



Law Society
of Scotland

Consultation Response

Human Rights Protections in International Agreements

January 2019



Introduction

The Law Society of Scotland is the professional body for over 11,000 Scottish solicitors. With our overarching objective of leading legal excellence, we strive to excel and to be a world-class professional body, understanding and serving the needs of our members and the public. We set and uphold standards to ensure the provision of excellent legal services and ensure the public can have confidence in Scotland's solicitor profession.

We have a statutory duty to work in the public interest, a duty which we are strongly committed to achieving through our work to promote a strong, varied and effective solicitor profession working in the interests of the public and protecting and promoting the rule of law. We seek to influence the creation of a fairer and more just society through our active engagement with the Scottish and United Kingdom Governments, Parliaments, wider stakeholders and our membership.

The Society's Constitutional Law Sub-committee, together with the Trade Policy Working Group, welcomes the opportunity to consider and respond to the Joint Committee on Human Rights' inquiry into *Human Rights Protections in International Agreements*.¹ We have the following comments to put forward for consideration.

General comment

International agreements can be used to bring about a wide range of changes in the relationship between states and regions. In many such agreements provisions are a means to promote or reinforce the application of the rule of law, including human rights. This includes, for example, trade negotiations, which we believe should take into consideration the need to ensure minimum standards or norms and respect for the rule of law and the interests of justice and access to justice. In this context we also emphasise our Support for the UN Principles on Business and Human Rights and work of bodies such as the International Bar Association,² in seeking to promote and facilitate adherence to these important principles.

¹<https://www.parliament.uk/business/committees/committees-a-z/joint-select/human-rights-committee/inquiries/parliament-2017/parliamentary-scrutiny-international-agreements-17-19/>

² <https://www.ibanet.org/LPRU/Business-and-Human-Rights-Training-Tools.aspx>

Response to questions

Question 1 - Should the UK Parliament have better mechanisms for scrutinising the human rights protections contained in international agreements contemplated by the UK? If yes, what processes, information and analysis might be appropriate? What should the JCHR's role be?

The UK's withdrawal from the EU has sparked a renewed interest in the current processes for creation of international agreements and scrutiny more generally, perhaps particularly in relation to trade policy and international trade agreements. Recent relevant Parliamentary inquiries to which we have responded include the House of Lords Constitution Committee inquiry into Parliamentary scrutiny of treaties^{3 4} and the House of Commons International Trade Committee inquiry into UK Trade Policy Transparency and Scrutiny.^{5 6}

In our response to the inquiry on the parliamentary scrutiny of treaties, we supported the idea of a parliamentary treaties scrutiny committee, which we consider *"would enable Parliament to hold Government to account more effectively. The various models from other jurisdictions provide examples of how such a system could work."* We also advocated more effective stakeholder engagement throughout the negotiation process. We also set out examples from other jurisdictions, all of which provide for greater scrutiny than the UK system.⁷

As we set out in our response to the International Trade Committee's Trade Transparency and Scrutiny inquiry:

"UK withdrawal from the EU presents an opportunity to review and, in so far as considered appropriate, to reform the process for negotiating international trade treaties. We believe that greater transparency

³ <https://www.parliament.uk/business/committees/committees-a-z/lords-select/constitution-committee/inquiries/parliament-2017/parliamentary-scrutiny-of-treaties/>

⁴ Our response can be found here: https://www.lawscot.org.uk/media/361552/21-12-18-lss-response_treaty-scrutiny.pdf

⁵ <https://www.parliament.uk/business/committees/committees-a-z/commons-select/international-trade-committee/inquiries/parliament-2017/uk-trade-policy-transparency-and-scrutiny-17-19/>

⁶ Our response can be found here: <https://www.lawscot.org.uk/media/360663/22-06-18-con-tra-trade-policy-transparency-and-scrutiny.pdf>

⁷ See response to question 10 and also comment by Bjorge and Smith in their response to the Trade Transparency and Scrutiny inquiry (https://www.law.ox.ac.uk/sites/files/oxlaw/hcitic_submission-june2018.pdf), where they note that "The UK Parliament is less involved in treaty-making than comparable Parliaments."

provides advantages in terms of democratic accountability and can facilitate more meaningful stakeholder engagement, while offering clarity, and (potential reassurance) to stakeholders, including civil society groups. Furthermore, trade agreements should be used to promote the rule of law, the interests of justice and human rights. Specific reference to the UN General Principles on Business and Human Rights would assist in embedding these considerations within the UK's international trading framework...

Furthermore, we note that the European Commission has taken steps in recent years to increase transparency around trade relations. In particular, the negotiating mandate for each trade agreement is often now made public⁸ along with reports on the various negotiating rounds.

