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The Trade Bill

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Summary

Introduction

This Commons Library briefing analyses the [Trade Bill](#). This Bill is one of a series of “Brexit Bills” intended to adjust UK legislation for Brexit, in addition to the [European Union \(Withdrawal\) Bill](#) (*EUW Bill*, now the *EUW Act 2018*). Together with the Customs Bill (the [Taxation \(Cross-Border Trade\) Bill](#)), the Bill is intended to allow the UK to continue its existing trade policy as far as possible immediately after Brexit. The Bill is not intended to deal with future trade agreements with the EU or other countries.

The Bill has completed its Committee Stage in the House of Commons. No amendments were made at Committee Stage. No date has been set at the time of writing for Report Stage, although the Bill is expected to return to the House of Commons before the summer recess. A number of further amendments have been tabled, including on the customs union.

Trade agreements

Continuity in trade policy

While a member of the EU, the UK is party to trade agreements negotiated by the EU. The Government’s aim is to provide continuity after Brexit in trade relations with those countries with which the EU has a trade agreement. The Government aims to enter into a UK agreement with each of the EU’s partner countries based as closely as possible on the EU’s agreement with that country.

During the transition or implementation phase, the Government is hoping that the UK will be treated as if it were an EU member state, under the terms of the draft Withdrawal Agreement. Beyond that, the Government is seeking to ensure continuity in these international agreements to avoid disruption to trade.

The Bill

The *Trade Bill*, which follows a Trade White Paper, aims to help with the process of “transitioning” the EU’s trade agreements to UK agreements. Trade agreements may need changes to domestic legislation in order for them to be implemented. The trade provisions of the Bill relate to this domestic implementing legislation rather than the trade agreements themselves. The Bill gives the Government powers to change domestic legislation to fulfil the obligations arising from certain trade agreements.

While the Bill is important in allowing the transitioning of existing EU trade agreements, it is relatively limited in what it sets out to achieve. It covers only agreements with countries with which the EU has signed a trade agreement before exit day – it does not cover “new” trade agreements. The Bill also only contains provisions relating to non-tariff barriers (these may be requirements on labelling or product specifications, for example). Tariff barriers (customs duties on imports and exports) are the subject of a separate bill – the *Taxation (Cross-Border Trade) Bill* which has completed its Committee Stage in the House of Commons. A [separate Library briefing](#) on this Bill has been published.

While the Government has said that the purpose of the Bill is to roll over existing trade agreements, the Bill itself does not limit the use of these powers only for these purposes. In legal terms, this means that the powers could be used to implement significant changes to existing agreements, even if the Government has said that it does not intend to use the powers in this way.

Procurement

The Agreement on Government Procurement (GPA) is an agreement between the EU and 18 other countries to open up public procurement above certain levels.

The UK is currently a part of the GPA only through its EU membership. The Government is taking steps so that the UK continues to be part of the GPA – becoming an independent member – as the UK leaves the EU.¹ As part of this, the Bill would allow legislative changes to be made where necessary for the UK to implement the agreement.

Trade Remedies Authority

Trade remedies – sometimes referred to as “trade defence measures” – allow a country to take steps against unfair competition from dumped or subsidised imports. Dumping occurs where a company exports a product at a lower price than it is sold for on its domestic market.

At the moment, trade remedies are dealt with by the EU. The Bill would establish a new UK non-departmental public body, the Trade Remedies Authority (TRA), to take over such functions.

Concerns were raised during Committee Stage that the Bill lacked detail on how the UK’s new trade remedies system would work.

Trade information

The Bill would give HM Revenue and Customs (HMRC) a new power to ask others for information about the identity and numbers of UK exporters. It would also allow HMRC to share information with other bodies for their public functions relating to trade.

Issues raised by the Bill

Delegated powers

The Bill gives the Government power to use secondary legislation, largely using the negative procedure. Clauses 2(1) and 7(3) also include a ‘Henry VIII power’. The Government justifies this on the grounds of “flexibility, transparency and efficiency”² and the need to put a framework in place in the short time available before Brexit. It is not unheard-of to use delegated legislation to implement treaty obligations. But this is nevertheless likely to raise questions about whether the powers will be subject to adequate Parliamentary scrutiny, particularly given that the UK trade agreements could be different from the current EU agreements, and their content is as yet unknown.

Devolution

International relations, including treaty-making, is a reserved matter in the UK. The devolved executives and legislatures, therefore, have no formal role in negotiating or approving UK trade or other treaties, but may be involved informally.

As trade treaties are relevant to many areas of devolved responsibility, such as agriculture, the devolved authorities currently have responsibility for implementing EU trade agreements insofar as they concern their areas of competence.

The Bill gives the devolved authorities specific powers (under clauses 1 and 2) to implement the obligations arising from the GPA and the trade agreements falling within

¹ Department for International Trade, [Preparing for our future UK trade policy](#), 9 October 2017

² [Trade Bill Delegated Powers Memorandum](#), para 53

the scope of the Bill. However, these powers are subject to several restrictions, set out in Schedule 1 (see section 5.4 below).

Both the Scottish and Welsh Governments have recommended that their respective legislatures should withhold legislative consent for the Bill in its current form. Their objections to the *Trade Bill* are similar to those previously expressed with regard to the *EUW Bill*. The Welsh Government has since agreed to the passage of the *EUW Bill*, but only after significant changes were made to its devolution provisions. The *Trade Bill's* drafting, at the time of writing, still shadows the approach taken to devolution by the original *EUW Bill* as introduced, rather than that taken in what is now the *EUW Act*. Both the Scottish and Welsh Governments are therefore likely to ask that changes are made to the *Trade Bill* at report stage.

Key concerns raised by the devolved authorities related to the exercise of delegated powers in devolved areas. The two devolved authorities believed that the scheme of concurrent delegated powers in the *Trade Bill* did not reflect the existing relationship between UK-wide and devolved institutions. They especially maintained that the Bill has inadequate safeguards against the exercise of delegated powers by UK Government ministers in relation to devolved matters. They also objected to certain additional restrictions that would be placed on a devolved authority exercising powers under clauses 1 and 2, which are not imposed on UK Government ministers exercising those same powers.

The *Trade Bill* does not address what role, if any, the devolved authorities might have in future treaty negotiations.

UK Parliamentary scrutiny of trade agreements compared with scrutiny by the European Parliament and national parliaments

The Bill contains no provisions for greater Parliamentary involvement in trade agreements. The Trade White Paper included a call for views on the Government's approach to its future trade policy, including scrutiny arrangements, and the Government is continuing to consult on this issue.

Parliament's role in UK treaties is currently much more limited than the democratic scrutiny currently given to EU trade agreements: it has no formal role in the negotiations and does not have to debate, vote on or approve them.

For EU trade agreements, the Council (composed of subject-area relevant Member State government ministers) gives the European Commission a mandate to negotiate on behalf of the Member States and authorises the signature and conclusion of agreements. The European Parliament does not take part in negotiations, but is kept "fully informed" at all stages, questions the Commission and can issue non-binding but politically important resolutions. The European Parliament's consent is usually required before trade agreements can be concluded.

National parliaments also scrutinise aspects of EU trade negotiations through their own EU scrutiny processes. In the UK, draft Council decisions on signing, provisionally applying or concluding an agreement are deposited, scrutinised by the EU Scrutiny Committees in both Houses, and may be debated on the Floor of the House or in European Committee.

By contrast, when the UK Government is considering its own treaty negotiations, it has no obligation to inform or consult Parliament. Parliament has no formal role, structures or procedures for scrutinising treaties; and it does not have to debate, vote on or approve treaties. It has a limited and as yet unused power to delay ratification (in addition to passing legislation where needed to implement a treaty). Trade agreements can, however,

be scrutinised via the usual Parliamentary means such as Parliamentary Questions, debates and select committee inquiries.

There have been many calls for Parliament to have a greater role in, for example, setting the negotiating mandate for trade negotiations, debating trade agreements and approving their ratification. Many other countries' Parliaments are more involved in treaty scrutiny, not least because treaties now cover a wide range of important policy areas. Pressure groups have expressed concern that the Bill does not provide for greater accountability to Parliament and the public in the negotiation of trade agreements.

Committee Stage

The Public Bill Committee met on eight occasions between 23 January and 1 February. While a number of amendments were pushed to a vote, none succeeded. The Bill will therefore be reported without amendment. At the end of the Committee Stage, the Opposition spokesperson, Barry Gardiner, said that "lacunae" remained in the Bill and that the Opposition would return to it at Report Stage.

The main issues discussed during the Committee Stage were Parliamentary scrutiny, Henry VIII powers, the role of the devolved administrations and the composition of the Trade Remedies Authority. Provisions not in the Bill, such as arrangements for Parliamentary approval and scrutiny of future trade agreements, were also discussed.

1. Introduction

Earlier versions of this paper was published to inform the Second Reading debate on the Bill in the House of Commons and following Committee Stage. This version has been updated again to take account of developments since then. Section 2.4 below looks at the main changes since Committee Stage.

The Conservative Party's manifesto for the 2017 General Election included a commitment to introduce a trade bill.³ The Bill was announced in the 2017 Queen's Speech. The *Trade Bill* was introduced into the House of Commons on 7 November 2017. [The Bill](#), [Explanatory Notes](#) and the [Impact Assessment](#) are available on the [Bill page](#) of Parliament's website. The Bill received its [Second Reading](#) on 9 January. The [Public Bill Committee](#) met eight times between 23 January and 1 February (see section 7 below). No date has yet been set for Report Stage. The Bill is expected to return to the House of Commons before the summer recess.

Although various amendments were proposed, and some voted on, the Bill was not amended at Committee Stage. Various amendments have been tabled for when the Bill returns to the House.⁴

The Department for International Trade has published a [Delegated Powers Memorandum](#) and a [Fact Sheet](#) on the Bill. The Bill follows publication of a [Trade White Paper](#) in October 2017 (see section 2.3). The Government published its [response](#) to the White Paper on 5 January 2018.

The Government has also introduced a related Customs Bill – the [Taxation \(Cross-Border Trade\) Bill](#).⁵ This has completed its Committee Stage in the House of Commons. Together these two Bills aim to allow the UK to continue its existing trade policy as far as possible after Brexit. EU trade agreements with other countries will no longer apply to the UK after Brexit, although the Government is hoping the UK will be treated as if it were a Member State during the transition period. The UK is seeking to replicate these agreements as far as possible, and needs some domestic powers to do so.

The Department for International Trade said that the *Trade Bill* would:

- create powers to assist in the transition of over 40 existing trade agreements between the EU and other countries
- enable the UK to become an independent member of the Agreement on Government Procurement (GPA) ensuring UK companies have continued access to £1.3 trillion worth of government contracts and procurement opportunities in 47 countries

³ [The Conservative and Unionist Party Manifesto 2017](#), p15

⁴ Details of the amendments are on the [Bill page](#) of the Parliament website.

⁵ A [Library briefing](#) was prepared for the Second Reading of this Bill.

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- establish a new independent UK body, the Trade Remedies Authority, to defend UK businesses against unfair trade practices
- ensure the UK Government has the legal abilities for gathering and sharing trade information.⁶

The Brexit Central website described the Bill as follows:

In many ways, this Bill is the trade equivalent of the EU (Withdrawal) Bill – it is essentially a procedural Bill concerned with legal housekeeping and ensuring a smooth transition out of the EU in terms of the UK’s existing trading arrangements, rather than setting a new policy agenda in itself. However, it is nonetheless a vital legal building block as the UK embarks on the process of operating an independent trade policy once again.⁷

An editorial on the MLex website said that that Bill involves “exceptional powers” for Ministers with “minimal Parliamentary oversight”.⁸

⁶ Department for International Trade Press Release, [New legislation to prepare UK for future trade and customs policy](#), 7 November 2017

⁷ [UK takes steps towards an independent trade policy as Government presents Trade Bill](#), Brexit Central, 7 November 2017

⁸ MLex, [Comment: UK’s fast track trade bill should expect rough treatment from lawmakers](#), 8 November 2017

2. Background

2.1 Trade policy as an EU Member State

At the moment, the UK is a member of the single market and customs union, and the UK's trade policy is largely determined by the EU. Trade agreements are currently negotiated by the European Commission on behalf of EU Member States. The Commission requires authorisation from the Council to begin trade negotiations. EU trade agreements require the consent of the European Parliament, and in some cases (known as "mixed agreements") ratification by Member States.⁹ The European Commission also represents the Member States at the World Trade Organization (WTO).

The EU concludes many kinds of external agreements with third countries and international organisations.¹⁰ The majority are concerned primarily with trade and investment, but they can include a range of aims and objectives depending on the third party concerned, such as strengthening democracy, good governance and human rights, economic development, cooperation and political dialogue, energy, transport, education and immigration.

A list of countries with which the EU has signed trade agreements is in the table below.¹¹ These countries account for nearly £140 billion of UK trade (13% of the total).¹² The largest trade flows are with Switzerland, the non-EU members of the European Economic Area (Iceland, Norway and Liechtenstein), Turkey, South Korea and Canada.¹³

These agreements aim to reduce tariffs and other barriers to trade. Types of non-tariff barriers include, for example, "Technical Barriers to Trade" (TBT) which include labelling and packaging requirements and technical specifications, and "Sanitary and Phytosanitary" (SPS) measures which aim to protect human, animal and plant health.

⁹ European Commission, [Trade negotiations step by step](#), September 2013

¹⁰ For information on EU external agreements, see Commons Briefing Paper 7850, [Legislating for Brexit: EU external agreements](#), 5 January 2017.

¹¹ Department for International Trade, [Trade Bill Impact Assessment](#), September 2017, pp6-7

¹² Department for International Trade, [Trade Bill Factsheet](#).

¹³ The EU has recently finished negotiating a trade agreement with Japan. Inclusion of this agreement would increase the figures for the amount of UK trade with countries which have trade agreements with the EU.

Countries with signed EU agreements and level of trade in 2015

	Total trade, £m	Share of UK trade
Albania	28	0.0%
Algeria	2,358	0.2%
Andorra, Monaco, San Marino	96	0.0%
Antigua and Barbuda, Bahamas, Barbados, Belize, Dominican Republic, Dominica Grenada, Guyana, Haiti, Jamaica, St Kitts and Nevis, St Lucia, St Vincent and the Grenadines Suriname, Trinidad and Tobago	2,028	0.2%
Benin, Burkina Faso, Gambia, Guinea, Guinea-Bissau, Liberia, Mali, Mauritania, Niger, Nigeria, Senegal, Sierra Leone, Togo,	4,879	0.5%
Bosnia and Herzegovina	114	0.0%
Botswana, Lesotho, Mozambique, Namibia, South Africa, Swaziland	8,664	0.8%
Cameroon	250	0.0%
Canada	14,869	1.4%
Chile	1,413	0.1%
Colombia, Peru and Ecuador	2,181	0.2%
Comoros, Madagascar, Mauritius, Seychelles, Zambia and Zimbabwe	1,097	0.1%
Costa Rica, Guatemala, Honduras, Nicaragua, Panama and El Salvador	994	0.1%
Cote d'Ivoire	365	0.0%
Egypt	2,835	0.3%
Fiji, Papua New Guinea	382	0.0%
Georgia	151	0.0%
Ghana	1,147	0.1%
Iceland, Liechtenstein, Norway	21,323	2.0%
Israel	3,739	0.4%
Jordan	839	0.1%
Kenya, Rwanda, Uganda, Tanzania and Burundi	1,593	0.1%
Kosovo	3	0.0%
Lebanon	654	0.1%
Mexico	3,566	0.3%
Moldova	307	0.0%
Montenegro	22	0.0%
Morocco	1,902	0.2%
Occupied Palestinian Territories	N/A	N/A
Serbia	373	0.0%
Switzerland	33,505	3.1%
Republic of Korea	11,121	1.0%
Republic of Macedonia	821	0.1%
Tunisia	560	0.1%
Turkey	13,351	1.3%
Ukraine	769	0.1%
Total	138,299	13.0%

Source: Department for International Trade, Trade Bill Impact Assessment, pp6-7

The Government has also said that Mutual Recognition Agreements will be covered by the Bill.¹⁴ These allow the UK to recognise tests and documents provided by expert bodies in other countries. Where these agreements are in place, imported goods do not need to be re-tested to be sold in the UK if they have already been tested in the exporting country (and vice versa).

