



The Scottish Parliament
Pàrlamaid na h-Alba

FINANCE AND CONSTITUTION COMMITTEE

AGENDA

6th Meeting, 2018 (Session 5)

Wednesday 21 February 2018

The Committee will meet at 10.30 am in the David Livingstone Room (CR6).

1. **Decision on taking business in private:** The Committee will decide whether to take items 3 & 4 in private.

2. **Trade Bill (UK Parliament Legislation):** The Committee will take evidence from—

Graham Fisher, Legal Directorate, Luke McBratney, Constitution and UK Relations Division, and Stephen Sadler, Trade Policy Team, Scottish Government;

and then from—

Dr Billy Melo-Araujo, Lecturer, School of Law, Queens University Belfast;

Professor Andrew Lang, Chair in International Law and Global Governance, Edinburgh University;

Professor Michael Keating, Director, ESRC Centre for Constitutional Change;

Professor Sangeeta Khorana, Department of Accounting, Finance and Economics, Bournemouth University.

3. **Written Agreement on the Budget process:** The Committee will consider a revised draft written agreement on the Budget process between the Committee and the Scottish Government.
4. **Land and Buildings Transaction Tax (Relief from Additional Amount) (Scotland) Bill:** The Committee will consider a draft report on the Land and Buildings Transaction Tax (Relief from Additional Amount) (Scotland) Bill at Stage 1.

FCC/S5/18/6/A

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The papers for this meeting are as follows—

Item 2:

Note by the Clerk

FCC/S5/18/6/1

Item 4:

PRIVATE PAPER

FCC/S5/18/6/2 (P)

Finance and Constitution Committee

6th Meeting, 2018 (Session 5), Wednesday 21 February 2018

Trade Bill: Legislative Consent Memorandum

Purpose

1. This paper provides information relating to the Committee's first evidence session on the UK Government's Trade Bill and the associated Scottish Government Legislative Consent Memorandum. The Committee will take evidence on the Bill from—

Panel One - Scottish Government officials

- Graham Fisher, Legal Directorate
- Luke McBratney, Constitution and UK Relations Division
- Stephen Sadler, Trade Policy Team

Panel Two – Academic experts

- Professor Michael Keating, Director, ESRC Centre for Constitutional Change, and
- Professor Sangeeta Khorana, Department of Accounting, Finance and Economics, Bournemouth University
- Professor Andrew Lang, Chair in International Law and Global Governance, Edinburgh University
- Dr Billy Melo-Araujo, Lecturer, School of Law, Queens University Belfast

2. Written submissions have been received from all the witnesses, with the exception of Dr Khorana, and are provided at **Annexe A** to this paper. It is anticipated that Dr Khorana will provide a written submission prior to the meeting and this will be provided when received.

Trade Bill

3. The UK Government introduced the Trade Bill, in the House of Commons on 7 November 2017, which seeks to legislate for a range of measures that the UK Government considers would be necessary in order to develop trade policy post-Brexit. The Bill, and its accompanying Explanatory Notes, can be accessed at: <https://services.parliament.uk/bills/2017-19/trade/documents.html>

4. The UK Government considers that the Bill requires the legislative consent of the Scottish Parliament in relation to the following clauses of the Bill:

- Clause 1: Implementation of the Agreement on Government Procurement
- Clause 2: Implementation of international trade agreements
- Schedules 1-3: Restrictions on devolved authorities; Regulations of Part 1; Exceptions to restrictions in the devolution settlements.

5. The Public Bill Committee, established to scrutinise the Bill, has now completed its work which did not result in any amendments to the Bill. The date for Report Stage in the House of Commons is not yet known.

Scottish Government Position

6. The Scottish Government lodged a Legislative Consent Memorandum (LCM) on the Trade Bill on 20 December 2017 which can be accessed at—
<http://www.parliament.scot/parliamentarybusiness/Bills/107243.aspx>

7. The Scottish Government state in the LCM that they accept the main purpose of the Trade Bill and “welcomes the conferral of powers on the Scottish Parliament and Scottish Ministers contained within it”¹. However, the Scottish Government note that the Trade Bill adopts a similar approach to the European Union (Withdrawal) Bill in terms of placing constraints upon the Scottish Government and Parliament. Accordingly, the Scottish Government state that—

“On withdrawal from the EU, the governance of the UK must respect the devolution settlements, and recognise the powers and responsibilities of the devolved legislatures and administrations. ... Given this fundamental difference of view, the Scottish Government cannot recommend the Parliament consents to the Bill in its current form”².

Committee Approach

8. The Parliamentary Bureau has designated the Committee as the lead Committee scrutinising the Trade Bill and associated issues with regard to legislative consent. The Committee has issued a call for evidence on the Bill which closes on Friday 23 February 2018. The call for evidence can be accessed at—
<http://www.scottish.parliament.uk/parliamentarybusiness/CurrentCommittees/107476.aspx>

9. This evidence session is intended to provide an introductory, scene-setting evidence session prior to the call for evidence closing.

**Committee Clerks
16 February 2018**

¹ Scottish Government, Trade Bill: Legislative Consent Memorandum, p.7

² Ibid, p.7.

PROFESSOR MICHAEL KEATING

Trade Agreements after Brexit

1. The UK Government aims to negotiate a series of trade agreements after Brexit. These include agreements:

- With the EU;
- With the European Economic Area (EEA) countries and Switzerland, with which the EU currently has close arrangements;
- With other countries with which the EU has trade agreements;
- With countries, including the United States, with which the EU currently has no agreements.

2. The ability to negotiate agreements depends on the UK being outside the EU Customs Union. Within the Customs Union, it would have to apply the common external tariff. Suggestions that it could apply different tariffs to imports destined to remain in the UK and those moving on elsewhere in the EU have been criticized as unrealistic.

3. Legislation is not required to negotiate trade agreements. Provisions allowing the UK to apply trade agreements are spread over several bills, including the EU Withdrawal Bill; the Taxation and Cross-Border Trade Bill; and the Trade Bill. This makes it difficult to read the provisions as a whole. The various bills have focused on technical matters, perhaps because the UK Government has yet to formulate its own overall policy on trade, including relations with the EU.

Scope of EU Trade Agreements

4. The EU currently has some forty trade agreements, which the UK aspires to continue as far as possible on the same terms. They account for 13 per cent of UK trade. Agreements are varied in their depth and scope. Key features, which vary from one to another, are:

- The extent of tariff cuts or elimination;
- The inclusion of goods, services or agriculture;
- Investment rules and investor protection;
- Recognition of product standards;
- Opening of public procurement;
- Competition rules and subsidies;
- Rules of origin;
- Intellectual property rights.

5. The EEA is the deepest agreement, amounting to Single Market membership (except for agriculture and fisheries) but the UK Government has indicated that it will not join that so that new agreements will have to be negotiated with Norway, Iceland,

Iceland and Liechtenstein. Switzerland has an agreement providing for many single market provisions to be applied but the UK has also rejected that as a model.

6. Other agreements contain various of the key measures. The most comprehensive is with Canada and covers some services as well as recognition of the product standards agencies on the two sides. The agreement with Turkey includes a customs union. It is not obvious that the countries involved will want to carry all existing measures over into agreements with the UK if it means different product standards or complex rules of origin as the UK diverges from EU rules.

7. The Trade Bill is narrow in focus. It aims at only continuity for the UK in international trade agreements that the EU currently has with third countries and covering only 'key measures'. The Scottish Government's Legislative Consent Memorandum slightly misquotes this as '*the* key measures'. The Bill's provisions relate to changes in domestic law not already covered by the Withdrawal Bill. Like the Withdrawal Bill, it provides for these to be made by secondary legislation.

