).
6. However, the UK’s existing scrutiny system is inadequate. The limited opportunities for scrutiny offered through CRAG require substantial and urgent overhaul in order to improve transparency, front-load scrutiny and ensure that the environment is not only sufficiently protected but that the UK continues to develop global leadership in securing thriving nature and a healthy climate around the world after leaving the EU.

7. We urge the government to set out a clear programme of enhancements to scrutiny fit for purpose in a post-Brexit world. To ensure that future treaty actions support a healthy democracy and a flourishing environment, scrutiny both inside and outside of parliament must be front-loaded and enhanced across the process.

Key recommendations:

- **Scrutiny must be enhanced across the treaty negotiation process** (from the pre-negotiation stage through to ratification) including through the development of mechanisms for meaningful parliamentary and civil society engagement.

- **There must be a presumption of transparency** for all documents related to negotiations – ie requiring that all documents are made public in a timely fashion unless there is a specific requirement for confidentiality. Parliamentarians should have access to all documents, including restricted ones, and be required to scrutinise them in a Parliamentary committee.

- **Engagement with Parliament must commence at the earliest possible stage of proposed treaty negotiations** so that it has a meaningful opportunity to debate and shape a negotiating mandate for each individual treaty. The process for this engagement must include a vote on the floor of each house and be enshrined in primary legislation.

- **Overarching mandates that guide future negotiations must be established in primary legislation.** In a trade context, this requires a new trade bill that delivers the requirements for effective scrutiny laid out above. A similar approach should be adopted for other forms of treaty agreement. These mandates must be developed in consultation with the public and civil society.

- **The Constitutional Reform and Governance Act 2010 (CRAG) is not fit for purpose and should be amended to:**
  - cover all types of international treaty requiring ratification where alternative, stronger scrutiny requirements do not already exist;
  - include a statutory requirement for adequate parliamentary time to be allocated for scrutiny;
  - provide an expanded role for devolved legislatures; and
  - allow for meaningful discussion and challenge of treaty terms and subsequent renegotiation or non-ratification of treaties – for example in the case of possible negative environmental consequences.

- **Parliament must be guaranteed a final up or down vote** on whether the Government should ratify treaties after negotiations are complete.

- **Treaties must be subject to suspension or termination** in the event that thorough evaluations demonstrate adverse effects and adequate mitigation measures are not implemented. Parliament should have a role in this process.
• Selected Parliamentary Committees should be able to call for a ‘Scrutiny Reserve’ that prevents a treaty from being ratified until specified scrutiny procedures (such as an environmental impact assessment) are completed.

• Devolved nations must be given a meaningful role throughout the process of treaty negotiation, including via a Joint Ministerial Committee on International Trade and representation as observers in delegations.

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?

2) 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. There is cross party agreement that effective scrutiny is ‘of vital importance’ in holding the Government to account, developing effective legislation and guarding against unintended legislative consequences (particularly vital in the case of cross-cutting issues such as the environment). Where international relations and co-operation are at stake, this scrutiny becomes particularly vital – something recognised by the former Brexit Secretary Dominic Raab in his introduction of the Withdrawal Agreement white paper in July 2018. Raab alluded to “the importance of maximum scrutiny [of the Withdrawal Agreement] in this House”¹ as a rationale for Government’s publication of a white paper before the culmination of UK-EU negotiations. Yet current scrutiny arrangements are severely lacking, neither holding Government to account nor ensuring agreements support the best possible outcomes for the environment or wider society.

9. Effective scrutiny should be a front-loaded requirement. Yet there is currently no general requirement or mechanism for Parliamentary scrutiny of non-EU treaties until negotiations have concluded. The one exception to this approach is the ‘meaningful vote’ on the EU-UK withdrawal agreement, afforded to Parliament through the European Union (Withdrawal) Act 2018. It is likely that subsequent treaties will, in a similar way, have a major effect on domestic law and policy. Indeed, we see this already in the increasingly broad scope of provisions contained within trade agreements (discussed further below). Future treaties will require a substantially improved approach. As Jeremy Corbyn said in 2014, “We still have some way to go where treaties and the use of ministerial power and the prime ministerial royal prerogative are concerned, and there should be far greater scrutiny.”²

10. In fact, it is interesting to note that the European Union Act 2011 responded directly to a perception that opportunities for the domestic scrutiny of treaties relating to UK membership of the EU were lacking – by requiring public referenda to take place in the event of further powers being conferred upon the EU by member states including the UK. At the time, the then

Minister of State for Europe, David Lidington, clarified “I want to put this beyond any doubt: The Bill will mean that any treaty change at all, whether using the ordinary procedure for amending a treaty or the simplified revision procedure, will have to be approved by primary legislation. This is a vitally needed improvement.” The Minister’s sentiment here is laudable – but this change had no bearing on the scrutiny of any future international treaties.

