

# class

Centre for Labour  
and Social Studies

# Back to Basics

# Trade

# Agreements

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- Global Justice Now
- Dr James Harrison, University of Warwick
- War on Want
- Trade Justice Movement

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## CLASS

The Centre for Labour and Social Studies (CLASS) is a thinktank established in 2012 to act as a centre for left debate and discussion. Originating in the labour movement, CLASS works with a broad coalition of supporters, academics and experts to develop and advance alternative policies.



## Global Justice Now

Global Justice Now is a democratic social justice organisation working as part of a global movement to challenge the powerful and create a more just and equal world. We mobilise people in the UK for change, and act in solidarity with those fighting injustice, particularly in the global south.



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FIGHTING GLOBAL POVERTY

## War on Want

War on Want works to achieve a vision of a just world, through our mission to fight against the root causes of poverty and human rights violation, as part of the worldwide movement for global justice.



## Trade Justice Movement

The Trade Justice Movement is a UK coalition of nearly seventy civil society organisations, with millions of individual members, calling for trade rules that work for people and planet.

# Foreword



**By Dr Faiza  
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Trade is set to be a hot topic for 2018, and probably for many years to come.

During the EU referendum we were told a trade deal would be better than EU membership, and the UK outside of the EU would be making trade deals with countries all over the world. Post-referendum, Brexit negotiations have kept trade front and centre of policy discussions, and International Trade Secretary Liam Fox has repeatedly claimed that the government will secure a free trade deal with the EU. But what would a free trade deal with the EU mean? And more importantly, how would a new raft of trade deals affect British jobs, workers and inequality?

Leaving the EU means that many of our working rights and regulations about everything from environmental protections to food safety could be back

on the table. While our government talks up the possibility of a trade deal with the US, Trump's Secretary of Commerce has already suggested the UK would have to lower food safety standards in exchange for a deal.

Trade cannot simply be an end in itself – a progressive trade agenda should be strengthening our industries, creating jobs and helping to tackle inequality. Our trade policy will also impact on our approach to a variety of issues, including immigration and working rights. At a time when we are building the foundations for a new generation of trade deals through the trade and customs bills, it's vital we get to grips with this complicated issue quickly.

This briefing aims to go back to basics and covers some of the biggest issues in trade policy, including the concerns about a democratic deficit in new trade legislation, public services and privatisation, labour and human rights and the risk of a race to the bottom in regulations.

CLASS will be working with trade unionists, academics and trade justice campaigners in 2018 to provide more detail on what a progressive trade agenda, with jobs and inequality at the heart of it, should look like for the UK.

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# Where are we heading?



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When the UK leaves the EU it will be in charge of its own trade policy for the first time in more than 40 years.

The UK government is already planning for this reality by embarking on informal negotiations with a host of countries across the world, while simultaneously proposing legislation to enable it to ratify new trade agreements in order to build a “stronger, fairer and more prosperous UK”.<sup>1</sup>

This comes at a time when trade is stirring significant public and political interest. There was widespread European and British public opposition to EU-USA agreement, the Transatlantic Trade and Investment Partnership (TTIP), and EU-Canada agreement, the Comprehensive Economic and Trade Agreement (CETA). Trade has become an increasingly prominent issue in US national politics, and

was a central issue in recent presidential elections. Multilateral institutions including the World Trade Organisation, International Monetary Fund and World Bank now admit that adjustment to trade can bring “harsh” and “prolonged” human and economic costs for those left behind.<sup>2</sup>

Public understanding of the wide remit of modern trade agreements and their consequent impact on many areas of life is rising, as too is public willingness to oppose potentially damaging agreements. As Trade Secretary Liam Fox MP admits, a successful UK trade policy must not repeat the mistakes of TTIP “where a huge amount of work is done only to find the public won’t accept”.<sup>3</sup>

As parliament returns in 2018 with a trade bill atop its agenda, we have a unique chance to ensure that transparency and democracy are at the heart of UK trade deals. Modern trade deals affect all areas of life, from environmental rules, to public services like the NHS and even whether or not our government can be sued – at taxpayer expense - for public interest policies that affect investors’ profits.

Under our current rules, parliament has no say about what's in trade deals, and it can't vote them down either. It's time for that to change.

# What is a trade deal?

**A trade deal is an agreement between two or more countries which sets out the rules that they will follow when they trade with each other.**

The World Trade Organisation (WTO) provides the core rules that all member countries of the WTO follow. Bilateral (two countries) or plurilateral (a group of countries) deals then go beyond the commitments that have been made at the WTO.