8. Specifically, the Bill covers:

- The UK becoming a member of the Agreement on Government Procurement (GPA) in its own right. This will retain rules about opening government procurement currently in force as part of EU membership;
- Changes in domestic law necessary to meet obligations under the specified trade agreements;
- Setting up a Trade Remedies Authority. This would administer measures taken against countries in breach of trading rules as allowed under WTO and trade agreement rules;
- Data collection and sharing.

Constitutional Issues

9. The constitutional issues are similar to those posed in the withdrawal bill and concern:

- The scope for ministers to change law by statutory instrument, including 'Henry VIII' powers;
- The restrictions on the powers of devolved ministers and legislatures. Powers are given to both UK and devolved ministers to make changes in law to give effect to the relevant international agreements. The powers of Scottish ministers can be over-ridden by UK ministers.

10. The new powers to make law by statutory instrument are subject to a five year 'sunset' clause, renewable. The Withdrawal Bill provides for sunset after two years (this is not the same as the reservation of powers over retained EU law, which has no sunset clause).

11. The UK Government has indicated that it will seek legislative consent for:

- Clause 1, on government procurement. Currently, these matters are mostly covered by EU regulations which are automatically binding on the devolved bodies;
- Clause 2 on implementation of trade agreements where they impinge on devolved competences.

12. Schedule 1 details the powers and restrictions on devolved authorities in reference to clauses 1 and 2.

13. Under the Sewel Convention, legislative consent is normally sought for Westminster legislation in devolved matters and the UK Government has accepted that in this case.

14. The Scottish Government has declined to recommend legislative consent, essentially on the same grounds as it has on the EU Withdrawal Bill. It accepts the need for common approaches but not the way it is done. It argues that the existing balance of powers should be preserved, with common approaches forged by agreement. It objects to a provision that the sunset clause can be extended without consultation with the devolved authorities.

15. While the Bill, giving ministers the power to change law by statutory instrument, comes under the Sewel Convention, the statutory instruments themselves do not. This was identified as an anomaly in debates on the Withdrawal Bill. As both the Withdrawal Bill and the Trade Bill expand the scope of secondary legislation to include modifying primary legislation, this has caused increasing concern. In the policy paper on trade, however, the UK government did state that:

As parts of these {trade} agreements will touch on devolved matters, legislation will create powers for devolved administrations to implement them. These powers will be held concurrently by the devolved administrations and the UK government. This approach will ensure that, where it makes practical sense for regulations to be made once for the whole UK, it is possible for this to happen. The UK government will not normally use these powers to amend legislation in devolved areas without the consent of the relevant devolved administrations, and not without first consulting them (Preparing for our future UK trade policy, October 2017, 3.2).

16. The committee might wish to press UK ministers on this.

17. More broadly, there is also concern about the lack of parliamentary scrutiny of trade agreements. Currently, there is provision for scrutiny of EU trade agreements by both the European and national parliaments. As the scope of trade agreements has expanded into areas such as environmental and labour standards, human rights or development cooperation, as well as product standards, they impinge on more aspects of domestic policy. The new agreements will be subject only to negative resolution; they will be laid before Parliament and ratified if neither House objects within 21 days.

18. Similarly, there are concerns about the input of the devolved authorities into international trade agreements. Currently these are handled through the Concordat on International Relations, which leaves the final decision to the UK Government.

PROFESSOR ANDREW LANG, EDINBURGH UNIVERSITY**1. Executive summary***Grandfathering existing EU trade agreements (Clause 2)*

- 1.1. The EU currently has free trade agreements with over 60 countries. The UK has a **strong interest in ensuring the continuity of its trading relationships with these countries** after exit day.
- 1.2. However, ‘grandfathering’ these agreements is likely to be more **complicated**, and more **time-consuming** than originally anticipated. **Significant changes to many of the agreements will be necessary**, some of which will require substantive negotiations.
- 1.3. The Scottish Parliament may wish to **conduct a review of existing EU FTAs**, with a view to **identifying those of particular significance for Scotland**, and analysing the legal and commercial issues which may arise during the grandfathering of these agreements.
- 1.4. Where substantive changes are anticipated to existing FTAs, devolved administrations ought to have **opportunities for consultation during, and oversight of, the renegotiation process** on matters within their competence.
- 1.5. Where substantive changes are made to existing FTAs, **domestic implementation through secondary legislation may provide for inadequate parliamentary scrutiny**. In such cases, requiring that international trade agreements are **implemented via primary legislation** – and/or requiring positive Parliamentary consent to the terms of any renegotiated trade deal – may be more appropriate.
- 1.6. The Trade Bill raises **the same issues as the EU (Withdrawal) Bill regarding limitations on the exercise of devolved powers**. In addition, the **further limitations** with respect to ‘quota arrangements’ are likely to become particularly relevant for regulations concerning the **sensitive areas of agriculture (including, importantly, provision for support to agricultural producers) and fisheries**.

The conduct of the UK future trade negotiations

- 1.7. **The Scottish government has a strong interest in ensuring that it has an effective voice in the UK’s future FTA negotiations**. Participation in the policy-making negotiation process **can take many forms**.
- 1.8. The Scottish administration may have a role to play in **providing analysis and impact assessment specifically related to issues of particular interest to Scotland**. It may also seek to **ensure that assessments**

conducted by the UK Government specifically address regional impacts, and matters of regional sensitivity.

- 1.9. There is a case for the **involvement of the UK and devolved parliaments** in the **setting of future negotiating mandates**. This can be an important mechanism to ensure parliamentary accountability.
- 1.10. **Formal structures will also have to be established for co-ordination between the UK government and the executive authorities of devolved administrations during negotiations.** An obligation could be placed on the UK government to **keep the UK and devolved parliaments continuously informed about the state and progress of negotiations,** and to provide **access to negotiating texts** where appropriate.
- 1.11. Devolved governments can also reasonably expect to be **actively involved on the periphery of the negotiations themselves in respect of obligations which they will be required directly to implement.**
- 1.12. **There are strong arguments in favour of UK parliamentary approval of future UK trade deals,** over and above the limited scrutiny provided for under the Constitutional Reform and Governance Act 2010. However, one would expect any proposal to **give the devolved parliaments similar formal rights of approval and disapproval** to be controversial.

The Government Procurement agreement (Clause 1)

- 1.13. The Scottish Government should expect to play a direct and active role in the negotiation of the UK's accession to the GPA after exit day, at least as regards the application of GPA obligations to procurement by entities which fall under its authority. As a result, **it may need over the coming months to formulate positions regarding the extent to which it wishes to submit its procurement practices to GPA disciplines.**

2. Introduction

2.1. I am currently Chair in International Law and Global Governance at the University of Edinburgh, and was previously Professor of Law at the London School of Economics. I have taught and researched in the field of international trade law for almost two decades. This evidence is provided in my personal capacity.

2.2. After a brief introduction to international trade agreements, this statement covers the following issues:

- the 'grandfathering' of existing EU free trade agreements after exit day (clause 2 of the Trade Bill);
- the potential role of the Scottish Parliament and Scottish Government in the conduct of UK trade negotiations after exit day; and
- UK accession to the WTO Government Procurement agreement (clause 1 of the Trade Bill).

2.3. This statement does not cover Part 2 (The Trade Remedies Authority) or Part 3 (Trade Information) of the Trade Bill.

3. Brief background on international trade agreements

3.1. This section is intended as a brief primer for those new to the area of international trade agreements. Some readers may wish to proceed directly to Section 4.

