



PARLIAMENTARY
LABOUR PARTY

BRIEFING:

The Trade Bill and parliamentary scrutiny of international trade agreements

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The government published its Trade Bill on 7 November, following a White Paper in October. The current briefing highlights the central importance of parliamentary scrutiny of any future trade agreements, and the failure of the Trade Bill to provide for any such scrutiny.

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TOP LINES

- Labour is committed to transparency in trade policy, with full parliamentary scrutiny of future UK trade and investment agreements.
- The Trade Bill should have offered an opportunity to legislate for meaningful parliamentary scrutiny of future UK trade and investment treaties.
- Instead, the government has published a Trade Bill that seeks to concentrate power in the hands of the executive, against the interests of Parliament and of wider democracy.
- Labour believes the most rigorous resolution procedure should be used for ratification of UK trade and investment agreements, with prior debate on the floor of the House of Commons.
- Labour believes that scrutiny powers similar to those currently enjoyed by the European Scrutiny Committee should be embodied in a new committee of the House of Commons after Brexit.
- MPs should be able to debate, amend and approve mandates drawn up for the negotiation of trade and investment agreements, prior to the start of negotiations.
- Negotiations should be informed by a prior comprehensive, independent sustainability impact assessment of the social, economic and environmental consequences of any potential deal.
- MPs should have access to the negotiating texts of international trade agreements as they are formulated.
- All documents relating to trade negotiations should be listed on the parliamentary website, as they are in other European parliaments.
- Labour is committed to timely and meaningful engagement with the devolved administrations on future UK trade and investment agreements, and with civil society.

BACKGROUND

Labour made a commitment to full transparency and parliamentary scrutiny of trade deals in the NEC statement on international trade adopted at the party conference in September 2016, and repeated that commitment in its 2017 general election manifesto. The importance of parliamentary scrutiny stems from the fact that trade agreements are international treaties which establish binding obligations on future governments. It is perverse that they should be subject, as they are at present, to the lowest level of democratic oversight.

The current procedure for ratification of treaties by Parliament is governed by the Constitutional Reform and Governance Act 2010, based on the informal Ponsonby Rule dating back to 1924. The 2010 Act is universally recognised to be inadequate as a democratic safeguard against the obligations inherent in treaty commitments. It allows the government to use the negative resolution procedure for secondary legislation, whereby the treaty in question passes into law automatically once it has been laid before Parliament for 21 sitting days along with an Explanatory Memorandum. In theory, both Houses have the right to challenge the treaty during that period, but as the House of Commons briefing paper [notes](#):

there is nothing in the Act to help Parliament look at treaties in a systematic way, decide which are significant or controversial and present its democratic opinions on them to the Government at a point where it could make a difference.

The true inadequacy of the 2010 Act becomes apparent on closer inspection. It is only through Opposition Day debates that the government's proposal to ratify a trade treaty can be challenged.¹ Yet it is perfectly possible for the government to lay a treaty before Parliament for ratification in a period when no Opposition Day is scheduled to take place – indeed, the government failed to schedule a single Opposition Day between the end of February 2017 and Parliament's return in September. Even if the government were to lay the treaty before Parliament at a time when there was an Opposition Day scheduled, and the opposition party in question chose to use one of their debates to challenge it and then succeeded in winning the vote, the government is required to do nothing more than issue a ministerial statement explaining why it supports ratification, and then lay the treaty before Parliament afresh. The opposition would then have to use up another of its Opposition Day debates to challenge the agreement once again during the next 21-day period (assuming that it had another of its debates scheduled at that time) and so on *ad infinitum*. In reality, Parliament cannot prevent the ratification of a treaty, and this power has never once been invoked since the introduction of the Act in 2010.

Other dualist states (i.e. states, like the UK, where international legal obligations have to be translated into national law by means of separate legislation rather than taking effect automatically) afford far greater powers to their parliaments. Germany provides that treaties must be ratified by an act of parliament following scrutiny by the relevant parliamentary committee, including evidence sessions with expert witnesses. New Zealand requires treaties to be scrutinised by the Foreign Affairs, Defence and Trade Committee, or another more relevant select committee, including a consideration of the national interest analysis submitted by the government and also of public submissions, where appropriate; only then can the domestic legislation needed to enact the treaty be brought before parliament. Australia has a dedicated Joint Standing Committee on Treaties (JSCOT) which can hold its own public inquiries into trade and investment treaties before presenting parliament with the implementing legislation necessary to enact final ratification; the committee was born out of [recognition](#) that there existed a “clear and unjustified democratic deficit” in the lack of parliamentary scrutiny on the UK model, and it has been instrumental in demanding significant changes from the Australian government in return for its consent.