The EU has Mutual Recognition Agreements with a number of countries, including some with which there is no trade agreement, such as Australia and the US. The European Commission website explains how these agreements allow conformity assessment (this is much narrower than mutual recognition of regulation):

Mutual recognition agreements lay down the conditions under which one Party (non-member country) will accept conformity assessment results (e.g. testing or certification) performed by the other's Party (the EU) designated conformity assessment bodies (CABs) to show compliance with the first Party's (non-member country) requirements and vice versa.

¹⁴ [Trade Bill Explanatory Notes](#) para 52

MRAs include relevant lists of designated laboratories, inspection bodies and conformity assessment bodies in both the EU and the third country.¹⁵

2.2 What can the UK do while an EU Member State?

Summary

The official documents of the EU institutions on the Brexit negotiations state that the UK is prevented by the EU duty of 'sincere cooperation' from both negotiating and concluding any trade deals.

The previous UK Government mainly agreed that it was limited by this loyalty duty but also by EU exclusive competence for the Common Commercial Policy (CCP) – they initiated informal trade dialogues with some third countries and signalled a 'softer' approach in future.

Some lawyers think any negotiation beyond informal discussions would breach EU law. Others consider that the UK as a withdrawing Member State can go further, as long as it does not enter into legally binding commitments, on the basis that this cannot be detrimental to the EU and CCP. The question of detriment would also appear from Court of Justice of the EU (CJEU) case law to be a relevant consideration more generally in considering whether a Member State's unilateral action in any given case breaches EU law.

Treaty base

Article 4(3) of the [Treaty on European Union](#) (TEU) states that "Pursuant to the principle of sincere cooperation, the Union and the Member States shall, in full mutual respect, assist each other in carrying out tasks which flow from the Treaties", and Article 13(2) TEU confirms this with regard to inter-institutional relations:

Each institution shall act within the limits of the powers conferred on it in the Treaties, and in conformity with the procedures, conditions and objectives set out in them. The institutions shall practice mutual sincere cooperation.

Article 24(3) TEU provides a similar duty of cooperation in the Common Foreign and Security Policy (CFSP): "The Member States shall support the Union's external and security policy actively and unreservedly in a spirit of loyalty and mutual solidarity".

Member States must abstain from acting (i.e. "legislating" and "adopting legally binding acts" according to Article 2(1) TFEU) in an area where the EU has been given exclusive competence under the EU Treaties. One of those areas is external EU trade policy, known as the Common Commercial Policy (CCP, see Article 3(e) TFEU). Member States can only act unilaterally where they have either exclusive Member State competence or unexercised shared competence (once the EU exercises shared competence, then that pre-empts Member State action). The EU can also assert implied exclusive competence when

¹⁵ European Commission, [Mutual Recognition Agreements](#)

entering into international agreements where they would affect EU internal rules (i.e. the EU already exercises internal shared competence).

Where EU competence is not exclusive, Member States may not depart from an agreed common position in international negotiations, and once the Council has authorised the Commission to start negotiations with a third country, the Member States are under a duty of close cooperation with the EU institutions “to ensure the coherence and consistency of the action and its international representation”.¹⁶

The general aim of the loyalty principle is to protect the unity of the EU’s international representation. It places a reciprocal duty on both the EU and Member States to cooperate in the attainment of the Treaty’s objectives and its external action under Article 21 TEU. So even where Member States have competence to act, they must refrain from action such as bilateral trade deals that would undermine the achievement of Treaty objectives. As Adam Łazowski and Ramses A. Wessel note, “It is important to underline that even in cases in which Member States do have some room for external manoeuvre, the principle of sincere cooperation will have to guide their behaviour”.¹⁷

The EU provisions are reflected in public international law. Article 18 of the Vienna Convention on the Law of Treaties provides that “A State is obliged to refrain from acts which would defeat the object and purpose of a treaty when ... it has signed the treaty ... subject to ratification”.

EU Court of Justice rulings

Judgments of the Court of Justice of the EU (CJEU) have ruled that this principle (or ones similar in meaning, such as “genuine cooperation” and cooperation “in good faith”) can prevent Member States from independently negotiating with third countries matters which would fall under the exclusive or shared competences of the EU when in force.¹⁸ In 1971 the CJEU prohibited Member States from exercising their external competences if this would risk affecting internal EU rules or alter their scope.¹⁹ The CJEU has also stated that “Inter-institutional dialogue [...] is subject to the same mutual duties of sincere cooperation as those which govern relations between Member States and the Community institutions”.²⁰

Negotiating trade agreements before Brexit day

The UK is a Member State of the EU until it leaves, and is therefore bound by all the rules and principles of membership until Brexit day. This position was set out in the European Council Negotiating Guidelines of [29 April 2017](#), which state:

¹⁶ CJEU, [Case C-266/03](#), Commission of the European Communities v Grand Duchy of Luxembourg [2005], para. 60.

¹⁷ [The External Dimension of Withdrawal from the European Union](#) (draft), 2017

¹⁸ E.g. [Case C-433/03](#), Commission v Germany (Inland Waterways) [2005] ECR I-7011, para. 64; [Case C-246/07](#), Commission v Sweden (PFOS) [2010], para. 77; [Case C-355/04](#), Segi and Others v Council [2007] ECR I-1662, para. 52.

¹⁹ AETR, Case 22/70, Commission v Council [1971], para. 22.

²⁰ Case C-204/86, Greece v Council [1988], para. 16; Case C-65/93, Parliament v Council [1995], para. 23.

25. Until it leaves the Union, the United Kingdom remains a full Member of the EU, subject to all rights and obligations set out in the Treaties and under EU law, including the principle of sincere cooperation.

26. The European Council recognises the need, in the international context, to take into account the specificities of the United Kingdom as a withdrawing Member State, provided it respects its obligations and remains loyal to the Union's interests while still a Member.

The European Parliament's Brexit negotiations [Resolution](#) of 5 April 2017 recalled that:

6. [...] it would be contrary to Union law for the United Kingdom to begin, in advance of its withdrawal, negotiations on possible trade agreements with third countries; stresses that such an action would be in contradiction with the principle of sincere cooperation laid down in Article 4(3) TEU and should have consequences, among them the United Kingdom's exclusion from the procedures for trade negotiations laid down in Article 218 TFEU.

But would this principle apply to trade agreements the UK wanted to negotiate with third countries, which would come into force after Brexit - and in particular those that seek to emulate existing EU agreements? The International Trade Secretary, Dr Liam Fox, acknowledged in [evidence](#) to the International Trade Committee on 1 February 2017 that the Government would be taking legal advice on their position:

The legal position is that any country that is in the European Union and is bound by common commercial policy has to abide by certain duties [...] we will be discussing and scoping out future agreements with [other] countries. We will not be signing any negotiation, but we will want to be taking legal advice as we go on about what we think the parameters are for our freedom of movement".²¹

The Trade White Paper said:

While we are members of the EU, we will continue to comply fully with our obligations and to engage constructively with our partners. The steps we are taking to introduce trade legislation will not at this point affect our trade relationships with third countries, the operation of the Common Commercial Policy of the EU, or the international trading frameworks within which the UK operates as a member of the EU.²²

There are differing legal and political views. Luis González García (international trade lawyer and former trade negotiator) thinks the UK can negotiate trade agreements as long as no binding legal commitments are made; trade negotiations with a third country would not in principle jeopardise the CCP, because "trade discussions do not translate into international obligations".²³

²¹ International Trade Committee, [UK trade options beyond 2019](#), First report of 2016-17, HC817, 7 March 2017, para 164

²² Department for International Trade, [Preparing for our future UK trade policy](#), Cm 9470, October 2017, p11

²³ Matrix Chambers, [Brexit: What trade agreements can the UK negotiate whilst being a part of the EU?](#) Luis González García, 27 July 2016.

But Dr Lorand Bartels (Reader in International Law, University of Cambridge) argues that although the UK should not be able to undermine the CCP, with the approach of a Member State's withdrawal under Article 50, the content of the obligation of sincere or loyal cooperation changes. He points to the anomaly of the UK still being in the EU, which would be "a competitor to some degree", while negotiating a future trade agreement with a third state. He suggests: "Perhaps the duty of loyal cooperation might lead to an 'empty chair' in this scenario. Certainly some creativity will be required to deal with this problem".²⁴

Dr Joris Larik (Assistant Professor of Comparative, EU and International Law, Leiden University) thought it would be possible for the EU to authorise the UK to start trade negotiations, but this would depend on the goodwill of the EU-27 and the EU institutions.²⁵ In other words, it would be a political decision, as well as a legal one. He thinks even the "preliminary discussions" the UK Government refers to "could be regarded as infringing upon the exercise of the EU's competence in combination with a violation of the duty of sincere cooperation". Once such UK discussions "reach a minimum threshold of specificity and could be detrimental to the EU's own position" in negotiations, the CJEU could find (as it did in *Inland Waterways*), that the Member States may not negotiate with third countries on matters which the EU is already discussing in ongoing negotiations.

This view is supported by Marise Cremona (European University Institute, Florence), for whom the duty of sincere cooperation means that "even in cases where EU competence is not exclusive, Member States are bound not to depart from an agreed common position in international negotiations".²⁶

Where the UK is seeking only to continue its current rights and obligations, this is less likely to be considered a breach of these legal principles than if it were seeking to agree new rights and obligations. It is also important to consider what detriment might arise and where any challenge might come from.

2.3 The Trade White Paper

The Department for International Trade published a White Paper on 9 October 2017. A White Paper on customs was published on the same day.²⁷

The Trade White Paper sets out the Government's approach to establishing the UK's independent trade policy after Brexit. Many aspects of trade policy are currently carried out by the EU. After Brexit,

²⁴ World Trade Law [Blog, 17 July 2016](#)

²⁵ J. Larik, "Sincere Cooperation in the Common Commercial Policy: Lisbon, a 'Joined-Up' Union, and 'Brexit'". *European Yearbook of International Economic Law 2017*, edited by Marc Bungenberg, Markus Krajewski, Christian Tams, Jörg Philipp Terhechte, Andreas R. Ziegler.

²⁶ Social Europe, [Negotiating Trade Deals Before Brexit?](#) 25 July 2016.

²⁷ Department for International Trade, [Preparing for our future UK trade policy](#), Cm 9470, October 2017. HM Treasury, [Customs Bill: legislating for the UK's future customs, VAT and excise regimes](#), Cm 9502, October 2017.

these will become the responsibility of the UK and legislation is needed in certain areas.

The White Paper set out the Government's aim for trade policy:

The United Kingdom has a long and proud history as a great trading nation and champion of free trade with all parts of the world. We want to maximise our trade opportunities globally and across all countries – both by boosting our trading relationships with old friends and new allies, and by seeking a deep and special partnership with the EU.²⁸

The White Paper said:

This paper is an early step in identifying the key elements of that trade policy. In order to ensure continuity in relation to our trade around the world and avoid disruption for business and other stakeholders, the UK needs to prepare ahead of its exit from the EU for all possible outcomes of the negotiations, and ensure that we have the necessary legal powers and structures to enable us to operate a fully functioning trade policy and pursue new trade negotiations.²⁹

The paper set out five components of the UK's future trade policy:

- Transparency and inclusivity
- Support for a rules-based global trading environment
- Boosting the UK's trade relationships
- Helping developing countries reduce poverty
- Ensuring a level playing field: trade remedies and trade disputes

The White Paper said that the Government would introduce legislation (including a trade bill and a customs bill) that:

- Enables continuity in the UK's current trade and investment relationships;
- Enables the UK to implement obligations that arise under the Government Procurement Agreement (GPA) (the UK will need to be able to implement these obligations in order to join the GPA as an independent member in our own right);
- Creates a UK trade remedies framework that addresses unfair and injurious trade practices, or unexpected surges in imports, and is consistent with our World Trade Organization (WTO) obligations;
- Enables the UK to enforce or abide by the outcomes of international trade disputes;
- Creates a unilateral UK trade preferences scheme to enable the UK to continue to provide preferences that support economic and sustainable development in the world's poorest countries, as part of our wider development agenda; and
- Provides a gateway to facilitate the collection and sharing of data which the Department for International Trade requires as it takes on functions previously performed by the EU

²⁸ Department for International Trade, [Preparing for our future UK trade policy](#), Cm 9470, October 2017, p10

²⁹ Department for International Trade, [Preparing for our future UK trade policy](#), Cm 9470, October 2017, p5

Commission. For example, in order for the Department for International Trade to collect the same data on intra- and extra-EU trade in goods as we do now.³⁰

The White Paper sought views on the Government's trade policy. The Department requested feedback by 6 November.³¹ The *Trade Bill* was published on 7 November. The Government published its response to the Trade White Paper on 5 January 2018.³²

2.4 Developments since Committee Stage

Trade policy generally

The Government's policy on customs has still to be decided. The Government has ruled out remaining in a customs union with the EU. It has put forward two customs proposals – a “customs partnership” with the EU and a “maximum facilitation” or max-fac” option. It has yet to make a decision on which is its preferred option. The Government has also put forward its proposal for a “temporary customs arrangement” as a backstop solution to the Irish border issue.³³ In early July 2018, it was reported that the Government was developing a third customs option.³⁴ The Government is expected to publish a Brexit White Paper shortly. The nature of the UK's trade relationship with the EU will have implications for the UK's relations with third countries.

UK approach to rolling over trade agreements

The Government's approach to ensuring continuity with respect to trade agreements appears to have changed. When the Bill was introduced, the aim was to transition the existing EU trade agreements by March 2019. The Explanatory Notes to the Bill said:

The Government has committed to providing continuity in the UK's existing trade and investment relationships with these third countries. We are already discussing how best to replicate as closely as possible the effects of these trade agreements. The Government has termed this process ‘transitional adoption’.

This work needs to be completed before the UK leaves the EU, if there is to be continuity in the UK's existing trade and investment relationships with these partner countries when we have left the EU. In light of this, the Trade Bill will provide the UK Government with the powers to make any changes to domestic legislation that are necessary to ensure these agreements, once signed by both parties, are fully implemented and can be ratified.³⁵

³⁰ Department for International Trade, [Preparing for our future UK trade policy](#), Cm 9470, October 2017, p11

³¹ Department for International Trade, [Preparing for our future UK trade policy](#), Cm 9470, October 2017, p39

³² Department for International Trade, [Preparing for our future UK trade policy: Government response](#), January 2018

³³ HM Government, Technical note: [Temporary Customs Arrangement](#), Technical Note, 7 June 2018. The European Commission has [published Slides on UK technical note on Temporary Customs Arrangements](#), 11 June 2018. There is more information on customs in [Brexit: Customs and Regulatory Arrangements](#), Commons Library Briefing Paper, CBP8309

³⁴ [No 10 produces new Brexit customs model](#), BBC News website, 2 July 2018, [May to float third Brexit customs model at Chequers meeting](#), Guardian, 2 July 2018

³⁵ [Trade Bill Explanatory Notes](#) paras 5 and 6

During transition

Now, the approach is for the UK to be treated as if it were a Member State during the transition (or implementation period). Article 124(1) of the [draft Withdrawal Agreement](#) says:

Without prejudice to Article 122(2), during the transition period, the United Kingdom shall be bound by the obligations stemming from the international agreements concluded by the Union, or by Member States acting on its behalf, or by the Union and its Member States acting jointly as referred to in Article 2(a)(iv).

A footnote says:

The Union will notify the other parties to these agreements that during the transition period, the United Kingdom is to be treated as a Member State for the purposes of these agreements.

The Government relied on this when responding to the International Trade Committee's report on rolling over trade agreements:

As agreed at March European Council, the EU has stated in the draft Withdrawal Agreement that the UK is to be treated as a Member State for the purposes of international agreements during the Implementation Period.³⁶

This depends on the agreement of the partner country but the Government is confident of their co-operation. This new approach effectively buys the Government more time.³⁷ It does, however, assume that the UK and EU will be successful in agreeing a withdrawal agreement.