## **What do trade deals cover?**

Trade deals open up markets for companies to trade internationally. Historically they covered trade in goods and opening up meant reducing the border taxes (tariffs) that companies have to pay when they export from one country to the other. However today a huge amount of what is officially 'trade' takes place within transnational corporations and their concerns have changed. Now trade rules cover a range of other areas, where the focus is on standards and regulations and the extent to which these can be seen as barriers to trade. These areas include services, investment, government procurement and intellectual property rights.

Trade deals are both binding and enforceable, dispute resolution mechanisms and sanctions. This includes state-to-state dispute resolution, but also investor-state dispute settlement (ISDS), where a company has the right to directly take a case against a government.

## Why is trade so controversial?

While trade is of immense importance to the UK and world economy – UK trade with the world is equivalent to more than half of national GDP – trade rules increasingly impact on a wide range of social, health and environmental regulations. Agreements can also remove the ability of governments to maintain or renationalise public services. Rules on investment use ISDS mechanisms to grant big business the power to sue governments in a one-way private justice system that fundamentally undermines the principle of equality before the law. Taken together, this agenda of deregulation, privatisation and investor rights, all embedded within a process of secret negotiations, has provoked staunch resistance to trade deals across Europe and beyond.

There are often expectations that trade deals will create jobs; however, there is little evidence to support this. Research into the recent potential EU-US trade deal, TTIP, found that it would result in at least one million job losses in the EU and USA combined.<sup>4</sup>

## UK trade policy will have ramifications far beyond our borders

Northern countries, including the UK, have increasingly pushed countries in the Global South to agree trade deals that go beyond what they feel ready to negotiate on and which prohibit the use of policy tools vital for development. The UK's independent trade policy could be an opportunity to pursue a progressive trade agenda for Southern countries. The current commitment to continue providing non-reciprocal preferential access for the least-developed countries is welcome and must be maintained - and ideally extended. However, to achieve an outcome that supports the SDGs (sustainable development goals), international trade rules must be reformed so they are compatible with Southern countries' industrial strategies and development objectives. This includes allowing Southern countries to use tariffs, subsidies and other policy tools to shield industries as they develop, and supporting countries to diversify their economies and transition to value added production.

# Democratic deficit

**Current UK procedures for negotiating and ratifying trade deals are wholly inadequate. The government can negotiate trade deals in secret with no oversight from parliament or the public. The recently introduced trade bill does nothing to change this as it stands. It needs to be amended to include fundamental transparency and scrutiny provisions.**

Under existing rules in the UK, the government negotiates trade deals entirely under the Royal Prerogative. Parliament has no role in setting the negotiating mandate, no oversight of the negotiations, and is not even guaranteed a debate or an affirmative vote on the final agreements. The public has no right of input.<sup>5</sup>

A trade bill has been introduced but it does not establish a framework that would ensure trade deals are subject to the highest levels of transparency, parliamentary scrutiny and accountability.

The government contends that these issues do not need to be addressed in the trade bill because it focuses on replacing existing EU trade deals with equivalent UK deals. However in practice this process will not be a technical one and the government has acknowledged that the new deals will likely be different to existing EU deals.<sup>6</sup> The government is also already discussing deals with further countries and has not committed to any future comprehensive legislation on trade. Given this, it is vital for a framework for scrutiny and accountability to be being put in place now for all of the UK's post-Brexit trade deals. The current trade bill may provide the only opportunity to reform the system prior to leaving the EU.

To date, more than 130 MPs have signed motions calling on the government to establish a democratic procedure for the negotiation and ratification of all UK trade agreements.<sup>7</sup> It is imperative that the trade bill is reformed to incorporate these provisions so that UK trade policy is subject to appropriate scrutiny and accountability mechanisms.



# Labour and Human Rights

Trade agreements can have significant impacts on labour rights and human rights. There are three key ways in which future UK trade policy could protect these rights.

## 1 Protect and promote labour and human rights commitments in the UK and its trade partners

**Why is this important?** Trade agreements are important legally binding instruments. If the UK leaves the Single Market, the UK's trade agreement with the EU could be the best way of guaranteeing that the UK government will not reduce labour and human rights protections in the future (e.g. by withdrawing from the European Convention on Human Rights (ECHR), repealing EU labour rights protection). The UK could also tackle specific labour and human rights issues through trade agreements.

**Current practice:** Labour standards are now included as a standard component of all EU and US trade agreements. Globally 136 countries have at least one trade agreement containing labour standards provisions.<sup>8</sup> EU agreements also include a standard set of human rights provisions.

