Dear Chair,

Please find enclosed a submission of evidence for your ‘UK Trade Policy Transparency and Scrutiny inquiry’ on the invitation of your Committee advisors in reference to the Terms of Reference. I enclose here written evidence, which makes the following points, set out here by way of summary:

I. The transparency and scrutiny of UK Parliamentary practice must look to all availability international and transnational models
II. Impact assessments as to global trade practice become more essential going forward
III. Global trade increasingly invites transnational regulatory cooperation practices to be developed—this should be inbuilt into the Committee’s recommendations
IV. Flexibility as to transparency practices is essential in light of the developing nature of transparency in international trade negotiations
Terms of Reference: Which documents pertaining to trade policy and negotiations should the Government make publicly available – and which should remain confidential?

1. The UK should be mindful of the broader trajectory of law and governance in the negotiation of international trade in the digital era which has shifted radically towards transparency at all levels of law-making and practice. While the UK is leaving the European Union (EU), the EU is also one of the largest multi-level trading polity’s in the world and still offers lessons in multi-level democracy. While it may be a painful suggestion to advocate in current times and negotiations, the EU has arguably an instructive tale to tell about the character of transparency in trade negotiations for the UK and its practices have in turn shaped many EU-27 national parliamentary practices.1

2. Significant inroads have been made on EU Access to Documents regulation through trade, through practice, laws and litigation.2 It is a tale of much dynamism, flexibility, going beyond the margins of the treaties. For example, all EU institutional actors radically changed their transparency procedures subsequent to the EU-US TTIP negotiations.3 The Ombudsman, not an EU institutional actor, has been pivotal in nudging better behaviour by EU institutional actors. Still, a uniformity of practice as to the declassification of the negotiation mandate for trade agreements has not been adopted by the EU.4 The Committee should seek access to the highest and broadest levels of documents.

3. Outside the EU and in life beyond the EU, the UK needs to be mindful be expressed as to the differential character of declassification of documents depending upon different regions of the world and different international organisations. Impact assessments as to the global dimension of trade policy perhaps has a different character in the national context but it is worth also saying that uniformity as to this has not been adopted by the EU.5 For example, the differential release dates of negotiation directives and impact assessments in all major post-Lisbon agreements is a matter of some controversy. However, the trend towards developing a more transparent formulation of global impact and global intent is important to acknowledge. Impact assessments and all related documents as to trade should be prioritised by Parliament going forward.

4. The Committee should investigate the broadest understanding of trade policy and negotiations and consider all stages of practice and procedure as being ripe in this new era for change, most critically as to access to documents.

Terms of Reference: What level of access should Parliament and the devolved administrations and legislatures have to trade policy documents, including trade negotiation texts?

5. It is worth noting that there is an evolving literature on sub-national structures in global societies which posits an increased voice in all areas of policy making.6 This view of an enlarged voice and participation needs to be carefully engaged with as regards access. Across the global legal order in a range of contexts, the development of the megaregional trade agreements had also spurred a new interest in transparency and participation of civil society.7 The significance of external events should not be underestimated in reflecting upon the practical dimension of the range of access.

6. Access to documents legislation exceptions for international relations have slowly been eroded at national and international level all over the world. The trend of greater inroads being made to access to documents exceptions for international relations in trade negotiations is notable, although less so with a security dimension. It is an important trend which features at national, international and EU level.8

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5 Ibid.
Indeed, transparency of trade negotiations has spurred on significant institutional reforms such as UNICTRAL and the EU’s International Investment Court proposal. These developments provide an important backdrop from which to reflect. Notably, transparency law at EU level is seen globally as standard-setting and leading public international law and thus must be noted.

7. It is highly advisable that the UK Parliament and devolved nations learn also from the EU on best practice as to provision of documents in international trade negotiations. The CJEU has made considerable inroads on the exceptions to international relations exceptions in its access to documents cases, including as to the provision of Legal Opinion between the institutions and the EU Ombudsman, has spurred further development to proactively nudge greater transparency. The malleability of the rules applicable to transparency and participation rights of Parliament was an important reminder of the dynamic nature of international trade and its capacity to change the face of trade negotiations at international level.

Terms of Reference: How should the Government consult business and civil society groups on trade policy matters, including prospective and on-going trade negotiations?

8. The rise of civil society is one of the most significant developments in Global Public Law in recent times. The voice of ‘others’ through participation in national and transnational international negotiations, not limited to trade, has become a mainstreamed formulation. The depth of engagement with civil society remains a challenge in deeper trade negotiation. For example, the EU’s Advisory Group established in the EU-US TTIP negotiations is a useful model of the breath of engagement with business, sectoral interests and consumers. Its relatively late establishment after the commencement of the negotiations and its increasingly ‘legalised’ engagement with the negotiations after several rounds is of note. Civil society needs to be engaged with from the outset as effective as possible. Clear parameters of how it engages with negotiations should be heavily circumscribed also from the outset.

