

# APPG Trade and Export Promotion: Trade Governance

Written evidence

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## Introduction

1. I am delighted to submit this evidence to the APPG for Trade & Export Promotion in answer to the Call for Evidence on Trade Governance. I am submitting evidence in my independent capacity as an academic at the Blavatnik School of Government, University of Oxford.
2. In this submission I focus on three areas: parliamentary scrutiny, engagement with devolved administrations, and stakeholder consultation. In each area I examine the UK's system of trade governance in light of the experiences of other countries.<sup>1</sup> On the basis of the analysis, I make a series of recommendations for strengthening UK trade governance:
  - i. **Provide Parliament with a statutory right to debate on the draft negotiating objectives** for any treaty or treaty action the parliamentary committee responsible for scrutiny identifies as important and meriting such action. *This would bring the UK in line with the EU and US where parliaments are fully consulted on the negotiating mandate, could provide Government with leverage in the negotiating room, and could strengthen the credibility of the Government as a negotiating partner by reassuring other governments that Parliament is on board with the Government's approach.*
  - ii. **Provide Parliament with a statutory right to timely and substantive information**, including regular public and private briefings, to relevant scrutiny and subject-specific committees, and access to draft negotiating texts and related documents for all MPs and security-cleared staff, on a confidential basis. *This would bring the Parliament in line with the US and the EU, where parliamentarians have a high level of access to information, including to confidential negotiating texts.*
  - iii. **Require Government to make the treaty text public well before the treaty is tabled in Parliament, to allow sufficient time for examination and scrutiny, and oblige Government to extend the 21 sitting-day period for scrutiny if requested to do so by the parliamentary committee responsible for scrutiny.** *In the US for example, Congress has access to the agreed text 60 days before signature, and access to the final text for 30 days before the treaty is laid before Congress for ratification.*
  - iv. **Require Government to publish preliminary impact assessments at the outset of negotiations and full impact assessments when the treaty is laid in Parliament, which**

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<sup>1</sup> The analysis is not intended to be exhaustive, rather to provide illustrative examples from which the UK might draw

**evaluate the economic, social, and environmental impacts of a proposed agreement.** *The UK Government has started to publish preliminary impact assessments at the outset of negotiations; this recommendation would formalise and systematise an emerging practice.*

- v. **Provide that trade agreements shall not be ratified unless Parliament has debated and authorized ratification of the agreement,** in cases where the parliamentary committee responsible for scrutiny so decides. *This would bring the UK in line with the EU and US, where parliaments must approve treaty texts as part of the ratification process. It also reflects the nature of contemporary trade agreements, which have implications for a wide range of public policy areas; would strengthen the quality of decision-making; and could provide the Government with greater leverage to during negotiations.*
- vi. **Establish a new mechanism for Parliamentary scrutiny of UK-EU relations,** and provide for greater transparency in the operations of the Partnership Council and of the Withdrawal Agreement Joint Committee, with the Government providing a statement to the House after each meeting, including details of any decisions reached by these bodies and followed by an opportunity for questions. *This would help ensure effective scrutiny of UK-EU relations now that the transition period has ended and the House of Commons Future Relationship with the European Union Committee has ceased to exist.*
- vii. **Provide devolved administrations with the statutory right to co-determine the negotiating mandate in areas of devolved competence, and fully participate in negotiations on issues of devolved competence;** provide devolved administrations and legislatures with the same level of information as the UK Parliament; and create an interparliamentary mechanism to involve devolved legislatures in treaty scrutiny. *There are valuable lessons to be learned from Canada, where the Government has found ways to involve Provincial administrations in areas where they have competence, whilst retaining control over the treaty-making process.*
- viii. **Develop and publish a national trade strategy** through extensive stakeholder and public consultation to provide clarity and wide buy-in on the overall objectives for UK trade policy. *This would bring UK practice into line with other governments including the US, Canada, New Zealand, and the EU which set overall strategies to guide trade policy.*
- ix. **Undertake a swift, independent review of the composition and functioning of the UK's trade advisory groups** to ensure balanced stakeholder representation, sufficient sharing of information, two-way dialogue and detailed discussion of policy options. This should include a review of the use and scope of non-disclosure agreements, with the aim of maximising transparency and openness of consultation processes. *This would help ensure the UK has a best-in-class approach to stakeholder consultation.*
- x. **Create a statutory obligation for the Government to publish key documents** relating to international trade, including a trade strategy, negotiating objectives for trade negotiations, impact assessments at the outset and conclusion of negotiations, and the legal text of trade agreements, once negotiations are concluded but before the agreement is signed. *This would follow the steps taken by other governments in recent years to improve transparency, help improve the quality of public discussions on trade policy.*

- xi. **Establish a strategy for effective public consultation on trade policy.** *This would improve public understanding of trade policy and enable the Government to have a regular, informed assessment of public attitudes and concerns.*

## Parliamentary scrutiny

3. With Brexit, the UK has an opportunity to strengthen parliamentary scrutiny of its trade agreements. Effective parliamentary scrutiny is important. Contemporary trade deals seek to align regulation between countries and affect many areas of the economy – from farming and food standards, to manufacturing, financial services and accounting, to the regulation of the digital economy, and healthcare. Effective parliamentary scrutiny could improve the quality of decision-making, provide leverage in negotiations, and reassure negotiating partners that any treaty they negotiate with the UK will be ratified and implemented.
4. In a recent paper a colleague and I systematically compare parliamentary scrutiny in the UK, United States, European Union, Australia, and Canada. We weigh up the arguments for and against greater scrutiny, and identify a series of practical steps the UK could take to strengthen parliamentary scrutiny. The key points from our research are presented below, and further details and full references can be found in our paper.<sup>2</sup>

## Comparison of the UK with other jurisdictions

5. While the US Congress and European Parliament have extensive scrutiny powers, those of the Westminster-style parliaments of the UK, Australia and Canada are much weaker. In the UK, the negotiation and ratification of international trade agreements falls under the Royal Prerogative; the making of international treaties is one of the few actions that Ministers can take without the approval of Parliament.<sup>3</sup> For anyone familiar with the powers of the US Congress and European Parliament in trade negotiations, those of the UK Parliament are strikingly weak.
6. The US Congress and European Parliament both get involved before trade negotiations begin, and shape the negotiating mandate. The US is unique among the five jurisdictions in that Congress stipulates in domestic legislation (the Trade Promotion Authority) precise negotiating objectives that the Government must follow whenever it negotiates a trade deal. Before the Government can initiate formal negotiations towards a new agreement, it must give Congress 90 days' notice and consult Congress on the mandate for that specific set of negotiations.<sup>4</sup> In the European Union, parliament has no formal right to shape the negotiating mandate but it does have the right to be informed, and it has become routine for the European Commission to share the draft negotiating mandate with the parliament, and for the parliament to issue advisory motions so that its preferences are known and can be taken into consideration.

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<sup>2</sup> Emily Jones and Anna Sands, 'Ripe for Reform: UK Scrutiny of International Trade Agreements', GEG Working Paper (Blavatnik School of Government, University of Oxford, September 2020), <https://www.geg.ox.ac.uk/publication/ripe-reform-uk-scrutiny-international-trade-agreements>.