11. The reliance of our current system on the Constitutional Reform and Governance Act 2010 (CRAG) is concerning. CRAG does not provide for any formal front-loaded procedures to involve Parliament in mandate-setting or the negotiation of treaties – meaning that there is a clear and significant democratic deficit from the very start of the process. There is also no opportunity to amend agreed text. It is crucial that Parliament is engaged throughout: from the development of negotiation mandates through to facilitation and implementation of the final text. The lack of front-loaded engagement the processes and powers provided for in CRAG means that it alone does not equate to robust scrutiny.

12. We are concerned that the 21 day sitting period is both too short and at too late a stage to secure thorough and effective scrutiny of international treaties. As reflected in evidence from the Bar Council and the Commons Public Administration Select Committee to the Joint Committee on the Draft Constitutional Renewal Bill, 21 days is insufficient for adequate scrutiny by Parliament and, where appropriate, the conduct of inquiries by relevant select committees. CRAG makes provision for Ministers to extend the 21 day sitting period to allow a committee to conduct an inquiry but evidence suggests that the Government is generally reluctant to use this power.

13. Following the 21 day period Parliament’s ability to oppose ratification is limited – akin more to indefinite obstruction than having a ‘final say’ to reject a treaty. There is also often huge political pressure to support ratification. The effectiveness of even this process is questionable: since its enactment in 2010, neither House has used the CRAG process to block ratification.

14. Further, the scope of CRAG is limited in a number of significant ways. It:
   - excludes certain types of international treaty, including MOUs and other treaties that do not require ratification, along with ‘exceptional cases’ – the definition of which is down to the Government, not Parliament;
   - provides a very limited role for the devolved legislatures – there is no legal requirement for the UK Government to consult the devolved executives or legislatures on treaties; and

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4 CRAG, s21.
6 Many acts adopted by treaty bodies are not subject to ratification, but enter into force automatically or through a tacit acceptance procedure. For example, decisions adopted under article 13 of the OSPAR Convention may become binding through a procedure which permits States to opt out but does not require any further action to signify consent to be bound - so there would be no ratification as defined by s 25 CRAG. Equally, for some treaties it is the signature, not the ratification, which binds the Government to the terms and aims of the agreement.
makes it difficult to pass a motion against a proposed treaty ratification, due to the time
required for Parliamentary debate and agreement not being built into Parliamentary
schedules without support from committees or the opposition.

15. In failing to empower Parliament with a positive ability to engage throughout the process, the
CRAG process is unsatisfactory. In these politically and constitutionally febrile times, it is even
more crucial that Parliament has a meaningful and robust role in scrutinising and approving
proposed international treaties. As it currently stands, MPs will have less of a say on any new
EU-UK trade deal than MEPs in the European Parliament and less influence on a potential US-
UK deal than the US Congress. The CRAG process should be updated to reflect this need.

16. We recognise that there have been various barriers to the adoption of a system of parliamentary
scrutiny in relation to treaty negotiations in the past. The variation in context, process and
potential outcome of treaties has often been cited as such a barrier. For example, in 2000 the
Wakeham Report on the Reform of the House of Lords agreed with a Foreign and
Commonwealth Office memorandum that “the huge number and variety of treaties, and the
political and diplomatic circumstances in which they are negotiated, would preclude a general
commitment [to compulsory pre-conclusion scrutiny]”.7 Similarly, in 2008 the Labour
Government suggested that a formal mechanism for scrutinising treaties before signature was
not practicable “given the diverse circumstances and timeframes in which treaty negotiations
are conducted”.8 We acknowledge these concerns, but feel that these factors in fact
demonstrate an increased need for commitments to robust scrutiny requirements. International
treaties are significant, their scope sprawling, and their impacts felt for generations. Given this,
it is even more vital that negotiations and agreement texts are transparent, and that Parliament
is given an adequate role in scrutinising the treaty terms.