The International Trade Committee commented on this change of approach as follows:

We cautiously welcome the Government's decision to pursue this approach while also continuing to seek to roll over these agreements. However, it is difficult not to see this as an admission that its policy of negotiating new agreements by March 2019 might not be achieved and may be failing.³⁸

With regard to new agreements, Article 122(4) of the draft Withdrawal Agreement says:

Notwithstanding paragraph 3, during the transition period, the United Kingdom may negotiate, sign and ratify international agreements entered into in its own capacity in the areas of exclusive competence of the Union, provided those agreements do not enter into force or apply during the transition period, unless so authorised by the Union.

³⁶ International Trade Committee, [Continuing application of EU trade agreements after Brexit: Government Response](#), 15 May 2018, HC1042, p4

³⁷ International Trade Committee, [Continuing application of EU trade agreements after Brexit](#), HC 520, 7 March 2018

³⁸ International Trade Committee, [Continuing application of EU trade agreements after Brexit](#), HC 520, 7 March 2018, pp3-4

After transition

On the period, after transition, the Government said, in response to the International Trade Committee's report:

In parallel to arrangements for the Implementation Period, the Government continues the important work with partner countries to ensure continuity of effect of our international agreements beyond the Implementation Period, to avoid any disruption in trade from January 2021 onwards.³⁹

Temporary customs arrangement

The UK Government has proposed a "temporary customs arrangement". The Government has said that this arrangement, if needed, is expected to come to an end in December 2021 (ie a year after the end of the transition period). On the issue of EU FTAs, the Government's note on the temporary customs arrangement says

Securing continuity in EU FTAs

17. To operate the CET [Common External Tariff] during a temporary customs arrangement, the UK will need to apply the preferential tariff rates to rest of world trade as set out in the EU's existing FTAs. Further technical discussions would be required with the EU to explore a shared solution to ensure the UK is able to apply the CET in full, and so that the UK continues to benefit from existing EU FTAs or any new ones signed during the period, and ensure that we remain WTO compliant.

Future EU FTAs

18. To keep pace with any changes to the EU's tariff policy and apply the CET, it will be necessary for the UK to continue to participate in any new FTAs that come into force during the period of the temporary customs arrangement. Further discussions will be required to determine a solution to this, including with respect to EU FTAs.

19. Whatever approach is pursued, it will be necessary for the UK and EU to agree a mechanism to ensure that the UK national interest is represented in future FTA negotiations affecting the UK.

The UK's independent trade policy during a temporary customs arrangement

20. As the CCP would no longer apply in full, the UK would be able to negotiate, sign and ratify new bilateral, plurilateral and multilateral trade agreements and bring into force any provisions not covered by the terms of the temporary customs arrangement.⁴⁰

Developments related to the *EUW Act*

The *Trade Bill* was introduced when the then *EUW Bill* was in its early stages in the House and Commons and before it had been considered by the House of Lords. The *EUW Bill* was amended significantly during its passage through Parliament. The *Trade Bill* interacts considerably

³⁹ International Trade Committee, [Continuing application of EU trade agreements after Brexit: Government Response](#), 15 May 2018, HC1042, p5

⁴⁰ HM Government, Technical note: [Temporary Customs Arrangement](#), Technical Note, 7 June 2018.

with the *EUW Act*. It is possible that the *Trade Bill* may be amended to fit more closely with the *EUW Act*, especially in areas related to devolution (see section 5.5 below).

International Trade Committee inquiries

The International Trade Committee has undertaken a number of inquiries related to the *Trade Bill* in addition to its one-off [hearing](#) on the Bill on 29 November 2017.

The Committee has published a [report](#) on the continuing application of EU trade agreements after Brexit. The Government has [responded](#) to this report.

Box 1: International Trade Committee report on the continued applicability of EU trade agreements after Brexit

The Committee published this report on 7 March 2018.

The report called on the Government to provide “clarity over the number, type, scope, extent and importance of the EU’s trade-related agreements” and provide reassurance that “it has a firm grasp of precisely which agreements will cease to have effect in respect of the UK at the point of Brexit if no action is taken, and what the consequences of that would be.”

The Committee welcomed the fact that the Government had identified the issue of “transitional adoption” of the EU’s trade agreements and the fact that the Government had made contact with so many trade partners. Nevertheless, the Government “still needs to show that it has a legally watertight and practically viable strategy for achieving “transitional adoption” at the point when it will need to take effect.”

The Committee noted that the Government was now seeking for the UK to be treated as if it were an EU Member State during the transition period for the purposes of these agreements. The Committee asked for more information on this.

Technical replication of free trade agreements would require some substantive changes which would need the agreement of the third country and, in many cases, the EU. The Committee’s report said:

Our evidence strongly suggests that substantive changes will be necessary when EU trade agreements are rolled over. The Government should set out provisions for both more extensive parliamentary scrutiny and enhanced involvement by the devolved administrations in situations where such changes do occur, particularly in the light of the fact that each of the four nations of the UK may differ in their priorities for trade deals.

The Committee noted that the rolling over of trade agreements was closely connected to the work of DExEU and called on the Government to “show what it is doing to foster a cross-departmental approach”.

Government response

The Government’s response was published on 15 May 2018.

The Government said that “major steps have been taken towards securing continuity for EU trade agreements” referencing the draft Withdrawal Agreement with the EU. Throughout, the Government’s response stressed the need to provide continuity for business and consumers.

The Government declined to give a definitive figure for the number of trade agreements the EU has with third countries. It said that such a focus could be “potentially misleading” as there are cases where multiple agreements may be referred to as a single agreement (eg EU’s 1972 trade agreement with Switzerland).

On the willingness of partner countries to agree to continue these agreements, the Government said that the “Government is not making assumptions, but basing its judgement on the evidence of continuous engagement with partner countries. It remains the case that all partner countries are committed to ensuring there is no disruption to our trading relationship.”

On Parliamentary scrutiny of existing EU trade agreements, the Government said that these had already been through the EU scrutiny process, overseen by Parliament’s EU Select Committees.

The Committee has also published a [report](#) on the UK Trade Remedies Authority (see Section 3.6 below).

Finally, the Committee has announced an [inquiry](#) into UK Trade Policy: Transparency and Scrutiny.

3. The Bill

3.1 Introduction

The Bill is relatively limited in scope and aims to help the UK preserve its trading arrangements with those countries with whom the EU has a trade agreement. The Government's aim is to provide continuity in these relationships. The Bill is not concerned with new trade agreements.

The Bill deals with non-tariff barriers only. Issues relating to tariffs are the subject of the *Taxation (Cross-Border Trade) Bill*.

The *Trade Bill* extends to the whole of the UK (see Clause 10). The Explanatory Notes say:

The UK Parliament does not normally legislate with regard to matters that are within the legislative competence of the Scottish Parliament, the National Assembly for Wales or the Northern Ireland Assembly without the consent of the legislature concerned. It is also the practice of the Government to seek the consent of the devolved legislatures for provisions which would alter the competence of those legislatures or of the devolved administrations in Scotland and Northern Ireland.

The Government will therefore seek legislative consent for the provisions in the Trade Bill relating to the power to implement the Government Procurement Agreement (clause 1) and the power to implement qualifying international trade agreements (clause 2).⁴¹

There is a discussion of the devolution implications of the Bill in section 5 below.

The general provisions in Part 4 of the Bill come into force on the day that the Bill becomes an Act of Parliament. The provisions of Parts 1, 2 and 3 (covering procurement, trade agreements, the Trade Remedies Authority and trade information) will come into force on days appointed by a Minister of the Crown by commencement regulations (see Clause 11).

3.2 Clause 1: Agreement on Government Procurement

Clause 1 of the Bill relates to the Agreement on Government Procurement.

The Agreement on Government Procurement (GPA) is a voluntary (plurilateral) agreement between the EU and 18 countries to open up their public procurement markets to each other, under the World Trade Organization (WTO).⁴²

⁴¹ [Trade Bill Explanatory Notes](#) para 15-16. See also Annex A

⁴² The [Government Procurement Agreement](#) is a WTO plurilateral agreement – in other words one that is optional for WTO members.

The current [parties](#) to the GPA are: Armenia, Canada, the EU, Hong Kong, Iceland, Israel, Japan, South Korea, Liechtenstein, Moldova, Montenegro, Netherlands with respect to Aruba, New Zealand, Norway, Singapore, Switzerland, Chinese Taipei,

The UK is currently a part of the GPA only through its EU membership. The Government is taking steps so that the UK continues to be part of the GPA – becoming an independent member – as the UK leaves the EU.⁴³ As part of this, the Bill would allow legislative changes to be made where necessary for the UK to implement the agreement.

The Bill would also allow changes to be made if another country joined the GPA, or withdrew from it.

The Agreement

Under the GPA, many large public sector procurement opportunities must be opened up to suppliers in the EU and certain other countries (the parties to the agreement), and this procurement must be subject to open, fair and transparent conditions of competition.⁴⁴

The Government says that the UK becoming an independent member of the GPA will:

- maintain “current guaranteed access for UK businesses to global procurement opportunities” and
- offer value for money for public sector buyers by promoting competition among suppliers.⁴⁵

It would also mean that certain larger UK procurement opportunities continue to be open to suppliers in EU countries and other GPA member countries, including the United States, Japan, South Korea and Canada.

What procurement is covered by the GPA?

The GPA focusses on larger procurements, above certain thresholds.⁴⁶ It covers procurement of goods, services and construction services, by both central government and other public sector bodies.

The GPA’s [schedules](#) set out the details of coverage for each party (the EU and certain other countries), including what bodies are subject to the agreement. The coverage can vary by party, often depending on what procurement that party has itself committed to open up – so exact coverage can differ across pairs of parties.

What does the GPA require and oblige?

For procurement that it covers, the GPA’s [general rules and obligations](#) guarantee:

- national treatment and non-discrimination – in other words, public authorities must treat potential suppliers from all parties equally,

Ukraine and the United States. Ten more WTO members are in the process of acceding, including China and Russia.

⁴³ Department for International Trade, [Preparing for our future UK trade policy](#), 9 October 2017

⁴⁴ WTO Integrated Government Procurement Market Access Information (e-GPA) Portal, [The Agreement in brief](#) [online, accessed 10 November 2017]

⁴⁵ [Trade and Customs Legislation: Written statement - HCWS228](#), 7 November 2017

⁴⁶ For example the threshold that applies for 2017 in the UK is £106,047 for goods and services for buyers in central government – this is the lowest of the thresholds that currently apply to the UK. The [thresholds](#) vary by buyer type and depend on what is being bought – they are considerably higher for construction services.

- minimum standards regarding national procurement procedures,
- transparency of procurement-related information.⁴⁷

How much is it worth?

Opportunities around the world

Around £1.3 trillion of contracts per year, from all GPA countries, are on offer to suppliers from the UK and other countries that are part of the agreement.⁴⁸ The US and the EU are the largest markets in the GPA.⁴⁹ In 2014/15, UK businesses won contracts with other EU states worth £609 million that would be covered under the GPA schedules.⁵⁰

UK opportunities

Around £68 billion of UK contracts were opened up to bidders from other countries under the GPA in 2013.⁵¹ To put this in context, in 2015/16, UK public sector procurement from the private sector was worth £255 billion in total (covering both GPA and non-GPA contracts).⁵² In practice most of the UK contracts that are opened up to bidders from abroad are won by UK suppliers. Over the last few years:

- about 2.5% of the value of larger UK procurements went directly to suppliers based outside the UK – of these, around half went to suppliers in EU countries and half to other countries.
- about 22% of the value of larger UK procurements was awarded indirectly to suppliers based outside the UK (in other words the successful bidder was based in the UK but was a subsidiary of a foreign company) – of these, again around half were in the EU and half outside.⁵³

⁴⁷ WTO Integrated Government Procurement Market Access Information (e-GPA) Portal, [The Agreement in brief](#) [online, accessed 10 November 2017]

⁴⁸ [Trade Bill Explanatory Notes](#), para 22

⁴⁹ Estimates vary for the exact size of procurement markets that are open under the GPA and the relative importance of each. For example:

- According to one author, among the GPA countries, the European Union share of government procurement opportunities constitute about 40% of the aggregate GPA market. *Source: Kamala Dawar for European Parliament, [Openness of public procurement markets in key third countries](#), 12 July 2017.*
- A US official source suggests that covered government procurement in the United States represents the largest market, worth \$837 billion in 2010, while the combined covered government procurement reported by the next five largest GPA parties—the EU, Japan, South Korea, Norway, and Canada—for 2010 was about \$381 billion. *Source: United States Government Accountability Office, [Government Procurement](#), February 2017*

⁵⁰ Department for International Trade, [Trade Bill Impact Assessment](#), September 2017 – para 41

⁵¹ WTO, [Committee on Government Procurement - Statistics for 2013 reported under article XIX:5 of the Agreement \(1994\) - Report by the European Union – Addendum](#), June 2017 - table 17_2972_01_e

⁵² HM Treasury, [Whole of Government Accounts 2016/17](#), June 2018 – figures do not include public sector procurement from other parts of the public sector. Changes have been made to the way that this sum is calculated since the previous version of this paper.

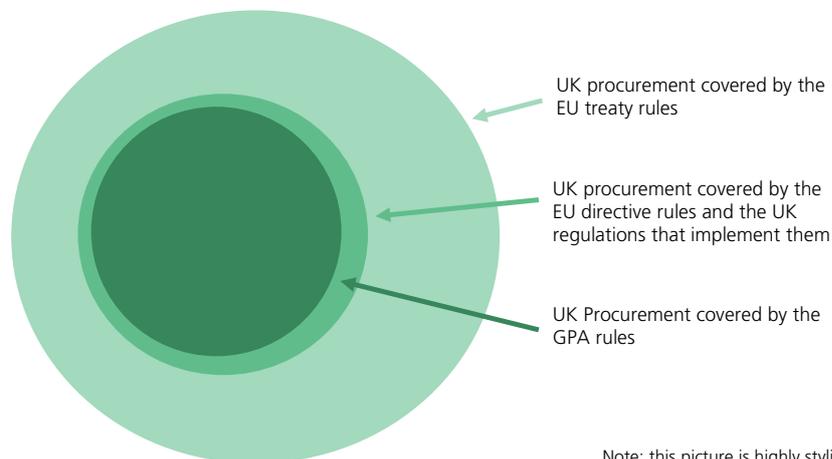
⁵³ Figures cover above threshold procurement from 2009 to 2015 and come from JIIP Joint Institute for Innovation Policy; VVA Consulting; London Economics for European Commission, Directorate-General for Internal Market, Industry, Entrepreneurship and SMEs, [Measurement of impact of cross-border penetration in public procurement](#), February 2017

Box 2: The current legal framework for procurement, the GPA and Brexit

The current UK legal framework for public procurement comes largely (but not completely) from EU law. There are three main elements:

- **EU Treaty principles** – general principles which apply to much procurement. These lead to general requirements such as advertising procurement opportunities and opening up procurement opportunities to suppliers located in other EU Member States.
- **EU directives and the UK regulations that implement them** – these are detailed rules that apply to much procurement above certain thresholds. They set out for example what procedures must be followed, the criteria that can be used to select suppliers and where procurement opportunities must be advertised.
 - **The EU directives and the UK regulations implement the GPA commitments that the EU has made. The rules in the EU directives and the regulations are generally more specific and detailed than those in the GPA, and they have slightly wider coverage.**⁵⁴
- A few **UK-specific rules**.

Relationship between the coverage of EU and GPA rules



We do not yet know what the UK's trade relationship will be with the EU after the UK leaves, including in relation to procurement.

As well as mutually opening up procurement as parties to the GPA, further commitments could be made as part of a UK-EU trade agreement or another arrangement between the UK and EU.

The current UK regulations will continue to apply after Brexit until/unless the responsible governments/parliaments choose to change them.

What are the 1994 GPA and the Revised GPA?

The Bill refers to both the 1994 GPA and the Revised GPA.

⁵⁴ The differences are usefully summarised by Prof Sue Arrowsmith:

“The scope of procurement covered for the EU/UK under the GPA is narrower than the scope of covered procurement under the EU procurement directives in relation to a few utility sectors, coverage of private utilities, the defence sector, some services, (possibly) concessions, and certain private contracts subsidised by government. The GPA also does not include below-threshold procurement. However, some of these differences are of limited importance in the UK context. Further, the procurement that does fall into the gaps between the directives and GPA, at least above the directives' thresholds, could easily be added to the GPA UK if desired. [...]”

