

# Submission to Scottish Parliament's Finance and Constitution Committee inquiry on the UK Government's Trade Bill

From Trade Justice Scotland coalition

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## Trade Justice Scotland Coalition



### About the Trade Justice Scotland coalition

The Trade Justice Scotland Coalition is an alliance of 27 Scottish organisations – including trade unions, NGOs and local activist groups representing hundreds of thousands of Scottish citizens. The coalition first came together in 2015, as part of the Europe-wide movement that opposed the EU-US trade deal TTIP, and continues now to focus on post-Brexit trade deals and in particular ensuring that there is a transparent and democratic process for scrutinising and approving those trade deals.

### Focus of our submission

Our submission is particularly focused on the need for parliamentary scrutiny of all international trade deals.

### Summary

- Modern international trade deals have impacts beyond tariffs and quotas, with their effects extending into the realm of public policy.
- While trade policy itself is reserved, many areas of policy (and public life) that trade deals may impact on are devolved.
- Scotland is inextricably linked to any international trade deals signed by the UK Government and, as such, we believe that it is vital that the elected representatives of the Scottish parliament are given a meaningful role in the scrutiny and ratification of international trade deals.
- The Trade Bill currently contains no provisions for allowing parliamentary scrutiny (by Westminster or Holyrood) of existing or future trade deals.

- There is a clear democratic deficit, with the UK government effectively able to set up, develop and finalise trade deals – which will have widespread impacts across the UK – with no oversight or accountability.
- In our evidence below we give some specific suggestions for measures that should be included in the Trade Bill in order to rectify this democratic deficit, and in particular to ensure that elected politicians in Scotland have some oversight.
- If the Trade Bill is not amended accordingly during its passage, then we urge the Scottish parliament to withhold its legislative consent for the Bill on the basis of this democratic deficit.
- The UK government argues that ‘replacement’ trade deals that the UK is currently part of, due to our membership of the EU, can be simply transferred on Brexit – and so there is no need to include provision in the Trade Bill for a process of parliamentary scrutiny. We strongly disagree with this and back up our argument in our evidence below.
- We believe that parliamentary scrutiny is vital and including it in this Bill would also usefully set the precedent for that same process to be used for further post-Brexit trade deals that are negotiated and passed in addition to the ex-EU ones.
- Looking at some other countries with varying federal systems, there are many examples of how regional, provincial and state parliaments and assemblies and their representatives are involved in the negotiation and ratification of trade deals.
- The campaign against TTIP showed how sceptical the public is of trade deals that are negotiated in secret and not subject to public or parliamentary scrutiny. The Trade Bill offers an immediate and important opportunity to change that and we believe it must be amended to accordingly. If it is not, then we believe that the Scottish parliament should not give legislative consent.
- Underpinning everything should be principles to ensure that democracy is protected, that transparency and accountability are ensured and that trade deals play a powerful and genuinely useful role in building a fairer society and protecting the planet. The Trade Justice Scotland coalition has drafted a set of ten principles that we believe could form such a basis.

## **Main body of evidence to committee**

### **Impacts of trade deals on devolved policy areas**

The Trade Justice Scotland coalition is of the firm view that members of the Scottish parliament should have a formal role in the scrutiny and passing of international trade deals.

Modern international trade deals (such as the EU-US trade deal TTIP and the EU-Canada trade deal CETA) have impacts beyond tariffs and quotas, with their effects extending into the realm of public policy through regulatory harmonisation and coherence, through the increased use of investor state dispute settlement mechanisms to challenge public policy making and the resulting regulatory ‘chill’, and through their impact on public services, public procurement and intellectual property. The impacts of trade deals are felt across society and in all parts of the United Kingdom.

While trade policy itself is reserved, many areas of policy (and public life) that trade deals may impact on are devolved, for example: health, environment, food, farming, public procurement and the provision of public services.

Scotland has regularly been the first nation in the UK to bring in stronger public policy legislation: from banning smoking in public places, to the extended moratorium on fracking, to greenhouse gas emissions targets. This, and the fact that if Scotland were to be sued using an investor protection clause in a trade deal, then it would be the UK government who would fight the case – but if the UK government lost then the Scottish government would have to pay the compensation costs<sup>i</sup> - mean that Scotland is inextricably linked to any international trade deals signed by the UK Government.