The US Constitution (Article II, section 2) requires the President to secure a two-thirds majority of the Senate in order to ratify any international treaty. The two-thirds requirement was included as a means of overcoming partisan divisions on international agreements, and it has led to the withdrawal or rejection of over 100 such treaties over the years. The Senate Committee on Foreign Relations has the [power](#) to call for amendments to the treaty once it has been submitted to the Senate by the executive, and to attach reservations, understandings and declarations during the ratification process that can affect the interpretation or implementation of the treaty in future. In addition, both Senate and Congress have in the past contributed to the negotiating mandates of the US Trade Representative at the outset of trade talks.

THE TRADE BILL

The government announced in the Queen's Speech of 21 June 2017 that it would be introducing a Trade Bill and a Customs Bill during the first session of the current Parliament. The Trade Bill was published on 7 November, along with Ways and Means resolutions relating to the Customs Bill, now renamed the Taxation (Cross-Border Trade) Bill, which is due to be published shortly.

¹ The Journal Office has confirmed that, under Standing Order No 14, the Backbench Business Committee should not consider any backbench motion for a resolution to object to ratification of a treaty.

The main substance of the Trade Bill is confined to just three elements:

1. The power to implement international trade agreements to which the UK is currently a party by virtue of its EU membership, namely the WTO's Government Procurement Agreement and any bilateral trade agreements which the EU has signed with third parties.
2. The establishment of a Trade Remedies Authority, a new 'arms length' body that will allow the government to take remedial action against dumping and unfair subsidies used by the UK's trading partners; the functions of the Trade Remedies Authority will be conferred by provisions in a separate Bill, while the implementation of trade remedy measures will be taken forward via the Taxation (Cross-Border Trade) Bill.
3. The power for HMRC to collect information on exporters of goods and services for trade promotion purposes, and (more controversially) to share that information with other public and private bodies, both within and outside the UK.

The Trade Bill is thus a deliberately limited piece of legislation designed to provide continuity with the present rather than establishing the legislative framework for future UK trade policy on a proper democratic footing. This means that the Trade Bill is in effect a Brexit Trade Bill, and it is similar to the EU (Withdrawal) Bill in that it seeks to allow for the government to be granted new powers to modify primary legislation that is retained EU law, and for discretionary powers to be granted to the Secretary of State. There is also concern at the new powers that the government will appropriate for itself in respect of the devolved administrations, as set out in Schedules 1-3 of the Bill.

As the parent Act for any future secondary legislation, the Trade Bill should determine what form of parliamentary procedure will govern scrutiny of future UK trade and investment treaties. The Institute for Government [recommended](#) that the Trade Bill include a statutory guarantee that the government must always schedule time for parliamentary debate and a vote on all future trade deals. Yet the government has deliberately ignored this recommendation, instead falling back on the existing 21-day procedure for ratification of international treaties.

The government's intention to fall back on existing procedure is made explicit in the explanatory notes to the Bill which refer to the WTO's Government Procurement Agreement. Note 24 states that parliamentary approval for the UK's renewed membership of the Government Procurement Agreement will be sought separately via the Constitutional Reform and Governance Act 2010. As already outlined above, this procedure is grossly inadequate in that it provides for the lowest possible level of parliamentary scrutiny, with no meaningful powers of opposition. The government has deliberately chosen to avoid legislating for proper democratic accountability, in the knowledge that it can rely on a failed piece of parliamentary process to appropriate more powers to itself.

LABOUR'S DEMANDS

Labour holds that the most rigorous resolution procedure should be used for ratification of any future UK trade or investment agreement, requiring Parliament's approval before it can come into effect, including prior debate on the floor of the House of Commons. Simply moving from the negative to the affirmative resolution procedure is insufficient: the Hansard Society's latest [report](#) has revealed how "woefully inadequate" the scrutiny afforded to secondary legislation is even under the affirmative procedure, with MPs describing the Delegated Legislation Committees set up to debate statutory instruments as "farcical" and "an absolute joke".

There are already examples of more rigorous procedures in other primary legislation. The Legislative and Regulatory Reform Act 2006 provides for a special process of parliamentary scrutiny and debate for the Legislative Reform Orders submitted as statutory instruments under the Act. These are placed before the twin committees of the Regulatory Reform Committee and the Delegated Powers and Regulatory Reform Committee, which have the power to determine whether the statutory instruments should be dealt with by negative, affirmative or super-affirmative procedure. Under the super-affirmative procedure, the committees have 60 days to decide whether the statutory instrument should be laid before the House of Commons for final scrutiny; whether it should be amended before being laid before Parliament; or whether it should not be proceeded with at all. The Act also requires the government to have undertaken an external consultation – including with the relevant devolved administrations – before it may submit a Legislative Reform Order to the parliamentary committees; these consultations are considered a key part of the process in that they enable the committees to gauge the level of public support for any government proposal, and widespread opposition has in some cases led the committees to reject the instrument.