<sup>3</sup> Gail Bartlett and Michael Everett, 'The Royal Prerogative', 17 August 2017, <https://commonslibrary.parliament.uk/research-briefings/sn03861/>.

<sup>4</sup> Trade Promotion Authority (TPA): Frequently Asked Questions. 21 June 2019. *Congressional Research Service*: <https://fas.org/sgp/crs/misc/R43491.pdf>

7. In the UK, Australia, and Canada, parliaments have no formal right to shape negotiating mandates, the Government is not under a legal duty to share them, and parliaments are not consulted in a detailed manner. In the UK, under the CRAG Act, parliament's engagement starts when a treaty has been signed: there is no requirement for the Government to consult or obtain the consent of parliament on its negotiating mandate, or even to alert parliament that it is opening treaty negotiations.<sup>5</sup> The UK has started to publish summaries of its negotiating objectives and hold short debates on them, but is yet to establish a mechanism for consulting Parliament on them. Several Committees proposed that Parliament's engagement should start long before a treaty is signed, and that Parliament should be consulted on draft negotiating mandates.<sup>6</sup> The International Trade Committee called on the Government to provide at least as much information as the EU provides in its mandates, and for Parliament to be given the opportunity to debate the Government's negotiating objectives on a substantive motion before the mandate is set and negotiations commence.<sup>7</sup>
8. When negotiations are underway, members of the US Congress and European Parliament have far more access to information than their counterparts in the UK, Australia and Canada. The US Congress and European Union have the legal right to be informed regularly and extensively by government at all stages of negotiations. In both jurisdictions, legislative representatives have a high level of access to negotiating documents, including classified negotiating texts. In the US, designated Congressional representatives have the right to join the Government's negotiating teams. In the UK, Australia, and Canada parliamentarians have no right to information during the negotiations and in practice they receive far less information than their counterparts in the US Congress and European Parliament, and do not usually have access to negotiating texts.
9. At the end of the negotiating process, the US Congress and European Parliament have to approve the final agreement for it to be ratified. In the US, the time for scrutiny and debate of the concluded agreement is ensured in law. Once negotiations have concluded, the executive is required to give Congress 90 days' notice before signing a treaty, to release the agreed text of the treaty to the public at least 60 days prior to signature, and consider reports by various advisory committees. After signature, the treaty is brought to Congress for approval. The executive is required to release the final, signed treaty text at least 30 days before the legislation is introduced to Congress, and to make public a full impact assessment carried out by the US International Trade Commission. In each chamber, the committees have 45 session days to issue a report. Similarly, in the EU, trade agreements must be approved by the European Parliament and, in some cases, are also subject to domestic ratification procedures in EU Member States.
10. In the UK, Australia and Canada, parliaments do not formally approve trade agreements, as ratification is the prerogative of the executive. Canada and Australia have a policy (but no legal obligation) of tabling treaties for scrutiny by parliamentary committees, but committee reports are

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<sup>5</sup> Select Committee on the Constitution, House of Lords, 'Parliamentary Scrutiny of Treaties', 30 April 2019, 19, <https://publications.parliament.uk/pa/ld201719/ldselect/ldconst/345/345.pdf>.

<sup>6</sup> House of Commons International Trade Committee; European Union Committee, House of Lords, 'Scrutiny of International Agreements: Lessons Learned'; Select Committee on the Constitution, House of Lords, 'Parliamentary Scrutiny of Treaties'; Joint Committee on Human Rights, House of Commons and House of Lords, 'Human Rights Protections in International Agreements', 12 March 2019, <https://publications.parliament.uk/pa/jt201719/jtselect/jtright/1833/1833.pdf>; European Union Committee, House of Lords, 'Treaty Scrutiny: Working Practices', 7.

<sup>7</sup> House of Commons International Trade Committee, 'UK Trade Policy Transparency and Scrutiny', 2018, <https://publications.parliament.uk/pa/cm201719/cmselect/cmintrade/1043/1043.pdf>. House of Commons International Trade Committee.

advisory, and neither parliament has the power to prevent ratification. In the UK, the Government is legally obliged to lay treaties before parliament for 21 sitting days under the CRAG Act. Parliamentary approval is not required for ratification, although the UK parliament can delay ratification for 21 sitting days, and can, in theory do this repeatedly. However, this process has never been used.

11. While the CRAG Act sets out the legal effect of a negative vote, it does not provide any mechanism to ensure that, if a debate and vote are requested by a sufficient number of members, they will take place.<sup>8</sup> Practically it is hard for backbench MPs to secure time to debate CRAG motions as parliament's Standing Orders stipulate that government business takes precedent in the parliamentary timetable, with certain exceptions.<sup>9</sup> Indeed, it is very rare for treaties to be debated in government time, and it is possible for the 21 sitting-days to pass without an Opposition Day debate.<sup>10</sup> Parliamentarians could use mechanisms such as adjournment debates and topical questions to attempt a debate, but these would not allow for a resolution against ratification.<sup>11</sup>
12. The EU Committee of the House of Lords notes that without a vote on the final treaty, "Parliament has no effective veto power to prevent the Government from ratifying agreements that it does not feel are in the national interest".<sup>12</sup> However, in its most recent report it stopped short of recommending a legislative change at present, seeking first to try and make treaty scrutiny work within the existing framework.<sup>13</sup> In contrast, the International Trade Committee was unequivocal in its recommendation that "[t]he House of Commons should have a final yes/no vote on the ratification of trade agreements".<sup>14</sup>
13. Parliaments in the UK, Canada and Australia play an important role in scrutinising implementing legislation, but this is not an effective substitute as it comes too late in the day to influence the text of agreements. As the UK operates a dualist legal system, parliament must legislate to give domestic legal effect to any treaty that creates new legal obligations. This gives parliament an opportunity to consider how treaty rights and obligations will be implemented in domestic law, but it does provide parliament with the power to reject or amend the treaty itself. Moreover, scrutiny only applies to those aspects of trade agreements requiring changes to primary legislation. In the case of the UK this may place some highly controversial policy changes, including over food standards, beyond the scope of parliamentary scrutiny.
14. In addition, many of the commitments that governments make in trade agreements involve an obligation not to change legislation in the *future*, (or an obligation not to change it in particular ways) in order to provide certainty for trading partners and foreign investors. Entering into such commitments does not require changes to existing legislation, but does limit the scope of future

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<sup>8</sup> European Union Committee, House of Lords, 'Scrutiny of International Agreements: Lessons Learned', 27 June 2019, 7, <https://publications.parliament.uk/pa/ld201719/ldselect/lducom/387/387.pdf>.

<sup>9</sup> Alice Lilly, 'Who Should Control the Parliamentary Timetable?' (London: Institute for Government, 28 January 2019), <https://www.instituteforgovernment.org.uk/blog/who-should-control-parliamentary-timetable>.

<sup>10</sup> Arabella Lang, 'Parliament's Role in Ratifying Treaties' (House of Commons Library, 17 February 2017), 18, <https://commonslibrary.parliament.uk/research-briefings/sn05855/>.

<sup>11</sup> Arabella Lang, 'Parliament and International Treaties', in *Parliament: Legislation and Accountability* (Hart Publishing, 2016), <https://doi.org/10.5040/9781509906468>.