As such, and given Prime Minister Theresa May's claim that the four nations of the UK are "equal partners", we believe that it is vital that the elected representatives of the Scottish parliament are given a meaningful role in the scrutiny and ratification of international trade deals.

### **The case for greater scrutiny and accountability in the implementation of international trade deals**

At the time of writing this submission, the Trade Bill contains no provisions for allowing parliamentary scrutiny (by Westminster or Holyrood) of existing or future trade deals. And amendments on this theme, tabled at committee stage by opposition parties, did not pass.

While new legislation, rightly, goes through a process of many stages of consultation, scrutiny, debate and voting, trade agreements are currently entirely negotiated under the Royal Prerogative. Using its prerogative powers, the UK government is able to:

- Decide when and who to start negotiations with
- Decide its own priorities and objectives
- Conduct negotiations, usually in secret, and
- Conclude and sign the eventual deal

Under the current procedure, there is no requirement to consult the public or civil society organisations and no role for the UK parliament or any of the devolved administrations. There is a clear democratic deficit in this procedure, with the UK government effectively able to set up, develop and finalise trade deals – which will have widespread impacts across the UK – with no oversight or accountability.

A number of those who gave evidence to the House of Commons Trade Bill committee called for a new and better process for trade deals, with increased levels of democratic engagement. The International Chamber of Commerce, for example, wrote: "It is rare for business groups, unions, NGOs and global experts to appear together and agree on an issue but on the need for better, more inclusive and democratic engagement there is a consensus."<sup>ii</sup>

The Trade Justice Scotland coalition also submitted written evidence to that committee and called on MPs to amend the Trade Bill to rectify this democratic deficit, and to amend the Trade Bill to ensure the following<sup>iii</sup>:

- Comprehensive, independently produced impact assessments that include environmental, human rights, gender, labour, social and economic impacts to be carried out and published.

It is important that impact assessments are done for all parts of the UK and that MPs, MSPs and the public have access to them.

- The government's negotiating objectives and mandate be published and receive parliamentary scrutiny in Westminster and by the Scottish parliament before negotiations begin.
- Westminster and Holyrood to be given the opportunity to agree the UK's priorities and 'red lines' for negotiations, and if the UK government wants to change this as negotiations progress then they must seek further consent.
- A joint ministerial committee on trade to be set up, and meet regularly, to strengthen Scottish ministers' oversight of UK trade policy.
- Consultation bodies outside parliament be set up, and include civil society representatives.
- During negotiations, texts should be made accessible to elected politicians of the UK parliament and the Scottish parliament (and the public where appropriate).
- Scrutiny of on-going trade agreements, and the final texts, to be allowed by committees in the UK parliament and the Scottish parliament.
- The final text of any trade deal must be subject to parliamentary debate and approval in Westminster and in Holyrood, using affirmative procedures in both cases.

***If the Trade Bill is not amended accordingly, then we urge the Scottish parliament to withhold its legislative consent for the Bill, for the reasons outlined above.***

The UK government argues that provisions relating to powers of scrutiny and accountability of trade deals are not needed in the Trade Bill as it will be dealing with what they describe as 'replacement' deals for those that the UK is currently party to by being a member of the European Union. They suggest that these deals will essentially just be 'cut and pasted' onto the UK statute books, negating the need for democratic scrutiny.

We strongly disagree with this view.

A number of experts who recently gave evidence to the House of Commons Trade Bill committee gave detailed and credible explanations as to the flaws in the UK Government's assumption that a roll-over of the current EU agreements is a mere technical exercise.

