Summary

- This submission focusses on trade treaties
- Current Parliamentary scrutiny of trade treaties is minimal and comes only when the treaty is effectively a fait accompli.
- A more effective approach would be for Parliamentary scrutiny to be ongoing and frontloaded in the treaty making process.
- CRAG comes only at the last minute. It is a negative procedure without any clear mechanism for raising and objection. Should a motion against ratification be passed, the government can simply explain why it wishes to proceed and then repeat the process, so Parliament cannot outright reject a treaty
- There is a clear expectation on the part of the government that Brexit will give Britain an independent trade policy. Such new 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.
- A framework for proper oversight should include
  - independent impact assessments and public consultation
  - Parliamentary consent for a mandate
  - transparency as the norm
  - ongoing Parliamentary scrutiny, including a scrutiny committee and a requirement for negotiators to keep Parliament informed on developments in time for their views to be taken into account
  - automatic Parliamentary vote on the final agreement before it is signed or implemented
  - ratification
  - review after a period of years
  - a role for the devolved administrations throughout

Introduction

1. War on Want welcomes the opportunity to submit evidence to the Constitution Committee’s inquiry on Parliamentary scrutiny of treaties. War on Want is a charity campaigning against the root causes of poverty and human rights violation, as part of the worldwide movement for global justice.

2. We have campaigned on trade and investment policy for many years, and this submission focuses on trade treaties.
How effective is Parliament's current scrutiny of treaties in both holding the Government to account and helping it get the best agreements possible?

3. Currently in the UK trade agreements and other treaties are entirely negotiated under the royal prerogative. Using its prerogative powers, Whitehall 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.

4. There is no role for Parliament until after the treaty is signed. At the very end Parliament is asked to ratify the deal in a procedure dating from the 1920s which is codified in the Constitutional Reform and Governance Act 2010.

5. At this point the treaty is effectively a fait accompli. Often years of negotiations will have gone into it and there is great political pressure to wave it through.

6. Modern trade agreements affect many aspects of life, from jobs and environmental protection to public service provision and food safety standards, both in the UK and across the world. They are no longer simply about the level of tariffs charged on goods crossing borders, but cover many areas of domestic public policy which would usually be subject to parliamentary scrutiny and debate. They are legally binding instruments and can subject the government to supra-national arbitration mechanisms, not including investor state dispute settlement (ISDS) which allows foreign corporations to sue governments outside of the national legal system.

7. They can also affect governance norms and legislative practice. Recent trade deals include chapters on domestic regulation and related provisions, which specify legislative processes that must be followed. Important norms such as the precautionary principle can also be affected, not as a result of democratic debate and parliamentary decision, but as the result of a rule in a trade agreement.

8. Many areas of trade agreements do not require implementing legislation, including ISDS, and so will not be subject to parliamentary scrutiny in that way.
9. The pattern with trade agreements in recent years is for them to be negotiated behind closed doors with no scrutiny. Outside, there is often public concern about what may be being given away on the negotiating table, and what politically controversial issues may be being decided by trade negotiators. However rather than there being any opportunity for specific politically sensitive issues to be addressed on their own merits as and when they arise, everything is presented as a ‘take it or leave it’ package at the last minute and there is a big fight. This is not good policy making.

10. A more effective approach would be for Parliamentary scrutiny to be ongoing and frontloaded in the treaty making process.

11. This could have an overwhelmingly positive effect on trade agreements and other treaties. The chance to have a more informed debate, through the democratic representative structures of Parliament, should lead to a better agreement in substance. This could allow issues to be resolved through democratic debate, including at times reaching the conclusion that some matters should be excluded from an agreement because of negative impacts.

12. In turn this would give an eventual agreement a greater legitimacy with the public. It is sometimes argued that such trade agreements have to be negotiated in secret because otherwise sensitive issues could not be pushed through. There are good reasons for not pushing sensitive issues through away from Parliamentary scrutiny. They have real life negative consequences on people, causing serious damage, including to jobs, health and the environment, and they may blow up in future.

**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?**

13. The Constitutional Reform and Governance Act 2010 (CRAG) happens only at the last minute in the treaty making process. As outlined above, this is not a constructive balance between Parliament and government. It would be more effective for Parliament to have scrutiny powers that are ongoing and frontloaded in the treaty making process.
14. There are also deficiencies within the CRAG process.

15. It is a negative procedure, in which the Government lays the trade agreement or other treaty before Parliament for 21 days and if there is no objection it is ratified. However as noted by a House of Commons Library briefing, there is no clear procedure for an objection to be raised.¹ The most realistic option is for this to be done in an Opposition Day Debate, but these are limited in number, may not occur during the required period and are not binding on the government. Even if a motion against ratification can be passed, the government then just has to explain why they nevertheless wish to go ahead, and the process repeats. Thus Parliament cannot outright reject an agreement, but can only delay it for a short while.