The multilateral level: the World Trade Organization (WTO)

3.2. The **foundation of international trade law is the law of the World Trade Organization**, which is set out in annexes to a multilateral treaty called the 1994 Marrakesh Agreement establishing the World Trade Organization ('WTO Agreement'). This treaty applies to WTO Members only. There are currently 164 WTO Members, covering over 95% of world trade, and 22 further countries are in the process of accession.

3.3. The WTO Agreement does not establish 'free trade' between WTO Members, but rather sets out the terms on which Members must give each other access to their goods and services markets.

3.4. An important principle of the WTO is that different WTO Members should not be treated differently – **market access must be given to all other WTO Members on a non-discriminatory ('most favoured nation') basis**. However, there is an **exception to this principle for so-called 'free trade agreements'**. In addition, a relatively small subset of WTO rules are 'plurilateral', which means that they apply only to a subset of WTO Members. The Government Procurement Agreement (GPA) is one such plurilateral agreement.

3.5. The WTO Agreement also establishes an international organization – the World Trade Organization – which is tasked with overseeing the implementation of these rules, negotiating new rules, and resolving disputes.

The UK's position in the WTO after exit day

3.6. The **UK is and always has been a WTO Member**. However, it currently enjoys and exercises its Membership rights through the EU. **When it leaves the EU, it will become a WTO Member in an independent capacity**.

3.7. When this happens, many rights and obligations under WTO law will continue apply to the UK without complication. However, **some specific issues will arise**. For example:

3.7.1. the UK will no longer be a party to the GPA, and will have to re-apply to accede to that agreement;

- 3.7.2. the UK will have to establish its own 'schedules of commitments' in respect of both goods and services trade;
- 3.7.3. as part of this, existing EU-wide tariff-rate quotas will have to be split into two quotas, one for the UK and another for the EU; and
- 3.7.4. EU-wide maximum permitted domestic support for agricultural producers will also have to be divided between the EU and the UK.
- 3.8. Each of these (and other) matters **will in practice require negotiation with some other WTO Members to resolve**, and there is no guarantee that that process will be smooth. **However, none of them calls into question the membership of the UK in the WTO, nor the application of WTO law as a whole to the UK.**

Free trade agreements

- 3.9. In addition to the multilateral rules established by the WTO Agreement, **there is an additional layer of 'free trade agreements'**. These are treaties between two state or a small group of states (usually WTO Members, but not necessarily). They provide for **enhanced levels of mutual market access between the parties** to them, which is not available to other WTO Members. They also often set out **new rules** on areas not comprehensively covered by the WTO law.
- 3.10. 'Free trade agreements' (FTAs) can take many forms. Some are relatively limited in their scope, providing only minor additional market access commitments for goods, and establishing a framework for co-operation on trade matters. However **more recent 'deep and comprehensive' free trade agreements can be very extensive in their scope and effects**, including for example: duty free access for almost all goods; enhanced access for key services exports; new rules on investment protection; extensive rules covering such matters as intellectual property, government procurement, cross-border data flows, product safety regulations, subsidies, and regulatory good practice; as well as binding quasi-judicial dispute settlement.
- 3.11. There are **well over 300 FTAs currently in force or under negotiation**. Notwithstanding the position of the current US administration, most major trading countries are actively seeking to negotiate new FTAs as a key part of their trade policy strategy.

4. 'Grandfathering' existing EU international trade agreements (Clause 2 of the Trade Bill)

What is grandfathering and what will it involve?

- 4.1. **The EU is currently a party to around 65 trade agreements with over 60 countries.** It has concluded negotiations on agreements with Japan,

Singapore, Vietnam and Armenia, and has 18 further negotiations underway with 18 more.

- 4.2. The economic significance of these agreements varies between agreements, but cumulatively it is high. They have been estimated to cover about 15% of UK goods trade and around 10% of UK services trade.
- 4.3. The UK is currently party to the EU's existing agreements by virtue of its membership in the EU. However, **once the UK is no longer an EU member state, the default position is that it will no longer enjoy the benefits of these agreements.**
- 4.4. This does not mean that all exports to FTA partner countries will stop, or indeed be equally impacted. Oil and gas exports, for example, may not face high tariffs in major export markets as a result. Food and drink exports, on the other hand, are typically sold into highly protected markets, and may also face the loss of certain rights relating to the protection of geographical indications and food names in FTA partner countries.
- 4.5. It is commonly agreed that **the UK has a strong interest in preserving the continuity of its relationships with existing EU FTA partners**, as far as possible ('grandfathering' these agreements). There is disagreement, however, as to the feasibility of this outcome, and the legal means to achieve it.
- 4.6. Ensuring continuity will ultimately require the conclusion of new trade agreements between the UK and the EU's current FTA partners, which seek to replicate existing arrangements as far as possible. Although this is certainly not as difficult and time-consuming as negotiating new FTAs from scratch, **a number of significant obstacles exist.** These include:
 - 4.6.1. *Resource and time constraints.* **Existing EU FTAs cannot simply be copied and pasted.** Many provisions contain specific reference to EU-specific bodies, regulations, and legislative processes, all of which will have to be amended. While in most cases, these changes will be technical rather than substantive, the sheer volume of them, across all the existing agreements, poses difficulties in the time available.
 - 4.6.2. ***Some parts of the agreement cannot logically be replicated, but must be re-negotiated.*** Existing EU FTAs contain certain rights and obligations which are defined by reference to EU-wide volumes of imports (tariff-rate quotas, special safeguards). These volumes cannot simply be transposed to a UK agreement, but must instead be renegotiated with the FTA partner and in some cases probably also with the EU. In addition, new agreements will have to define new 'rules of origin' for (at least) UK products covered by the agreement. The probable preferred approach to rules of origin ('diagonal cumulation') will require the agreement of the EU as well as the FTA partner.

4.6.3. ***Our FTA partners may seek changes to the agreements.*** Although many of the most important FTA partners have signalled their desire to maintain continuity, this is not assured. For many FTA partners, existing access to the UK market may be significantly less valuable once the UK leaves the single market. Those FTA partners with a high trade deficit with the UK may not see the value of continuing present arrangements unchanged. In any case, there is little incentive for an FTA partner to agree to any new arrangement until the terms of the UK-EU relationship are reasonably clear.

4.6.4. ***The continuation of some agreements may be inconsistent with stated UK policy.*** If the UK is indeed to exit the single market and the customs union, it cannot replicate existing arrangements with Norway, Iceland, Liechtenstein, or Turkey. Replicating the current arrangements with Switzerland may also conflict with stated policy, to the extent that they require, for example, free movement of people. Significant renegotiation of these arrangements is likely to be required.

4.7. As a consequence, **it is likely that grandfathering existing agreements is likely to (a) take longer and be more difficult than originally anticipated; and (b) require significant substantive changes to the content of many of them.**

4.8. It is worth noting that **a simpler solution may be available for the duration of the implementation period** (though not beyond). A recent Technical Note, published 8 February 2018, suggests that FTA partner countries may agree with the UK and the EU, that the UK may be treated as if it were an EU member for the duration of the implementation period, for the purposes of the FTA.³ This solution assumes (as is currently envisaged) that the UK remains for all practical purposes bound by EU law throughout the implementation period, as presently.

The role of the Trade Bill

4.9. Where the UK enters into arrangements with FTA partners to grandfather existing agreements, **the new agreements will need to be implemented domestically.** Clause 2 of the Trade Bill – along with the Taxation (Cross-Border Trade) Bill and the EU (Withdrawal) Bill – establish and allocate powers to implement them.