9. The digital dimension to transnational civil society should also be carefully engaged with and should be regularly revaluated for its direct and indirect engagement. The capacity to limit the engagement of civil society is more and more challenging in the age of the transnational. The Citizens Rights Initiatives ‘STOP TTIP and CETA’ gained significant legal and constitutional rights after litigation before the General Court of the EU. It reflects deepening Civil Society Organisation (CSO) engagement globally with trade and a new generation of engagement with the voice of the global ‘others’ which may become significant precedents globally in an unprecedented era necessitating imagination and fresh thinking.

10. Prospective and ongoing trade negotiations raise significant and different differences. Ex ante, the exposure of parliament to impact assessments is critical in shaping its understanding of Global Britain, in its current and future forms through its evolving trade strategy. Impact is likely to shift considerably according to region and over time. The nature of the ‘global’ therein needs to be carefully articulated for adequate scrutiny in every iteration. The UK parliament should seek the highest levels of scrutiny as a result.

Terms of Reference: What role should Parliament and devolved administrations and legislatures have in drafting and/or approving the UK’s negotiating mandate for trade negotiations?

11. There is a necessity for Parliament to get involved with international organisations and more transnational forms of law-making processes in the configuration of Global Britain going forward.
Possible existing templates include EU and US parliament’s exchanges in the form of the Transatlantic Legislators Dialogues.17

12. The parliamentary consent to approving an executive mandate for approving international trade negotiations is increasingly a more politicised step. It as a result increasingly matched with responsiveness where concerns are expressed prior to the adoption in certain regional contexts. All possibilities to input into the drafting and approval of a national mandate to enter negotiations must be exercised in the UK context so as far possible beyond government and towards cross-party lines.

13. There is an emerging literature on the scope of transnational regulatory cooperation. The UK Parliament needs to be mindful of the breath of the assent it is giving to regulatory cooperation where this arises and the retrospective checks on delegation that can and should be put in place.18

Terms of Reference: What procedures should be in place for the UK Parliament and devolved administrations/legislatures to scrutinise trade agreements as they are being negotiated?

14. The introduction of procedures accommodating the deepest forms of accountability and engagement seem imperative in this new era. Flexible legal procedures need to be adopted to evolve the relevant procedures for the UK Parliament to scrutinise trade agreements. Law and political science literature is replete with the dynamic nature of accountability between parliaments and executives in contemporary times as relating a form of living constitution requiring dynamic processes.19 The accountability of the Government to Parliament needs to be highly dynamic and to relay shifts in the negotiating rounds. It should also reflect the institutional autonomy of Parliament and its committees with a capacity to innovate when it comes to scrutiny, present and future. The place of final consent and approval should be carefully distinguished from ongoing scrutiny. The relationship between negotiators, legal drafting, legal scrubbing and the initial mandate should not become fundamentally separable.

15. Reading rooms were the primary device developed by the EU to enable national parliamentarians read classified information and reading rooms in trade negotiations and such access programmes are essential but may still not be viewed as wholly optimal.20 Flexible understandings of information transfer and accountability dynamics resulting therefrom need to be adopted.

16. Ensuring the mandate is cross-referenced in scrutiny procedures rigorously is also of fundamental importance.

17. UK Parliament and the Devolved nations should be accorded the highly possible scrutiny rights of international agreements and this needs to be reflected in flexible legal procedures, which should be committed to legal text rather than being the subject of non-transparent constitutional ‘practice’. The UK classification of access to documents system needs careful revision in this new era where information to the global agenda becomes much more salient and in need of active revision.

Terms of Reference: What powers should Parliament and the devolved administrations and legislatures have over the ratification and implementing legislation of UK trade agreements?

18. increasingly regulatory authority is transferred to transnational level and the consent given to the initial transfer may have considerable implications going forward. The EU’s trade agreements with Singapore, Japan, Canada and Korea all contain important steps towards transnational regulatory cooperation.21 This step is significant and will eventually possibly pivot this large trading bloc towards closer efforts to nudge multilateral standards. However, they also come with significant costs. For example, some question whether the legal delegations of authority given by national parliaments will suffice for regulatory cooperation bodies to do their work.

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19. The UK Parliament and devolved administrations and legislatures will need to retain significant control and powers over the forms of regulatory cooperation that it signs up to in a new era of global trading. Even if not engaging in regulatory cooperation with the EU, for example, it will still be significant that large parts of the G8 and G 20 are engaging in this activity. However, from a practical perspective, the form of authority conferred and the amount of periodic reviews inbuilt into cooperation with transnational entities is a significant question to ask prior to considering what powers Parliament should have over implementing acts etc e.g. legislation.

20. Thus, for example, powers should be interpreted in as broad a fashion as possible- whether power is ongoing is another matters erg possibility to actively check and retrospective and retroactively remedy international cooperation becomes essential e.g. in EU-Japan FTA. The EP has struck down agreements for the lack of information and has also successfully litigated to enforce these rights where it has not been given sufficient information, e.g. where laws were published without informing them.

21. The UK Parliament and in particular its devolved nations should seek to have equivalent powers and rights as parliamentarians in international contexts (as to release of negotiating mandates, reading rooms, suspension powers etc) and should track international developments and build in the innovations incrementally arising in international contexts where possible.

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See Weiss, above.