Source: Summary to Chapter 4 of Sue Arrowsmith, [Consequences of Brexit in the area of the public procurement](#), April 2017

The GPA was originally agreed in 1994, entering into force in 1996. A new version, the Revised GPA, was agreed in 2012, entering into force in 2014.⁵⁵

For most countries the Revised GPA is in force but Switzerland has not yet formally accepted it, so the original 1994 GPA remains in force with respect to Switzerland. The Government has therefore said that it wants to have the power to allow the UK to accede to both the 1994 GPA and the Revised GPA.⁵⁶

Other steps towards joining the GPA

Working with GPA members

Along with this legislation, the Government is taking other steps to make the UK an independent member of the GPA in its own right after the UK leaves the EU. It has said it is working with GPA members to find a way that the UK remain a member of the GPA on the same terms that currently apply (out of a number of options for doing this).⁵⁷ In a joint letter, representatives of the EU and UK stated that:

The UK and EU will work together on the UK's objective of remaining, upon leaving the EU, subject to the rights and obligations it currently has under the Government Procurement Agreement as an EU Member State on the basis of the commitments currently contained in the EU schedule of commitments. The EU and the UK will also cooperate in a spirit of transparency with regard to the UK's intentions to establish its own separate UK services schedules.⁵⁸

The UK formally communicated its interest in acceding to the GPA to become a Party in its own right on 1 June, with a draft market access offer.⁵⁹

GPA to be laid before Parliament

The Government will have to meet the requirements of the [Constitutional Reform and Governance Act 2010](#) (CRAGA) before it can join the GPA as an independent member.⁶⁰ As section 6 below explains, this means that the Government cannot accede to these treaties unless they have been laid before Parliament for 21 sitting days without either House objecting.

To clarify what the Delegated Powers Memorandum says,⁶¹ CRAGA does not require Parliament to scrutinise whether the UK should join the GPA, to decide whether to approve it, or to agree that the UK should join. It simply requires the Government to lay the instrument before

⁵⁵ [Trade Bill Explanatory Notes](#), para 19

⁵⁶ [Trade Bill Explanatory Notes](#), para 32

⁵⁷ [Letter](#) dated 8 October 2017 from Dr Liam Fox to Angus Brendan MacNeil and Hilary Benn regarding the Government's future commitments within the World Trade Organization as we leave the EU

⁵⁸ [Letter](#) dated 11 October 2017 from UK and EU Permanent Representatives to all Permanent Representatives to the World Trade Organization

⁵⁹ [Application for accession of the United Kingdom to the Agreement on Government Procurement in its own right](#), letter dated 1 June 2018

⁶⁰ [Trade Bill Explanatory Notes](#) para 24

⁶¹ See paras 17, 19, 27 and 28.

Parliament, gives Parliament an opportunity to object, and gives an objection statutory effect.

Sequencing: will there be a gap?

The GPA and Revised GPA will automatically cease to apply to the UK as soon as it leaves the EU. Will this leave a gap before the UK can join as an independent Member, particularly given that there is a 30-day waiting period between depositing a new instrument of accession and it coming into force?

It depends what steps the UK is allowed to take, under EU legal principles, towards joining the GPA while it is still an EU Member State. In other words, how many of the steps in the timeline below can be taken before the EU treaties cease to apply to the UK?

Possible timeline:

- Trade Bill royal assent
- Instrument of accession to GPA laid before Parliament for 21 sitting days with no objections⁶²
- Government makes implementing regulations
- Instrument of accession deposited
- [30 days later] UK accedes to GPA; implementing legislation comes into force

This is a difficult legal question, involving the interaction between the two EU legal principles of EU exclusive competence and the duty of loyalty (sincere cooperation) described above in section 2.2. The answer is not yet clear, although it could be resolved by political agreement or ultimately by the CJEU.

Devolution and changes in responsibilities

If responsibilities for much of procurement law move from the EU to the UK with Brexit, there are questions about who takes on these responsibilities.

At present, responsibilities for procurement are generally either devolved or set at the EU level.⁶³ There is the potential for a greater role for the devolved administrations and legislatures after Brexit.

It seems plausible that procurement might be the subject of a future “framework” between the UK government and devolved administrations setting out a common approach and how it will be operated and governed. Such frameworks are expected to be agreed where they are necessary in order, for example, to: enable the functioning of the UK internal market (while acknowledging policy divergence); ensure compliance with international obligations; and

⁶² See section 6 below on parliamentary scrutiny of treaties.

⁶³ The devolved governments in [Scotland](#), [Wales](#) and [Northern Ireland](#) have their own procurement policies (although Northern Ireland has not had a functioning Executive or Assembly since January 2017). The devolved legislatures in Scotland and Wales can legislate on procurement to implement EU directives in their areas, although Wales has gained this power only in the last couple of years.

ensure the UK can negotiate, enter into and implement new trade agreements and international treaties.⁶⁴ See section 5 below for information about devolution and treaty making / trade policy.

There is also a question about whether any bodies will take on central functions relating to procurement – for example one author has suggested that the Competition and Markets Authority might play a role.⁶⁵

Policy choices

Like the current EU rules, the GPA will limit the ability of UK public sector buyers to choose to buy only from certain groups of suppliers when carrying out certain larger procurement processes – for example it would generally stop buyers only buying British or local goods.

The restrictions in the GPA only apply, however, in the procurements covered by the agreement – certain procurements above certain values. Unlike some of those in the current EU framework, they do not apply to lower value procurements, under the thresholds. This potentially opens up the possibility of a more flexible or different procurement policy for smaller procurements, even if the UK accedes to the GPA.⁶⁶

There are policy trade-offs here: while such international agreements restrict domestic policy choices, they can also mean a greater choice of suppliers (potentially leading to better value for money for the public sector), along with greater opportunities for UK businesses to sell to the public sector in other countries.

Clause 1

The Bill would allow an “appropriate authority” (UK, Scottish or Welsh Ministers, or a Northern Ireland Department) to make regulations to implement the GPA, or to respond to another party joining the GPA or a current member leaving the GPA.

These regulations would be in secondary legislation, under the negative procedure.

Why does the UK need to accede to the GPA, given it is already part of it?

The EU is currently a member of the GPA and the UK is currently a part of the GPA through its EU membership.

There has been some debate about whether the UK needs to formally accede to the GPA, given its current participation.⁶⁷ However, the

⁶⁴ See [Joint Ministerial Committee communiqué: 16 October 2017 and Cabinet Office, Frameworks analysis: breakdown of areas of EU law that intersect with devolved competence in Scotland, Wales and Northern Ireland, March 2018](#)

⁶⁵ Kamala Dawar for Trade Policy Observatory, [Brexit and Government Procurement](#), March 2017

⁶⁶ Sue Arrowsmith, [Consequences of Brexit in the area of the public procurement](#), April 2017

⁶⁷ This issue and its implications are discussed from Page 28 of Prof Sue Arrowsmith, [Consequences of Brexit in the area of the public procurement](#), April 2017. See also Kamala Dawar for Trade Policy Observatory, [Brexit and Government Procurement](#), March 2017 for more on the possible steps and challenges to joining the agreement.

Government itself talks about the need to make changes so that the UK can become a member of the GPA in its own right.⁶⁸

Implementing treaties through delegated legislation

Because treaties do not automatically become part of domestic law in the UK, primary and/or secondary legislation is often required to implement some of their obligations. UK policy is to have any necessary legislation in place at the point it becomes bound by the treaty, to avoid the risk of a breach of its international obligations.

As the Delegated Powers Memorandum points out, “there is precedent for taking a delegated power to implement an international agreement that the UK has agreed to join”. It cites section 8 of [the Intellectual Property Act 2014](#) which allows the Government to make orders to give effect to a 1999 treaty on international registration of industrial designs.⁶⁹ However, those orders (which include a Henry VIII power) require the draft affirmative procedure, in contrast to the negative procedure specified for clause 1 of this Bill.

How is the GPA currently embedded in UK law?

The GPA is currently embedded in UK law primarily via a series of regulations – for example the Public Contracts Regulations 2015 – that transpose EU procurement directives.⁷⁰ These regulations were made by the Scottish ministers for Scotland and UK ministers for the rest of the UK.⁷¹ See Box 2 above for information on the current procurement rules and how the GPA fits into them.

Why are these changes not being made via the *EUW Act*?

The *EUW Act* would not allow for the domestic implementation of the UK’s GPA obligations if the terms of the UK’s GPA offer change during joining negotiations, or if the GPA is amended after EU exit but before

⁶⁸ [Trade Bill Explanatory Notes](#), para 23

⁶⁹ The 1999 Geneva Act of the Hague Agreement [Concerning the International Registration of Industrial Designs](#). The Government intends to ratify the Geneva Act by 31st March 2018 and be in a position to launch the service on 6th April 2018: HCWS575, 30 March 2017. The UK currently benefits from the system through its EU membership.

⁷⁰ The key regulations are:

- The [Public Contracts Regulations 2015](#) and [The Public Contracts \(Scotland\) Regulations 2015](#) – transposing [EU Directive 2014/24/EU on public procurement](#)
- The [Utilities Contracts Regulations 2016](#) and [The Utilities Contracts \(Scotland\) Regulations 2016](#) – transposing [Directive 2014/25/EU on procurement by entities operating in the water, energy, transport and postal services sectors](#)
- The [Concession Contracts Regulations 2016](#) and [The Concession Contracts \(Scotland\) Regulations 2016](#) – transposing [Directive 2014/23/EU on the award of concession contracts](#)

⁷¹ While much UK law on public procurement derives from EU law, responsibilities within the UK are generally devolved beyond this.

The devolved governments in [Scotland](#), [Wales](#) and [Northern Ireland](#) have their own procurement policies (although Northern Ireland has not had a functioning Executive or Assembly since January 2017).

The devolved legislatures in Scotland and Wales can legislate on procurement to implement EU directives in their areas, although Wales has gained this power only in the last couple of years.

the UK becomes an independent member (for example if another party joined the GPA).⁷²

The details of Clause 1

Subsection 1(1) of the Bill would allow an appropriate authority – a UK government minister, a devolved authority (a Scottish or Welsh minister or a Northern Ireland department) or a UK minister acting jointly with a devolved authority – to make provisions, via regulations, to:

- implement the requirements of the GPA (the original 1994 GPA and/or the Revised GPA) as an independent member; or
- respond to another party joining the GPA, or a current member leaving the GPA.

The Government say that the first set of powers could be used to amend the existing UK procurement regulations, for example to update the list of government departments following recent machinery of government changes.⁷³ It says that the second set might be used to update the regulations to reflect a change in GPA parties.

Subsection 1(2) says that such regulations must not come into force early (ahead of the UK joining the GPA, the other party joining the GPA or the current member leaving the GPA).

As Schedule 2 sets out, regulations made under this clause would be subject to the negative procedure. The Government suggests that this is the appropriate procedure to (a) avoid delays and (b) because this power will likely be used to amend regulations themselves made under the negative procedure.⁷⁴

3.3 Clause 2: International trade agreements

Summary

As an EU Member State, the UK benefits from many trade agreements negotiated by the EU. In their current form, these will cease to apply to the UK after Brexit. Nevertheless, during the transition or implementation phase, the Government is hoping that the UK will be treated as if it were an EU member state, under the terms of the draft Withdrawal Agreement.

The Government is also seeking continuity in trade agreements through the Bill:

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.⁷⁵

Instead of seeking to become a party to existing EU trade agreements in the long term (sometimes called “trilateralisation”), the Government’s

⁷² Department for International Trade, [Trade Bill Impact Assessment](#), September 2017

⁷³ Such as the change that created the Department for International Trade and Department for Exiting the European Union.

⁷⁴ [Trade Bill Delegated Powers Memorandum](#), paras 27-30.

⁷⁵ [Trade Bill Explanatory Notes](#), para 38

approach is to negotiate new bilateral agreements with the third countries that are 'substantively the same or as similar as possible'.⁷⁶

The House of Commons International Trade Committee has recently published a report on the continuing application of EU trade agreements after Brexit.⁷⁷ This called on the Government to clarify how its objective of continuing to be treated as if an EU Member State during transition would work and how this would fit along its intention to form equivalent UK trade agreements with those countries with which the EU has trade deals.

We cautiously welcome the Government's new policy to seek agreement of all parties to interpret relevant terms of EU free trade agreements, such as "European Union" or "EU Member State", to include the UK during transition, while continuing to seek to roll over those agreements. While we welcome the Government's willingness in this respect to be pragmatic, it is difficult not to see this as an admission that its policy of negotiating new agreements by March 2019 might not be achieved and may be failing. We seek urgent reassurance that the Government is allocating appropriate resources not only to this objective but to all its policy objectives, including the bilateral strand of negotiating these agreements, and that it is being realistic about how achievable those objectives are. *The Government should write to this Committee setting out why it might not achieve and may be failing to achieve this policy objective in the time it originally set, and how it will change its future plans on these and other trade agreements to take account of the lessons learnt. If the EU's agreement to the treating of the UK as a de facto EU territory for the purposes of the transition period is not agreed at the March 2018 EU Council meeting, the Government should publish a statement setting out its alternative approach for achieving continuity.* (Paragraph 42)

In addition, it is still far from clear that it will be possible to secure continued application of EU trade agreements during the post-Brexit transition period. *The Government must urgently clarify the nature and form of the trilateral (UK-EU-third country) agreements whereby it is intended that the UK will remain a de facto party to the EU's trade agreements during a transition period. It must also evaluate and set out the potential risks and benefits attached to this approach.* (Paragraph 43)

11. Meanwhile, the Government must still address the issues that we have raised in respect of its pursuit of "transitional adoption" and act on the assumption that this could still need to be in place at the point of Brexit in March 2019. Even if the new approach does prove successful, it will only buy the Government a limited amount of extra time in which to achieve roll-over and it would still need to redouble its efforts in that respect. (Paragraph 44)⁷⁸

The Government's response said:

The Government notes the Committee's recommendation was made before the agreement at the March European Council. As noted earlier in the response to recommendations 4 and 5, the EU

⁷⁶ [Trade Bill Delegated Powers Memorandum](#), para 46

⁷⁷ International Trade Committee, [Continuing application of EU trade agreements after Brexit](#), 7 March 2018, HC520

⁷⁸ International Trade Committee, [Continuing application of EU trade agreements after Brexit](#), 7 March 2018, HC520, p32

has stated in the draft Withdrawal Agreement that the UK is to be treated as a Member State for the purposes of international agreements during the Implementation Period.

[...]

The Government is keenly aware of the limited time available. We and our trading partners are clear that this is a technical exercise to ensure continuity. We are also aware of ratification timeframes and requirements for each of our partner countries. Officials will continue to work with their counterparts within these countries to ensure relevant deadlines are met.⁷⁹

Clause 2 of the Bill gives the Government powers to change domestic legislation to ensure that any such “transitioned” trade agreements can be implemented. The clause applies only to agreements with countries with which the EU has an agreement before exit day. It is not clear yet exactly how many such agreements there might be, or the extent to which they will be different from the existing EU agreements.

The Bill does not:

- continue or replicate the existing EU agreements itself;
- say anything about new trade agreements with the EU or other countries; or
- say anything about parliamentary scrutiny of trade negotiations (see section 6 below).

Implementing trade deals

A party to an international trade agreement must ensure that its domestic legislation is consistent with its obligations under that agreement (although not every obligation in a trade treaty will require legislation to implement it).

At the moment, the UK does this through the *European Communities Act 1972* (directly through section 2(1) or through regulations the UK makes under section 2(2)). That Act will be repealed on exit day by the *European Union (Withdrawal) Act*.

The Explanatory Notes to the *Trade Bill* explained that most of the UK’s obligations under the “transitioned” trade agreements would continue to be implemented by retained EU law under the *EUW Act* (with any necessary amendments made under that Bill’s powers):

The EU (Withdrawal) Bill is expected to preserve EU law existing at the point that the UK leaves the EU, and allow it to be amended to make it work in a UK context. It is therefore expected that, in most cases, the implementation of any obligations within these UK trade agreements can be dealt with through the EU (Withdrawal) Bill.⁸⁰

However, this would not cover every scenario. For example:

- If implementing legislation for an EU treaty had not been completed by exit day, it would not form part of ‘retained EU law’ in the UK.