<sup>12</sup> European Union Committee, House of Lords, 'Treaty Scrutiny: Working Practices', 10 July 2020, 6, <https://publications.parliament.uk/pa/ld5801/ldselect/lducom/97/97.pdf>.

<sup>13</sup> European Union Committee, House of Lords, 27.

<sup>14</sup> House of Commons International Trade Committee, 'UK Trade Policy Transparency and Scrutiny'. House of Commons International Trade Committee.

legislative actions, as legislative changes could breach international legal obligations. While the legislative implications of such commitments may be substantial, without changes to the UK's scrutiny processes, they are unlikely to receive detailed examination by parliament.

15. The Act does not place any obligation on government to provide information, or otherwise involve parliament, while negotiations are on-going. When the treaty is laid before parliament, the CRAG Act stipulates that it must be accompanied by an explanatory memorandum that explains treaty contents, the rationale for ratification, and 'such other matters as the Minister considers appropriate' (s 24 CRAG). This is the only information that the Government is required to provide at any point in the treaty-making process.<sup>15</sup>
16. In practice, the provision of information to Parliament on trade negotiations has been patchy. The Government published preliminary impact assessments for trade negotiations with the US, Japan, Australia, and New Zealand, but not the EU, even though it is the UK's most important trading partner.<sup>16</sup> Following the EU's lead, the Government published draft negotiating texts that it was proposing in negotiations with the EU, but has yet to publish any information about the proposals it is tabling in negotiations with the US and other countries, and has not indicated that it will do so.<sup>17</sup>
17. The International Trade Committee recommended that it be granted "full access to all negotiating documents, on a confidential basis when required, and should receive regular updates, in private, from ministers and civil servants who are involved in ongoing trade negotiations". In addition, regularly briefings should be given to the House.<sup>18</sup> The adoption of such practices would bring the UK closer that of the US and EU, where legislators have full access to classified documents, including negotiating texts. More generally, there is agreement that the Government should operate on a principle of transparency, and publish documents related to trade negotiations unless there is a compelling reason not to.<sup>19</sup> This is the approach that the EU has taken in recent years, declassifying and publishing many more documents.

#### *Examples of weakness in UK scrutiny*

18. Shortcomings of the UK's scrutiny processes have been revealed with the recent UK-Japan Comprehensive Economic Partnership Agreement and the UK-EU Trade and Cooperation Agreement. The UK-Japan agreement was in a large part a replication of the EU-Japan agreement, with relatively few substantive changes, and the Government provided parliament with additional time for scrutiny, providing access to the treaty text and drafts of the accompanying documents on

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<sup>15</sup> Select Committee on the Constitution, House of Lords, 'Parliamentary Scrutiny of Treaties', 11.

<sup>16</sup> See for example the preliminary impact assessment for the US: <https://www.gov.uk/government/publications/the-uks-approach-to-trade-negotiations-with-the-us>

<sup>17</sup> For UK proposals on negotiations with the EU, see: Department for International Trade, 'The UK's Approach to Trade Negotiations with the US', GOV.UK, 2 March 2020, <https://www.gov.uk/government/publications/the-uks-approach-to-trade-negotiations-with-the-us>. For EU proposals see: European Commission, 'Documents Related to the Work of the Task Force for Relations with the United Kingdom', European Commission - European Commission, 2020, [https://ec.europa.eu/info/european-union-and-united-kingdom-forging-new-partnership/publications-and-news/documents-related-work-task-force-relations-united-kingdom\\_en](https://ec.europa.eu/info/european-union-and-united-kingdom-forging-new-partnership/publications-and-news/documents-related-work-task-force-relations-united-kingdom_en).

<sup>18</sup> House of Commons International Trade Committee, 'UK Trade Policy Transparency and Scrutiny'. House of Commons International Trade Committee.

<sup>19</sup> House of Commons International Trade Committee, 'UK Trade Policy Transparency and Scrutiny'; European Union Committee, House of Lords, 'Scrutiny of International Agreements: Lessons Learned'. House of Commons International Trade Committee, 'UK Trade Policy Transparency and Scrutiny'; European Union Committee, House of Lords, 'Scrutiny of International Agreements: Lessons Learned'.

a confidential basis for ten sitting days before the treaty was formally laid before parliament under the CRAG Act. Despite this additional time, the International Trade Committee reported that their ability to scrutinise the document was constrained by the “limits of both time and resources” and asked that the Secretary of State work with them to review scrutiny arrangements for future trade agreements.<sup>20</sup>

19. The UK-EU Trade and Cooperation Agreement is arguably the most important trade agreement that the UK will enter into, as the EU is its largest trading partner. Due to the weak scrutiny powers of Parliament, there was minimal oversight of the negotiating process. As the EU Committee of the House of Lords concluded, Parliament received too little information to perform its scrutiny role effectively.<sup>21</sup> During the UK-EU negotiations over the Withdrawal Agreement for instance, the Committee was unable to gain access to timely or detailed information on the progress of negotiations. Requests for meetings with Ministers were turned down, and Government responses to letters and reports were delayed and often of poor quality. The report noted that although relations with the Department for International Trade were cordial, officials felt unable to provide substantive information while negotiations were on-going.<sup>22</sup>
20. Once UK-EU negotiations concluded, there was minimal scrutiny of the implementing legislation. The procedures under the CRAG Act were disappplied and the implementing legislation was fast-tracked through Parliament in a single day.<sup>23</sup> Parliament debated the Bill just four days after the UK-EU treaty text was published and less than 2 days before the treaty was due to be applied. The implementing Bill and accompanying Explanatory Memorandum was published only 18 hours before it was debated and voted on in Parliament, and there was no time for it to be scrutinised and reported on by parliamentary committees. Dr. Fowler from the Hansard Society called the process a ‘farce’ arguing that the process “represents an abdication of Parliament’s constitutional responsibilities to deliver proper scrutiny of the executive and of the law”.<sup>24</sup>
21. The House of Commons Future Relationship with the European Union Committee judged it “a matter of deep concern” that the Government and the European Commission had left so little time for parliamentary scrutiny before provisional application of the treaty.<sup>25</sup> Although there were proposals for the Committee to conduct scrutiny of the treaty after the implementing Bill had been passed, the Committee ceased to exist on 16<sup>th</sup> January 2021. It is important that Parliament continues to scrutinise UK-EU relations, including with respect to the implementation of the new trade agreement and the work of the Withdrawal Agreement Joint Committee, but the Government

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<sup>20</sup> House of Commons International Trade Committee, ‘UK-Japan Comprehensive Economic Partnership Agreement: Second Report of Session 2019–21’ (House of Commons, 18 November 2020), <https://committees.parliament.uk/publications/3549/documents/34421/default/>.

<sup>21</sup> European Union Committee, House of Lords, ‘Scrutiny of International Agreements: Lessons Learned’.

<sup>22</sup> European Union Committee, House of Lords.

<sup>23</sup> Usually, the requirements of the Constitutional Reform and Governance Act 2010 (CRAG) must be fulfilled before the UK can ratify an international agreement. This involves laying a treaty before Parliament for 21 sitting days without either House resolving it should not be ratified. However, section 36 of the European Union (Future Relationship) Act 2020 says that the CRAG requirements do not apply to the TCA and the other two agreements. See Charley Coleman and Nicola Newson, ‘UK-EU Trade and Cooperation Agreement’ (House of Lords Library, 5 January 2021), <https://lordslibrary.parliament.uk/uk-eu-trade-and-cooperation-agreement/>.