We support pursuing a similar approach in relation to UK trade negotiations. In terms of specific documents, this approach would be consistent with, for example, regular publication of trade policies, negotiating mandates and guidelines, periodic updates on progress on negotiations, and publication of draft agreements with commentary on agreed / to-be-agreed elements. Impact assessments evaluation prospective and proposed agreements in terms of the economy, equality, environment and the devolution settlement should also be made publicly available...

At a minimum, trade policy documents, including negotiation texts, should be made available to parliamentarians, both in Westminster and the devolved administrations and legislatures, to enhance transparency, facilitate scrutiny and strengthen democratic accountability. In an EU context, MEPs are able to consult such documents in so-called reading rooms, as was done in the case of EU-US TTIP negotiations. This approach balances the need for transparency on the one hand while ensuring confidentiality of negotiating texts (which are not themselves made public)."

Similarly, we consider that human rights protections should also be included in other types of international agreements, and scrutiny might be better achieved through the same sorts of mechanisms as suggested for trade agreements. In this regard, we emphasise the importance of coordinating policy across all areas of international relations. We also note the Foreign Affairs Committee report on the FCO and their finding that the FCO focus on rule of law and human rights priorities "lacks a clear definition of what this concept entails."⁹ The Joint Committee might play a part in the process of defining what the UK's objectives in this context should be.

More generally, the role of the JCHR would be, not only to lead Parliamentary scrutiny of the provisions in terms of creation of obligations, but also to ensure the Government is held to account in terms of achieving effective enforcement by parties to the agreement, including the UK itself.

⁸ The decision to publish the mandate is ultimately one for the Council and is assessed on a case by case basis <http://data.consilium.europa.eu/doc/document/ST-8622-2018-INIT/en/pdf> but the text of the negotiating mandate has been published for a number of treaties under negotiation – see <http://trade.ec.europa.eu/doclib/press/index.cfm?id=1395>

⁹ See summary at page 3

In the first instance, it should ensure that provisions relating to the protection of human rights are included in agreements as appropriate. There is no accepted international definition of “human rights” and accordingly international treaties should make specific reference to recognised human rights instruments, for example, the European Convention on Human Rights. Within this it would also be possible to refer to specific rights depending on the context of the agreement – for example rights of privacy and data protection in an international agreement on data flows. Singling out individual rights without specific reference to an independent source could give rise to issues in relation to interpretation and therefore implementation/enforcement. The second aspect is, of course, to ensure that the drafting of those provisions means they are fit for purpose.

Finally, we note that the EU conducts human rights impact assessments when negotiating international trade agreements.

Question 2 - Should the UK require standard clauses in international agreements to protect human rights? For example:

- a) should the UK require a standard exemptions clause such that nothing in the agreement prevents the UK from adopting measures necessary for the protection of the UK’s domestic and international human rights obligations?**

We would support this approach. While in practice, we do not consider that it is likely that many international agreements would in fact prevent this,¹⁰ the inclusion of this clause would send a clear message of the paramount importance of human rights.

- b) should the UK require a standard suspension clause to highlight the importance of human rights in inter-State relations and to provide for potential sanctions if human rights standards slip below a certain threshold?**

The usual approach to infringement of treaty conditions is to invoke the internal dispute resolution mechanism contained in the treaty. We consider that this approach should be followed for any suspected infringement of provisions relating to human rights.

In the context of trade agreements, it is important to note that preferences granted to developing countries by the Generalised System of Preferences (GSP) is contingent upon those countries meeting human rights

¹⁰ For example, investor state dispute settlement clauses in free trade agreements and bilateral investment treaties will often specifically protect the right to regulate

conditions. Indeed, the European Parliament has described the GSP as “one of the EU’s main tools to promote human rights in third countries”.¹¹ We would advocate the adoption of a similar approach in the creation of the UK’s post-withdrawal trade framework.

c) how should UK international trade rules ensure adequate restrictions continue to apply to the export of equipment that could be used in human rights abuses, such as torture?

The Sanctions and Anti Money Laundering Act of 2018 enables the UK to create a sanctions regime once the UK leaves the EU. We consider that sanctioning can operate as an effective remedy against human rights abuses and therefore suggest that it is preferable to utilise this mechanism, rather than relying on trade rules.

The UK already deploys “Strategic Export Control” Lists (underpinned by various enabling legislation) which already prohibits the export of certain goods or “dual-use” items to particular jurisdictions, without necessary licence. These lists are derived from various international commitments - including foreign policy, national defence and security interests. Licences may be provided by the UK Government to export such controlled items in order to provide humanitarian relief or to support peacekeeping duties. We believe this system to be effective.

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¹¹ [http://www.europarl.europa.eu/RegData/etudes/BRIE/2018/621905/EPRS_BRI\(2018\)621905_EN.pdf](http://www.europarl.europa.eu/RegData/etudes/BRIE/2018/621905/EPRS_BRI(2018)621905_EN.pdf)