17. Sir Michael Wood, former legal adviser to the FCO, suggested in 2007 that parliamentary
scrutiny would be difficult or impossible given the secrecy surrounding negotiations.9
Similarly, in relation to Brexit, the Government has maintained that disclosing its negotiating
position would be damaging, and that parliamentarians should not ‘micromanage’ the process
of leaving the EU. While we acknowledge the need for discretion in the development of
treaties and sensitivity around the UK’s departure from the EU – including a need for
discretion in relation to the Government’s negotiating position – prudence around the content
of proposed agreements and ongoing negotiations need not preclude sensitive and appropriate
scrutiny. The Government must also recognise the significance of the terms of the future UK-
EU relationship and the need to ensure that it is agreed with the level of transparency and
scrutiny appropriate within a democracy.

18. The existing EU process for negotiating treaties includes more stringent requirements for
transparency and accountability than the current UK procedure offers alone, including through

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7 Royal Commission on the Reform of the House of Lords (the Wakeham Commission), A House for the Future, Cm 4534,
the involvement of Member States’ representatives in negotiations through EU institutions. The EU encourages national governments to decide how to adequately engage with their own legislatures, and the involvement of national Parliaments has increased incrementally in many Member States in recent years. This is demonstrated in discussions around the EU-Canada Comprehensive Economic and Trade Agreement (CETA); the Transatlantic Trade and Investment Partnership (TTIP), the Dutch referendum on the EU-Ukraine Association Agreement and the temporary refusal of the government of Wallonia to sign CETA in October 2016. However, the actual role of the UK Parliament is left to the Government to set – and is therefore limited to the inadequate procedure provided for in CRAG.

19. Gains in UK scrutiny and transparency arrangements over the past 20 years have focused on engagement with EU-level decision making – for example, ensuring that the transfer of powers to EU level, commitments to further funding and new EU laws are subject to parliamentary and/or public scrutiny. Leaving the EU will make many of these gains irrelevant.

20. After the UK’s departure from the EU, the oversight and scrutiny of treaty negotiations and approval of final texts by UK representatives through the EU institutions will cease. This will result in a reduction of scrutiny of treaties that affect the UK, leaving us in danger of perpetuating an opaque system without the checks and balances previously provided by the EU. The UK Government should therefore both replicate and improve upon the processes currently employed by EU institutions during mandate-setting and negotiation phases and ensure that EU best practice in scrutinising the implementation of treaties ensure that the UK’s future procedures provide more, not less, opportunities for Parliamentary involvement.

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

21. The UK’s departure from the EU poses several challenges for Parliament’s consideration of international treaties. These challenges arise as a result of four specific but related issues (the latter two of which are explored in response to question 1 above):

- Brexit means that the UK will need to agree many new treaties, particularly trade agreements;
- some of these treaties will be of a type with which the UK has not needed to directly deal for a considerable period of time owing to its EU membership;
- existing procedures for approval of agreed treaties (i.e. CRAG) are inadequate; and
- existing procedures for scrutiny of the mandating and negotiation of future treaties are even weaker, partly because the EU has historically performed these pre-ratification functions on the UK’s behalf.

Volume of treaties

22. The impact of the UK’s departure from the EU will initially be particularly significant for trade deals – a subset of international treaties. It is likely that (pending the outcome of ongoing negotiations) trade policy will return to the UK Government’s competence. The UK is currently a party to the EU’s trade agreements with third countries by virtue of its EU membership. The Government’s policy objective is to “provide a technical replication of the
conditions that exist today, so there is no disruption at the point at which we leave the European Union”.10 The Trade Bill currently going through Parliament makes provision for the ‘rollover’ of these existing free trade agreements (FTAs) with the aim that, following exit, the UK’s relationships with these third countries will continue. The Government’s intention is to “establish a UK trade agreement with each partner country”.11 The EU has 35 agreements fully in place and many more that are partly in place, pending, being updated and being negotiated.12 This is a significant workload and presents a particular challenge for scrutiny.