<sup>24</sup> Brigid Fowler, ‘Parliament’s Role in Scrutinising the UK-EU Trade and Cooperation Agreement Is a Farce’, *Hansard Society Blog* (blog), 29 December 2020, <https://www.hansardsociety.org.uk/blog/parliaments-role-in-scrutinising-the-uk-eu-trade-and-cooperation-agreement>.

<sup>25</sup> Committee on the Future Relationship with the European Union, ‘The UK-EU Future Relationship: The Trade and Cooperation Agreement’ (House of Commons, 29 December 2020), <https://publications.parliament.uk/pa/cm5801/cmselect/cmexeu/1094/1094.pdf>.

has yet to propose arrangements for how this will be done.<sup>26</sup> To date the work of the Withdrawal Agreement Joint Committee has been opaque, and Parliament has called for much greater transparency.<sup>27</sup>

### *Arguments for and against reform*

22. Given the substantial policy implications of many trade agreements, it is no surprise that there is disquiet in the UK with a series of parliamentary committee reports calling for reforms and greater parliamentary scrutiny. There is also disquiet in Australia, with their Affairs, Defence and Trade References Committee concluding in 2015 that Australia's processes leave its parliament to "rubber-stamp agreements that have been negotiated behind closed doors".<sup>28</sup> During 2020, Australia's Joint Scrutiny Committee on Treaties (JSCOT) opened a new inquiry on the role of Parliament in trade negotiations.<sup>74</sup>
23. Concerns about the lack of parliamentary scrutiny of international treaties are not new. As Walter Bagehot stated as far back as in 1872, "Treaties are quite as important as most laws, and to require the elaborate assent of representative assemblies to every word of the law, and not to consult them even as to the essence of the treaty, is prima facie ludicrous".<sup>29</sup> As the scope of contemporary trade agreements grows, the discrepancy between the level of scrutiny that treaties and domestic legislation receive becomes even more glaring.
24. A common objection is that providing Parliament with a vote would undermine the Royal Prerogative (which enables Ministers to take specific actions without the approval of Parliament, including the deployment of armed forces and negotiation of international treaties). But conventions change, and it has become the norm for the UK Government to obtain approval from Parliament before deploying armed forces.<sup>30</sup> A similar practice could be legislated to enable Parliament to debate and vote on trade agreements before they are ratified.
25. Another objection is that greater parliamentary scrutiny would reduce the Government's flexibility in the negotiating room. Yet, there is substantial evidence that tying one's hands domestically can confer strength. US negotiators are renowned for invoking their mandate from Congress as the reason why they cannot make concessions in the negotiating room, while the EU negotiators frequently invoke recalcitrant member states, whose representatives set their negotiating objectives and must approve the final outcome.

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<sup>26</sup> Committee on the Future Relationship with the European Union, 'The Shape of Future Parliamentary Scrutiny of UK-EU Relations' (House of Commons, 14 January 2021),

<https://committees.parliament.uk/publications/4370/documents/44329/default/>.

<sup>27</sup> Committee on the Future Relationship with the European Union, 'Implementing the Withdrawal Agreement: Citizens' Rights' (House of Commons, n.d.), <https://committees.parliament.uk/publications/3082/documents/28944/default/>.

<sup>28</sup> Foreign Affairs, Defence and Trade References Committee, The Senate, 'Blind Agreement: Reforming Australia's Treaty-Making Process' (Canberra: Commonwealth of Australia, 2015),

[https://www.aph.gov.au/Parliamentary\\_Business/Committees/Senate/Foreign\\_Affairs\\_Defence\\_and\\_Trade/Treaty-making\\_process/Report](https://www.aph.gov.au/Parliamentary_Business/Committees/Senate/Foreign_Affairs_Defence_and_Trade/Treaty-making_process/Report).

<sup>29</sup> Walter Bagehot, *The English Constitution [Electronic Resource]*, The Making of the Modern Law (London: Chapman and Hall, 1872), <https://ezproxy-prd.bodleian.ox.ac.uk/login?url=https://heinonline.org/HOL/Page?handle=hein.cow/elicotn0001&collection=cow>.

<sup>30</sup> Gavin Phillipson, 'Gavin Phillipson: "Historic" Commons' Syria Vote: The Constitutional Significance. Part I', *UK Constitutional Law Association* (blog), 19 September 2013, <https://ukconstitutionallaw.org/2013/09/19/gavin-phillipson-historic-commons-syria-vote-the-constitutional-significance-part-i/>.

26. Greater parliamentary scrutiny could also improve the quality of outcomes. Knowing their decisions will be robustly examined would provide additional impetus for Ministers and senior officials to make high-quality decisions. It would also increase the UK's credibility as a negotiating partner, as properly engaging parliament and devolved administrations would reassure negotiating partners that any treaty they conclude with the UK Government will be ratified and implemented.

### *Progress to date*

27. To its credit, the Government has taken steps to improve the level of information available to parliament, although more steps are needed before the UK has a robust scrutiny process for international trade agreements.

28. The Government has started to publish its 'Outline Approach' before embarking on a new set of trade negotiations, in most cases, these have been accompanied by a preliminary impact assessment. Alongside the EU, the UK is now one of the few jurisdictions to publish impact assessments at the outset of negotiations. The Government has also given statements to Parliament when the Outline Approach is published, providing parliamentarians the opportunity for a short debate on its negotiating objectives.<sup>31</sup> However, the Government does not yet consult Parliament on the details of the draft negotiating objectives. Furthermore, the Outline Approach only provides a high-level summary of the Government's negotiating objectives, a less granular level of detail than is typically found in negotiating mandates published by the US and EU. The UK's Outline Approach for US negotiations for instance is only 4 pages long while the US's summary of its UK negotiating objectives runs to 15 pages.<sup>32</sup>

29. In December 2020, the Government issued a statement on transparency and scrutiny arrangements for new trade agreements, promising to publish negotiating objectives and scoping assessments at the outset of negotiations; to keep Parliament and the public informed of progress for these negotiations through the publication of 'Round Reports'; hold regular briefings for Parliamentarians; keep select committees apprised of negotiations, including through public and private briefings with Ministers and Chief Negotiators; and provide scrutiny committees with treaty text and other related documents or reports on a confidential basis, a reasonable time prior to them being laid or deposited in Parliament under the CRAAG Act. It also promised that when a signed treaty text is laid in Parliament, it will be accompanied by an Explanatory Memorandum and the an independently verified impact assessment which will covering the economic and environmental impacts of the deal.

30. Crucially, with the exception of the new Trade and Agriculture Commission, these commitments are not placed on a statutory footing. Even if these commitments are fulfilled, Parliamentarians will still have much less input on the negotiating mandate and far less access to information during negotiations than their counterparts in the United States and European Union. Although the Government has committed to providing greater time for scrutiny, the example of the UK-Japan

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<sup>31</sup> See for instance the statement and short debate on the UK's approach to US negotiations House of Commons, 'UK-US Trade Deal - Hansard' (2020), <https://hansard.parliament.uk/Commons/2020-03-02/debates/09E16FFE-C5F3-4AD9-A7F6-770D1E903F55/UK-USTradeDeal>.