4.10. The Trade Bill only covers agreements which have been signed by the EU by exit day. It covers ‘free trade agreements’, as well as other international agreements which ‘mainly relate to trade’. In reference to the latter category the Explanatory Notes give the example of mutual recognition agreements, and refer to ‘associated ancillary agreements’ related to FTAs.

³ See HMG, ‘Technical Note on International Agreements’, 8 February 2018, available at https://www.gov.uk/government/uploads/system/uploads/attachment_data/file/680366/Technical_Note_-_International_Agreements_in_the_Implementation_Period_-_CLEAN.pdf.

- 4.11. The **Bill permits the implementation of these agreements through secondary legislation**, either in Westminster or the devolved administrations, according to their respective competences. Schedule 1 sets out **certain restrictions on the exercise of these powers by devolved authorities**, most importantly relating to the modification of retained direct EU legislation. The consent of a Minister of the Crown is also required for regulations coming into force before exit day, as well as regulations making provision about quota arrangements, on account of the need for a co-ordinated UK-wide position on such arrangements.
- 4.12. **These powers are time limited**, and may not be exercised beyond five years from exit day, though the Bill makes provision for extensions of this time limit through regulations made by the Secretary of State.

Issues raised by clause 2 of the Trade Bill

- 4.13. *The significance of existing EU FTAs for Scottish exporters.* There is limited analysis available of the potential challenges associated with grandfathering particular agreements, and of the associated legal and economic risks. The Scottish Government may wish to **conduct a review of existing EU FTAs, with a view to identifying those of particular significance for Scotland, and analysing the legal and commercial issues which may arise during the grandfathering of these agreements.**
- 4.14. *Consultation and oversight during the renegotiation process.* While the Bill does not directly address the process for the renegotiation of existing FTAs, it is reasonable to assume that **opportunities for consultation and oversight of the renegotiation process may be limited, particularly for devolved administrations.** This is because the process is likely to be carried out under considerable time pressure and resource constraints, and because it will likely be impractical to use a comprehensive process of formal consultation as described in Section 4 of this note. The Scottish Parliament may also wish to maintain a close watching and listening brief as regards the renegotiation of these agreements, including establishing formal and informal channels for sharing of information.
- 4.15. **Limited Parliamentary oversight of implementation.** As noted, the Bill provides for implementation of trade agreements through secondary legislation. Schedule 2 clarifies that such secondary legislation is subject to Parliamentary scrutiny via the mechanisms of an annulment resolution by either House of Parliament, or the negative procedure (for regulations of the Scottish Ministers). The Explanatory Notes further confirm that the trade agreements will 'still be subject to Parliamentary scrutiny before they can be ratified' in accordance with the usual process established by the Constitutional Reform and Governance Act 2010.
- 4.16. **This limited degree of Parliamentary oversight may be acceptable where implementation is a purely technical exercise** – that is to say, where it merely involves replicating the content of an existing agreement, which has already been scrutinized and implemented through the existing EU

process. **But it raises concerns to the extent that the content of those agreements is modified or supplemented.** These concerns are particularly acute where the renegotiation process is undertaken under time pressure and resource constraints, as is likely. In such cases, requiring that international trade agreements are **implemented via primary legislation** – and/or requiring positive Parliamentary consent to the terms of any negotiated trade deal – may be a more appropriate mechanism for ensuring adequate Parliamentary supervision of, and input into, the negotiation process.

4.17. ***Limitations on the powers granted to the Scottish Ministers.*** Schedule 1 of the Trade Bill places constraints on the ability of Scottish Ministers to exercise their powers under Clause 2, which mirror those contained in the European Union (Withdrawal) Bill. **The Scottish Government has already articulated its concerns about these limitations in respect of that Bill, and the same concerns arise in relation to the Trade Bill.** The further restrictions placed on regulations which ‘make provision about any quota arrangements or are incompatible with any such arrangements’ are likely to become particularly relevant for regulations concerning the sensitive areas of agriculture (including, importantly, provision for support to agricultural producers) and fisheries.

4.18. ***Ambiguity as to the nature of agreements covered.*** The Trade Bill establishes powers in respect of two types of agreements: ‘free trade agreements’ and ‘international agreements that mainly relate to trade, other than free trade agreements’. The latter category is on its face broad enough to include a number of agreements which are not typically understood as ‘trade agreements’, perhaps including agreements relating to air transport, maritime transport, fisheries management, or even trade in hazardous waste. Some clarification may be necessary.

5. The conduct of the UK’s future trade policy, and the role of devolved administrations

5.1. While the Trade Bill does not seek to establish procedures for the conduct of the UK’s future trade negotiations, its publication provides an important opportunity to consider the issue.

The need for effective participation of devolved authorities in UK trade negotiations

5.2. **The Scottish government has a strong interest in ensuring that it has an effective voice in the UK’s future FTA negotiations.** This is for at least the following reasons:

5.2.1. The obligations contained in future FTAs are certain to cover a range of matters falling within a number of the devolved powers, including for example agriculture, fisheries, forestry, environment, health, education and transport. **FTAs may place constraints on the exercise of these devolved powers.** They will certainly require implementation by

devolved authorities, with associated commitment of resources. Furthermore, **FTA rules may *de facto* affect the respective powers of the UK government and the devolved authorities**, for example where an FTA requires the formulation of a consistent UK-wide policy on matters within devolved competence.

5.2.2. The conduct of FTA negotiations necessarily involves significant internal trade-offs between the interests of different sectors, regions and even companies within the UK. **There will be winners and losers from new trade agreements, and some will win more than others.** The Scottish Government has an important role to play in **ensuring the interests of Scottish producers, consumers and civic groups are adequately taken into account.**

5.2.3. Trade agreements have become matters of high public sensitivity, particularly within Europe. Looking ahead, the UK should anticipate reasonably high levels of civil society engagement on matters of trade policy. The Scottish Government (like all levels of government) will be called upon to **respond to civil society concerns**, including through careful oversight and engagement with the processes of trade policy-making and trade negotiations.

5.2.4. There are numerous **recent examples of the actions of sub-national bodies being challenged** in the context of international trade and investment disputes. In such cases, experience suggests that sub-national entities with prior knowledge of the content and implications of the FTA, and, are better equipped to respond effectively.

5.3. Although trade is a reserved matter, it should be noted that the **UK government also recognises the importance of working closely with devolved administrations on trade matters.** This is particularly the case in areas in which implementation will fall to devolved authorities, where the consent of devolved administrations will be essential. It is also important given that the UK government (in the absence of a liability sharing agreement) will be liable for any failure by a devolved administration to comply with the UK's international obligations.

5.4. More generally, it is now recognised that – even if they bring with them certain challenges – **transparency, broad stakeholder participation and parliamentary scrutiny in the conduct of trade negotiations helps on balance to ensure a better quality and more legitimate negotiating outcome.** This will be particularly true where negotiations are conducted under time and resource pressures.

Modalities of participation and oversight

5.5. Participation by the Scottish Government and Scottish Parliament in UK trade policy-making can take a number of forms. Four can usefully be distinguished: (a) the provision of independent analytical capacity; (b)

consultations before and during negotiations; (c) playing a role in the establishment of a negotiating mandate; (d) formal approval of the final deal.

