KEY POINTS

- There are deficiencies in the Parliamentary oversight of the ‘roll-over’ of pre-existing trade agreements; the Government should address these as a matter of urgency.

- For future trade agreements, the provisions of the Constitutional Reform and Governance Act 2010 (CRAG Act) are insufficient. The influence of the UK Parliament on the treaty ratification processes should be at least equivalent to that currently enjoyed by the European Parliament and other EU Member State legislatures, with a remit for devolved administrations.

- The UK should establish formal mechanisms for a wide range of stakeholders to feed into the process of trade negotiation.

- In addition, the UK should undertake Sustainability Impact Assessment (SIA) of new trade agreements. Certain key features should be adopted from the EU’s approach, including the use of independent consultants, an emphasis on stakeholder and public engagement and ex-post evaluation.

- The SIA process could play a greater role in shaping negotiation outcomes. Providing a role for parliamentary committees would introduce greater transparency and accountability into the UK’s trade policy.

- Through the roll-over of EU trade agreements, the UK will inherit the EU’s approach to trade and sustainable development. Implementing EU sustainable development chapters will require the UK government to replicate an array of advisory bodies currently managed by the EU.

- The UK’s degree of future regulatory alignment with the EU remains uncertain at the time of writing. If it prioritises access to new markets over continued levels of access to the EU, this underscores the importance of identifying and responding to the impacts of new Free Trade Agreements (FTAs) on environmental and consumer protection standards.

- Effectively addressing procedural and substantive elements of sustainable development through trade negotiations will result in trade policy that is more informed, more democratically legitimate, and benefits more of Britain.
INTRODUCTION

Leaving the EU Customs Union will necessitate the UK having an independent trade policy. As part of the process of governing its external trade, the UK must consider how it will integrate its sustainable development objectives into this policy. In this briefing paper, we conceive such objectives broadly, including transparency, political participation and access and consultation, as well as obligations within FTAs to uphold labour standards and environmental protections. Among developed countries, in particular, commitments in all these areas have increasingly expanded and strengthened (see, eg, Berger, et al., 2017). In the EU’s case, for example, the past decade has seen a greater role for the European Parliament in trade negotiations, a major initiative to increase transparency and the promotion of sustainable development from listed objective to the subject of dedicated chapters. This promotion has arisen in concert with ambitions to address a wider range of issues, including regulatory standards and approval processes, intellectual property and Investor State Dispute Settlement, through Free Trade Agreements (FTAs). It also responds to public protest, and concerns about the potential competitive advantage that the EU’s FTA partners gain through low labour and environmental standards.

Here we consider potential approaches to (1) integrating sustainable development objectives into the negotiating process; and (2) reflecting these objectives through UK trade strategy. The intent is not to provide a set of policy recommendations (though we do offer some), but rather to identify gaps which we believe require more discussion. These gaps are inextricable from the larger, and largely unresolved, question of how the UK will undertake the governance of its trade agreements. As the UK has not managed its external trade independently for many years, there are no existing procedures for scoping, negotiating and ratifying trade agreements. The UK government has indicated that more information is forthcoming (Fox, 2018) but trade agreements. The UK government has indicated that there are no existing trade agreements will be both an influence of UK foreign policy, and also a significant determinant of its domestic economy and regulation. The UK has outlined its ambition for ‘Green Brexit’, in its twenty-five year environmental plan (HM Government, 2018), acted as a global leader on climate change mitigation through its Climate Change Act 2008, Clean Growth Strategy and Fifth Carbon Budget, and committed to the UN Sustainable Development Goals (2015).

Its trade strategy should harmonise with its policy ambitions in other areas as well. For these reasons we believe that the set of issues we address here are not auxiliary concerns but rather integral to UK trade policy.

PROCEDURAL DIMENSIONS: ‘TRANSPARENT AND INCLUSIVE TRADE’

The UK has committed to ‘transparent and inclusive’ trade, stating that ‘Parliament, the devolved administrations, the devolved legislatures, local government, business, trade unions, civil society, and the public from every part of the UK must have the opportunity to engage with and contribute to our trade policy’ (HM Government, 2017). There are significant gaps in identifying, and formalising, the role that these actors will play in UK trade policy. To undertake transparent and inclusive trade policy, the UK Government will actively need to reform the approach to Parliamentary involvement and stakeholder consultation; it needs to fill gaps that exist and go beyond its current proposals in others.