<sup>32</sup> UK Department for International Trade, 'UK-US Free Trade Agreement', 2020, [https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment\\_data/file/869592/UK\\_US\\_FTA\\_negotiations.pdf](https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/869592/UK_US_FTA_negotiations.pdf); Office of the US Trade Representative, 'United States-United Kingdom Negotiations. Summary of Specific Negotiating Objectives.', February 2019, [https://ustr.gov/sites/default/files/Summary\\_of\\_U.S.-UK\\_Negotiating\\_Objectives.pdf](https://ustr.gov/sites/default/files/Summary_of_U.S.-UK_Negotiating_Objectives.pdf).

agreement suggests that simply extending the scrutiny period by a few days will not substantially improve the quality of scrutiny. Crucially there is no commitment that Parliament will debate or vote on agreements, with the Government simply stating that “Should the International Trade Committee or International Agreements Sub-Committee recommend a debate on the deal, the Government will seek to accommodate such a request subject to Parliamentary time”.<sup>33</sup>

### *Recommendations for strengthening parliamentary scrutiny*

31. Reviewing practices in the UK and other jurisdictions highlights a number of steps that could be taken to strengthen Parliament’s scrutiny of trade agreements.

- **Provide Parliament with a statutory right to a debate on the draft negotiating objectives for any treaty or treaty action the scrutiny committee identifies as important and meriting such action.** *This would bring the UK in line with the EU and US where parliaments are fully consulted on the negotiating mandate, could provide Government with leverage in the negotiating room, and could strengthen the credibility of the Government as a negotiating partner by reassuring other governments that Parliament is on board with the Government’s approach.*
- **Provide Parliament with a statutory right to timely and substantive information, including regular public and private briefings to relevant scrutiny and subject-specific committees, and access to draft negotiating texts and related documents for all MPs and security-cleared staff, on a confidential basis.** *This would bring the Parliament in line with the US and the EU, where parliamentarians have a high level of access to information, including to confidential negotiating texts.*
- **Require Government to make the treaty text public well before the treaty is tabled in Parliament, to allow sufficient time for examination and scrutiny, and oblige Government to extend the 21 sitting-day period for scrutiny if requested to do so by the relevant scrutiny committee.** *In the US for example, Congress has access to the agreed text 60 days before signature, and access to the final text for 30 days before the treaty is laid before Congress for ratification.*
- **Require Government to publish preliminary impact assessments at the outset of negotiations and full impact assessments when the treaty is laid in Parliament, which evaluate the economic, social, and environmental impacts of a proposed agreement.** *The UK Government has started to publish preliminary impact assessments at the outset of negotiations; this recommendation would formalise and systematise an emerging practice.*
- **Provide that trade agreements shall not be ratified unless Parliament has debated and authorized ratification of the agreement, in cases where the scrutiny committee so decides.** *This would bring the UK in line with the EU and US, where parliaments must approve treaty texts as part of the ratification process. It also reflects the nature of contemporary trade agreements, which have implications for a wide range of public policy areas; would strengthen*

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<sup>33</sup> Elizabeth Truss, ‘Transparency and Scrutiny Arrangements for New Free Trade Agreements’ (Statement, House of Commons, 7 December 2020), <https://questions-statements.parliament.uk/written-statements/detail/2020-12-07/hcws623>.

*the quality of decision-making; and could provide the Government with greater leverage to during negotiations.*

- **Establish a new mechanism for scrutiny of UK-EU relations, and provide for greater transparency in the operations of the Partnership Council and of the Withdrawal Agreement Joint Committee**, with the Government providing a statement to the House after each meeting, including details of any decisions reached by these bodies and followed by an opportunity for questions. *This would help ensure effective scrutiny of UK-EU relations now that the transition period has ended and the House of Commons Future Relationship with the European Union Committee has ceased to exist.*

## Role of devolved administrations

32. A pressing question for the UK is how to involve the devolved administrations of Scotland, Wales and Northern Ireland in trade negotiations. It is vital that the devolved administrations are thoroughly consulted on trade policy and on the negotiation of trade agreements, given the constitutional set-up of the UK and differential treatment of Northern Ireland in the context of UK-EU relations.

## *Comparison of the UK with other jurisdictions*

33. The CRAG Act does not provide any role for the devolved administrations in treaty making, even where treaties impact areas of devolved policy. Yet, where trade agreements touch on areas of devolved competence, legislation may need to be passed by the devolved legislatures – or at Westminster with their consent – to reflect any new international obligations.<sup>34</sup> In 2013, the Governments agreed on guidelines on how devolved administrations would be involved in treaty agreements<sup>35</sup>. In these guidelines, the Governments committed to exchanging information during the negotiation of treaties and the implementation of treaty obligations, and for devolved ministers to form part of the UK treaty negotiating team when invited by the UK government.<sup>36</sup> However, devolved administrations have expressed concern that existing consultation mechanisms are not working effectively.
34. The UK also has sub-national legislatures but they do not play a formal role in treaty scrutiny. The informal Interparliamentary Forum on Brexit was the only forum in which the Scottish parliament, National Assembly for Wales, and Northern Ireland Assembly could engage in scrutiny of inter-governmental policy of any sort.<sup>37</sup> Now that the negotiations on the Withdrawal Agreement and on the Future Relationship have been completed, the future of this Forum is uncertain.
35. In deciding how to involve devolved administrations in trade negotiations, lessons can be learned from Canada. In Canada, competency in some areas of policy and legislation lies with the provinces,

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<sup>34</sup> Institute for Government, ‘Institute for Government-Written Evidence’, 5 June 2020, <https://committees.parliament.uk/writtenevidence/6552/html/>.

<sup>35</sup> UK Government, Scottish Ministers, Welsh Ministers, Northern Ireland Executive Committee, ‘Memorandum of Understanding and Supplementary Agreements’, October 2013, [https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment\\_data/file/316157/MoU\\_between\\_the\\_UK\\_and\\_the\\_Devolved\\_Administrations.pdf](https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/316157/MoU_between_the_UK_and_the_Devolved_Administrations.pdf).

<sup>36</sup> House of Commons Scottish Affairs Committee, ‘Scotland, Trade and Brexit’, 10 March 2019, <https://publications.parliament.uk/pa/cm201719/cmselect/cmsscota/903/903.pdf>.