⁷⁹ International Trade Committee, [Continuing application of EU trade agreements after Brexit: Government Response](#), 15 May 2018, HC1042, p6

⁸⁰ Trade Bill: [Explanatory Notes](#), para 41

- Sometimes the new UK agreement will have to be different from the EU treaty to ensure it works outside the EU context, and some of these changed provisions would have to be implemented in domestic law, but the *EUW Act* powers do not extend to such changes.
- Administrative changes could be made to the agreements after exit day (the Explanatory Notes give the example of updating them with new assessment bodies in the partner country). These will need to be recognised in UK law, but the *EUW Act* powers do not extend to such changes.

The Bill

Purpose

Clause 2 of the Bill allows the Government (and/or a devolved administration) to implement the provisions of certain trade agreements through secondary legislation using the negative resolution procedure.

Limitations

There are several limitations to this power.

It applies only to “an international trade agreement”, defined in subsections (2) and (7) as:

- a free trade agreement notifiable under certain provisions of the General Agreement on Tariffs and Trade (GATT) or the General Agreement on Trade in Services (GATS); or
- “an international agreement that mainly relates to trade, other than a free trade agreement”.⁸¹

According to the Explanatory Notes, “the types of agreement that mainly relate to trade will include the key trade agreements, and associated ancillary agreements, that the EU currently has with third countries. For example it will include Mutual Recognition Agreements.”⁸²

It applies only to agreements with countries that already have a trade agreement with the EU or sign one before exit day (subsection (3)).

It relates only to non-tariff barriers (subsection (5)). It excludes powers relating to customs duties (tariffs) as these are included in the *Taxation (Cross-Border Trade) Bill*.

The Government states that clause 2 does not apply to new trade agreements between the UK and the EU, or to any other treaties to which the EU is a party.⁸³ The wording of clause 2(3) seems to support this, as it refers to “the other signatory (or each other signatory) and the EU”. It seems likely that this terminology contemplates the Bill applying only to agreements which do not include the EU. But this is not entirely clear. The Delegated Powers Memorandum says: “It is recognised that Parliament will want considerable assurances from the Government that

⁸¹ A free trade agreement is defined in subsection (7) as an agreement notifiable under paragraph 7(a) of Article XXIV of GATT or paragraph 7(a) of Article V of GATS (the General Agreement on Trade in Services).

⁸² [Trade Bill Explanatory Notes](#), para 52

⁸³ [Trade Bill Delegated Powers Memorandum](#) paras 51, 57 and 58

this power will not be used beyond what is necessary to ensure a seamless transition of the agreements in scope”.⁸⁴

Scope

Subsection (6) determines the kinds of provisions that may be made under subsection (2). Among other things, regulations may:

- modify retained EU law, as defined in the *EUW Act* (including primary legislation that is retained EU law);⁸⁵
- confer functions on the Secretary of State or any other person (including conferring a discretion);
- provide for the delegation of functions; and
- provide for civil penalties.

However, Schedule 1 imposes considerable restrictions on the powers of devolved authorities to make regulations under clause 2 (see section 5 below).

Time limit

Subsections (8) and (9) contain a five-year renewable “sunset” provision for these powers.

Subsection 8(a) states that no regulations may be made under subsection (1) once a period of five years since exit day has elapsed. However, subsections 8(b) and (9) allow this period to be extended by up to five years at a time, with the approval of both Houses of Parliament. This contrasts with the two-year non-renewable sunset clauses for what were clauses 7 and 8 of the *EUW Bill* as introduced.⁸⁶

Continuity?

The Government hopes to conclude new bilateral agreements to replace the EU’s trade agreements with third countries instead of trying to “trilateralise” the EU agreements so that the UK becomes a party to these in its own right with any necessary adjustments. One advantage of this approach is that there would be less need for formal EU involvement (although in practice the EU may well need to be involved in areas such as dividing up tariff rate quotas⁸⁷ and setting rules of origin).⁸⁸ As noted above, the UK is also seeking to continue to participate in EU trade agreements during the transition period.

⁸⁴ [Trade Bill Delegated Powers Memorandum](#) para 57

⁸⁵ Making this a Henry VIII power.

⁸⁶ What was clause 7 is now section 9. Clause 8 (the international obligations power) was removed from the *EUW Bill* at Lords Report stage.

⁸⁷ Tariff rate quotas are predetermined quantities of goods which can be imported at a “preferential” (i.e. lower) rate of customs duty (“in-quota tariff rate”). Once the TRQ has been filled, one can continue to import the product without limitation but a higher tariff rate must be paid.

⁸⁸ Rules of origin are laws, regulations and administrative procedures which determine a product’s country of origin. Their purpose is to specify the domestic content requirements for goods to qualify for preferential treatment under trade agreements. On the rules of origin as an issue in transitioning free trade agreements, see Peter Holmes and Michael Gasiorek, [Grandfathering Free Trade Agreements and Rules of Origin: What might appear bilateral is in fact trilateral!](#), UK Trade Policy Observatory, 27 September 2017

But moving from an EU trade agreement to a UK deal with the same country may not be a straightforward process. The Delegated Powers Memorandum describes the process of “transitioning EU-partner country trade deals into UK domestic law” as “uncharted territory”.⁸⁹ While the aim may be to ensure continuity of these agreements, the new UK deals may not be identical to the EU ones. The Delegated Powers Memorandum says:

Although the intention is to keep these trade agreements substantively the same or as similar as possible to the current EU-partner agreements, they will, nevertheless, be legally distinct. There will be textual changes to current agreements that ensure future operability. There could be consolidation of agreements. The power is broad enough to allow implementation of substantial amendments, including new obligations.⁹⁰

Similarly, the Explanatory Notes say that “it may be necessary to substantially amend the text of previous EU agreements, so that the new arrangements can work in a UK legal context”.⁹¹ The powers in clause 2 could therefore be used to implement treaty provisions that are different from the UK’s current obligations under EU treaties.

The Government’s wish to ensure continuity of these agreements also relies on the co-operation of the other country. In evidence to the International Trade Committee, the Secretary of State and Crawford Falconer, the chief trade negotiator, indicated that while most of the EU’s trade agreement partners had agreed in principle to a process for concluding new agreements based on the existing ones, no guarantees had been given.⁹²

Procedure for making the agreements

The “transitioned” bilateral agreements between the UK and the third countries will be “legally distinct” from the EU’s agreements with those countries.⁹³ They will have to meet the requirements of the [Constitutional Reform and Governance Act 2010](#) (CRAGA) before the Government can ratify them.⁹⁴ As section 6 below explains, this means that the Government may not ratify a treaty unless it has been laid before Parliament for 21 sitting days and neither House objects.

3.4 Clause 3: Regulations: devolved authorities and general provision

Clause 3(1) provides that the regulations made under clauses 1(1) or 2(1) may make different provision for different purposes or areas, make provision generally or only in relation to specified cases, may make incidental, supplementary or consequential provision and may make transitional, transitory or saving provision.

⁸⁹ [Trade Bill Delegated Powers Memorandum](#), para 53

⁹⁰ [Trade Bill Delegated Powers Memorandum](#), para 46

⁹¹ [Trade Bill Explanatory Notes](#), para 53

⁹² [Can Liam Fox match EU’s current trade deals?](#), Financial Times, 2 November 2017

⁹³ [Trade Bill Explanatory Notes](#) para 53

⁹⁴ [Trade Bill Explanatory Notes](#) para 24

Clause 3 also gives effect to Schedules 1, 2 and 3 which relate to restrictions on the devolved authorities and the regulations made under Part 1 of the Bill (clauses 1-4). These provisions are discussed in sections 4 and 5 below.

3.5 Clauses 5 and 6: Trade Remedies Authority

What are trade remedies?

Trade remedies (sometimes referred to as trade defence measures) allow a country to take steps against unfair competition from dumped or subsidised imports, or to put temporary safeguards in place:⁹⁵

- Dumping occurs where a company exports a product at a lower price than it is sold for on its domestic market.⁹⁶
- Subsidies occur when a government provides financial assistance to companies.⁹⁷
- Safeguards are used as a temporary measure if a domestic industry is injured or threatened with injury caused by a surge in imports.⁹⁸

At the moment, trade remedies are dealt with by the EU.⁹⁹ The EU's process for investigating is set out on the [European Commission's website](#). The EU has taken action against cheap imports of steel from China, for example. The Government's approach to trade remedies was discussed in section 5.1 of the Trade White Paper. The White Paper invited feedback on this approach. As a WTO member, the UK's policy will have to abide by WTO rules in this area.

Clauses 5 and 6

Clause 5 establishes the Trade Remedies Authority (TRA) as a non-departmental public body.

Clause 6 relates to the provision of advice, support and assistance by the TRA.

Subsection (1) requires the TRA, on the request of the Secretary of State, to provide him or her with advice, support and assistance relating to:

- international trade disputes,
- the functions of the Secretary of State relating to trade, and
- the functions of the TRA.

The Explanatory Notes say that this includes trade remedies. Further powers relating to trade remedies are in *the [Taxation \(Cross-Border Trade\) Bill](#)*.

Subsection (2) says that the advice, support and assistance requested under subsection (1) may include, among other things, analysis of trade

⁹⁵ For more background on trade remedies for dumping and subsidies see George Peretz QC, [Trade 101: Trade Defence Instruments](#), UK Trade Forum, 10 October 2017

⁹⁶ World Trade Organization, [Anti-dumping](#).

⁹⁷ For more information on subsidies and countervailing measures see the Library note, [EU State Aid Rules and WTO Subsidies Agreement](#).

⁹⁸ World Trade Organization, [Anti-dumping, subsidies, safeguards: contingencies, etc](#)

⁹⁹ EU anti-dumping rules are set out in [Regulation 1036/2016](#) while rules on countervailing measures are in [Regulation 1037/2016](#)

remedies imposed in other countries and how these affect producers and exporters in the UK.

Subsection (3) requires the Secretary of State to consult the TRA before making a request under subsection (1) and have regard to the expertise of the TRA, its operational independence and its ability to make impartial assessments.

Subsection (4) allows the TRA to provide advice, support and assistance to other organisations on its own initiative in relation to international trade and trade remedies.

Schedule 4 contains further detail about the TRA.

Membership

The TRA is to be made up of:

- A Chair appointed by the Secretary of State
- Other non-executive members appointed by the Secretary of State (in consultation with the Chair)
- A Chief Executive appointed by the Chair, with the approval of the Secretary of State, (or if the Chair has not been appointed), by the Secretary of State
- Other executive members appointed by the Chair

There must be no more than nine members and the number of non-executive members must exceed the number of executive members as far as practicable.

Terms of appointment of members

Terms and conditions of appointment as a non-executive member are to be determined by the Secretary of State. Terms and conditions of executive members are to be determined by the Chair with the approval of the Secretary of State. Both are subject to the provisions of the Schedule. The Bill does not specify the term of office or arrangements for re-appointment.

Remuneration

The Secretary of State determines the pay of non-executive members. The pay of executive members is determined by the Chair with the approval of the Secretary of State. Paragraphs 18-23 of Schedule 4 set out what happens where a Chief Executive is appointed by the Secretary of State. Under these circumstances, the remuneration of the Chief Executive is determined by the Secretary of State.

Staffing, committees and funding

The TRA may appoint employees whose terms and conditions are to be determined by the TRA. The TRA may establish committees. The Secretary of State must pay to the TRA the funds they consider appropriate to allow the TRA to perform its functions. The TRA is expected to cost £15-20 million a year, paid for from the Consolidated

Fund, although the exact amount will depend on negotiations with the EU and other policy decisions.¹⁰⁰

Delegation of functions

The TRA may delegate any of its functions to a member of the TRA, an employee or other member of staff authorised for that purpose or a TRA committee. A function may not be delegated to a committee which includes someone who is neither a member nor an employee of the TRA where that function could be exercised in relation to a specific trade remedies investigation.

Guidance

The TRA must have regard to guidance published by the Secretary of State. Before publishing guidance, the Secretary of State must consult the TRA, and have regard to its expertise as well as the need to protect its operational independence and its ability to make impartial judgements. The Secretary of State may not publish guidance in relation to a specific trade remedies investigation.

Comment

The Bill establishes the TRA but says relatively little about its functions or the Government's approach to trade remedies. As noted above, the Trade White Paper sought feedback on the Government's approach to trade remedies. The *Taxation (Cross-border Trade) Bill* includes more details on how the new UK trade remedies framework will operate.

According to the Trade White Paper, the UK's approach to trade remedies will comply with the WTO's rules on trade defence and be based on principles of impartiality, proportionality, efficiency and transparency. The level of duties will be based on the level of injury caused by the dumping or subsidy.¹⁰¹ This is the "lesser duty rule" which requires the anti-dumping duties to address the injury caused by dumping rather than eliminate the dumping margin.

There have been concerns that the EU could allow higher anti-dumping duties after Brexit, as the UK, which has been an advocate of the lesser duty rule, would no longer be part of the EU. Industry groups argue that this could leave the UK more exposed to dumped imports than the EU or US. An article in *The Times* quoted a Department of International Trade official as saying "we take the view that the lesser duty rule makes a lot of sense ... if other people decide they want to go a different way, that's their business."¹⁰²

Questions have been raised about the independence of the TRA and whether the proposed system concentrates too much power in the hands of the Secretary of State. Legal experts told the International Trade Committee that the proposed system risked putting a dangerous amount of power in ministers' hands. Michael Clancy, of the Law Society of Scotland, told the Public Bill Committee on the Trade Bill, that

¹⁰⁰ [Trade Bill Explanatory Notes](#), para 110

¹⁰¹ Department for International Trade, [Preparing for our future UK trade policy](#), Cm 9470, October 2017, p35

¹⁰² Britain "will be target for steel dumping by China", *The Times*, 9 November 2017

the independence of the TRA could be improved by limiting the tenure of members of the TRA.¹⁰³

Margot James, Minister for Small Business, Consumers and Corporate Responsibility, told the House of Lords EU Internal Market Sub-Committee:

It is appropriate that the new body is set up as an arm's length body in order to demonstrate and preserve its impartiality, as decisions on trade remedies cases can have significant effects on markets.¹⁰⁴

The composition of the TRA is also important. Cliff Stevenson, a specialist adviser to the Manufacturing Trade Remedies Alliance (MTRA), told the Bill Committee:

In terms of this Bill, the composition of the members is very important to look at because, if all the members thought trade remedies were protectionist, we would never get any trade remedies through—or all members might believe that trade remedies were essential. You would want to ensure that there is some balance in there.¹⁰⁵

The Bill Committee heard evidence that the TRA should represent interests from employers and trade unions and that there could be a requirement for the Secretary of State to consult with various organisations before making appointments (as happens with the Health and Safety Executive).¹⁰⁶

On the issue of appeals, George Peretz QC told the Public Bill Committee:

If one looks at the customs Bill to find out where the appeal mechanism is—as a barrister, my first thoughts go to what the appropriate appeal mechanism is—all you find is a power of the Secretary of State to make appropriate regulations.