A) Existing trade agreements

The Government has declared its intention to establish UK trade agreements that are based as closely as possible on those that partners have signed with the EU (UK Parliament, 2017, para. 38). This has been described informally as ‘rolling over’, and the process is governed by the proposed Trade Bill, which is currently being debated. The Trade Bill grants the UK Government the ability to implement the non-tariff aspects of rolled-over trade agreements (Trade Bill, Clause 2(1)).

While the term ‘roll-over’ suggests automatically, as Gasorek and Holmes have argued, this is not the case. Among other issues, partner countries can renegotiate the EU agreements be reopened for negotiation with an independent UK (Gasorek and Holmes, 2017). The powers granted to the UK government under the Trade Bill, controversially, are broadly conceived: they apply even if trade agreements change from those agreed under the EU. The Trade Bill grants the government what are known as ‘Henry VIII powers’ to enable changes to primary legislation retained under EU law without normal parliamentary scrutiny. Hestermeyer concludes that this could impact upon EU labour and environmental laws inter alia and that the resulting agreements should be subject to detailed parliamentary scrutiny, including a final vote on whether to accept or reject them (Hestermeyer, 2018, at 10, 22).

We recognise that, from a pragmatic perspective, Parliament may find such a task overwhelming given the number of trade agreements at stake and the competition from other Brexit-related legislation. Even barring a full parliamentary vote, however, the Government must provide for some scrutiny and oversight of its approach to the trade agreements which will, at least initially, constitute its external trade treaties, which may be subject to substantial modifications from their current forms. One approach would be to utilise Parliamentary Select Committees to perform this function.

As has been noted by the International Trade Parliamentary Select Committee (ITC), there has been to date little transparency regarding the rollover process, such that the strategy, timeline and process by which the UK Government is negotiating with EU trade partners remains unclear. The ITC has made the sensible suggestion that the Government produce a ‘risk register’ detailing which Agreements take priority and outlining contingency plans in case a partner country changes its mind about simply replicating an agreement (ITC report, p. 15).

Another consideration is that the implementation of these agreements, notably their chapters on sustainable development, environmental and labour standards, will not be seamless; it will require the UK Government to establish advisory bodies and develop other governance mechanisms. This challenge is not unique to trade; it is relevant across the entire spectrum of issues that are currently subject to EU regulation. We discuss this in more detail below.

B) Future trade agreements

Parliamentary scrutiny

The Trade Bill does not say anything about negotiating future trade agreements, and it remains unclear what role the Parliament and the devolved nations will have in their negotiation and ratification. This is concerning, as the default legislation applying to UK trade negotiations is the 2010 Constitutional Reform and Governance Act (CRAG Act). While it provides that the Commons can block treaty ratification indefinitely, Parliament’s powers are limited: it does not have to vote on, or even debate, ratification of treaties. (CRAG Act, Chapter 2, Part 2) The CRAG Act provides Parliament a more limited influence than, for example, the European Parliament, which has to provide or decline assent to the final trade agreement, must be kept informed during the negotiation process and can state its positions and make recommendations at any time (European Parliament, 2015). Trade agreements that include provisions on portfolio investment and Investor State Dispute Settlement also must be ratified by individual EU Member States’ Parliaments (Court of Justice of the European Union, 2017).

The reinforcement of parliamentary sovereignty is often cited as one of the main benefits of Brexit. For this reason, the UK Parliament’s oversight of, and influence on, UK trade policy should at least be commensurate to that enjoyed by parliament under EU law. Nor does the EU Parliament have an unusually large degree of influence on trade negotiations in an international context; in the UK for example, the Congress has greater authority over whether trade negotiations can be authorised, and also must vote on whether to accept the final agreement.

UK trade agreements will impact upon many areas of the UK economy in which Parliament has legislative powers, such as energy, public service agriculture and finance. Parliament should have an enhanced role in trade negotiation, including a specific remit for devolved administrations, and may need to effectively engage in setting the mandate for negotiations and reviewing their progress, as well as voting on whether to ratify the final Agreement.