- 5.6. *Analytical capacity.* Independent analysis can play an important role in the conduct of trade negotiations. For example, many governments conduct scoping studies prior to negotiations to identify the areas of greatest potential gain, as well as areas of domestic sensitivity. Some governments also routinely conduct formal impact assessments of all proposed FTAs. The EU's sustainability impact assessments, for example, cover economic, social, environmental and human rights impact assessments. More generally, independent analysis can assist in the resolution of intra-governmental policy differences, and can guard against special interest capture.
- 5.7. In this context, **the Scottish administration may have a role to play in providing analysis and impact assessment specifically related to issues of particular interest to Scotland.** It may also seek to **ensure that assessments conducted by the UK Government specifically address regional impacts, and matters of regional sensitivity.** Although a soft form of influence, it may nevertheless be significant in the important early stages of setting negotiating priorities, and identifying key sensitivities.
- 5.8. *The establishment of a negotiating mandate:* Trade negotiations are typically carried out in accordance with a formal mandate. In the US, this mandate is issued by Congress; in the EU, it is established by the European Council; in Australia the negotiation mandate is set by Cabinet.
- 5.9. In the UK, **consideration could be given to granting parliament a formal role in the setting of negotiating mandates – including the devolved parliaments on matters within their competence.** This can be an important mechanism to ensure parliamentary accountability, especially if there is no parliamentary power to veto the final agreement. Even in the absence of a Parliamentary role, it would be reasonable to expect the Scottish Government to have a significant consultative role in the drafting of a negotiating mandate, to the extent that it covers matters within its competence.
- 5.10. *Consultations before and during negotiations.* **It will be crucial to establish an effective mechanism for ongoing consultation between the UK government and devolved administrations before and during negotiations.** In trade negotiations at the EU level, there is an **obligation** on the European Commission to keep the European Parliament **continuously informed about the state and progress of negotiations** – a similar obligation could be considered in the UK context, for both the UK Parliament and devolved parliaments. Parliamentary committees may also be given special access to negotiating texts.
- 5.11. **Formal structures will also have to be established for co-ordination between the UK government and the executive authorities of devolved administrations during negotiations.** In the UK context, some have suggested the creation of a 'Joint Ministerial Committee on International Trade', with a structure and function analogous to the similar body already

created in respect of EU withdrawal negotiations. Furthermore, devolved governments can reasonably expect to be **actively involved on the periphery of the negotiations themselves in respect of obligations which they will be required directly to implement**. This has been the recent experience of Canadian provincial government in respect of CETA negotiations, as well as a 2010 US-Canada agreement regarding government procurement.

5.12. *Ratification/approval*: The question whether national and subnational parliaments ought to be given a power of final approval or disapproval over trade agreements is controversial. A number of the UK's closest international peers – including the US, Australia, New Zealand and Canada – provide for formal Parliamentary debate and approval of trade deals, whether by law or by convention.

5.13. In the EU, the consent of the European Parliament is required for an international trade agreement to enter into force. In addition, ratification by EU member states is also required where a trade agreement covers matters for which competence is shared between the EU and member states. Such shared competencies include, for example, portfolio investment, and investor-state dispute settlement. Since Belgium requires the consent of its three regional assemblies to ratify such agreements, this gives those three sub-national parliamentary bodies a potentially very powerful voice in the conduct of EU trade negotiations. The Wallonian Parliament famously exercised this power in late 2016 when it threatened not to agree to the ratification of CETA, the EU-Canada free trade agreement.

5.14. **There are strong arguments in favour of UK parliamentary approval of future UK trade deals**, over and above the limited scrutiny provided for under the Constitutional Reform and Governance Act 2010. However, **one would expect any proposal to give the devolved parliaments similar formal rights of approval and disapproval to meet resistance**. For many, the recent experience of the EU in respect of CETA threatened to undermine the credibility of the EU as a negotiator, and demonstrated the difficulties that such an arrangement can create. Some middle ground solutions may be worth exploring.

6. Accession to the WTO Agreement on Government Procurement (Clause 1 of the Trade Bill)

6.1. As noted above, the WTO Government Procurement Agreement is a plurilateral WTO agreement, applying only to the 19 WTO Members which are parties to it (comprising 47 countries, including the UK through its EU membership).

6.2. Under the GPA, these countries provide to each other certain defined access to their public procurement markets. It has been estimated that the combined value of these procurement markets is over US\$1.7 trillion annually.

- 6.3. When the UK leaves the EU, it will no longer be a party to the GPA. The UK government has indicated its desire to accede to the GPA as soon as possible thereafter.
- 6.4. Clause 1 of the Trade Bill establishes powers for the domestic implementation of the WTO Agreement on Government Procurement (GPA), in both its original 1994 and its subsequently revised version, after accession.
- 6.5. The Scottish Government should expect to play a direct and active role in the negotiation of the UK's accession to the GPA, at least as regards the application of GPA obligations to procurement by entities which fall under its authority. As a result, **it may need over the coming months to formulate positions regarding the extent to which it wishes to submit its procurement practices to GPA disciplines, specifically considering:** (a) the identity of the **procuring entities** to be covered; (b) the value of the **procurement transactions** covered; and (c) the **type of the good or service** being procured. In addition, it may wish may include **qualifications** to its commitments regarding, for example, green purchasing policies, preferential treatment for domestic SMEs, or other policies.

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This submission is in response to the Committee's call for evidence to inform the Finance and Constitution Committee's scrutiny of the Trade Bill and the associated Legislative Consent Motion.

1. GOVERNMENT PROCUREMENT AGREEMENT

Scope

1. The Trade Bill provides the executive the power to implement obligations derived from the Government Procurement Agreement (GPA). The WTO Government Procurement Agreement includes two broad categories of rules. Firstly, there are national treatment obligations that require GPA members not to discriminate against procurement suppliers of other parties. Non-discrimination obligations included in the GPA are typically subject to a number of limitations based on three parameters: entities covered; value thresholds; and coverage in regards of goods, services and construction services⁴. With respect to the type of entities covered by the GPA, countries are entitled to choose the extent to which their market access commitments apply to procurement from central government entities, sub-central governmental entities and other governmental entities⁵. Federal countries such as Canada and the US have thus been able to exclude provincial/state and local government procurements from non-discrimination requirements under the GPA. GPA members can also set the minimum value of public procurement contracts above which the non-discrimination obligation applies

2. The second broad category of obligations are the so-called 'framework rules' – that is, minimum rules that together establish an overall regulatory framework that aims to ensure open, transparent and competitive public procurement procedural frameworks. Such procedural rules usually relate to transparency requirements,

⁴ Article II(2) GPA

⁵ Article II(4) GPA.

eligibility of tenderers, contract award procedures and judicial and administrative enforcement.

3. Currently the UK benefits from the GPA in its capacity as an EU Member State. Whether the UK would remain a party of the GPA once it formally leaves the EU is a question that is the subject of some debate. However, the Trade Bill Explanatory Notes⁶ published by the UK Department of International Trade accepts that the UK will leave the GPA once it formally withdraws from the EU and will need to accede as a new party in its own right. Although the EU's exclusive competence in the area means that the UK is in principle precluded from negotiating trade agreements, it is understood that the UK is, in cooperation with the EU, currently engaged in discussions relating to the terms of its accession to the GPA. On 3 October 2017, a Joint EU-UK Letter to the WTO membership was published confirming that the EU and the UK would work together on the UK's objective of remaining within the GPA upon leaving the EU, on the basis of the commitments currently contained in the EU schedule of commitments.

Potential amendments to terms of UK GPA membership

4. With respect to national treatment commitments, it is expected that the UK's new proposed GPA coverage will be at the very least in line with the existing EU GPA commitments. Any proposal to reduce access to the UK procurement market would be unlikely to be looked upon favourably by GPA membership, not least because the UK represents a smaller market than that on the basis of which the EU GPA coverage was negotiated. The Explanatory Notes state that the changes to UK regulations as a result of the accession to the GPA would include those relating to the creation of new Government Departments as a result of the UK's exit from the EU, which are currently not mentioned in the EU GPA schedules. However, the possibility that GPA parties may demand a renegotiation of terms of the UK's accession and demand additional market access commitments from the UK should not be dismissed.