23. Additionally, although the Government’s intention is to achieve consistency with existing arrangements, the Government has recognised that “the new UK-third country agreements that are implemented…will be legally distinct from the EU-third country agreements on which they are based. It may also be necessary to substantively amend the text of the previous EU agreements, for example so that the new agreements can work in a UK legal context.”13 It is possible that the third countries with which the UK seeks to negotiate these rolled-over agreements will require significant amendment to the text of the agreements before entering into them.

24. In addition, the Government intends to commence negotiations on new international trade agreements.14 These will be both with the EU and with other countries, and on a wide range of topics including aviation, fisheries and nuclear safety, as well as trade.

25. As a result, the sheer volume of trade agreements that Parliament will need to scrutinise will be very high. Under current arrangements, all of these agreements (i.e. the ‘rolled-over’ UK-third country agreements and the ‘new’ agreements) will be subject to the CRAG scrutiny procedure.15 There is a very real risk that this is, in practice, weakened even further as a result of the inevitable squeeze on Parliamentary time and pressure to get new deals agreed in order to ensure as much consistency as possible.

**Unfamiliar treaty types**

26. The EU has exclusive competence for trade outside of the Union. This means that for the past 40 years, the EU – rather than the UK – has been responsible for negotiating and concluding the international trade agreements to which the UK is a party. The Government’s anticipated approach to trade post-Brexit will require it to negotiate, and Parliament to scrutinise, agreements of a type that have not been within the UK’s competence for some time. Coupled with the increasingly broad scope of trade agreements and significant possible environmental impacts, this context means that it is even more crucial that scrutiny procedures allow sufficient

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10 Oral evidence taken before the International Trade Committee on 1 November 2017, HC (2017–19) 436-ii, Q 160 [Rt Hon Dr Liam Fox MP].
11 Trade Bill Explanatory Notes (November 2017), para 38.
13 Trade Bill Explanatory Notes (November 2017), para 53.
14 See, for instance, Department for International Trade, ‘Preparing our future UK trade policy’ (9 October 2017).
15 Trade Bill Explanatory Notes (November 2017), para 50.
time for thorough analysis of proposed agreements, debate on their merits and, ultimately, a meaningful role for Parliament in the final approval of each deal.

27. There is a real need to enhance Parliament’s role in the scrutiny of treaties. Our recommendations for ensuring an enhanced role for Parliament in the scrutiny of international treaties are explored in the following answer.

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?

28. The relationship between international law and domestic law and policy is not straightforward. There are a range of factors (including legal, economic, political and social) that can affect the influence international treaty provisions have within signatory states. However, it is clear that international treaties have the potential to create major and long-lasting changes to domestic law and policy – these effects have the potential both to benefit and jeopardise environmental protections.

29. For instance, the ratification of international treaties is often a catalyst for the introduction of new progressive domestic legislation. One example is the UK Post-2010 Biodiversity Framework that was introduced in part in response to the Convention on Biodiversity’s Strategic Plan for Biodiversity 2011-2020. Similarly, the UK has given effect to the Convention on International Trade in Endangered Species of Wild Fauna and Flora (CITES) through domestic legislation that makes provision for the enforcement of relevant EU regulation.

30. However, the terms of international treaties can also threaten the health of our natural world. For instance, international trade and investment agreements often contain investor-state dispute settlement (ISDS) provisions. These enable transnational companies to sue national governments where it is alleged that domestic regulation adversely affects the company’s ability to operate in the jurisdiction. This can have a chilling effect on regulations intended to protect the environment. ISDS requires no implementing legislation, so effective parliamentary scrutiny of the mechanism requires effective scrutiny of the entire treaty, and the power for parliament to refuse to approve any deals containing ISDS.

31. Given the scope for international treaties’ influence on domestic law and policy, Parliament must have a substantial role in scrutinising the objectives, negotiations and terms of these treaties throughout their development and adoption as well as in relation to subsequent treaty actions. Both Parliament and civil society should have access to mechanisms to raise concerns about the enforcement of treaty terms by all parties, and the ability to hold the UK Government to treaty commitments through structures including the planned environmental watchdog.
32. FTAs are one form of international treaty that can have particularly significant domestic impacts. As discussed in response to question 2 above, the Government will seek to renegotiate existing EU agreements and negotiate brand new trade deals. FTAs are increasingly complex and powerful tools of international law: their scope is often very broad and they create binding obligations in important policy areas well beyond trade.