It is my personal view that that is somewhat unsatisfactory. There are a number of important questions that arise about appeals, one of which is very important, and that is what the appropriate standard of review is. Is it a merits review, which enables a specialist appeal court to correct the decision maker on questions of fact as well as questions of law, or is it simply a judicial review mechanism, where all the court is doing is saying, “Is this a reasonable decision, whether it is right or wrong?” It is a very important decision to make and it seems to me that that is one that ought to be made by Parliament in primary legislation and not by the Secretary of State or the Executive in a statutory instrument. That is a decision for you.¹⁰⁷

The Government is separately also consulting business on whether existing EU trade remedy measures should continue after Brexit.¹⁰⁸ The

¹⁰³ Trade Bill Deb 23 January 2018 c54

¹⁰⁴ [Letter](#) to Lord Whitty, chair of the House of Lords EU Internal Market Sub-Committee from Margot James MP, Minister for Small Business, Consumers and Corporate Responsibility, 20 November 2017

¹⁰⁵ Trade Bill Deb 23 January 2018 c65

¹⁰⁶ Trade Bill Deb 23 January 2018 c66

¹⁰⁷ Trade Bill Deb 23 January 2018 c53-54

¹⁰⁸ Department for International Trade consultation, [Call for evidence to identify UK interest in existing EU trade remedy measures](#), 28 November 2017

International Trade Committee heard differing views on the legality of the UK continuing to apply EU anti-dumping duties after Brexit. Bernadine Adkins of law firm Gowling WLG told the committee “it won’t be possible to grandfather the measures, otherwise you will face problems with the World Trade Organization.” The UK would have to carry out its own investigation before imposing duties. Edwin Vermulst, of law firm VVGB, told the committee:

It seems to me that that kind of measure can be maintained if you can show there is UK production, which obviously there is, and maybe we have to conduct a review in order to see, for example, whether the dumping margin that was calculated on an EU-wide basis would be different if it was supplied only for the UK. But I think that is what DIT’s plan is.¹⁰⁹

Gareth Stace, of UK Steel, thought grandfathering would be consistent with WTO rules. If the UK needed a new investigation post-Brexit, so would the EU, as its investigation was originally based on the EU market including the UK.¹¹⁰

3.6 International Trade Committee report on Trade Remedies Authority

Following a one-off [hearing](#) on the Trade Bill on 29 November 2017, the International Trade Committee launched an [inquiry](#) into the UK Trade Remedies Authority (TRA). In May 2018 the Committee’s published its [report](#).¹¹¹

The Committee stressed in this [report](#) that establishing a robust trade defence regime is critical to protect UK domestic industries against adverse trading practices and that the Trade and Customs Bills are important steps in this respect. However, the Committee concluded that “*the Bills do not yet have sufficient detail pertaining to the UK’s future trade defence framework*”. The Government should ensure that Parliament has adequate opportunity to scrutinize the coming trade defence regulations.¹¹²

The comments and recommendations of the Committee relating to the Trade Bill focussed on the capacity and delivery of the TRA, its appointments and structure, its functions, transparency of its work and the Bill’s lack of an appeals process with respect to the TRA’s decisions.

Capacity and delivery of the TRA

The Committee requested urgent assurance from the Government that the TRA could be fully operational by the Government’s self-imposed deadline of 29 March 2019.¹¹³ In response, the Government is regularly

¹⁰⁹ International Trade Committee, [The Trade Bill, Oral evidence](#), HC603i, 29 November 2017, Q21

¹¹⁰ MLex, UK plan to roll over EU dumping tariffs after Brexit risks WTO dispute, lawyers warn, 29 November 2017

¹¹¹ Third Report of Session 2017-19, [UK Trade Remedies Authority](#), HC 743, 10 May 2018

¹¹² Third Report of Session 2017-19, [UK Trade Remedies Authority](#), HC 743, 10 May 2018, para 17

¹¹³ [Urgent assurance needed over creation of Trade Remedies Authority](#), 10 May 2018

updating the Committee on the timeline of the TRA's establishment and the recruitment of process.¹¹⁴

If the UK could legally continue or 'grandfather' the EU's existing trade defence measures without new investigations, the TRA's potentially extensive initial workload could be brought down. In light of the uncertainty around this option, the Committee asked the Government to highlight its position in this matter and how it would reflect on TRA's work.¹¹⁵

TRA appointments and structure

During the inquiry, concerns were raised about how the powers of the Secretary of State to appoint TRA's Board members would affect the TRA's independence.¹¹⁶ In order to increase scrutiny of the recruitment process, the Committee said that the Government should amend the Trade Bill to require that appointments of the Chair should be conditional upon the Committee's approval. The Committee also expects to conduct a pre-appointment hearing with the proposed candidate for chief executive.¹¹⁷

The Department for International Trade was urged to publish guidelines as to the independence of TRA Board members and their role in the decision-making process for recommending trade defence measures. The Committee also drew attention to the proposed size of the TRA (nine members), and the need for diversity amongst its members, both in terms of experience and expertise.¹¹⁸

Functions of the TRA

The Committee stressed that the operational independence of the TRA and its freedom from political interference were crucial to the TRA's credibility. It recommended that the Government should publish guidelines for the Secretary of State on the TRA's operational independence. The Secretary of State should *"also publish a written summary outlining how he or she took into account the TRA's operational independence"* when issuing a direction to the TRA or publishing guidance. The Bill should be amended to reflect this.¹¹⁹

The Government should also amend the Customs Bill to remove the obligation for the TRA to perform an economic interest test in trade remedy cases. The Committee reasoned that performing such a test

¹¹⁴ [Letter](#) from Rt Hon Dr Liam Fox MP to Angus Brendan MacNeil MP, Chair of the International Trade Committee, 10 May 2018; [Letter](#) from Rt Hon Greg Hands MP to Angus Brendan MacNeil MP, Chair of the International Trade Committee, 11 June 2018

¹¹⁵ Third Report of Session 2017-19, [UK Trade Remedies Authority](#), HC 743, 10 May 2018, 10 May 2018, para 29

¹¹⁶ Third Report of Session 2017-19, [UK Trade Remedies Authority](#), HC 743, 10 May 2018 para 32-34

¹¹⁷ Third Report of Session 2017-19, [UK Trade Remedies Authority](#), HC 743, 10 May 2018, p4, para 43-44

¹¹⁸ Third Report of Session 2017-19, [UK Trade Remedies Authority](#), HC 743, 10 May 2018, para 45-46

¹¹⁹ Third Report of Session 2017-19, [UK Trade Remedies Authority](#), HC 743, 10 May 2018, para 63-64

could involve making essentially political decisions - a situation which could compromise TRA's independence.¹²⁰

Transparency and appeals process

In the interests of transparency, the Committee asked the Department for International Trade to publish detailed guidelines as to how the TRA should carry out the assessments of dumping and injury.¹²¹

Commenting on the absence of an appeals mechanism for the decisions of the TRA and the Secretary of State in both the Trade and the Customs Bills, the Committee stressed that *"it would be constitutionally inappropriate for Ministers to determine such mechanism in regulations without parliamentary scrutiny"*. The Committee called for the Government to amend the appropriate Bill in order to provide a right of appeal before a specialist tribunal where appeals should be determined 'on the merits'.¹²²

In response to this, the Minister confirmed that that the appropriate destination for appeals would be the Tax & Chancery Chamber (an Upper Tribunal) of the Unified Tribunals.¹²³

3.7 Clauses 7 and 8: Trade information

Collecting information on exporters

The Bill would give HM Revenue and Customs (HMRC) a new power to ask others for information to establish the identity and numbers of UK exporters.

The Government says that providing such information will be voluntary, suggesting that there is therefore *"no imposition on UK businesses of a requirement to provide the information"*.¹²⁴

According to the Government, the power will allow them to assess the number of exporters, in order *"to carry out functions linked to the provision of trade statistics and export trade promotion"*.¹²⁵

The Government can set out in regulations:

- the types of information to be collected, and
- how the request is to be made (for example via tax returns).

These regulations include a Henry VIII power as they may amend primary (as well as secondary) legislation. The Government says that the power might be used to amend primary legislation – in particular the tax

¹²⁰ Third Report of Session 2017-19, [UK Trade Remedies Authority](#), HC 743, 10 May 2018, para 60-62, 65

¹²¹ Third Report of Session 2017-19, [UK Trade Remedies Authority](#), HC 743, 10 May 2018, para 82

¹²² Third Report of Session 2017-19, [UK Trade Remedies Authority](#), HC 743, 10 May 2018, para 84-85

¹²³ [Letter](#) from Rt Hon Greg Hands MP to Angus Brendan MacNeil, Chair of the International Trade Committee, 11 June 2018

¹²⁴ [Trade Bill Delegated Powers Memorandum](#), para 69. The Government says that the voluntary basis for providing the information will be made clear in the instruments made under the power.

¹²⁵ [Trade Bill Delegated Powers Memorandum](#), para 65

Acts – where that is needed to provide the mechanism to collect the data.¹²⁶

The regulations are subject to the affirmative procedure if they amend primary legislation, and are otherwise subject to the negative procedure.

The Government suggests that the delegation of these powers is appropriate as the details of the information being collected and how it will be collected are “procedural matters that are administrative in nature” and that the actual questions to be asked are “secondary to delivery of the policy as a whole”.¹²⁷

Clause 7

Subsection 7(1) would give HMRC a new power to request information to help determine the number of UK exporters and their identities.

Subsection 7(3) would allow the Treasury to make regulations, by statutory instrument, to set out the types of information that may be requested and how the request is to be made. Subsection 7(4) states that such regulations may amend primary legislation.

Subsection 7(5) and 7(6) says that such regulations would be subject to the affirmative procedure if they amend primary legislation, and otherwise will be subject to the negative procedure.

HMRC information sharing

HMRC may only disclose the information they hold on taxpayers under certain limited circumstances – for example, to comply with a court order, or if the person to whom the information relates has given their assent. It is a criminal offence for HMRC officers to deliberately disclose information without lawful authority.¹²⁸

This Bill would allow HMRC to share information with other bodies for their public functions relating to trade – for example:

- With the Department for International Trade and the Trade Remedies Authority so that they can carry out the trade dispute and trade remedies functions that are currently fulfilled by the European Commission.
- With the Department for International Trade to allow it to produce statistics, research and analysis to inform the development of trade policy, and monitor and evaluate its effectiveness.¹²⁹
- With international organisations such as the WTO.¹³⁰

¹²⁶ [Trade Bill Explanatory Notes](#), para 71

¹²⁷ [Trade Bill Delegated Powers Memorandum](#), para 68

¹²⁸ Under s18 & s19 of the [Commissioners for Revenue & Customs Act \(CRCA\) 2005](#). The department’s [Manual on Information Disclosure](#) sets out these provisions in detail; see from [para IDG4000](#) onwards. See also, [HC Deb 10 July 2014 cc389-90W](#).

¹²⁹ Department for International Trade, [Trade Bill Factsheet](#), 7 November 2017

¹³⁰ [Trade Bill Explanatory Notes](#), para 75

This power will sit alongside one in the [Taxation \(Cross-Border Trade\) Bill](#), which will allow information to be disclosed relating to import duty (but only for purposes relating to customs duty).¹³¹

Clause 8

Subsection 8(1) would allow HMRC – or anyone acting on their behalf – to share information with public or private bodies for their public functions that relate to trade.

Subsection 8(2) states that anyone who receives information through this power may only use it for the purpose of public functions that relate to trade and may not share the information further (unless they have permission from the HMRC Commissioners). This restriction mirrors one in the *Commissioners of Revenue and Customs Act 2005*.

Subsection 8(3) states that offences and penalties – [in section 19 of the Commissioners of Revenue and Customs Act 2005](#) – may apply if such information is disclosed, should that information allow someone to be identified.

¹³¹ [Trade Bill Explanatory Notes](#), para 74

4. Delegated powers and the relationship with the *EUW Act*

4.1 Introduction

Delegated powers are central to the legislative scheme proposed by the *Trade Bill*. The main delegated power in the Bill, clause 2, is designed to *implement* any changes, using secondary legislation, to trade agreements into domestic law. This power can only be used to implement certain trade agreements: namely agreements with countries that the UK has an agreement with through the EU.

The Government has said that these new agreements will replicate the agreements currently in place through the UK's membership of the EU. In evidence to the International Trade Committee on 24 January 2018, Greg Hands, then Minister of State for Trade Policy, said that the agreements should "remain substantively the same".¹³² The powers in the Bill, in particular clause 2, will be used to implement "technical changes" made to these agreements.¹³³

The *Trade Bill* follows the approach of other Brexit Bills in that it sets out a legislative framework in an area of policy covered by EU law, and uses delegated powers to enable the Government to respond to different outcomes of the negotiations using secondary legislation. The changes made using the powers in this Bill will to an extent depend on the substance of the both the withdrawal agreement and the declaration on the future relationship. As such, how the powers in this Bill will be used will in part depend on the outcome of the vote on the agreements presented to Parliament when the negotiations are concluded.¹³⁴

Relationship with delegated powers in other Brexit Bills

The main power in this Bill, clause 2, should be read together with the powers in the *Taxation (Cross-border Trade) Bill*. Clause 2 of this Bill only enables the implementation of non-tariff measures while the *Taxation (Cross-border Trade) Bill* contains powers relating to custom duties (tariffs). For example, clause 31 of the *Taxation (Cross-border Trade) Bill* contains powers relating to customs union arrangements. Together the powers in these two Bills seek to cover all possible outcomes of the Brexit negotiations, including the contingency scenario of the UK leaving the EU without a negotiated agreement.

The justification put forward for clause 2 is in part based on the fact that this power would be able to make changes that could not be made under the powers in the *EUW Act*. Clause 2 of this Bill enables changes that go beyond those that can be made by the correcting power

¹³² [International Trade Committee Oral evidence: Continuing application of EU trade agreements after Brexit](#), HC 520 iv Wednesday 24 January 2018 Q244

¹³³ [Trade Bill Explanatory Notes](#), para 44

¹³⁴ Jack Simson Caird, [Parliament and the withdrawal agreement: the "meaningful vote"](#) 9 February 2018

(originally clause 7 now section 8) in the *EUW Act*. Further this power is subject to different safeguards; for example, this power can survive on the statute book for ten years post-exit, whereas the life of the correcting power in the *EUW Act* is limited to two years post-exit. The power in the *Trade Bill* also enables EU-third country agreements which had not been fully implemented by EU law before exit, and therefore will not be copied over by the *EUW Act*, to be implemented in domestic law.¹³⁵

4.2 Clause 2(1)

Clause 2(1) enables Ministers to implement certain international trade agreements using secondary legislation.

The purpose of clause 2(1) is limited to implementing the international trade agreements that meet the specified statutory definition set out in 2(2), 2(3) and 2(4). The Delegated Powers Memorandum emphasises that clause 2 is framed so as to enable secondary legislation to be made to implement adjustments resulting from the need to make changes, arising from Brexit, to the agreements between the EU and partner countries that will be maintained post-exit.¹³⁶ Some of these adjustments will be “textual” in nature and may only result in changes to domestic legislation in order to ensure its continued “operability”.¹³⁷

The Delegated Powers Memorandum also, however, notes that the clause 2 power is “broad enough” to also enable the implementation of “substantial amendments, including new obligations”.¹³⁸ The scope of the power is not limited to changes which are “technical” in nature.

This can be distinguished from original clause 7 of the *EUW Bill*, which was designed to cure “deficiencies” in retained EU law. The Explanatory Notes to this Bill explain that EU legislation, made before exit day, which implements trade agreements will be converted by the *EUW Act*.¹³⁹ Further, this retained EU law will be able to be corrected through the powers designed to correct deficiencies in retained EU law (now section 9) of the *EUW Act*.

The Explanatory Notes add that some trade agreements will not have been implemented by EU legislation before exit day; therefore, a specific power is needed for this purpose, and this is one of the tasks that clause 2 is designed to deal with.¹⁴⁰ Similarly, if a trade agreement made between the EU and a third country needs to be adjusted to work for the UK after exit day, the clause 2 power is required to implement the relevant changes to domestic law.

¹³⁵ [Trade Bill Explanatory Notes](#), para 41 and 42; If a transition period is agreed, and EU law automatically takes effect during that period then this change could occur through the relevant primary legislation that provides transition.

¹³⁶ [Trade Bill Delegated Powers Memorandum](#), para 45

¹³⁷ [Trade Bill Delegated Powers Memorandum](#), para 46

¹³⁸ [Trade Bill Delegated Powers Memorandum](#), para 46

¹³⁹ [Trade Bill Explanatory Notes](#), para 41

¹⁴⁰ [Trade Bill Explanatory Notes](#), para 42

Transition

Any EU legislation to implement agreements with partner countries which is made *after* exit day but *during* the transition period could take effect in UK law through any legislation which implements the transition period. The Government has announced it will bring forward a Withdrawal Agreement and Implementation Bill to provide the legislative basis for any transition period agreed as part of the withdrawal agreement. This Bill could enable any EU law made during this period to have effect in UK law automatically, as it does currently through section 2(1) of the ECA, but for a time limited period.

A power to amend primary legislation that is retained EU law

The delegated power in clause 2(1) expressly, in clause 2(6)(a), enables changes to be made to “primary legislation that is retained EU law”. As a consequence, the Delegated Powers Memorandum confirms that the power qualifies as a Henry VIII power.¹⁴¹ The Delegated Powers Memorandum adds that the express provision means that other primary legislation, which is not retained EU law, cannot be amended by clause 2(1).