⁶ Trade Bill Explanatory Notes. Available at: <https://publications.parliament.uk/pa/bills/cbill/2017-2019/0122/en/18122ennew.pdf>

5. These framework rules only establish minimum standards. Since the EU procurement rules are accepted to be GPA-compliant, accession to the GPA should not require any substantive amendments in UK procurement rules as they currently stand.

2. INTERNATIONAL TRADE AGREEMENTS

Scope

6. The Trade Bill provides the executive the power to implement obligations derived from international trade agreements. There is a significant deal of uncertainty concerning what is encompassed by the term “international trade agreements”.

Clause 2(3)(a) of the Bill describes an international trade agreement as (a) a free trade agreement, or (b) an international agreement that mainly relates to trade, other than a trade agreement. The Trade Bill defines free trade agreements as agreements notifiable under Article XXIV GATT(7)(a). This includes customs union and free trade agreements.

7. A customs union is defined by Article XXIV(8)(a) GATT as the substitution of a single customs territory for two or more customs territories, so that (i) duties and other restrictive regulations of commerce [...] are eliminated with respect to substantially all the trade between the constituent territories of the union or at least with respect to substantially all the trade in products originating in such territories, and, (ii) substantially the same duties and other regulations of commerce are applied by each of the members of the union to the trade of territories not included in the union”. This would include customs union agreements with Turkey, Andorra and San Marino.

8. A free trade area is defined under Article XXIV(8)(b) GATT as an agreement whereby “a group of two or more customs territories in which the duties and other restrictive regulations of commerce [...] are eliminated on substantially all the trade between the constituent territories in products originating in such territories”). The Explanatory Notes to the Trade Bill list by way of example free trade agreements signed by the EU countries, such as those with Switzerland, Canada and South Korea. It would also include agreements such as the European Economic Area

(EEA) agreement and the EU-Ukraine Deep and Comprehensive Free Trade Agreement.

9. The Trade Bill provides that the UK intends to implement international trade agreements only to the extent that the European Union was a signatory to the agreement immediately before exit day. This means that the Trade Bill empowers the executive to implement international trade agreements that have not yet been ratified by the EU on the day the UK formally withdraws from the EU. Free trade agreements that have been signed but are currently in the process of being ratified include the EU-Singapore FTA and the EU-Canada Comprehensive Economic Trade Agreement (CETA).

10. Conferring power to implement obligations derived from international trade agreements that have merely been signed by the EU, rather than ratified, raises questions about the democratic legitimacy of the process. International trade agreements that are not yet ratified will not have gone through the entire parliamentary scrutiny process either at EU or national level. This is certainly the case of agreements such as the CETA which is a mixed agreement and will therefore have to be ratified by both the European Parliament and the national parliaments. In order to ensure that parliamentary scrutiny is not bypassed, the Trade Bill could be amended to provide that only those agreements that have been ratified by the prior to the UK's withdrawal of the EU are covered by the bill.

11. The Trade Bill does not provide much guidance with respect to the term 'international trade agreements that mainly relate to trade'. The Explanatory Note states that these include "key trade agreements, and associated ancillary agreements" such as mutual recognition agreements. Although not specifically mentioned in the Trade Bill, one would assume that the concept of international trade agreements would also encompass customs cooperation or facilitation agreements concluded by the EU. It has also concluded international agreements with countries such Australia and the United States that protect names of origin (geographical indications) for agricultural products and foodstuffs, notably wine and spirits.

12. There are number of areas that are increasingly covered by free trade agreements but which are arguably not *mainly* related to trade liberalisation. Contemporary EU free trade agreements contain provisions addressing issues such as competition law, and labour and environmental protection. This raises the question of whether stand-alone agreements focusing on such issues could also be considered as “international trade agreements” for the purpose of the Trade Bill. For example, the EU currently has in place agreements concerning cooperation on anti-competitive activities with countries such as Japan and the United States. As stated above, it has also concluded stand-alone agreements relating to the protection of geographical indications. Similar questions can be raised with respect to international treaties signed by the EU in areas such as aviation and environmental protection.

13. Therefore, as currently drafted, the Trade Bill is very broad in its scope. The vagueness of the term “international trade agreements” provides a significant amount of discretion to the government to decide which type of agreements negotiated by the EU could fall under the scope of the Trade Bill. In light of the significant powers that are being conferred to the executive to implement international trade agreements under the Trade Bill, as well as the light-touch level of parliamentary scrutiny currently envisaged (see Section 3), it may be worth considering amending the Trade Bill to provide further clarity in terms of the type of international agreements concluded by the EU that would fall within the scope of the bill. This could be achieved, for example, by including in the Trade Bill an exhaustive list of the international trade agreements that fall within the scope of the bill.

Potential amendments to ‘rolled-over’ international trade agreements

14. The Explanatory Notes explain that the executive power provided under the bill to implement international trade agreements will be limited to non-tariff measures. Tariff measures are addressed under the Taxation (Cross-Border Trade) Bill. The Explanatory Notes also state that the “aim is to establish a UK trade agreement with each partner country based, as closely as possible, on the corresponding trade agreement that country has with the EU”⁷.

⁷ Paragraph 38 Explanatory Notes.

15. However, the EU FTAs cannot simply be copy pasted in their current state or with only minor changes. This is acknowledged in the Explanatory Notes, which state that 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”. In fact, the UK international trade agreements will be entirely separate legal instruments and are likely to be substantially different from the EU FTAs for both political and technical reasons.

16. Firstly, third countries are likely to see the transitioning of FTAs as an opportunity to revise the terms of these agreements. Some may also consider that to the extent that the UK is now offering a much smaller market than the EU single market, the terms of trade have changed, meaning that the market access commitments included in these FTAs must also be renegotiated. In this respect, it is worth noting that there are recent reports that countries such as Chile and South Korea have already signalled that post-Brexit, the status quo will not be maintained and that key aspects of existing EU trade agreements, such as agriculture, will have to be renegotiated with the UK⁸.

17. Secondly, from a technical perspective, the idea that UK will be able to simply copy-paste existing EU FTAs does not take into account the fact that the rules of origin will have to be amended. As explained by the UK Trade Policy Observatory, the renegotiation of rules of origin included in trade agreements will be a tri-lateral process involving the UK, the third countries and the EU⁹. Finally, some text included in current EU FTAs would no longer make sense in the context of a UK-only trade agreement. For example, all recent EU FTAs tend to include schedules listing EU and third country geographical indications that must be protected by both parties.

⁸ Hans Von der Bruchard, EU trade partners demand concessions for Brexit transition rollover, Politico. 2 February 2018. Available at: <https://www.politico.eu/article/eu-trade-partners-object-to-brexit-transition-roll-over/>.

⁹ Peter Holmes and Michael Gasiorek, “Grandfathering Free Trade Agreements and Rules of Origin: What might appear bilateral is in fact trilateral!” 27 September 2017. Available at: <https://blogs.sussex.ac.uk/uktpo/2017/09/27/grandfathering-ftas-and-roos/>

References to geographical indications from other EU Member States will have to be removed.

3. THE POWER TO IMPLEMENT THE GPA AND INTERNATIONAL TRADE AGREEMENTS

18. The implementation of international trade agreements will be achieved through Henry VIII clauses. This executive power to implement international trade agreement is laid down in sections 1(1) and 2(1) of the bill which provide that an appropriate authority may by regulations make such provision as the authority considers appropriate for the purpose of implementing the GPA or international trade an agreement which the United Kingdom is a signatory.