**Limitations of that practice:** Research shows that EU labour provisions, which focus on 'soft' co-operative activities with trade partners, have had very limited effects. The harder sanctions contained in the US model are difficult to enforce in practice. EU human rights clauses have only been used in relation to issues of grave human rights violations and political instability in developing country trade partners.<sup>9</sup>

**What should future UK trade agreements do?** If an EU-UK trade deal is to provide any future guarantees for UK human and labour rights protection, obligations must be specific (e.g. no withdrawal from the ECHR, match EU protection of labour rights) and

supported by stronger enforcement mechanisms than the current EU model. Beyond that, individual attention could be given to the human/labour issues that are of particular concern in each trade relationship (e.g. the rights of migrant workers and precarious work could be a focus of an EU-UK trade deal). But, once the UK leaves the EU, UK policy-makers should be very wary of claims the UK can successfully raise human rights concerns through trade relationships (e.g. with Saudi Arabia or the Philippines) given our reduced market size and likely influence.

## 2 Ensure trade agreements do not themselves undermine human rights and labour rights

**Why is this important?** Modern trade agreements include not only obligations to remove tariff barriers but all kinds of other obligations from investor protection to intellectual property and regulation of service industries. These commitments can have various human and labour rights impacts and/or limit the ability of governments to take action on labour/human rights issues.

**Current practice:** The EU conducts 'sustainability impact assessments' (SIAs) of all new trade agreements. SIAs assess the economic, environmental and social impact of trade agreements, including on human and labour rights. Once in force, EU agreements include a commitment to assess the effects of the agreement on sustainable development.

**Limitations of that practice:** SIAs do not generally include detailed, sector-specific impact assessments on human/labour rights. They tend to find positive impacts on the basis of assumptions that jobs will be created and government revenues increased. SIAs therefore do not tend to lead to specific and targeted labour/human rights protections in negotiating texts. Ex-post assessments rarely happen in practice.<sup>10</sup>

**What should future UK trade agreements do?** (1) Develop appropriate methodologies for SIAs that take human rights, labour rights and equality issues seriously. (2)

Recognise that it is impossible to measure the future impact of all provisions and therefore consider excluding particularly troubling commitments on principle (e.g. strong forms of investor protection). (3) Consider incentives in trade agreements to enhance labour/human rights standards in both trade partners.

### **3 Tackle labour and human rights abuses in global supply chains**

**Why is this important?** Many millions of workers in global supply chains around the world suffer as a result of modern slavery and failure to pay a living wage. Trade agreements govern the conditions under which goods and services are traded internationally and so could potentially be utilised to tackle this issue.

**Current practice:** The EU has Trade and Sustainable Development (TSD) chapters in all of its trade agreements which are seen by EU representatives as a vital first step towards responsible supply chains.

**Limitations of that practice:** EU TSD chapters only contain vague references to corporate social responsibility (CSR) in the text of agreements, which in practice has led only to educational projects about CSR in trade partner countries. This is very limited in ambition and fails to recognise the inherent limits of voluntary CSR activity for improving labour and human rights conditions in global supply chains.<sup>11</sup>

**What should future trade agreements do?** Create stronger mechanisms in trade agreements for tackling abuses in global supply chains, for instance, by establishing road maps for action in key export sectors with clear monitoring processes aimed at enhancing working conditions relevant to those economic sectors.

***Dr James Harrison***

See the Working Beyond the Border Project <http://www.geog.qmul.ac.uk/research/research-projects/beyondtheborder/> for more analysis and recommendations on this issue.

# Deregulation

**Too often trade deals are used to push deregulation and a race to the bottom on key standards in areas such as food safety, financial services and environmental protection.**

To most people, regulations such as air pollution limits and food safety standards are common sense protections against dangerous threats. However, to many big businesses, these rules are just ‘red tape’ which inhibit profits and are identified as such during trade negotiations. Because tariffs in many sectors are already low, this has become a central part of trade deals.

## How do trade deals lead to deregulation?

Trade deals can lead to deregulation in various ways, including:

### 1 Necessity tests

Trade deals can include a rule, known as a necessity test, that says that standards and regulations must be the ‘least burdensome for business’. This means that standards are being judged not on how well they deliver on their actual purpose – such as food safety, animal welfare, fire safety or equality – but solely on their business impact.

### 2 Mutual Recognition

Under ‘mutual recognition’ the regulations in the countries involved in a trade deal are seen as equivalent. However, this means that products meeting less rigorous standards (and thus costing less to produce) could be sold in a market with higher standards, undercutting them. This puts enormous pressure on producers to cut costs and leads to

calls for the higher standards to be reduced. A good example of this is animal welfare standards for chickens. In the UK cage sizes are required to be much larger than in the US, but a future trade deal with the US could lead to US producers taking advantage of lower production costs, undermining animal welfare.