Section 6(7) of the *EUW Act* provides the definition of retained EU law:

“retained EU law” means anything which, on or after exit day, continues to be, or forms part of, domestic law by virtue of section 2, 3 or 4 or subsection (3) or (6) above (as that body of law is added to or otherwise modified by or under this Act or by other domestic law from time to time)

Although not stated expressly on the face of the Bill, clause 2(1) could be used to amend retained EU law which is not primary legislation.¹⁴² This would include, for example, EU regulations converted by section 3 of the *EUW Act*. This body of law defined as “retained direct EU legislation” is neither primary nor secondary legislation. Clause 2(6)(a) sets out a list of what regulations under 2(1) can be used “among other things” to legislate for. Therefore, it is not an exhaustive list of what clause 2(1) regulations can be used to achieve.

Explicit reference to powers relating to retained EU law is not required as paragraph 3 of schedule 8 of the *EUW Act* provides that powers (including pre-exit powers) to make subordinate legislation may be exercised, so far as the context permits or requires, to modify retained direct EU legislation.¹⁴³ Retained direct EU legislation is to be converted into domestic law by section 3 of the *EUW Act*, and is estimated to include over 20,000 EU regulations.

The reference to retained EU law that is primary legislation in clause 2(6)(a) illustrates that the statutory concepts created by the *EUW Act* are

¹⁴¹ [Trade Bill Delegated Powers Memorandum](#), para 50

¹⁴² [Trade Bill Delegated Powers Memorandum](#), para 50

¹⁴³ Furthermore, paragraph 11 of schedule 8 amends the definition of “enactment” in Schedule 1 to the Interpretation Act 1978 (words and expressions defined) so that it includes “retained direct EU legislation” - Department for Exiting the European Union—Written evidence to the HL Constitution Committee (EUW0036)

likely to feature in much of the primary legislation designed to prepare the statute book for Brexit.¹⁴⁴ The Delegated Powers Memorandum confirms that the body of primary legislation that can be amended by clause 2(1) is not fixed and can be added to after exit day.¹⁴⁵

The drafting of clause 2(6) of the *Trade Bill* reflects the fact that there are different forms of domestic legislation within retained EU law, including secondary legislation preserved by section 2(2)(a) of the *EUW Act*, and this will affect how powers to amend retained EU law are drafted.

A connected issue is that it may prove difficult to identify what primary legislation is caught by section 2 of the *EUW Act* and, therefore, forms part of the primary legislation that can be amended by clause 2(1) of the *Trade Bill*. Section 2(2)(d) of the *EUW Act* brings any legislation made before exit “relating otherwise to the EU or the EEA” within the definition of retained EU law.

During debate in the Public Bill Committee, Greg Hands, then Minister of State for Trade Policy, said that the power to change retained EU law would be used to implement “technical changes” to make sure that these agreements operate after exit day.¹⁴⁶ He also sought to allay concerns about the potency of a power to amend retained EU law that is primary legislation:

We should also note that, as little primary legislation is retained EU law, this is a highly restricted so-called Henry VIII power. Let me be clear that this power cannot be used to amend the vast body of primary legislation that is not retained EU law—that is in line with our intention to use the power only to maintain the effects of our existing trade agreements.¹⁴⁷

The precise scale of retained EU law that is primary legislation is difficult to estimate; however, it is clear that as the power could be used to change the entire body of retained EU law, it covers a significant proportion of the post-exit statute book.

Safeguards

The safeguards accompanying these powers are different from those in the *EUW Act*. For example, the correcting power in section 8 of the *EUW Act* can only be used for two years after exit day (section 8(8)). By contrast, under clause 2(8) of this Bill, regulations under clause 2(1) to implement international trade agreements can be made up to five years from exit day, and the Secretary of State can make regulations to extend this time period by further periods of up to five years. Regulations to extend the time period are subject to the affirmative resolution procedure (Schedule 2, paragraph 4).

¹⁴⁴ Clause 1 of the [Nuclear Safeguards Bill](#) provides that the delegated power in section 113(7) of the Energy Act 2013 can be used to make changes to “retained EU law”, as defined by the European Union (Withdrawal) Act; The Sanctions and Anti-Money Laundering Bill [HL] also contains a number of references to “retained EU law”.

¹⁴⁵ [Trade Bill Delegated Powers Memorandum](#), para 50

¹⁴⁶ Trade Bill Deb 30 Jan 2018 c166

¹⁴⁷ Trade Bill Deb 30 Jan 2018 c166

In the Public Bill Committee, Greg Hands justified the longer life of this power on the following basis:

Since this power may be required to ensure the operability of transition agreements beyond the five-year period, potentially indefinitely, it is important that the Government have the option to extend the use of the clause 2 power.

For example, the power might be needed so that we can make technical changes to agreements after exit day to ensure that they remain operable on a longer-term basis. To give a specific example, in the case of a transitioned mutual recognition agreement, we may need to change secondary legislation to update the names of awarding bodies in third countries so that UK businesses can continue to use such bodies legally. Alternatively, where our trade agreements refer to international standards—we debated environmental and labour protection earlier, for example—we may need the power to update those references in domestic legislation to ensure that we remain compliant with our international agreements.¹⁴⁸

All the regulations under clause 2(1) of the *Trade Bill* would be subject only to the negative resolution procedure, whereas certain types of regulation under the *EUW Act* require the affirmative resolution procedure.

And the *Trade Bill* does not specify restrictions on the use of these delegated powers to match those in sections 8 and 9 of the *EUW Act*. Those clauses specify, for instance, that regulations made under them may not make retrospective provision, create a “relevant criminal offence”, or amend, repeal or revoke the *Human Rights Act 1998*. This reflects the fact that the *Trade Bill*’s powers have a much narrower purpose than those in the *EUW Act*.

How will the power be used?

Clause 2 of the Bill is not legally limited to making “technical changes” to legislation, and this has led some to question whether the powers in the Bill could also be used to implement legislative changes that result from any substantive renegotiation of the rolled over agreements.¹⁴⁹ In response the Government has argued that substantive revisions to existing deals would not be made as part of this roll-over process, and as a result if such changes were made, they would not be implemented through the powers in this Bill. Substantial changes would in effect mean that the agreement would, as the Government has emphasised, be a new trade deal, and would not be implemented through this legislation which is exclusively designed for the “transitional adoption” process.

Professor Derrick Wyatt QC, in evidence to the International Trade Committee, argued that the scope of powers would enable substantial changes, if any were made to these agreements as part of the “transitional adoption” process, to be implemented:

¹⁴⁸ Trade Bill Deb 30 Jan 2018 c203

¹⁴⁹ For example: [Written evidence submitted by Dr. Holger Hestermeyer, Shell Reader in International Dispute Resolution, King’s College London](#) (TB24)

This is not just about rollover. This is about any agreement potentially over the next 10 years that the UK is party to with another country not in the EU which at the time of Brexit had an EU trade agreement. We are talking about maybe four years down the track—when the UK has rolled over an agreement and they are changing it, they are renegotiating it.¹⁵⁰

Wyatt pointed out that the powers enable the implementation of all the content of any agreements made with a relevant party. The powers do not distinguish on the basis of the content of such agreements. In legal terms, this means that the powers could be used to implement significant changes to existing agreements, even if the Government has said that it does not intend to use the powers in this way. Wyatt also draws attention to the power's lifespan, which is set at five years after exit day, but can be extended by secondary legislation to ten years after exit day (subsection 2(8) and 2(9)).

The Government acknowledges that the way the powers are framed means that Parliament will need to be reassured as to how they are intended to be used:

It is recognised that Parliament will want considerable assurances from the Government that this power will not be used beyond what is necessary to ensure a seamless transition of the agreements.¹⁵¹

Dr Brigid Fowler, senior researcher at the Hansard Society, draws attention to the statement in the Explanatory Notes, that it might “be necessary to substantively amend the text of the previous EU agreements”.¹⁵² Fowler also notes that the Delegated Powers Memorandum says that the clause 2 power is “broad enough to allow implementation of substantial amendments, including new obligations”.¹⁵³ This would imply that the power is designed to enable the Government to implement changes to agreements, even if the Government's preferred option is that there are no changes to these agreements during the transition period. In other words, the power provides more legal discretion than is needed to execute the Government's preferred approach to “transitional adoption”, so as to operate as contingency if more substantive changes are made to the relevant agreements. The Government is not therefore able to restrict the legal scope of the powers to match their intended use, as to do so would restrict the powers' ability to be used in a contingency scenario where the Government did not secure its preferred option.

When will the power be used?

The UK Government and the EU are currently negotiating a transition or implementation period, during which the UK would continue to be

¹⁵⁰ [International Trade Committee Oral evidence: The Trade Bill, HC 603i Wednesday 29 November 2017](#)

¹⁵¹ [Trade Bill Delegated Powers Memorandum](#), para 57

¹⁵² [Trade Bill Explanatory Notes](#), para 53; Brigid Fowler, [Trade Bill highlights Parliament's weak international treaty role](#), Hansard Society Blog, 9 January 2018

¹⁵³ [Trade Bill Delegated Powers Memorandum](#), para 46; Brigid Fowler, [Trade Bill highlights Parliament's weak international treaty role](#), Hansard Society Blog, 9 January 2018

bound by EU law “as if it were a Member State”.¹⁵⁴ The UK Government is proposing that rather than making new agreements to replace existing bilateral agreements between the EU and third countries, these agreements will be rolled over without change for the duration of the transition period. The note explains that the third parties would need to agree that “the relevant terms in these international agreements, such as “European Union” or “EU Member State”, [should be read] to include the UK”. This would mean that for the purposes of these agreements, the UK leaving the EU will make no practical difference for the duration of the transition period.

Dr Holger Hestermeyer, from Kings College London, points out that even if these agreements are continued through an exchange of notes, they would constitute “new agreements”. Hestermeyer explains that a new arrangement constitutes a treaty under international law, as the Vienna Convention on the Law of Treaties refers to an agreement “whether embodied in a single instrument or in two or more related instruments and whatever its particular designation”.¹⁵⁵

In terms of the delegated power in clause 2 of this Bill, this could mean that there would not need to be any changes to these agreements that require implementation before exit day, and to take effect on the moment that the UK leaves the EU. If this arrangement only applies until the end of the transition period, the clause 2 power could then be used after exit day, during the transition period, in order to implement changes to agreements or new agreements, which would take effect once the UK is no longer bound by EU law “as if it were a Member State”.

At this point any new bilateral agreements entered into to replace those continued during transition, which include new obligations that reflect the UK’s new relationship with the EU, could take effect using the clause 2 power. If these new agreements sought to replicate the existing agreements, and did not contain new obligations, then clause 2 could be used to make purely technical changes to ensure that the “new” agreements function effectively after the end of the transition period.

If the UK does not secure a transition period, or if this proposal is not accepted, then the power could be used before exit day to implement any changes made to new agreements covered by the definition in clause 2(3) which would take effect when the UK leaves the EU.

Approval or implementation?

This Bill, and the powers within it, would not determine how Parliament will be involved in the process of scrutinising or approving the substance of future trade agreements. In committee, Greg Hands explained that

¹⁵⁴ [EU Negotiating directives](#), 29 January 2018, para 13

¹⁵⁵ [Written evidence submitted by Dr. Holger Hestermeyer, Shell Reader in International Dispute Resolution, King’s College London](#) (TB24) para 5

the Government would bring forward proposals that set out how Parliament will “interact with future trade agreements”.¹⁵⁶

In evidence to the Public Bill Committee, Nick Dearden, Director of Global Justice Now, summarised the problem with viewing legislative implementation of agreements as a route for parliamentary influence:

On the public policy aspects of trade deals, traditionally we thought that we did not need to worry about whether we ratified the trade deal, because Parliament would have the power to authorise implementing legislation for the various things that we needed to do to put the trade deal into effect. There is a problem with that: once a trade deal is signed and ratified, it really makes no difference whether Parliament enacts that legislation or not—we are committed to it under international treaty. It is too late to say no. Normally, we do not intend to say no—we have done the deal—but if there was a real dispute, and Parliament said, “We have a problem with that”, we would have real difficulty in stopping it, because we had already agreed to do it. Various things that impact on public policy are never brought forward for implementation as legislation anyway.¹⁵⁷

If Parliament refused to implement an agreement that had been signed and concluded this would not necessarily result in any changes to the substance of the agreement.

In a similar vein, Professor Derrick Wyatt, in evidence to the International Trade Committee, argued that effective parliamentary oversight over the substance of the legal changes, which will eventually be made through the powers in the *Trade Bill*, would come through the “supervision of the negotiations and through a formal role in approving agreements, rather than through supervision of legislative implementation”.¹⁵⁸

Parliament’s principal opportunity to vote upon the substance of the UK’s future trade policy as it relates to the EU will be through the planned vote on a resolution to approve both the withdrawal agreement and the declaration on the future relationship, which is expected in Autumn 2018.¹⁵⁹

4.3 Scrutiny of secondary legislation

The Government proposes that regulations to implement the GPA; to reflect the accession of a party to, or the withdrawal of a party from, the GPA; and regulations implementing international trade agreements should be subject to the negative procedure.

GPA

Regulations to implement the GPA would be needed after a Treaty enshrining any agreements had been ratified.

¹⁵⁶ Trade Bill Deb 25 Jan 2018 c151

¹⁵⁷ Trade Bill Deb 25 Jan 2018 Q19

¹⁵⁸ [International Trade Committee Oral evidence: The Trade Bill, HC 603i Wednesday 29 November 2017](#)

¹⁵⁹ Jack Simson Caird, [Parliament and the withdrawal agreement: the “meaningful vote”](#) 9 February 2018

The Government argued, in the Delegated Powers Memorandum, that legislative changes need to be implemented quickly because GPA obligations enter into force after a 30-day waiting period; and before any agreements are ratified there is opportunity for parliamentary scrutiny of the Agreement (through the Treaty process in CRAGA). The Government also noted that existing GPA obligations were implemented through regulations subject to the negative procedure under the *European Communities Act 1972*.¹⁶⁰ However, existing agreements would have been scrutinised by the European Scrutiny Committee before negative SIs were laid, whereas there is no automatic scrutiny under the CRAGA arrangements (see section 6 below).

The Government argued that regulations to reflect changes in GPA members needed to be implemented quickly as accession to, and withdrawal from, the GPA take place after 30 and 60 days, respectively. Using the negative procedure would “allow the UK to amend its legislation quickly to reflect new accession and withdrawals”.¹⁶¹

Trade agreements

The Government argued that regulations to implement international trade agreements, derived from EU trade agreements, would “allow the implementation of obligations that are intended to, as far as possible, reflect existing obligations which form part of trade agreements between the EU and partner countries. These have already been through a domestic Parliamentary scrutiny process, so the Department considers that the negative procedure offers the appropriate level of further scrutiny”.¹⁶² However, it acknowledged that the “power is broad enough to allow implementation of substantial amendments, including new obligations”.¹⁶³

In none of these cases would Members of Parliament or members of the House of Lords have any opportunity to amend the regulations brought forward by the Government. If Members objected to specific provisions, the whole regulation would need to be annulled in order to prevent those provisions having effect.

Members have expressed concerns that the Government does not provide time for debates on motions to annul statutory instruments within the statutory praying time,¹⁶⁴ thus denying the House the opportunity to overturn secondary legislation that is subject to the negative procedure.

The regulations in clause 7 (requesting export information) are generally subject to the negative resolution procedure. However, if they amend or repeal primary legislation, the regulations would be subject to the affirmative resolution procedure.

In its report on the *EUW Bill*, the House of Lords Delegated Powers and Regulatory Reform Committee noted the “long-established practice

¹⁶⁰ [Trade Bill Delegated Powers Memorandum](#), paras 14, 19 and 23

¹⁶¹ [Trade Bill Delegated Powers Memorandum](#), para 42

¹⁶² [Trade Bill Delegated Powers Memorandum](#), para 61

¹⁶³ [Trade Bill Delegated Powers Memorandum](#), para 46

¹⁶⁴ [HC Deb 11 September 2017 cc489-490](#)

whereby the Government have accepted the Committee's position that powers to amend primary legislation should be made in affirmative instruments save in exceptional cases".¹⁶⁵

Box 3: Outline of procedures for Parliamentary control of secondary legislation

Under the **affirmative procedure**, an instrument is usually laid before Parliament in draft and must be approved by both Houses before it may be made.¹⁶⁶

In the Commons, affirmative instruments are usually referred automatically to a committee for debate, with the approval motion then being taken without debate in the Chamber: it is rare for an approval motion to be debated on the floor of the House. It is generally understood that the Government will not arrange for debate on an instrument until the Joint Committee on Statutory Instruments has considered the instrument and reported on it.