19. The regulations will be subject to the negative scrutiny procedure meaning that the delegated legislation remains law unless a House votes to annul it within a limited time period.

20. Parliamentary scrutiny on the implementation of international trade agreements will therefore be limited under the current Trade Bill. This is problematic because, as discussed, (i) the term ‘international trade agreement’ used by the Trade Bill is vague and potentially very wide in its scope: (ii) the Trade Bill covers EU free trade agreements that have merely signed, rather than only those that have been ratified under EU law; and (iii) the UK government has acknowledged the implementing power conferred by the Trade Bill “is broad enough to allow implementation of substantial amendments, including new obligations”¹⁰.

4. RESTRICTIONS ON DEVOLVED AUTHORITIES AND THE SEWEL CONVENTION

21. In accordance with the Sewel Convention, the Scottish Parliament must give its consent where the UK Parliament intends to legislate a matter that is normally legislated by the Scottish Parliament. It is outlined under the Devolution Guidance

¹⁰ Delegated Powers Memorandum by the Department for International Trade paragraph 46. Available at: <https://publications.parliament.uk/pa/bills/cbill/2017-2019/0122/Trade-Bill-Delegated-Powers-Memorandum.pdf>

note 10 that any proposals in UK Parliament legislation which alter the legislative competence of the Parliament or the executive competence of the Scottish Ministers require the consent of the Parliament. The convention is further restated under section 28 of the Scotland act which recognises “that the Parliament of the United Kingdom will not normally legislate with regard to devolved matters without the consent of the Scottish Parliament”.

22. It can be argued that, together, the EU Withdrawal Bill and the Trade Bill both alter the legislative competence of the Scottish Parliament and legislate in areas of devolved competence.

23. Clause 11(1) of the Withdrawal Bill maintains the current prohibition on the Scottish Parliament to legislate in a manner that is incompatible with “retained EU law”. More specifically, it restricts the ability to amend retained EU law in a way that would have been incompatible with EU law before the UK’s withdrawal.

24. This restriction also affects the interaction between devolved authorities and future UK trade policy. One of the advantages of leaving the EU is that devolved authorities could in theory be able to regulate matters falling within their competence in a manner that better reflects their interests and preferences. For example, with respect to procurement, should the UK leave the EU without a deal or even with a CETA-style agreement, this would significantly expand the regulatory flexibility available to the UK and allow it to address some of the flaws typically associated with the EU procurement regulatory system¹¹. To the extent that the GPA rules are far less detailed and restrictive than EU rules, devolved authorities such as Scotland would, in theory, have a greater degree of regulatory autonomy in setting procurement rules once the UK leaves the EU.

¹¹ The foregoing is subject to certain caveats. The extent to which the UK or Scotland would be able to deviate from the current regulatory framework once it leaves the EU depends on what type of agreement is struck with the EU. In the case of a soft-Brexit where the UK remains a party to the European Economic Area agreement, the status quo would be maintained as the UK would still be bound by EU directives and case law on procurement. Should the UK’s future trade relationship with the EU come in the shape of a free trade agreement, the constraints imposed on procurement rules would depend on the level of economic integration pursued by the agreement. The EU-Ukraine FTA, for example, requires Ukraine progressively approximate its laws with the EU directives and keep up with the evolution of the *acquis communautaire* (including EU case law). By contrast free trade agreements such as the EU-Canada CETA do little more than replicate the text of the GPA.

25. However, as the Withdrawal Bill restricts the ability of devolved territories from amending retained EU law, the devolved administrations may be precluded from adopting a procurement system which better reflects their own regulatory preferences.

26. This approach is replicated in the Trade Bill. Paragraph 2(1) of the Schedule 1 to the Trade Bill provides that devolved authorities may not make regulations implementing the GPA or international trade agreements which modify any retained EU law or anything which is retained by virtue of section 4 of the Withdrawal Bill. A similar restriction is not imposed on UK ministers in order to ensure that the UK-wide regulatory framework provided by EU-retained law is maintained. However, this means that the powers of UK ministers will be increased in areas of devolved competence which would arguably alter the constitutional balance between Westminster and Scotland.

5. PARLIAMENTARY SCRUTINY

27. As a preliminary point, it is important to highlight that the Trade Bill is silent on the negotiation phase of international trade agreements, as it focuses only on the implementation phase. More specifically, the bill makes no mention of any parliamentary procedure which would lead up to the negotiation and ratification of trade agreements. Most countries have in a place, at a very basic level, a trade negotiating authority mechanism where Parliament can give the authority to the executive branch to negotiate trade agreements and ratify such trade agreements once negotiations are concluded.

28. The Explanatory Notes explain that Parliamentary approval for ratifying both the UK's membership of the GPA and the international trade agreements covered by the Trade Bill will be sought via the Constitutional Reform and Governance Act 2010 (CRGA). Under the CRGA, the Parliament has a de facto power to block the ratification of international treaties. The government must submit international treaties before both Houses for 21 sitting days and if the House of Commons resolves that the treaty is not ratified, a further 21 sitting-day period is triggered. If

parliament maintains its refusal to ratify the agreement, the process is repeated indefinitely.

29. In the context of the negotiation and conclusion of trade agreements, this system is not fit-for-purpose. A more substantial involvement of parliament in the decision making process involving the negotiation of trade agreements is required. As stated above, at a basic level, most countries will grant parliament the power to either approve or reject the international agreement as a whole.

30. Many jurisdictions have gone further by allowing for substantial parliamentary engagement prior and during the negotiating process. For example, in the EU, trade negotiations may only be initiated once the Council of Ministers has approved a negotiating mandate for the Commission. The draft negotiating directive must be made available to the European Parliament prior to the granting of the authorisation. While the European Parliament has no formal role in the authorization of the negotiations, it does have extensive rights to be kept informed during the entire procedure. The European Commission must report to the European Parliament on the progress of negotiations after each negotiating round. The European Parliament can adopt resolutions that signal conditions under which it is willing to approve the agreement at the end of the process. When the Commission submits the finalised version of the negotiated agreement for approval, the European parliament cannot make any amendments but votes to either approve or reject the entire agreement.

31. In the US, the negotiation and conclusion of trade agreements occurs in accordance with the Trade Promotion Authority. TPA is the authority Congress grants to the President to enter into certain trade agreements, and to have their implementing bills considered under expedited legislative procedures, provided the president observes certain statutory obligations. The fast track approach does not mean that the US Congress has no role to play in the decision making process. Before the negotiations begin, the executive must notify Congress of its intention to enter into trade negotiations and consult with the House Ways and Means, Senate Finance and other relevant committees. Likewise, once negotiations have been completed, the executive must notify Congress of its intention to enter into the agreement and consult relevant congress committees on issues relating to the

nature of the agreement, how it achieves the purposes defined in TPA, and any potential effects it may have on existing laws. Finally, agreements concluded under the TPA can either be approved or not.

32. In addition to formal procedures allowing for parliamentary scrutiny, there are also other tools that should be put in place in order to enhance the democratic legitimacy of trade negotiations. Firstly, some consideration should be given to the creation of mechanisms and obligations that enhance the transparency of trade negotiations. The European Commission, for example, publishes the draft negotiating directive, a report of each negotiating round and its initial negotiating proposals and organises regular meetings with civil society actors.