<sup>37</sup> Ewan Smith, Erik Bjorge, and Arabella Lang, ‘Treaties, Parliament and the Constitution’, *Public Law*, 2020, 5.

including local procurement and tax, while competency in areas like agriculture is shared between the federal and provincial governments. Although the Federal Government has sole authority to negotiate, sign and ratify international treaties, provincial legislative assemblies may pass legislation in areas where they have jurisdiction. Thus, although the Federal Government is the only level of government responsible to the international community for compliance with the treaties that it signs, and provincial consent is not required for ratification, the Federal Government cannot enforce compliance with international treaties in areas beyond its jurisdiction.<sup>87</sup>

36. To address this tension, the Federal Government has a policy of consulting with provinces before signing treaties that touch on matters of provincial jurisdiction. Federal, provincial, and territorial governments meet quarterly to discuss trade negotiations and are regularly consulted, particularly in areas where they have responsibility for proper implementation.<sup>88</sup> During negotiations with the EU for example, they were consulted on the mandate and were represented at the negotiating table for the first time.<sup>89</sup> In some treaties the Government includes a “federal state clause” in the treaty itself that allows the Government to consent to be bound by only those international obligations that come within federal jurisdiction, and to make best efforts to get provincial compliance.<sup>90</sup> The only sub-national parliament with power at the ratification stage is the National Assembly of Quebec: if the Assembly rejects the treaty, the agreement is not annulled, but the parts touching on provincial competences are not applicable to Quebec.<sup>91</sup>

#### *Recommendations for strengthening the role of devolved administrations*

37. UK Parliamentary Committees have called for devolved administrations and legislatures to play a greater role, to ensure that devolved competences are respected and that the devolved legislatures are able to undertake meaningful scrutiny of the treaty actions that will affect them.<sup>38</sup> Recommendations include the Government committing to more regular consultation with the devolved administrations during negotiations, and the inclusion of representatives from the devolved administrations in the UK negotiating teams, especially where commitments are being sought that will impact on devolved competencies.<sup>39</sup> There are also proposals for more effective inter-parliamentary coordination, so that scrutiny committees in Westminster engage closely with the Welsh and Scottish parliaments and the Northern Ireland Assembly to scrutinise treaties.<sup>40</sup>
38. To strengthen the role of devolved administrations in the negotiation of trade agreements, the UK could:
- **Provide devolved administrations with the statutory right to co-determine the negotiating mandate in areas of devolved competence, and fully participate in negotiations on issues of devolved competence; provide devolved administrations and legislatures with the same level of information as the UK Parliament; and create an interparliamentary mechanism to involve devolved legislatures in treaty scrutiny.** *There are valuable lessons to be learned from Canada, where the Government has found ways to involve Provincial administrations in areas where they have competence, whilst retaining control over the treaty-making process.*

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<sup>38</sup> Select Committee on the Constitution, House of Lords, ‘Parliamentary Scrutiny of Treaties’.

<sup>39</sup> House of Commons Scottish Affairs Committee, ‘Scotland, Trade and Brexit’.

<sup>40</sup> European Union Committee, House of Lords, ‘Treaty Scrutiny: Working Practices’.

## Stakeholder consultation

39. External engagement is vital for effective policy formulation and implementation in complex policy areas like international trade with substantial distributional effects and trade-offs. It provides government officials with multiple sources of expertise and bringing in outsiders provides an important mechanism for challenging government thinking and opportunities for policy testing and feedback. Effective engagement can help government avoid costly policy mistakes and improve the quality of decisions, and is useful at all stages of policymaking, from initial design to implementation.<sup>41</sup>
40. The UK needs a robust modern, inclusive and democratic governance model to oversee trade policy that has broad legitimacy in society, strengthens the social contract, and produces policy priorities that are also a balance of socioeconomic priorities. In 2018, UK businesses, trade unions and civil society organisations agreed a series of principles that should guide UK trade governance, emphasising the need for consensus building, transparency, democratic oversight and ensuring net benefit for all. They noted that a modern governance model needs to put a stronger emphasis on consensus building and accountability, to develop trust, and enable decisions to be made in a more inclusive and transparent manner. This does not mean there will not be tough decisions and compromises during the negotiation process itself, but it does mean that these decisions are made with the full knowledge of stakeholders, and with them feeling that their contributions are really heard, and fully considered, to ensure stronger buy-in to the results. Trust built early on will deliver faster results later in the process.<sup>42</sup>
41. The UK government has created a series of Trade Advisory Groups (TAGs).<sup>43</sup> While an important step, the advisory groups are business-focused and are a missed opportunity to create a forum for dialogue and consensus-building between representative constituencies, which is an essential step to building trust, problem solving and decision making, especially in such a contested policy area like trade. The current structure risks marginalising the voices and knowledge of trade unions, consumer groups, civil society organisations, and experts in the formulation of trade policy. There are a number of steps that could be taken to improve stakeholder consultation.

## *Effective stakeholder engagement and public consultation*

42. Past experience in the UK and other countries including Canada, the United States, and Australia suggests that in economic policy areas like trade policy, continuous structured dialogue through formal multi-stakeholder advisory committees, rather than ad hoc consultations, is an effective mechanism for engagement.<sup>44</sup>
43. It is vital to have an overall trade strategy, developed in consultations with stakeholders, to guide consultations on specific trade negotiations. In the absence of an overall strategy there is the risk

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<sup>41</sup> Institute for Government, 'Creating and Sustaining an Effective Strategic Dialogue with Business', March 2016, [https://www.instituteforgovernment.org.uk/sites/default/files/publications/edited\\_20150723%20-%20BIS%20Slide%20Deck%20-%20Final%20Versionb%28no%20print%20border%29.pdf](https://www.instituteforgovernment.org.uk/sites/default/files/publications/edited_20150723%20-%20BIS%20Slide%20Deck%20-%20Final%20Versionb%28no%20print%20border%29.pdf).

<sup>42</sup> A Trade Governance Model That Works for Everyone. 2020. *The International Chamber of Commerce*: <https://iccwbo.org/products/trade-governance-model>

<sup>43</sup> *Trade Advisory Groups: Membership*. 4 January 2021. UK Government: Department of International Trade: <https://www.gov.uk/government/publications/trade-advisory-groups-tags/trade-advisory-groups-membership>

<sup>44</sup>

that trade policy might degenerate into a shopping list of ‘deals for the sake of deals’.<sup>45</sup> A strategy should set high-level objectives, and prioritise activity. It will have to link into the UK’s wider economic strategy, such as the tax regime, regulatory environment, labour market and industrial policy, as well as wider policy areas like climate change and environment, foreign and international development policy. Trade strategy should pull together work from across Whitehall.

44. Structured dialogues enable governments to engage with a collective view from stakeholders on issues that are affecting an industry or sector as a whole, rather than individual companies or organisations. They bring together multiple interlocutors that represent different interests and sub-sectors of industry, promote ongoing, long-term co-ordination around a set of strategic issues and coherent priorities for the industry, and allow government to better identify and dynamically respond to opportunities and challenges. Successful dialogue combines the aggregated views from representative organisations and on-the-ground insights from individual organisations.<sup>46</sup>
45. For legitimate reasons, the concept of government engagement with business raises a number of concerns including industry capture and lobbying (dialogue is used to advance special concerns of interest groups that dominate the industry); incumbency bias (bigger/dominant companies are disproportionately represented in the dialogue or dominate the agenda vis-à-vis emerging/disruptive players); collusion (dialogue acts as a platform where government becomes an ‘uncritical friend’ of business); deadweight loss (business persuades government to invest in areas that they would have invested in regardless).<sup>47</sup> Creating engagement structures that are managed through official channels, is preferable to unofficial forms of engagement which increased the risk of trade policy being captured by vested interests.<sup>48</sup>
46. A study on the UK’s experience with sector councils highlighted three factors that are important to creating and sustaining an effective strategic dialogue: attaining balanced stakeholder representation; maintaining a strategic focus; and effectively harnessing inputs.
47. Ensuring that advisory committees are representative of all stakeholders is particularly important in trade policy; a policy area in which there is a high level of public mistrust and scepticism. Balanced representation would help counter concerns that advisory committees, with their high level of confidential access, represent a ‘capture’ of government policymaking by a narrow set of corporate interests. During the Transatlantic Trade and Investment Partnership negotiations, the US and EU faced widespread accusations of this kind, and high levels of public mistrust was a major factor in the breakdown of the negotiations. That experience emphasises the importance of ensuring that membership of the advisory committees in the UK is diverse, including non-governmental organisations and consumer groups as well as businesses.<sup>49</sup>
48. Care needs to be taken to ensure that smaller and new businesses are included, so that business representation is not skewed towards larger and more established companies or sub-sectors, and that London-based organisations are not over-represented. For organisations that are not