33. Given this, we welcome the Government’s commitments to “ensure that the process of negotiating and implementing trade deals is transparent, efficient and effective”. However, indications that the negotiation process and negotiating positions will remain private in upcoming negotiations with the US, Australia and New Zealand are deeply concerning and inconsistent with the Government’s commitments.

34. Negotiations must be guided by a clear and modern legal framework established through consultation with stakeholders, members of the public and Parliament. It is crucial that the processes for mandating, negotiation, adoption and implementation of future FTAs are consulted on, and legislated for, as part of the Government’s development of a comprehensive and binding overarching trade policy.

35. This policy must set out both substantive and procedural safeguards for the negotiation of trade agreements. The procedural safeguards should include:
   - a meaningful role for Parliament at the earliest stage of development of proposed trade agreements to allow it to influence the development of the negotiation mandate;
   - a presumption of transparency for all documents related to negotiations – requiring that all documents are made public in a timely fashion unless there is a specific requirement for confidentiality. Parliamentarians should have access to all documents, including restricted ones.
   - a requirement that Parliament is updated on an ongoing basis during the negotiations, in line with best practice;
   - a meaningful role for Parliament in the process for suspending or terminating an FTA in the event that impact assessments demonstrate adverse effects and adequate mitigation measures are not implemented;
   - opportunities for civil society to raise concerns around the implementation of treaties to hold Government to account or engage in the process of reviewing adverse effects of FTAs;
   - the ability for selected relevant Parliamentary Committees to require that FTAs are held in a ‘Scrutiny Reserve’ pending further research or outcomes of the impact assessment (meaning that a treaty held in reserve cannot be ratified until specified scrutiny procedures have been completed); and
   - a guarantee that Parliament has a final up or down vote on the ratification of FTAs after negotiations are complete.

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?

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

36. The Government should give Parliament the possibility to examine treaty actions at the earliest possible stage to ensure adequate scrutiny. Parliamentary consent must be a pre-condition for the Government’s commencement of negotiations. As noted by Michael Bowman, early Parliamentary involvement can minimise the risk of disagreement between Parliament and Government when it comes to ratification.17

37. We recognise the need to balance prudent discretion of negotiations with adequate transparency, consultation and scrutiny procedures. However, the need for discretion must not be used to inappropriately restrict Parliament’s important role in scrutinising international treaties. Government must regularly report to and respond to questions from Parliament on the progress and content of negotiations.

Joint Committee on Treaties

38. A Parliamentary treaties scrutiny committee could provide a valuable role in sifting proposed treaties to determine the appropriate level of Parliamentary scrutiny. In its 2008 report, the Joint Committee on the Draft Constitutional Renewal Bill recommended the establishment of a Joint Committee on Treaties (JCT).18 The JCT’s envisaged functions included: sifting treaties to establish their significance; assessing the need to extend the 21 day sitting period, and supporting existing select committees in their scrutiny of treaties. Given the current context, including the significant volume of new trade agreements into which the UK anticipates entering, we welcome the establishment of a similar committee to ease Parliamentary pressures. Other committees with an interest in policy areas affected by treaties could also be involved in the process, learning from and building on the role of the EU’s International Trade Committee.

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

39. There is currently no requirement for the Government to consult the public and civil society. However, given the significant impact that international treaties can have on domestic law and

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policy, it is crucial that stakeholders including members of the public and civil society organisations are involved with the processes of treaty negotiation and scrutiny.

40. The TTIP negotiations between the EU and the US were heavily criticised for their lack of transparency. This led to extensive public distrust. Transparency is crucial if the Government is to secure public support for international treaties. However, in recent months, the Department for International Trade has fully answered just 27% of freedom of information requests received and have responded late in 34% of cases19. This sets a dangerous precedent and is reason for concern.