Public information and consultation mechanisms in trade negotiations

As the UK government determines which new trade agreements will be beneficial for the UK, it is essential that it strengthens and clarifies its negotiating strategy by soliciting information from both businesses and civil society regarding their offensive and defensive interests in the agreement. UK industry already consults domestically on its priorities for EU trade
agreements (Henig, 2018, p 3). However, a recent report from the London School of Economics (LSE) and the British Chamber of Commerce concludes that the UK’s current approach to stakeholder engagement is insufficient to guarantee that the government will have access to the scope and quality of information it will need to inform a trade negotiation. The report notes that stakeholder engagement has been ad hoc, non-transparent and focused on large businesses (LSE and BCC, 2018).

As it takes control of its trade policy, the UK must adopt a more transparent and accountable approach to stakeholder engagement by establishing direct channels of influence into the negotiation process. In line with the LSE/BCC recommendation, as well as recent EU practice (European Commission, 2017), the UK should establish minimum standards of engagement for trade agreements, as well as formal bodies to facilitate this engagement. For example, an Advisory Group comprised of a wide variety of stakeholders, including civil society and small and medium enterprises, could feed in recommendations to the UK negotiating teams. The UK government must also address the need for public information, committing to making its negotiating objectives clear/explicit, publishing draft negotiating chapters, and providing readable, accessible explanatory documents in a timely manner.

Sustainability Impact Assessment (SIA)

The UK should pursue an evidence-based approach to trade policy in which the impacts of trade agreements are identified and addressed. It is in the UK’s interests to develop its own SIA framework for future trade agreements. Trade liberalisation often requires trade-offs between different sectors of the domestic economy. SIA is a mechanism that not only seeks to minimise the negative impacts of FTAs, but also to maximise their benefits. In short, a robust SIA framework will lead to better trade agreements.

EU SIA is conducted by independent consultants, which are selected through a competitive process. The Commission provides an overarching framework with which all SIAs must comply (EU Commission, 2016), but consultants are expected to devise a bespoke methodology relevant to the specific issues that will be negotiated. Consultants must also produce a consultation plan, which, inter alia, identifies key stakeholders that must be formally consulted, sets out the consultation methodologies and explains how other interested parties and the broader public can feed into the SIA.

Whilst a useful foundation for the UK, EU SIAs have been criticised. There are flaws in the SIA process and SIAs have been found to have only a limited impact on trade negotiations (Kirkpatrick, 2006). The following proposals form the basis of a new UK scheme for SIA that best serves the UK’s trade policy, taking into account the weaknesses that have been identified in the EU’s framework.

i) Process

As the main proponent of the trade agreement, the Government would have an obvious conflict of interest in the SIA’s findings being positive. As in the EU, UK SIA should, therefore, be conducted by independent consultants chosen through a competitive process. Due to the relatively small number of companies that are active in this area, and their desire to attract future contracts, questions can be raised over whether the consultants will be completely independent. Nevertheless, the use of an external party should still be considered preferable to the Government assessing an FTA’s potential impacts. Consideration could be given to there being an oversight role for either the ITC or another independent body, but this would not completely address the concerns raised here, but it would add an additional level of scrutiny to the selection process.

Like the EU, the UK should develop an overarching framework for SIA, setting out its core principles and certain basic requirements, but consultants should be required to develop bespoke methodologies and consultation plans that best suit the agreement being negotiated. This would ensure that SIAs both meet the needs of the UK’s negotiators and are directly relevant to the agreement in question. It would not be necessary for every SIA to cover every issue, if an FTA is solely concerned with improving access to financial services, for example, there would be no need to assess its impacts on fisheries.

Equally, UK SIA should also consider a broad range of environmental, social, economic and human rights impacts, but these should reflect the UK’s own national and international development priorities. There are certain factors not considered in the EU that the UK may wish to include, for example, whether a trade agreement could lead to regulatory reform in the UK and the impacts the agreement may have on different regions within the UK. How different issues are categorised should be consistent across all SIAs to facilitate comparisons of different trade agreements.

It is essential that mechanisms are put in place to enable dialogue between stakeholders and consultants, and consultants and the negotiators, and the wider public should also be given opportunities to feed into the process. A dedicated SIA website, on which all relevant information is made publicly available, would be an efficient way in which to facilitate this. There is extensive research highlighting the benefits of stakeholder participation in decision-making processes, it can provide decision-makers with information that might otherwise be unavailable and can help to build public support for decisions (for example, see Steele, 2001).

ii) Accountability

Parliament should, therefore, be involved in the SIA process so that it can hold the negotiators, i.e. the Government, to account as it develops and exercises the UK’s new trade policy. Trade negotiations will often involve potentially controversial trade-offs between equally legitimate policy goals and the Government must be made to publicly account for these.