16. Experience within the EU institutions is worth noting. The European Parliament acquired the right for an automatic vote on treaties, and eventually used this to reject a treaty. At this point, the pragmatic incentive for EU negotiators to more actively involve the European Parliament throughout negotiations and try and keep them on board greatly increased.

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

17. There is a clear expectation on the part of the government that Brexit will give Britain an independent trade policy. Such new 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.

18. 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 below (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.

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?

19. 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 as follows:

Before negotiations start:

20. **Assessments and consultations.** Before negotiations start, 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.

21. **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 parliament sets a mandate for its representatives to the EU. There should be a remit for the devolved administrations and legislatures to input into the mandate process, insofar as their powers and territories will be affected by a trade deal.

**During negotiations:**
22. Transparency should be the norm during trade negotiations, so that the presumption is that material can be made public unless there is a specific and convincing reason against. In particular the UK should release its text proposals ahead of each negotiating round, and the consolidated text, showing the current state of agreement between the parties, should be released after each negotiating round. This reflects the trend for increasing transparency in EU and WTO negotiations, as well as common practice in other areas of international negotiations such as on climate change.

23. Documents released should be published online within a structured, searchable database, in order to ensure that their release equates to meaningful public access to the information. Major documents should be accompanied by ‘plain English’ guidance, explaining technical terms and highlighting significant implications. The purpose of such guidance should be to aid public understanding of policy issues and policy making in trade negotiations, particularly on areas of controversy, not to promote a particular perspective on trade negotiations.

24. **Scrutiny.** Negotiators should have a duty to keep Parliament informed on developments in the negotiations in sufficient time for Parliament’s views to be taken into account. This should enable politically sensitive issues to be raised, debated and addressed as they arise.

25. MPs should have full access to any trade policy documents, including trade negotiation texts, that have not already been made public. For members of the International Trade Committee and/or any other committee that might have a scrutiny role on trade (see below) this should be routine. Other MPs should be able to request access to the documents.

26. Devolved administrations and legislatures should have full access to any trade policy documents, including trade negotiation texts, that touch on devolved powers and territories. Again, for members of devolved legislatures there could be a routine / request distinction between members of particular committees and others.

27. While MPs and the devolved administrations and legislatures may be asked to maintain confidentiality, they should have access to the documents in a way that enables meaningful analysis and scrutiny. They should be able to take notes, compare documents, consult
reference material, and generally be able to do what is necessary to form an understanding of long technical material.

At the end of negotiations:

28. **Consent.** Parliament should have an automatic debate and vote on a trade agreement. This should take place after the agreement is finalised but before it is signed or implemented. The vote should use a super-affirmative procedure.

29. The devolved administrations and legislatures should use the legislative consent process in relation to a final trade agreement, and any impacts it may have on their powers and territories.

30. **Ratification.** After signing and legal scrubbing, ratification of the agreement should proceed. CRAG would thus be complemented by a more comprehensive and effective set of scrutiny procedures.

After negotiations:

31. **Review.** We propose that trade agreements include review clauses for the agreement to be assessed every five years and be 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?**

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

32. If there were to be different levels of scrutiny, these should relate to the degree to which the type of treaty impacts on constitutional arrangements and issues that would normally accrue to Parliament.

33. The flip side of this question is whether the way in which government conducts negotiations should differ for different types of treaties. We do not believe this should be the case. However trade agreements are currently negotiated in greater secrecy than many other areas, for instance compared to environmental treaties. Trade
agreements are not private commercial deals, they are about matters of public policy. The Climate Treaty, which deals with matters of planetary significance, was negotiated with far greater levels of transparency and scrutiny than has been the case for trade agreements.

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?

34. Many treaties would at present fall under the jurisdiction of the EU institutions, which were overseen in our own parliament by the EU 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 stronger scrutiny and accountability mechanisms should be created post-Brexit to hold the Government to account and help it get the best agreements possible. It may well be appropriate for there to be more than one committee, to deal with different types of treaties, ensuring that expertise and understanding of the area can be developed.

35. On trade agreements, a role should be established for a Parliamentary committee to be fully involved in scrutinising any trade negotiations and providing guidance and direction. This could be a role for the existing International Trade Committee or for a new parallel trade scrutiny committee – whichever seems most appropriate for parliamentary procedure.