For example, Dr. Holger Hestermeyer, Shell Reader in International Dispute Resolution at King's College London said that: "In practice, numerous changes have to be expected in these agreements. On the technical level, for example, rules of origin and TRQs will have to be negotiated, but also institutional provisions... For some agreements (Switzerland, Turkey, Norway), the very structure of the agreement does not conform to the Government's stated goals and accordingly a future trade agreement will look very different from the ones in force now."<sup>iv</sup> And Nick Ashton-Hart, Trade Policy Consultant and Associate Fellow at the Geneva Centre for Security Policy, when asked about this during the committee oral evidence session, said: "I have never seen or heard of a Trade Ministry not asking for some improvement when any deal is being renegotiated, because that is how you are seen to be doing your job."<sup>v</sup>

Rob Davies, South Africa's trade minister, was recently reported as saying that while he is hopeful a new trade agreement could be ready by the time Britain leaves the EU in 2019, there will have to be a renegotiation of agricultural quotas and sanitary standards.<sup>vi</sup> South Korea and Chile have also both

reportedly objected to their trade agreements with the EU being automatically applied to the UK after Brexit.<sup>vii</sup>

And the UK government's own explanatory notes to the Trade Bill say: "New UK-third country agreements that are implemented through use of this power will be legally distinct from the EU-third country agreements on which they are based. It may also be necessary to substantively amend the text of the previous EU agreements, so that the new agreements can work in a UK legal context."<sup>viii</sup>

Given the evidence above, we would argue that a democratic process of scrutiny and accountability for all trade deals is vital, that this should include the Scottish parliament (and other devolved administrations) and that the Trade Bill should be amended to ensure that. An additional benefit would be that this would then set the precedent for that same process to be used for further post-Brexit trade deals that are negotiated and passed in addition to the ex-EU ones.

### **Examples from other countries of inclusion of devolved administrations in trade negotiations**

Including the Scottish parliament (and the other devolved administrations of the UK) in the development, negotiation and scrutiny of international trade deals is not a radical ask.

Looking at some other countries with varying federal systems, there are many examples of how regional, provincial and state parliaments and their representatives are involved in the negotiation and ratification of trade deals. Here in the UK, we may not choose to (or be able to) emulate any of them completely but they serve as useful examples of how things could be done differently – and by comparison also highlight the extreme lack of involvement in trade deals that the devolved administrations here in the UK currently have.

A recent briefing produced by SPICe gave a useful summary of how trade agreements in some other federal countries are negotiated and passed. We expect that the committee members may have read the SPICe briefing but, just in case not, we summarise some examples from the briefing below:

Looking at the example of Canada, and the EU-Canada trade deal (CETA), it's clear that the provinces played an active part. The mandate for the negotiations was drafted with input from the provincial governments, who also nominated their own chief negotiators and representatives who joined the Canadian national delegation. Those provincial negotiators were present during the bilateral talks with the EU, and they also participated in a pan-Canadian trade committee which worked between negotiations to agree and set the Canadian position for future talks. And all the negotiating documents were made readily accessible to provincial teams.

In Belgium, all regional governments are guaranteed the right to approve trade agreements under article 67 of the federal constitution. The Belgian government's role is to achieve consensus between the regional governments, meaning a much greater sharing of information and of views on all aspects of international trade deals than we see here in the UK between the UK Government and the devolved administrations.

Wallonia's refusal to allow Belgium to support the EU-Canada trade deal CETA received a lot of attention in 2016. The Belgian regional parliament's objections to the deal were based on eighteen months of hearings on CETA, including a local impact assessment, and which showed potential

negative impacts particularly in the agriculture sector in Wallonia. As a result, the parliament of Wallonia was able to negotiate a number of concessions in CETA, as part of a compromise deal, which will benefit Wallonian farmers and the region's economy on ratification.

In the US, there has been concern from the state governments about the power of the federal government to pass trade deals whose rules over ride individual state laws on aspects of public policy. Public procurement laws have been a particular area of dispute. In order to counter this, five American states (Maryland, Maine, Rhode Island, Hawaii and Minnesota) passed legislation creating a formal 'opt-in' mechanism for public procurement in trade deals. This requires a vote by the state parliament before state purchasing policies can be bound to comply with a new US trade agreement. The state of New Jersey created similar legislation and also established an office of trade enforcement to monitor trade agreements, and assess the impact on the local economy.<sup>ix</sup>

### **Public opposition to international trade deals**

The EU-US trade deal TTIP faced huge public opposition here in Scotland, as well as right across Europe and in the US. Lack of transparency and democratic accountability in the negotiation process was a key issue in the public's concern. Almost 3.5 million people across Europe signed a petition opposing TTIP and marches of hundreds of thousands of people took place in cities here in the UK and around Europe. TTIP became a politically toxic trade deal due to the strength of public opposition.