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<sup>45</sup> Oliver Ilot, Ines Stelk, and Jill Rutter, ‘Taking Back Control of Trade Policy’ (Institute for Government, 2017), [https://www.instituteforgovernment.org.uk/sites/default/files/publications/IFGJ5448\\_Brexit\\_report\\_160517\\_WEB\\_v2.pdf](https://www.instituteforgovernment.org.uk/sites/default/files/publications/IFGJ5448_Brexit_report_160517_WEB_v2.pdf).

<sup>46</sup> Institute for Government, ‘Creating and Sustaining an Effective Strategic Dialogue with Business’.

<sup>47</sup> Institute for Government.

<sup>48</sup> Ilot, Stelk, and Rutter, ‘Taking Back Control of Trade Policy’.

<sup>49</sup> Ilot, Stelk, and Rutter.

represented, it is important to ensure that the proceedings of the advisory committee are transparent – publishing minutes, membership lists and agendas – is important.<sup>50</sup>

49. The purpose of strategic dialogue, in part, is to translate the dialogue into action – whether this be action from government or from the industry itself. The experience of sector councils underscores the importance of having high-level decision makers from stakeholders and government, enabling advisory committees to act decisively. The role of committee chairs is vital. Sector councils had industry co-chairs which was vital to efficacy, and was most effective when industry co-chairs had experience and gravitas within the sector, displayed even-handedness and impartiality, and set a strategic tone and discouraged lobbying. Continuity is important for relationships and trust to develop among dialogue participants and allows for a sustained effort on issues facing a sector. Dialogue between the members of different advisory committees can help inform economy-wide decisions.<sup>51</sup>
50. A fraught issue is whether, and to what extent, advisory committees should act in a confidential manner and be subject to non-disclosure agreements. While governments often argue that confidentiality is essential so that members of advisory committees do not disclose negotiating positions and undermine the Government’s negotiating strategy, transparency is important for effective consultation and public trust. As the Confederation of British Industry notes, building support throughout the country and across stakeholder groups for trade deals is crucial to success. Growing buy-in needs to start at the beginning of the process by showing sufficient transparency and making the negotiating objectives public in draft form, followed by a real consultation with businesses and other stakeholders across the country.<sup>52</sup>
51. Members of the UK’s trade advisory groups have been asked to sign non-disclosure agreements but, as the UK’s Confederation of British Industry argues, their use can reduce the efficacy of advisory committees and stakeholder consultation. Critical engagement on Brexit preparation, particularly No Deal, was conducted under non-disclosure agreements. While there is a place for such agreements to protect commercial interests and genuinely sensitive information, this hampered the effectiveness of business consultation, especially when government communicated to separate groups of business simultaneously but prevented them from cross-referencing. In some cases, UK business organisations found European Trade Associations and diplomats a better source of information than the UK government.<sup>53</sup>
52. While it may be justifiable to use non-disclosure agreements to ensure that confidential negotiating positions are not disclosed, care needs to be taken to ensure that these agreements are narrow in scope, so they do not undermine detailed trade policy discussions and consultations with people and organisations who are not members of advisory committees, do not hamper transparency over committee proceedings, and include appropriate provisions on public interest disclosure.
53. Wider public consultation is important for building public understanding and trust in trade policy decision-making, but it can be difficult to manage. In other areas of policy, the UK government has learned public backlash and improved its processes of public consultation. In the early 2000s, the

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<sup>50</sup> Institute for Government, ‘Creating and Sustaining an Effective Strategic Dialogue with Business’.

<sup>51</sup> Institute for Government, ‘Creating and Sustaining an Effective Strategic Dialogue with Business’.

<sup>52</sup> Confederation of British Industry, ‘Building a World-Leading UK Trade Policy’, 2020, <https://www.cbi.org.uk/media/3897/building-a-world-leading-uk-trade-policy-002.pdf>.

<sup>53</sup> Confederation of British Industry.

UK Government was surprised by the strength of the public backlash to farm trials of genetically modified food. Policymakers and politicians misread public attitudes, and the policy had to be withdrawn. Government followed up with extensive citizen engagement and created Sciencewise, a government-funded programme that runs public engagement exercises on scientific issues, improving public understanding and enabling the Government to have a much better gauge of public attitudes and concerns.<sup>54</sup>

54. As the Institute for Government notes, ‘The lesson for DIT is clear: it should not take public attitudes for granted, particularly on issues such as regulation and health and safety, or it may find the public acting as a veto-player on its policymaking’.<sup>55</sup> In response to widespread public concern on food standards, the Government established an independent Trade and Agriculture Commission to advise the Government on trade policy, and placed it on a statutory footing.<sup>56</sup> While the Commission has been welcomed, including by the agricultural industry, some concerns have been raised by civil society organisations on its scope and composition.

### *Insights from other jurisdictions*

55. Governments have a range of approaches to stakeholder consultation. Many governments have formal committees for stakeholder consultation.
56. The US has a formal set-up for stakeholder consultation which is required by Congress and set out in statute. It has a series of 26 advisory committees with a total of approximately 700 advisers who provide confidential information and advice on proposed trade agreements, comment on US draft proposals, and advise on the operation of a trade agreement once it has come into force.<sup>57</sup> While primarily comprised of business representatives, membership of the committees extends to non-business interests, such as non-governmental organisations and consumer groups.<sup>58</sup> Members joining advisory councils have to sign non-disclosure agreements, which include provisions ensuring that information is not shared with other parts of their organisation. In return, those individuals are able to access confidential negotiating information.<sup>59</sup>
57. The US advisory committees have been criticized for lacking balanced representation and disproportionately reflecting the interests of large corporations, for lacking transparency, for not being sufficiently timely to have an impact on policy, and concerns have been raised by committee members and negotiators that the consultations that did occur were not always meaningful or useful.
58. Canada created a consultation mechanism in the late 1980s and early 1990s based on the US model, although it was not based in statute, and therefore had a much greater degree of flexibility. This system, known as Sector Advisory Groups on International Trade, was used by Canada in the US–Canada FTA negotiations, and sustained through the North American Free Trade Agreement and

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<sup>54</sup> Ilot, Stelk, and Rutter, ‘Taking Back Control of Trade Policy’.

<sup>55</sup> Ilot, Stelk, and Rutter.

<sup>56</sup> Department for International Trade, ‘Trade and Agriculture Commission Put on Statutory Footing’, *Press Release*, 1 November 2020, <https://www.gov.uk/government/news/trade-and-agriculture-commission-put-on-statutory-footing>.