36. The committee should have full access to all trade policy documents including trade negotiation texts, and a remit to review and advise on negotiating positions. Adequate time is needed for the committee to scrutinise documents and for the Government to then revise its negotiating position.

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

37. Negotiators should have a duty to keep Parliament informed on developments in the negotiations in sufficient time for Parliament’s
views to be taken into account. This should enable politically sensitive issues to be raised, debated and addressed as they arise.

38. In the EU, The Commission is required to ensure the European Parliament is “immediately and fully informed at all stages”. This information must be provided in sufficient time to take the Parliament’s views into account.

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

39. Transparency, in itself, is an essential and key means of enabling democratic participation and thus genuine consultation. If there is a healthy level of public access to trade policy and negotiation documents, then public understanding and public debate will enable government to hear and take into account the views of civil society and business – through the media, through Parliament, through public meetings and events, etc. This should be the background and context for formal, specific consultations.

**Before negotiations**

40. Before negotiations are initiated, the Government and the devolved administrations should carry out open public consultations on the prospective trade negotiations. The outcome of the consultation must be taken into account in a decision whether to go ahead and how the said trade negotiations should be shaped.

41. The consultation should be informed by the impact assessments. These should look at social (including health and education), economic, human rights, environmental, labour and gender impacts. Impacts should be assessed for the UK, including a regional breakdown, but also for the other country or countries involved in the prospective negotiations and developing countries that would be affected by an

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4 Meaning here the type of consultation listed at [https://www.gov.uk/government/publications/publication_filter_option=consultations](https://www.gov.uk/government/publications/publication_filter_option=consultations)
eventual deal. The impact assessments must be commissioned and carried out independently and must be published, with the findings communicated in non-technical language.

42. For these consultations, efforts must be made to actively reach out and encourage submissions from a wide range of groups, particularly any groups that the impact assessments indicate will be strongly affected by the potential deal.

43. The UK should encourage the other country or countries involved in the prospective trade negotiations to carry out similar consultations, and if those countries are developing countries, it should offer financial support to enable this if requested.

44. Earlier this year the Department of International Trade conducted consultations on four potential trade agreements. While the exercise was welcome and we appreciate the adequate time given to this process, the actual substance of the consultations was so vague as to make them of limited use. The information notes provided for each agreement were largely identical, primarily setting out the departments position on the benefits of free trade agreements, with a few trade statistics for the specific country or agreements added. Without seeing the government’s mandate and meaningful impact assessments alongside the consultation it is hard to know what is being proposed. 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.

During negotiations

45. During negotiations, a civil society consultation body should be established. Civil society should be able to decide who participates in the consultation body, and participants should not have restrictions placed upon them as to what they can communicate throughout this process.

46. Consultation should involve more than a briefing, with a short time at the end for civil society participants to ask quick questions that receive vague or stock answers from officials. It must not be used to give a veneer of legitimacy without actually having any effect.
47. There should not be any privileged groups in terms of access to information and documents. If documents are released on one set of third party stakeholders, they must be released to everyone, thereby ensuring that all citizens are treated equally.

48. There must be transparency on consultation and lobby meetings, so that it is clear with whom not only ministers, but also negotiators are meeting and what input they are receiving. Lists of meetings held, with all attendees, should be published regularly and promptly. Written submissions made by stakeholders should be published.

49. During the TTIP negotiations between the US and the EU, the European Commission committed to publish information about who meets its political leaders and senior officials.\(^5\) The European Ombudsman encouraged the Commission to go further and extend this to the levels of director, head of unit and negotiator. She also concluded that submissions by stakeholders should be published, and that documents released to one group of stakeholders should be released to all.\(^6\)

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

50. 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 into account
- MEPs having the right to see all negotiating documents and an increasing limitation of the ability of the Commission to restrict access to texts.
- The Parliament and Council giving affirmative consent.

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• 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.

51. 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.

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

53. 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.

54. It is important to note that under the CRAG, British parliamentarians would have substantially less power than MEPs, and, depending on the content of that 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

55. The domestic impact of many trade agreements extends beyond Westminster. Many modern trade agreements include provisions that
impact on devolved areas of policy, for instance around health, education, agriculture, and the environment. These agreements encroach on devolved administrations’ policy space, restricting their ability to make public policy in these areas.

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

57. Devolved administrations and legislatures should therefore have a role in negotiating and agreeing trade agreements insofar as their powers and territories will be affected by the agreement.

58. This should include:

- A remit to input into the mandate process
- Full access to any trade policy documents, including trade negotiation texts, that touch on devolved powers and territories. For members of devolved legislatures there could be a routine / request distinction between members of particular committees and others.
- Use of the legislative consent process in relation to a final trade agreement

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