### **3 Regulatory cooperation**

Recent trade negotiations have proposed regulatory cooperation forums which would fundamentally change law-making processes. The forums would enable business groups and other stakeholders to meet with regulatory authorities to influence the early stages of law-making before proposals reach parliament and elected officials. In TTIP this would have seen potential new legislation assessed according to a narrow cost-benefit analysis with economic factors outweighing social and environmental concerns. Big business would have had a central role in setting the political agenda, including being able to kill legislative proposals before they are even seen by lawmakers or the public. These forums continue to enforce the removal of regulations after a trade deal has been agreed.

### **Protecting the right of government to regulate?**

To try and allay these concerns references have been made to the 'right to regulate' in recent trade negotiations. However, these are rhetorical, while the other provisions are enforceable.

The 'general exclusion' clause in WTO rules is also pointed to. Yet in 40 cases brought seeking to use this, only one case has so far been found in favour of states.<sup>12</sup>

# Privatisation of Public Services

## Trade rules on services open the doors to deregulation and privatisation

Rules about local services, including which kinds of company can run them and how they are regulated, used to be decided entirely by domestic regulation, either at the national or local level. However in 1995 the WTO introduced international rules on services known as GATS (General Agreement on Trade in Services). These started opening up service industries to be run by (or outsourced to) global corporations with fewer restrictions as to how they could operate. Corporate lobbyists, aware of the huge value of services markets – the global education market is worth \$4.4 trillion, the annual NHS budget is over £100 billion – have been at the heart of this seismic shift in trade policy.

More extensive rules on services have been included in recent negotiations, including the EU-Canada deal, CETA, and the Trade in Services Agreement (TiSA) currently being negotiated. The thrust has been to turn public services into commodities to be run for the benefit of business, rather than in the interest of people who need services like electricity, healthcare and transport.

## How are services traded?

CETA, seen by the UK government as a ‘template’ deal, is the first trade agreement to use a ‘list it or lose it’ approach to services (known as negative list), something that has been pushed for by lobby groups on both sides of the Atlantic.<sup>13</sup> Under this approach, all service sectors that are not already explicitly included in a list of exemptions are auto-

matically opened up. This includes any sectors that have not yet been invented – for instance a trade deal a couple of decades ago would not have mentioned broadband services. Previously the ‘positive listing’ model was used, where only specifically selected services are opened. In CETA, the UK government failed to specifically exempt core NHS services from liberalisation.

### **Trade agreements could make it more difficult to reverse privatisation**

CETA and TiSA also include the controversial ‘standstill’ and ‘ratchet’ mechanisms for services sectors. The standstill clause says a country must keep offering the same level of openness that it has when the trade deal is agreed. This could make it much harder to for a future government to renationalise the railways, a move backed by 60% of the British public.<sup>14</sup> The ratchet clause says that if the country opens up new sectors in future, that then becomes the new standstill position.

Some commentators argue that public services in trade deals are protected by safeguards. However the most cited protection only protects services “supplied in the exercise of governmental authority”.<sup>15</sup> This is defined as services that are supplied neither on a commercial basis nor in competition with any other service supplier, rendering it effectively meaningless for UK public services.

# Investor-State Dispute Settlement (ISDS)

**ISDS enables foreign investors to sue governments for lost profits – including future profits -in a one-way, private justice system. It acts a padlock on the other rules of trade deal.**

ISDS lets a company bring a case against a government over trade rules. This goes to a tribunal outside the national legal system and the company does not first have to try to bring the case in the national courts. It grants excessive powers to big business to challenge public interest legislation, while destroying the ancient principle of ‘equality before the law’. UN independent expert Alfred de Zayas argues that ISDS is a “revolution against the law”<sup>16</sup> and that ISDS “cannot be reformed. It must be abolished.”<sup>17</sup>

The provisions under which a case can be brought are vaguely defined. Under ‘discrimination’ principles, no foreign investor can be treated differently to a domestic business. Under ‘fair and equitable treatment’, regulatory changes must not breach an investor’s broadly defined ‘legitimate expectations’. Under ‘indirect expropriation’ investors can sue when public policies affect investments, and when investment is defined to include “the expectation of gain or profit” (as in CETA), the lost future value of an investment can be compensated.

Although historically ISDS has been used by companies to sue countries in the Global South, the use of ISDS powers in NAFTA, the trade deal between the US, Canada and Mexico, to sue those countries, has exposed the risk ISDS presents to Europe and North America.