33. There are additional measures that have been put in place to enhance the quality of parliamentary scrutiny of the negotiation and conclusion of EU FTAs. Firstly, the European Commission must carry out a scoping exercise where it will hold preliminary discussions with third parties to determine whether a free trade agreement with a particular third country is feasible or indeed desirable. Secondly, the Commission will order an impact assessment. This will include a public consultation with stakeholders and interested parties. It also carries out sustainability impact assessment which looks at the likely economic, social and environmental effects of a trade agreement. The Commission also regularly carries out ex-post evaluations to assess the effects of FTAs.

34. In this respect, it should be noted that, on 17 January 2018, an amendment to the Trade Bill has been tabled proposing that negotiations on international trade agreements cannot begin until a public consultation and a geographic impact assessment examining the effect of the agreement on the devolved territories are carried out¹². Such an amendment would be to enhance the democratic legitimacy and the quality of parliamentary scrutiny on such agreements.

¹² Available at: https://publications.parliament.uk/pa/bills/cbill/2017-2019/0122/amend/trade_rm_pbc_0117.1-4.html

35. The lack of parliamentary scrutiny envisaged by the Trade Bill in the process of transitioning EU third country free trade agreements is reflective of the need for urgency in transitioning current EU FTAs once the UK leaves the EU, and the fact that most of these agreements have already been through the comprehensive parliamentary scrutiny process carried out at EU and (for EU mixed agreements) national level. However, the small role attributed by the bill to parliament and devolved authorities seems ill-placed given that some of the agreements may require substantive modifications whilst some have not gone through the entire EU parliamentary scrutiny process. It is also important to ensure that the decision making process concerning the negotiation of “rolled-over” trade agreements covered by the Trade Bill are not used as a template for the negotiation of future international trade agreements.

6. ROLE OF DEVOLVED ADMINISTRATIONS IN NEGOTIATING TRADE AGREEMENTS

36. The Trade Bill does not foresee any role for devolved administrations in the decision-making processes surrounding the negotiation and conclusion of trade agreements. This is problematic, since many issues covered in contemporary EU trade agreements are also devolved matters (e.g., agriculture and procurement).

37. There are a number of examples in federal countries of systems of inter-governmental relations that allow for cooperation between central and sub-national governments in the development of trade policy. Canada, in particular, has institutionalised cooperative mechanisms that allow for the consultation and sometimes even the involvement of provinces in trade negotiations. Consultations occur in the framework of the Federal-Provincial committee on Trade (C-Trade), a body composed of trade representatives from both the federal government and provincial executives. It meets on a quarterly basis to discuss a wide variety of trade policy issues from broad discussions on the general orientation of the Canadian international trade policy framework and Canada’s position in relation to the negotiation of bilateral or multilateral trade agreements, to discussions on specific trade topics of relevance to the provinces. Beyond these meetings, the federal government also makes draft negotiating documents available to province

representatives, who are invited to submit their observations and put forward their agendas. The C-Trade meetings therefore provide a platform for ongoing information exchange on the development of trade negotiations and a venue through which provinces can influence the negotiating positions of the federal government. In doing so, the discussions enhance the legitimacy of the negotiated agreements in the eyes of the provincial executives.

38. The C-Trade cooperation framework is also complemented by a number of consultative committees that focus on sector specific issues. For example, agriculture is not an issue that is typically addressed in the context of C-Trade but rather in a specifically designated federal-provincial committee. In addition to these consultative mechanisms, the provinces maintain regular dialogue with the federal government on trade policy matters. Cooperation occurs through informal communication channels of communication between trade officials on both sides. However, informal cooperation remains limited to minor administrative and technical issues, rather than the more important policy issues.

39. Finally, there are recent examples of occasions where the role of provinces in trade negotiations was elevated to that of an active participant in trade negotiations. During the negotiations of the EU-Canada Comprehensive Economic Trade Agreement, the EU, which was hoping to gain access to the provincial procurement markets in Canada, requested that provinces be involved in the negotiation process. Another recent example can be found in the context of the negotiation on the TransPacific Partnership (TPP) where, at the request of the United States, provinces were not allowed to present sit at the negotiating table but were briefed after all negotiating meetings and given the opportunity to voice their concerns and advise on matters that fell within their competence.

40. The UK currently has in place a series of agreements which provide guidelines and mechanisms to ensure cooperation and coordination in policy making in matters that fall within the sphere of competence of the devolved administrations. The UK system has, however, failed to provide an effective framework for inter-governmental cooperation in areas of foreign policy that overlap with devolved matters. In 2015, the House of Lords Select Committee on the Constitution issued a

report on inter-governmental relations in the United Kingdom which found that, with the exception of the European Affairs sub-committee, the Joint Ministerial Committee had proved highly ineffective in fostering cooperation between the UK government and devolved administrations.

41. The UK's system of inter-governmental cooperation, as it currently stands, would not provide devolved administrations the type of influence on trade policy and trade negotiations that is bestowed on Canadian provinces. To redress that balance, the UK should consider the establishment of a formal and institutionalised system of cooperation based on regular consultations. The formal cooperation mechanism can adapt the template set by Canadian inter-governmentalism and create a Joint Committee on Trade (JCT) focused exclusively on trade. The JCT would be composed of relevant ministerial representatives of the central government and devolved administrations and meet four times per year to discuss major issues relating to trade agreements, such as the setting of negotiation objectives and common positions, and the identification of areas where trade agreements should reflect the specific circumstances of devolved territories. Inter-governmental cooperation in this area should be made legally binding to ensure that cooperation occurs on a continuous basis rather than on an ad hoc basis. The additional security resulting from the requirement to hold regular meetings would encourage the devolved administrations to assume responsibility in trade matters, and to make the necessary investment to develop capacity and expertise in trade matters. The regular dialogue would also build trust between the parties, which is more likely to lead to constructive cooperation.

42. The formal institutionalised mechanisms of cooperation should also reflect the complex nature of contemporary trade agreements. The complexity relates to the subject matters regulated in trade agreements as well as the processes involved in negotiating, concluding and implementing them. Cooperation should encompass all areas covered in trade negotiations that overlap with devolved matters. The JCT should be granted the power to establish working committees focused on key areas of strategic interests for devolved administrations. These sub-committees would be composed of civil service staff with expertise on specific trade issues from both

central government and devolved administrations, and would be used to carry out more technical discussions.

43. Consideration must also be given to the right of devolved administrations to participate in trade negotiations. The Canadian experience shows that the inclusion of sub-national representations in international negotiations need not undermine the cohesion of a country's negotiating position. On the contrary, the evidence suggests that the involvement of representatives of devolved administrations would add a layer of legitimacy to the negotiation process and improve the chances of successful outcome. Devolved administrations are more experienced and attuned to the complexities of matters that fall wholly within devolved competence and would be better placed to put forward solutions and break deadlocks that may arise in relation to such matters. In short, allowing for such representation would reflect the fact that devolved territories are also responsible for matters addressed in trade agreements, further reinforcing buy-in for such agreements at devolved levels.

44. An amendment to the Trade Bill was tabled on 23 January 2017¹³, to create a clause that would establish a Joint Ministerial Committee as a forum where devolved administrations could be consulted on (i) the terms upon which the United Kingdom is to commence negotiations with respect to any international trade agreement; and (ii) proposals to amend retained EU law for the purposes of the implementation of international trade agreements. The amendment would be welcome as it creates a legally binding obligation on the UK government to consult with devolved territories for each individual trade agreement. It could, however, go further by establishing a legal obligation to hold a specified number of meetings on an annual basis that would allow devolved authorities to follow up on the progress of negotiations and shape such negotiations progressively.

¹³ Available at: https://publications.parliament.uk/pa/bills/cbill/2017-2019/0122/amend/trade_day_pbc_0131.1-5.html