Such a form of enhanced scrutiny would seem entirely appropriate for trade and investment agreements, given the binding obligations that they impose on future administrations. The process includes a triage stage at which MPs can determine the level of scrutiny needed for any individual piece of secondary legislation, allowing for the expedited passage of non-controversial instruments whilst maintaining the potential for fuller investigation in cases where the consultation has revealed more problematic concerns. Drawing from best practice in other Westminster-style parliaments around the world, the process should also require the government to submit a national interest analysis at this stage, outlining not only the expected impacts of the treaty but also the obligations to which it will expose the UK, the domestic implementation process and all other formal aspects such as the potential for withdrawal or denunciation in future.

Scrutiny reserve powers

Before reaching the stage of ratification, Labour believes scrutiny reserve powers similar to those currently afforded to the European Scrutiny Committee should be extended to a new committee after Brexit. The existing scrutiny reserve dictates that the government may not agree to draft EU laws or policies that have been deposited in Parliament until the relevant committees of both Houses have completed their scrutiny of them. Leaving the EU will create a vacuum in respect of the powers currently held by the European Scrutiny Committee, which has previously been able to subject EU trade agreements to scrutiny prior to permitting the government to proceed with signing, implementation or ratification, as seen most recently in the case of the Comprehensive Economic and Trade Agreement (CETA) between the EU and Canada.

Labour believes that a new committee of the House of Commons should be granted the power to subject trade-related instruments to the full process of scrutiny and to prevent the government from proceeding with the signing, implementation or ratification of trade and investment treaties unless and until that process has been completed. Granting such powers to a committee would not of itself require separate legislation, as the European Scrutiny Committee was granted its powers under Standing Order No 143 and the scrutiny reserve resolution of 17 November 1998. However, the Trade Bill is an obvious opportunity to put such powers on the strongest legislative footing, even if the specifics may be left to Standing Orders.

In particular, the House of Commons should have the power to prevent the government from approving the provisional application of any trade or investment treaty prior to ratification by Parliament. The government's Trade White Paper states that it wishes to introduce a legislative framework "that will enable future trade agreements with partner countries to move quickly from

signing to implementation and then to ratification”. Providing for implementation of a trade agreement prior to ratification would be an illegitimate expansion of the government’s power taken over from the practice of the European Union in cases of ‘mixed’ competence, where national ratification is required in all member states before the terms of an agreement may be implemented on a permanent basis. Provisional application prior to ratification would undermine the sovereign right of Parliament to approve the terms of new treaty obligations, and is wholly inappropriate in a single unitary state such as the UK.

Mandate, impact assessment and review

In the context of EU trade agreements, the Council of Ministers – as the supreme governance body of the European Union – is required to debate and approve the negotiating mandate for any forthcoming treaty. Now that the UK is to be responsible for its own trade and investment treaties, the supremacy of Parliament dictates that a similar power be extended to the House of Commons. Labour believes that the Trade Bill should grant MPs the power to debate, amend and approve mandates for the negotiation of all future trade and investment agreements, prior to the start of negotiations.

In addition, there needs to be a comprehensive, independent sustainability impact assessment conducted in advance of the launch of new trade and investment negotiations in order to establish the potential social, economic and environmental consequences for all sectors and regions of the UK. The European Union is required to commission such an [assessment](#) for every new trade agreement, but the results have often been delayed until it is too late for them to make any difference to the negotiations themselves. The assessments have also been insufficiently disaggregated, so that the adverse effects of the prospective agreements have not been fully appreciated; even where significant threats have been identified, negotiators have typically continued without altering course.

The Trade Bill offers an opportunity to establish the type of analysis necessary for any sustainability impact assessment at the outset of future trade and investment agreements. Previous exercises have focused on econometric analysis that government officials themselves have admitted is an unreliable guide as to the future impact of new trading arrangements. Drawing from best practice in other countries, the Trade Bill should set the parameters of reporting across all potential social, economic and environmental impacts, disaggregated by sector, by geographical region (including the devolved administrations) and with particular reference to the impact on small and medium-sized enterprises; plus a requirement to include a human rights impact analysis, including parallel reports commissioned from other relevant ministerial departments and a survey of possible threats to domestic regulatory powers. Each assessment should also be based on a process of wide public consultation with extra-parliamentary bodies, including the devolved administrations.

There also needs to be a standing procedure for parliamentary review of trade and investment agreements, including an *ex post* assessment of their social, economic and environmental impacts to set alongside the *ex ante* sustainability impact assessment. This could be triggered by means of a stipulated duration period for each agreement. The UK’s existing bilateral investment treaties (BITs) typically set a 10-year duration period for each treaty and allow for its termination by either contracting party at any time after that period, on 12 months’ notice. In the absence of any review mechanism, however, most BITs have remained in force by default.