41. There is considerable scope to improve the Government’s transparency in relation to the negotiation of international treaties. Since there is no requirement for Parliament to scrutinise the text of trade agreements or to consult the public, the texts of agreements are often kept entirely secret until ratification. Although the EU procedure for negotiating agreements has many flaws, it consists of greater transparency and accountability requirements than the UK procedure. Following the criticism during the TTIP negotiations, the EU has worked to improve transparency requirements20, while through the EU’s ‘Trade for All’ strategy it has committed to making public final trade agreement texts in advance of the legal revision being completed.21 The UK should learn from this approach and apply it across future treaty processes.

42. To increase public trust and ensure agreements enjoy public support, Government must also develop a procedure to carry out mandatory and meaningful public and civil society consultations and opportunities to input throughout negotiations. These public consultations should address issues of public interest such as environmental standards, and civil society must be able to participate to the same degree as business stakeholders. One model to build upon might be that of the US, where public consultations must be carried out for 90 days prior to the initiation of trade negotiations.22

43. In a post-Brexit Britain looking to agree a number of FTAs it will be particularly important that the Government oversees a process of engagement with civil society to develop a binding and comprehensive framework for the UK’s trade strategy, rather than relying on engagement on FTA content on a case-by-case basis. The UK should develop meaningful mechanisms including civil society representatives as observers in official UK trade delegations. In the development of these delegations, the Government must be careful to avoid domination by business stakeholders.

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20 EU Ombudsman report into transparency in TTIP – http://europa.eu/!Bf49nN.
Impact assessments

44. In addition to public consultations, the UK should also perform extensive and thorough environmental impact assessments that assess in detail how a proposed agreement may affect the environment. These impacts will be diverse and sometimes subtle. Some of the more obvious issues include climate change (including how the agreement will affect greenhouse gas emissions and regulatory co-operation in relation to climate change policies) and land use, ecosystems and biodiversity (including the impact of increased production induced by the agreement).

45. Evidence suggests that, at least in relation to biodiversity and land use impacts, there is considerable room for improvement on the EU’s current system for sustainability impact assessment. The UK should endeavour to develop a far more sophisticated and nuanced approach. This should, amongst other things, translate projected changes in production and consumption into consequences for patterns of land use and management (both domestically and overseas) and account for the associated impacts on the natural environment.

46. FTA assessments must be developed with input from across Government departments and the devolved administrations. They should analyse how the proposed agreement will affect the environment that falls within the jurisdiction of the parties as well as in other relevant countries. In addition, they must include consideration of global environmental impacts, enabling assessment of the international sustainability footprint of the UK’s trade activities. Where necessary, adequate mitigation measures consistent with the mitigation hierarchy must be proposed, agreed and, where appropriate, implemented before negotiations can progress. Impact assessments should consider the potential for regulatory chill.

47. Lastly, impact assessments should be regularly updated to reflect the effects of the negotiated terms. In the EU, the European Commission has set up an expert group of national experts that meets twice a year and consists of environmental experts. The group is tasked with advising the Commission on how the impact assessments are conducted, the preparation of legislative proposals and policy initiatives and co-ordination with Member States and stakeholders. The UK could set up a similar group to ensure that reviews the effectiveness of the assessments to reflect the experience gained as well as changes in legislation and policy.

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

48. It is clear that the UK’s current system for Parliamentary scrutiny of treaties is inadequate. A ‘perfect’ model for parliamentary scrutiny of international treaties does not currently exist in any jurisdiction. However, many jurisdictions do give their institutions a more robust role than the UK benefits from. This is the case even in some ‘dualist’ states where the legislature must actively incorporate provisions of international treaties into domestic legislation before they

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can form a part of domestic law, as in the UK. Indeed, there are various examples of good practice from which the UK could learn and upon which the UK could build.

**International**

1. **Transparency**: The UK could learn from the example of the UN Framework Convention on Climate Change, which publishes draft texts and parties’ submissions before negotiations commence. This transparency enabled governments to increase their levels of ambition rather than hampering negotiations.²⁴

**Australia**

2. **Scrutiny during negotiations**: In Australia the Joint Standing Committee on Treaties²⁵ is able to inquire into and report on matters arising from treaties and proposed treaty actions and raise any question relating to a treaty or other international instrument, whether or not it has been negotiated to completion.

3. **Scrutiny and ratification of agreed treaties**: The Joint Standing Committee on Treaties is able to make non-binding recommendations against ratification.