<sup>57</sup> See <https://ustr.gov/about-us/advisory-committees>

<sup>58</sup> ACTPN Charter (2014). Charter US Advisory Committee for Trade Policy and Negotiations, Office of the United States Trade Representative. Available at: <https://ustr.gov/sites/default/files/ACTPN-Charter-2014-2018.pdf>

<sup>59</sup> ITACT. 2014. Industry Trade Advisory Committee, Operations Manual. Available at: <https://2016.trade.gov/itac/documents/ITAC-OpsManual-2014-18.pdf>

Uruguay Round of WTO negotiations. However, since the 1990s Canada has slowly unwound this formal structure as interest and engagement began to wane. They replaced the formal committees with ad hoc consultative committees. although there are concerns that these have not been very effective.<sup>60</sup>

59. In both the US advisory committees and original Canadian SAGIT structure, membership was granted to the individual, not their organisation. If a representative from one organisation could not attend, the business was not allowed to send a replacement for them. These individuals were selected on the basis of their expertise on particular issues of trade policy.<sup>61</sup>
60. Australia has no settled practice for stakeholder consultation, which tends to take place on an ad hoc basis. The Trans-pacific Partnership (TPP) was negotiated under strict conditions of confidentiality, with all participating governments agreeing that the negotiating texts, proposals of each Government, accompanying explanatory material, emails related to the substance of the negotiations, and other information exchanged in the context of the negotiations, is provided and will be held in confidence, unless each participant involved in a communication subsequently agrees to its release. This meant that the documents could be provided only to (1) government officials or (2) persons outside government who participate in that government's domestic consultation process and who have a need to review or be advised of the information in these documents. Anyone given access to the documents will be alerted that they cannot share the documents with people not authorized to see them.<sup>62</sup>
61. The Australian parliament, stakeholders and the wider public raised concerns about the lack of access to information about confidential negotiations, and the impact of such a lack of information on the quality of stakeholder consultation. Although the Government held extensive stakeholder and public briefings during the TPP negotiations, the Government shared minimal information and did not hold detailed discussions on the content of agreements, so consultation initiatives were of limited value. In 2015, the Foreign Affairs, Defence and Trade Committee of the Australian Parliament recommended that the Government move toward a system where stakeholders are granted confidential access to draft negotiating text. For stakeholders, the lack of access to negotiating text and other detailed information inhibits their ability to influence and scrutinise decisions being made in the trade context in the way they would in a domestic context. Stakeholders are also at a disadvantage in comparison to their counterparts in partner countries—at least in the US—who are allowed confidential access to draft texts.<sup>63</sup>
62. The EU has one of the most transparent approaches to trade policymaking. In its 'Trade for All' strategy, published in 2015, the European Commission committed to increased levels of transparency. This included publishing EU texts online for all trade and investment negotiations, and publishing the text of the agreement immediately after negotiations are concluded, as it stands, without waiting for the legal revision to be completed<sup>64</sup>. For example, the EU declassified its negotiating directives for negotiations with Australia before commencing negotiations in July 2018, and published its initial text-based proposals.<sup>65</sup> The European Commission publishes multiple

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<sup>60</sup> Ilot, Stelk, and Rutter, 'Taking Back Control of Trade Policy'.

<sup>61</sup> Ilot, Stelk, and Rutter.

<sup>62</sup> Foreign Affairs, Defence and Trade References Committee, The Senate, 'Blind Agreement'.

<sup>63</sup> Foreign Affairs, Defence and Trade References Committee, The Senate.

<sup>64</sup> European Commission and Directorate-General for Trade, *Trade for All: Towards a More Responsible Trade and Investment Policy*. (Luxembourg: Publications Office, 2015).

<sup>65</sup> Available here: <https://trade.ec.europa.eu/doclib/press/index.cfm?id=1865>

impact assessments of the trade agreement, including a sustainability impact assessment which is conducted by external consultants and analyses the potential economic, social, human rights and environmental impacts of the agreement under negotiation. The Commission publishes its views on the sustainability impact assessment but is under no formal obligation to follow the report's recommendations, and it's not clear if the findings actually influence the Commission's approach.<sup>66</sup>

63. With regards to the development of an overall trade strategy, New Zealand has taken a novel approach. Its 'Trade for All' approach seeks to ensure that trade policy delivers for all New Zealanders, and contributes to addressing global and regional issues of concern, such as environmental issues and labour standards. The Government's goal is a trade policy that works alongside other government policies, to support sustainable and inclusive economic development.

64. New Zealand's approach was motivated by the Government's observation that public concern around globalisation have grown. As it explains "There are reservations about the balance in trade agreements between market access for exporters and concerns over potential loss of sovereignty and the perception that globalisation is exacerbating environmental problems and increasing inequality. There are questions about who benefits from trade and the long-term sustainability of our economic development. The Trade for All agenda responds to these concerns, seeking to rebuild public consensus around New Zealand's trade policy while successfully navigating the turbulent global environment to advance and protect our trade interests". The Government has undertaken a wide-ranging public consultation process including dedicated consultation with Māori, as the Crown's treaty partner, and created an independent Trade for All Advisory Board.<sup>67</sup> The Board comprises experienced leaders from a range of backgrounds in civil society and business; government and non-governmental organisations.<sup>68</sup>

#### *Recommendations for improving the quality of stakeholder consultation*

65. The UK needs an effective process for stakeholder consultation and public engagement in trade policy. Several steps could be taken to improve the UK's current set-up:

- **Develop and publish a national trade strategy through extensive stakeholder and public consultation to provide clarity and wide buy-in on the overall objectives for UK trade policy.** *This would bring UK practice into line with other governments including the US, Canada, New Zealand, and the EU which set overall strategies to guide trade policy.*
- **Undertake a swift, independent review of the composition and functioning of the UK's trade advisory groups** to ensure balanced stakeholder representation, sufficient sharing of information, two-way dialogue and detailed discussion of policy options. This should include a review of the use and scope of non-disclosure agreements, with the aim of maximising transparency and openness of consultation processes. *This would help ensure the UK has a best-in-class approach to stakeholder consultation.*

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<sup>66</sup> Nicolás Brando et al., 'The Impact of EU Trade and Development Policies on Human Rights', Large-Scale FP7 Collaborative Project GA No. 320000, 30 June 2015, <https://repository.gchumanrights.org/bitstream/handle/20.500.11825/95/Deliverable-9.2.pdf?sequence=1&isAllowed=y>; James Harrison, 'The Use of Impact Assessments by Governments and Businesses: Questioning Purpose and Utility', in *Handbook on Human Rights Impact Assessments*, ed. Nora Götzmann (Edward Elgar Publishing, 2019), 424–39.

<sup>67</sup> See <https://www.mfat.govt.nz/en/trade/nz-trade-policy/trade-for-all-agenda/>

<sup>68</sup> See <https://www.tradeforalladvisoryboard.org.nz/>

- **Create a statutory obligation for the Government to publish key documents relating to international trade**, including a trade strategy, negotiating objectives for trade negotiations, impact assessments at the outset and conclusion of negotiations, and the legal text of trade agreements, once negotiations are concluded but before the agreement is signed. *This would follow the steps taken by other governments in recent years to improve transparency, help improve the quality of public discussions on trade policy.*
- **Establish a strategy for effective public consultation on trade policy.** *This would improve public understanding of trade policy and enable the Government to have a regular, informed assessment of public attitudes and concerns.*