Post-Brexit trade deals here in the UK are also likely to face public opposition, and that opposition is likely to be increased by the lack of transparency, parliamentary scrutiny and democratic process that currently exists here in relation to trade deals. It is really important that this process is changed.

***The Trade Bill offers an immediate and important opportunity to do that and we believe it must be amended accordingly. If it is not, then we believe that the Scottish parliament should not give legislative consent.***

### **The principles underpinning a just and ethical trading system**

The Trade Justice Scotland coalition is opposed to the new wave of trade deals, such as TTIP and CETA as we believe that they grant too much power to corporations and weaken democracy and the ability of governments to protect people and the planet. As a coalition, we have drafted a set of ten principles that we believe a just and ethical trade system (and the trade deals that are negotiated as part of that) should be based on. We believe that trade deals should honour obligations to human rights, workers' rights, and environmental and climate change commitments. We believe that international trade agreements should focus on trading in goods, and that public services, patents, local and national government procurement, domestic regulation, migration, investment and data privacy lie outside the scope of these agreements. We also believe that domestic courts rather than 'corporate courts', (which give foreign companies special legal rights outside of the national legal system) should deal with trade disputes. In short, our principles outline how we believe that trade deals could play a powerful and genuinely useful role in building a fairer society and protecting the planet. The full document is online at <http://scotlandagainstttip.org.uk/wp-content/uploads/Just-Trade-Principles-FINAL.pdf>. In a debate on Scotland's international policy framework and priorities

for 2018, on January 16 this year, an amendment to the motion was tabled which welcomed and endorsed the Trade Justice Scotland coalition's trade principles and this amendment was voted for by a majority of MSPs.<sup>x</sup>

**We believe that amending the Trade Bill to guarantee a democratic and inclusive process for agreeing international trade deals, that includes scrutiny by the Scottish parliament, is the first step in ensuring that the United Kingdom plays a truly positive and exemplary role in its post-Brexit trading arrangements with other countries around the world – and without that then the Trade Bill should not become law.**

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<sup>i</sup> <https://www.parliament.uk/business/publications/written-questions-answers-statements/written-question/Commons/2016-03-15/31198/>

<sup>ii</sup> <https://publications.parliament.uk/pa/cm201719/cmpublic/trade/memo/tb30.pdf>

<sup>iii</sup> Where our suggestions relate specifically to Scotland, and not the other devolved nations, we do so only because that is where our experience and expertise lie, and in doing so we don't in any way suggest that the other devolved administrations should be excluded

<sup>iv</sup> <https://publications.parliament.uk/pa/cm201719/cmpublic/trade/memo/tb24.htm>

<sup>v</sup> [https://hansard.parliament.uk/Commons/2018-01-23/debates/a6ff882f-96de-489e-9f65-b8ce0aef37ae/TradeBill\(FirstSitting\)#contribution-5940B044-99C7-436A-8BEF-0D1A192779ED](https://hansard.parliament.uk/Commons/2018-01-23/debates/a6ff882f-96de-489e-9f65-b8ce0aef37ae/TradeBill(FirstSitting)#contribution-5940B044-99C7-436A-8BEF-0D1A192779ED)

<sup>vi</sup> <https://www.thetimes.co.uk/article/fox-suffers-south-africa-trade-setback-wwv0jzpf>

<sup>vii</sup> <https://www.thesun.co.uk/news/5490597/countries-to-demand-concessions-uk-eu-trade-deals-brex/>

<sup>viii</sup> <https://publications.parliament.uk/pa/bills/cbill/2017-2019/0122/en/18122ennew.pdf> Paragraph 53

<sup>ix</sup> [https://www.citizen.org/sites/default/files/states\\_rights\\_and\\_trade.pdf](https://www.citizen.org/sites/default/files/states_rights_and_trade.pdf) p.33

<sup>x</sup> <http://www.parliament.scot/parliamentarybusiness/28877.aspx?SearchType=Advance&ReferenceNumbers=S5M-09887.1&ResultsPerPage=10>