**Denmark**

4. **Consultation and transparency during negotiations**: Ministers introducing non-EU treaties are required to consult with the Parliament’s Foreign Policy Committee on all matters of major importance to foreign policy and are required to respond to questions received. The Danish Parliament’s European Affairs Committee also requires that the executive get a mandate prior to developing positions in the European Council²⁶.

**The EU**

5. **Transparency**: After criticism around the TTIP negotiations, the EU improved its transparency process throughout the negotiations including by making more negotiation texts public, committing to disclose negotiating mandates immediately after their adoption and making public final trade agreement texts in advance of the legal revision being completed. All MEPs are also able to access confidential texts in a secure reading room.²⁷ Although there are still many flaws in the EU’s processes, the UK should take the existing EU transparency

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requirements as a baseline to ensure the democratic legitimacy of future international treaty agreements.

6. **Civil society/public engagement**: In terms of civil society engagement, DG Trade’s Civil Society Dialogue provides a mechanism, for regular, structured meetings to discuss trade policy issues. Meetings are recorded and web-streamed, increasing accessibility and transparency. However, the dialogue is largely one way and there is little opportunity for civil society to present their ideas or for detailed discussion between government and non-government representatives. The EU’s consultations are also often targeted towards corporate stakeholders and the questions offer limited scope to address environmental concerns. The UK could improve upon this model by outlining an open, structured process for engagement between civil society and government departments responsible for trade policy and ensuring that environmental concerns are built into the discussion framework.

7. During the Economic Partnership negotiations with the EU, the Economic Community of West African States (ECOWAS) took this one step further by including private sector and civil society representatives in its negotiating team. This gave civil society actors the opportunity to put forward alternative market access schemes that offered better development opportunities of West African countries.

8. **Pre-negotiation scrutiny and public participation**: The EU treaty-making process makes provisions for extensive engagement with relevant committees and information sharing between organisations providing a valuable example from which the UK could learn. Relevant committees of the European Parliament can decide to draw up a report or otherwise monitor the preparatory phase when the European Commission intends to open negotiations on the conclusion, renewal or amendment of an international agreement. The European Parliament may also ask the Council not to authorise the opening of negotiations until Parliament has stated its position on the proposed negotiating mandate. Furthermore, Parliament may seek an opinion from the European Court of Justice on the compatibility of an international agreement with the Treaties.

9. In addition, before commencing negotiations, the European Commission conducts a public consultation and scoping exercise and makes recommendations to the European Council based on its findings. At this stage, the Council decides the negotiation mandate, including the general objectives.

10. **Scrutiny during negotiations**: The European Commission prepares, negotiates and proposes the EU’s international trade agreements. It is required to ensure that the European Parliament is “immediately and fully informed at all stages”. During negotiations, opinions from other EU parliamentary committees (such as the Foreign Affairs Committee and the Committee on International Trade) are taken into account, giving Members of the European Parliament an opportunity to influence the trade agreements.

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28 Treaty on the Functioning of the European Union, Article 218(10).
11. **Scrutiny and ratification of agreed treaties**: The current EU process involves the Commission laying out formal proposals for adoption to the European Council, and the Council determining if it is happy to sign the agreement. The agreement is then transmitted to the European Parliament for its consent. Once the Parliament’s consent is received, the Council can adopt a decision to conclude the agreement. As a result of this process, both the Council and the Parliament can actively refuse to approve a treaty, and elected representatives of each member state are able to participate in the process of scrutinising and ratifying or withholding ratification of treaties. Furthermore, in the case of ‘mixed’ agreements (i.e. agreements for which the subject matter does not fall within the EU’s exclusive competence), Member States must ratify the agreement on a national (and sometimes regional) level. While there are still some barriers to the rejection of completed deals at this stage, this process ensures debate across the institutions and offers multiple opportunities for powers to be used to block ratification in a far more forceful manner than the UK CRAG process.

**Germany**

12. **Transparency during negotiations**: The Bundesverfassungsgericht does not consider it sufficient for Government to withhold information from the Bundestag until negotiations are concluded. To remedy this, there is a duty on the Government to regularly update Parliament on the progress of negotiations, in order to enable it to exercise its role in the ratification process.