Parliamentary committees should be established to oversee the SIA process. Consultants should be required to go before the committee at key points in the process, equivalent to the three stages in the EU SIA process, to explain their methodologies and findings. Equally, negotiators should go before the committee to outline how the SIA’s findings are being used in the negotiations. At the end of the negotiations, the Government should publish a position paper similar to that prepared by the Commission. Again, a minister should be required to go before a committee to explain how the results of the SIA and stakeholder feedback have been taken into account. This will enhance the influence that SIA has on the trade negotiations as the Government would have to defend decisions they make before Parliament.

Given that the UK intends to agree a large number of trade agreements in a short period of time, consideration should be given to establishing different committees to oversee individual SIAs. In the future, when the political and economic imperative for rapidly adopting large numbers of trade agreements in a short period of time is reduced, this work could be taken on by the ITC.

These measures should be separate from Parliament’s role in ratifying any new trade agreement. The proposals here are intended to enhance transparency and accountability within the SIA process by requiring the Government to show how it has responded to specific concerns that may become lost in wider parliamentary consideration of the merits of the final trade agreement.

Finally, the role of the judiciary in the SIA process should be clearly defined. If rights of participation are being created, either for formal stakeholders, the wider public or both, there must be effective means of recourse if these rights are violated. Due to the issues relating to standing, time and costs (Bell and McNeillivray et al, 2017, 331-349), establishing a
specific statutory right of appeal or other expeditious procedure would be preferable to relying on judicial review.

**CONCLUSION**

In this Briefing Paper, we argue that the UK should approach sustainable development objectives as integral to its trade policy. Whilst this approach differs from agreement-based approaches, it contains cross-cutting and distinct features. Most notably, EU FTAs are normally made conditional on trade partners upholding human rights and democratic principles. In contrast, commitments to uphold labour and environmental standards are often characterized as ‘soft’ or ‘cooperative’ – countries have no recourse to formal dispute settlement mechanisms, and they function through the FTA’s establishment of monitoring bodies (see Bartels, 2013).

This has significant implications for the UK. First, UK external trade will enshrine human rights as a pre-eminent FTA objective, with scope for the UK to unilaterally withdraw benefits of the Agreement on violations of human rights or democratic process. Second, in the actual implementation of rolled-over agreements, the environmental and labour standards chapters will entail specific practical challenges. In this respect, the roll-over of EU trade agreements is not ‘automatic’. For example, the CETA Comprehensive Trade and Economic Agreement provides for transparency and consultation (Henig, 2018, pp 10-12). The Government should not be complacent about public consultation; these include ensuring that agreements take account of a wide array of different interests, and provide formalising their involvement. Redressing these will lead to better-informed and indeed more successful trade negotiations; these include ensuring that agreements take account of a wide array of different interests, and providing for transparency and consultation (Henig, 2018, pp 10-12). The Government should not be complacent about public support for FTAs, and ensure, to the extent possible, that governance of its external trade does not deepen domestic divides.

With respect to the substantive commitments made through FTAs, liberalising UK trade should not lead to the weakening of UK objectives in other areas, such as environmental and consumer protection and high labour standards. The Government has committed to upholding its current levels of standards and protections through the Brexit process (HM Government, 2018b). Integrating this objective into its future trade agreements will simply ensure that it is able to uphold and operationalize this commitment.

These different choices can be made explicit even in trade agreements that do not succeed in harmonizing the specific sectoral regulations in question. CETA lists the precautionary principle as an accepted justification for regulation to protect workers or the environment (Articles 23.3, 24.8.2). In contrast, the Trans-Pacific Partnership regulatory coherence chapter, which the US effectively developed before withdrawing from the Agreement, affirms that partners should base regulation on scientific information (TPP Article 20.5.24).

**BIBLIOGRAPHY**

The full bibliography is available online: [https://blogs.sussex.ac.uk/uktps/publications/integrating-sustainable-development-objectives-into-uk-trade-policy/](https://blogs.sussex.ac.uk/uktps/publications/integrating-sustainable-development-objectives-into-uk-trade-policy/).
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