PARLIAMENTARY ACCESS TO TREATY TEXTS

Parliamentary pressure over the lack of transparency in the TTIP negotiations between the EU and USA led to the introduction of reading rooms in capitals across Europe so that MPs could have at least some minimal access to the text of the agreement as it was being formulated. Labour [criticised](#) the highly restrictive procedure surrounding the reading room, which barred MPs from using any specialist assistance to help them understand the technical text. The UK government failed to set up a TTIP reading room in London until November 2016, a full nine months after promising to do so; by that time the TTIP negotiations had been put on ice, rendering the whole exercise redundant.

The government has [stated](#) that it is considering the setting up of similar reading rooms for the UK-EU negotiations, drawing on the experience of the TTIP one. The government has also given its [assurance](#) that MPs will enjoy at least the same level of access to information as MEPs throughout the Brexit negotiations. The House of Lords European Union Committee concluded, in its [report](#) on parliamentary scrutiny of the Brexit negotiations, that it would be “inconceivable” for the government to take the many decisions that will arise in the course of Brexit without active parliamentary scrutiny. Responding to the Secretary of State for Exiting the European Union’s contention that accountability to parliament should be largely retrospective, the Committee warned that “mere accountability after the fact” would not represent a sufficient basis for meaningful parliamentary scrutiny.

Parliamentary scrutiny is essential to the effective democratic defence of people’s rights in the face of trade and investment negotiations; without real time access to the texts concerned, scrutiny is impossible. Any suggestion that granting public access to negotiating documents will hand an advantage to the other side in the negotiations is patently false, since the other side has already been involved in the creation of the texts in question. Other European countries provide their parliamentarians with access to internal documents relating to trade negotiations as they are produced, just as the US President is required to provide Members of Congress and their staff with access to classified material relating to trade negotiations, as part of the agreement granting the President ‘fast track’ or Trade Promotional Authority. The UK must now ensure that MPs have unrestricted access to negotiating texts as they are formulated, with the power to analyse those texts with the technical experts of their choice.

BEYOND PARLIAMENT

There is more to be said in respect of extra-parliamentary scrutiny of trade agreements, including consultation with the devolved administrations, which are excluded from the provisions of the Constitutional Reform and Governance Act 2010. In addition, Labour is committed to meaningful engagement with civil society as a further element in the proper democratic scrutiny of international treaties. The current briefing deals with parliamentary scrutiny only, while the development of policy on extra-parliamentary oversight is ongoing.

EDM 166

Labour’s Early Day Motion 166 on ‘Parliamentary Scrutiny of Trade Deals’, tabled on 11 July 2017 by Grahame Morris MP, takes up many of the themes raised in this briefing. It reads as follows, and colleagues are encouraged to sign it:

That this House is concerned about the lack of parliamentary scrutiny and accountability of trade deals to which the UK is a party; and calls on the Government to ensure the right of

Parliament to set a thorough mandate to govern each trade negotiation, with a remit for the devolved administrations, the right of the public to be consulted as part of setting that mandate, a presumption of full transparency in negotiations, the right of Parliament to amend and to reject trade deals, with full debates and scrutiny guaranteed and a remit for the devolved administrations, and the right of Parliament to review trade deals and withdraw from them in a timely manner.

The same text is also contained in the cross-party EDM 128, which is currently the focus of a civil society campaign and which colleagues may also wish to sign.

KEY LABOUR QUOTES

“We will be fighting every step of the way to ensure the Trade Bill provides for proper parliamentary scrutiny of trade deals in the future... We totally reject the idea that this government can bring back the power to negotiate trade agreements from Europe and then bypass Parliament.”

Barry Gardiner MP, Shadow Secretary of State for International Trade, 11 September 2017

“Labour will set out our priorities in an International Trade White Paper to lead a national debate on the future of Britain’s trade policy. We will ensure proper transparency and parliamentary scrutiny of all future trade and investment deals.”

Labour Party general election manifesto, 2017

“Labour has committed to transparency and parliamentary scrutiny of trade and investment deals, rejecting the idea that the negotiating, signing and ratifying of international treaties should be the exclusive preserve of government operating without the checks and balances of democratic oversight.”

Barry Gardiner MP, Shadow Secretary of State for International Trade, 31 May 2017

FURTHER READING

Taking Back Control for Brexit and Beyond, Hansard Society, September 2017

Taking Back Control of Trade Policy, Institute for Government, May 2017

Parliament’s role in ratifying treaties, House of Commons Briefing Paper 5855, February 2017

Statutory Instruments, House of Commons Briefing Paper 06509, December 2016