**New Zealand**

13. **Scrutiny and ratification of agreed treaties**: Some treaties are presented to the House of Representatives prior to ratification. Treaties are also presented to the Foreign Affairs, Defence and Trade Committee which can examine the treaty itself or refer it to another committee. Committees can make recommendations to Government, including making recommendations against ratification.

**The US**

14. **Public participation**: The US has a mandatory public consultation mechanism that the UK could learn from in order to address issues of public interest such as the impact of proposed treaties on environmental standards. This includes an advisory system that consists of 28 advisory committees enabling around 700 citizens’ advisors to gain access to confidential information and comment on draft agreements. The public consultation system mandates that public consultations must be carried for 90 days prior to the initiation of all trade negotiations. However, business interests often still dominate these committees – something the UK could mitigate against by setting out more equitable engagement from the inception of such scrutiny.

15. **Scrutiny during negotiations**: The Senate Committee on Foreign Relations has a potentially influential role in relation to the development of treaties and is able to propose amendments to

\[\text{Deutscher Bundestag, ‘Parliament’s role in international treaties’ (Wissenschaftliche Dienste, WD 2 – 3000 – 038/17).}\]
treaties. The President and the other parties to the treaty must then decide whether to accept the conditions and renegotiate the treaty or to abandon it.

16. **Transparency:** The Government publishes negotiation objectives prior to starting trade negotiations, impact assessments for all trade agreements, and negotiating texts before signing trade agreements.

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

17. At the moment, the devolved administrations do not play a role in the scrutiny of international treaties. CRAG does not create a legal requirement for the UK Government to consult the devolved administrations in relation to treaties. The Concordat on International Relations (which forms part of an MOU between the four nations) clarifies that international relations including treaty-making remain the exclusive responsibility of the UK Government. Given this, the devolved administrations have generally not played a formal role in negotiating international treaties. Through the Concordat, the UK Government recognises the interest of the devolved administrations in international policy-making and commits to involving them to the extent that their functions may be affected. However, the terms of the Concordat are not legally enforceable and instead ‘binding in honour only’.

18. We welcome the Government’s commitment to engage with “the devolved administrations [and] devolved legislatures” in developing the UK’s future trade policy. However, the involvement of the devolved administrations must extend beyond contribution to the UK’s future trade policy to direct engagement in the process of negotiating those aspects of future treaties that impinge on devolved competences. It is positive that the Government recognises the “devolved administrations’ direct interest in our future trade arrangements” and that the Secretary of State has committed to “work closely with the devolved administrations as we forge new and deeper trade relationships around the world”.

19. Therefore, Members of the Scottish Parliament and the Welsh and Northern Ireland Assemblies should be given the right to view and make recommendations on the negotiation mandates prior to the start of the negotiations, the negotiation texts during the negotiations and the final text of the trade agreements, prior to ratification. A Joint Ministerial Committee on International Trade should lead discussions around proposed FTAs, while representatives from devolved administrations should be included as observers in official UK trade delegations and at the negotiation of UK wide treaties.

20. Given that the provisions of future treaties may have significant implications for the environment in each of the devolved administrations, it is critical that all future treaties are co-designed and co-owned by the four nations of the UK. In Belgium, an agreement needs to be...

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30 Memorandum of Understanding and Supplementary Agreements (October 2013).
approved by all parliaments concerned – meaning up to eight parliaments must scrutinise and approve agreements. Belgian regions and communities can conclude their own treaties in fields within their competences. In Germany and Austria,34 regions can conclude international agreements on their own, with the federal government’s approval. Similarly, in Spain and Italy, in areas falling within their responsibility, regions can enter into international agreements with foreign states.

Conclusion:

21. The current process for scrutiny of international treaties is unsatisfactory. International treaties have the potential to significantly affect domestic law and policy-making. Given this, it is crucial that transparency is implemented across the process; and existing mechanisms for Parliamentary scrutiny are updated and front-loaded to enable Parliament to properly engage with the terms of treaties throughout the process, and to approve or reject the final negotiated agreement. A meaningful role must also be accorded to citizens and civil society in treaty-making. And once treaties are in force, both Parliament and civil society should be able to engage with enforcement mechanisms and contribute to ongoing review of the impacts of international treaties, including their effect on the environment. This will not only mean that treaties better reflect the UK’s values and priorities but also help to ensure public confidence in the Government’s treaty actions.