## Who benefits from ISDS?

The average cost of an ISDS case runs into the millions so it can only be used by big business, and the biggest ISDS beneficiaries are companies with an annual revenue of over \$1bn. Worryingly, another large beneficiary of ISDS is the legal industry built up around it.<sup>18</sup>

The logic behind ISDS is that it boosts inward investment by providing foreign investors with legal certainty that their investments will be protected. However, to date, there has been no research able to demonstrate that ISDS leads to higher levels of investment.

The UK government commissioned the London School of Economics to study the impacts on the UK of the inclusion of ISDS in TTIP: the research found that ISDS would bring no benefits to the UK, but significant costs.<sup>19</sup> The UK government could even face multiple ISDS challenges from Brexit itself, putting the taxpayer on the line for billions of pounds due to the regulatory changes resulting from a public referendum.<sup>20</sup>

## Opposition to ISDS and the introduction of ICS

ISDS was a lightning rod for opposition to TTIP. The European Commission received its highest ever response to a consultation when it asked whether people wanted ISDS: more than 97% of the 150,000 replies said 'no'. Over 100 law professors signed a letter in 2016 stating that ISDS is incompatible with EU law.<sup>21</sup> European Trade Commissioner Cecilia Malmström admitted that ISDS is “the most toxic acronym in Europe”.

This prompted the re-branding of ISDS in CETA as the Investor Court System (ICS). In this some of the procedural elements of ISDS were addressed but the substantive basis remains unchanged.

# What do CLASS want to see in a post-Brexit trade agenda?

## 1 Parliamentary scrutiny and meaningful public consultation

The lack of parliamentary scrutiny provided for in the trade and customs bills is startling. Modern trade agreements can affect every aspect of our lives, and our MPs need to be able to scrutinise government proposals – parliament should have the right to vote to approve a negotiating mandate, and to vote to approve a finished trade deal. Alongside parliamentary scrutiny, the next public consultation should be thoroughly considered by the government. We cannot have another bill released just hours after the consultation closes, as happened with the trade bill.

You can keep up to date with the campaign for trade democracy through the Trade Justice Movement: [www.tjm.org.uk/democracy](http://www.tjm.org.uk/democracy)

## 2 A focus on jobs, workers and inequality

With the UK making independent trade deals post-Brexit, we have an opportunity to reset our approach to trade policy. We want to see a progressive trade agenda that focuses on measures that tackle inequality, create quality jobs and protect workers' rights.

CLASS will be working with academics, trade policy experts from the Trade Justice Movement, Global Justice Now and War on Want and UK trade unions to produce a blue print for a progressive post-Brexit UK trade agenda. Watch this space.

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7. See Early Day Motions 128 and 166.
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11. See Harrison et al as above
12. Public Citizen 'Only one of 40 attempts to use the GATT Article XX/GATS Article XIV "General Exception" has ever succeeded'
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19. Bonnitcha et al (2013) 'To the Department for Business Innovation and Skills: Costs and Benefits of an EU-USA Investment Protection Treaty' *LSE Enterprise*
20. Corporate Europe Observatory (2017) 'Brexit Bonanza: Lawyers encouraging corporations to sue UK and EU Member States'.
21. ClientEarth (2016) '101 law professors say ISDS is incompatible with EU law'

## Further reading

### General

- Key issues in UK trade policy post-Brexit  
<http://tjm.org.uk/documents/briefings/Trade-and-Brexit-Briefing-1.pdf>
- Brexit and trade justice for the global south  
<http://tjm.org.uk/documents/briefings/Trade-and-Brexit-Briefing-4.pdf>

### Trade democracy

- Trade Bill parliamentary briefing  
[http://www.globaljustice.org.uk/sites/default/files/files/resources/trade\\_bill\\_briefing\\_for\\_mps\\_nov\\_2017.pdf](http://www.globaljustice.org.uk/sites/default/files/files/resources/trade_bill_briefing_for_mps_nov_2017.pdf)
- Securing democracy in UK trade policy  
[http://tjm.org.uk/documents/reports/TJM\\_SecuringDemocracyInUKTradePolicy\\_2017\\_w eb.pdf](http://tjm.org.uk/documents/reports/TJM_SecuringDemocracyInUKTradePolicy_2017_w eb.pdf)

### ISDS

- UK protections for international investors - not fit for purpose  
<http://tjm.org.uk/documents/briefings/Trade-and-Brexit-Briefing-3.pdf>
- Stepping away from ISDS  
<http://tjm.org.uk/resources/briefings/stepping-away-from-isds>

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