In the Lords, affirmative instruments are always debated. Although there is no set timing for such debates, under House of Lords Standing Order 72 no motion to approve a draft affirmative can be taken until the Joint Committee on Statutory Instruments has reported on the instrument.

Where there is particular urgency for an instrument to come into effect, the parent act may provide for a **made affirmative** procedure, whereby an instrument may be made by a Minister before it is laid before Parliament, but must be approved within a specified period in order to continue in force.

Under the **negative procedure**, a statutory instrument is laid before both Houses,¹⁶⁷ usually after being 'made' (ie signed into law). Either House may within 40 days pass a motion that the instrument be annulled: this triggers a procedure whereby the Sovereign will annul the instrument.

The instrument may come into force at any time after it is made and remains in force until it expires or is revoked (by another instrument) or annulled.

In the Commons, MPs may signify their discontent with an instrument by tabling a 'prayer'—a motion requesting that the instrument be annulled. It is only effective if passed within the 40-day "praying time" stipulated in the *Statutory Instruments Act 1946*. Such 'prayers' may result in the instrument being referred to a committee for debate: it is rare for them to be debated and voted on in the Chamber.

In the Lords, instruments under the negative procedure are only considered in the Chamber if a peer specifically requests a debate.

Source: House of Lords Delegated Powers and Regulatory Reform Committee, *Special Report: Strengthened Statutory Procedures for the Scrutiny of Delegated Powers* (HL (2012–13) 19) para 5

¹⁶⁵ Delegated Powers and Regulatory Reform Committee, [European Union \(Withdrawal\) Bill](#), 28 September 2017, HL Paper 22 2017-19, para 102

¹⁶⁶ In some cases the parent Act may specify that the instrument is to be approved by the House of Commons only.

¹⁶⁷ In some cases the parent Act may specify that the instrument is to be laid before the House of Commons only.

Comparison with the scrutiny procedure in the *EUW Act*

Brigid Fowler, Senior Researcher at the Hansard Society, has argued that the same scrutiny arrangements that apply to secondary legislation made under the *EUW Act* should apply to the *Trade Bill*:

The EU (Withdrawal) Bill was successfully amended at committee stage to incorporate a new sifting committee procedure so that MPs can sift all future EU (Withdrawal) Orders and recommend an upgrade in the level of scrutiny of those about which they have most concern. A key question is whether that mechanism will now be adopted for scrutiny of Orders arising from some very wide delegated powers in the Trade Bill.¹⁶⁸

Under the European Union (Withdrawal) Act 2018, [Schedule 7](#), ministers cannot lay negative SIs before committees in each House have considered proposals for negative SIs. These proposals for negative SIs are sifted by committees in each House. The committees can recommend whether the proposed SI should be subject to the draft affirmative procedure or clear it to proceed under the negative procedure. The sifting committees have 10 sitting days to report their recommendations. Ministers are not bound by the committees' recommendations but they cannot lay either the draft affirmative SI or the made negative SI until the 10 sitting days have elapsed.

In the Public Bill Committee, Greg Hands defended the procedure for clause 2 of the Bill:

That is why we are seeking a power that ensures that our transitioned trade agreements can be implemented in the nimblest and most efficient way possible, through the negative resolution procedure.¹⁶⁹

The Delegated Powers Memorandum on the Bill justifies the use the negative procedure for clause 2 on the basis that the agreement to be implemented have "already been through a domestic Parliamentary scrutiny process".¹⁷⁰

¹⁶⁸ Brigid Fowler, [Trade Bill highlights Parliament's weak international treaty role](#), Hansard Society Blog, 9 January 2018

¹⁶⁹ Trade Bill Deb 30 January 2018 c222

¹⁷⁰ [Trade Bill Delegated Powers Memorandum](#), para 61

5. Devolution

5.1 Summary

International relations, including treaty-making, is a reserved matter in the UK. The devolved executives and legislatures, therefore, have no formal role in negotiating or approving UK trade or other treaties, but may be involved informally.

As trade treaties are relevant to many areas of devolved responsibility, such as agriculture, the devolved authorities currently have responsibility for implementing EU trade agreements insofar as they concern their areas of competence.

The Bill gives the devolved authorities specific powers (under clauses 1 and 2) to implement the obligations arising from the GPA and the trade agreements falling within the scope of the Bill. However, these powers are subject to several restrictions, set out in Schedule 1 (see section 5.4 below).

Both the Scottish and Welsh Governments have recommended that their respective legislatures should withhold legislative consent for the Bill in its current form. Their objections to the *Trade Bill* are similar to those previously expressed with regard to the *EUW Bill*. The Welsh Government has since agreed to the passage of the *EUW Bill*, but only after significant changes were made to its devolution provisions. The *Trade Bill*'s drafting, at the time of writing, still shadows the approach taken to devolution by the original *EUW Bill* as introduced, rather than that taken in what is now the *EUW Act*. Both the Scottish and Welsh Governments are therefore likely to ask that changes are made to the *Trade Bill* at report stage.

Key concerns raised by the devolved authorities related to the exercise of delegated powers in devolved areas. The two devolved authorities believed that the scheme of concurrent delegated powers in the *Trade Bill* did not reflect the existing relationship between UK-wide and devolved institutions. They especially maintained that the Bill has inadequate safeguards against the exercise of delegated powers by UK Government ministers in relation to devolved matters. They also objected to certain additional restrictions that would be placed on a devolved authority exercising powers under clauses 1 and 2, which are not imposed on UK Government ministers exercising those same powers.

The *Trade Bill* does not address what role, if any, the devolved authorities might have in future treaty negotiations.

5.2 Existing role of devolved executives and legislatures

Negotiation of and agreement to treaties generally

There is no legal requirement under CRAGA (or other provisions) for the UK Government to secure the approval of, or to consult, the devolved

executives or legislatures on the terms agreed to under international treaties. Under all three devolution settlements, international relations, including treaty-making, remains the exclusive responsibility of the UK Government. There is, nevertheless, a recognition that the devolved administrations in Northern Ireland, Scotland and Wales need to be involved where a treaty has possible implications for devolved areas of responsibility.

The process of cooperation and consultation around negotiating and implementing treaties is set out in the Concordat on International Relations. It is one of 5 concordats re-enforcing the [Memorandum of Understanding](#) between the UK Government and the three devolved administrations.¹⁷¹

The Concordat promises cooperation on exchanging information, formulating UK foreign policy, negotiating treaties and implementing treaty obligations. It also provides for ministers and officials from the devolved administrations to form part of UK treaty-negotiating teams and for apportioning any quantitative treaty obligations, as well as imposing penalties should the devolved bodies default on any agreed liability. A recent example of this commitment operating in practice concerned the UK Government consulting the devolved administrations before ratifying Protocol 15 to the European Convention on Human Rights.¹⁷²

Notwithstanding this political undertaking of cooperation and consultation, and as Joanna Harrington (Professor of Law at the University of Alberta) has pointed out:

It is both implicit and explicit in the nature of the devolved arrangements that Westminster retains the ability to override the actions of any devolved body and it could do so to ensure the State's compliance with its international commitments.¹⁷³

The Scottish Parliament has a Committee on European and External Relations to monitor developments (though most of its work currently involves EU scrutiny).

Annex 1 of this paper looks at Treaty-making powers of federal EU states by way of comparison.

Implementation of treaties

Although the devolved administrations lack formal powers to negotiate or agree to treaties, they do have some formal responsibility for implementing obligations that have been imposed on the UK by treaty commitments. Some international obligations (whether or not they arose from EU law) can be achieved by an act or omission (or by the introduction of legislation) that falls within an area of devolved

¹⁷¹ [Memorandum of Understanding and Supplementary Agreements between the United Kingdom Government, Scottish Ministers, the Cabinet of the National Assembly for Wales and the Northern Ireland Executive Committee](#), October 2013

¹⁷² Ministry of Justice, [Explanatory Memorandum on Protocol No 15 Amending the Convention on the Protection of Human Rights and Fundamental Freedoms](#), Cm 8951, 2014

¹⁷³ J Harrington, 'Scrutiny and Approval: The Role for Westminster-Style Parliaments in Treaty-Making', 55 *International and Comparative Law Quarterly* 121 (2006), p150.

competence of the Scottish Ministers, Welsh Ministers or a Northern Ireland Department.

In those circumstances, the existing devolution statutes provide that those devolved authorities have a duty to act (and where relevant to legislate) in a way which is compatible with that obligation. Where a devolved authority does not voluntarily undertake to do so, UK Government Ministers may instruct that devolved authority to do so.¹⁷⁴

International obligations may leave an element of discretion as to the means by which a common objective can be achieved. Where this is the case, and meeting it would involve an exercise of functions falling within a devolved administration's executive competence, the relevant devolved authority is entitled to adopt different means than either the UK Government or one or more of the other devolved authorities for other parts of the UK. Where the Scottish Government has domestic responsibility for setting the procurement rules for bodies exercising devolved functions, it has introduced its own set of regulations separately from the UK Government.¹⁷⁵

Trade Policy

The regulation of international trade is a reserved matter notwithstanding the responsibilities devolved administrations have for implementing trade agreements.¹⁷⁶ As part of the European Union, the UK Government has therefore represented the interests of the devolved nations in negotiations concerning trade. This includes negotiations between Member States and with respect to those involving the EU and third countries.

When doing so, the UK Government consults, on a non-statutory basis, the devolved administrations, to take into account their views when preparing a UK position. The Joint Ministerial Committee (JMC) serves as a forum for consultation and coordination of the relationship between the administrations. The positions of devolved administrations on relevant EU matters are discussed in the JMC (Europe), which meets quarterly. The [Memorandum of Understanding](#) outlines how the powers of the UK Government and those of the devolved administrations operate concurrently with one another in this area to promote international trade and inward investment.¹⁷⁷

¹⁷⁴ The relevant Secretary of State may so order for the Scottish Ministers under [s58 Scotland Act 1998](#), the Welsh Ministers under [s82 Government of Wales Act 2006](#) or for a Northern Ireland Department under [s26 Northern Ireland Act 1998](#).

¹⁷⁵ [Section 1](#) and [Schedule](#) of the [Procurement Reform \(Scotland\) Act 2014](#) identifies the "contracting authorities" regulated by devolved procurement legislation in Scotland.

¹⁷⁶ [Schedule 5, Part I, sub-para 7\(1\) Scotland Act 1998](#), [Schedule 7, Part I, para 4 Government of Wales Act 2006](#) and [Schedule 3, para 20 Northern Ireland Act 1998](#)

¹⁷⁷ [Memorandum of Understanding and Supplementary Agreements between the United Kingdom Government, Scottish Ministers, the Cabinet of the National Assembly for Wales and the Northern Ireland Executive Committee](#), October 2013, D4.22 p59

5.3 Future role of devolved executives and legislatures

The UK Government's White Paper included a commitment to "seek the input of the devolved administrations to ensure they influence the UK's future trade policy, recognising the role they will have in developing and delivering it".¹⁷⁸ It invited comments on how this could be delivered.

Negotiation of and agreement to treaties

When the UK leaves the EU, future trading relationships with third countries are likely to concern the implementation of a UK trade policy, directly reflected in agreements with other States. Devolved administrations would therefore be implementing obligations created by the UK Government in domestic law. This differs from the existing situation, in which Member States implement EU trade policy and agreements between the EU and third countries. Member States' governments exert influence through the Council of the EU by setting the terms on which the European Commission may negotiate with third countries. Both the Council and the European Parliament decide whether to approve what has been negotiated.¹⁷⁹

Given that the EU will no longer exercise responsibility for this external function of trade policy and negotiation, devolved authorities will be expected to implement trade deals in a different context. It is not yet clear what or how much of a role devolved administrations will play in setting UK trade policy and priorities in negotiating future trade deals with third countries. Neither is it clear how formal any role will be.

An Institute for Government report [Taking back control of trade policy](#) (published in May 2017) argues that a "working arrangement" with the devolved administrations will be needed for future trade discussions:

... there is a clear need for the UK to create a model for engaging the devolved administrations in trade discussions. This should be part of the 'common framework' with the devolved administrations, which the Government, in its Great Repeal Bill white paper, said it needed to develop to coordinate policy after Brexit. This could include establishing a Joint Ministerial Committee on International Trade (there is already a Joint Ministerial Committee on EU Negotiations), but also will require official-level forums for discussion of more detailed policy issues. This would build on the existing methods of cooperation that are used when the UK lobbies Brussels on EU regulations and directives related to devolved areas.

If a working arrangement is not found, the Westminster Government will find itself either in a 'political hell' of making trade policy without reference to the devolved administrations, or negotiating deals that are limited in their scope.¹⁸⁰

¹⁷⁸ Department for International Trade, [Preparing for our future UK trade policy](#), Cm 9470, October 2017, p22

¹⁷⁹ Many Council decisions in this process will be taken by qualified majority vote ([Articles 207\(4\)](#) and [218\(8\)](#) *Treaty on the Functioning of the European Union*). Member States might therefore have to implement trade policy decisions with which their national Governments do not agree.

¹⁸⁰ Institute for Government, [Taking back control of trade policy](#), May 2017, p20

The approach taken to “working arrangements” can vary significantly depending upon a country’s broader constitutional settlement. Most notably, there are EU Member States with federal constitutions that proactively involve sub-State bodies in the ratification process of “mixed agreements”.¹⁸¹ Three key characteristics will determine the nature of any future UK working arrangements, and with that the relationship between the UK Government and devolved institutions concerning international trade.

Negotiation or Implementation

The UK Government will need to decide whether devolved authorities should have a substantive role in trade negotiations, or whether their role should be confined purely to implementing trade deals. The more constraints that are placed on the role of devolved authorities with respect to one aspect, the greater the emphasis devolved administrations will likely place on safeguarding their influence over the other.

Consultation or Consent

With respect to each stage of the trade deal process, the UK Government will also have to decide whether devolved involvement is principally one of consultation, or whether devolved executives or legislatures should have a role in consenting to key trade decisions. Stringent consent provisions could make it more difficult for the UK Government to secure agreement to certain types of trade deals, especially those affecting areas of devolved competence.¹⁸² Adopting consent provisions might also (indirectly) lead to greater levels of consultation at earlier stages in setting a negotiating mandate or priorities.

Consent and consultation provisions will also be important where the UK wishes to use concurrent powers in areas of devolved competence to implement any trade deal.

Legislative or non-legislative

Thirdly, the UK Government will need to establish whether working arrangements should take legislative form. At EU level, the process of trade agreement decision-making between governments happens through the Council of the EU. The rules for that process are set out in [Articles 207](#) and [218](#) of the *Treaty on the Functioning of the European Union*.

Within the UK, however, the involvement of devolved authorities in setting negotiating priorities occurs through the Joint Ministerial Committee. This approach has no legal underpinning. The influence of devolved authorities manifests itself as a form of soft power.

¹⁸¹ Annex 1 explains how the constitutional requirements of some Member States mean that sub-state bodies (e.g. in Belgium) have an effective “veto” over mixed agreements.

¹⁸² By analogy, it is more difficult for the EU to conclude mixed agreements (requiring unanimous ratification by all Member States) than those that only require a qualified majority vote in the Council of the EU.

The future balance between legislative and non-legislative constraints is a matter of continuing disagreement between the UK Government and the Scottish and Welsh Governments.¹⁸³

The Constitution and Legislative Affairs Committee of the National Assembly for Wales published a report on 2 February 2018, [UK governance post-Brexit](#). It called for the Joint Ministerial Committee structure to be put on a statutory footing (by amending the *EUW Bill*).¹⁸⁴ It also said there should be a dedicated forum within the JMC structure for single market and trade issues as the UK leaves the EU.

Implementation of future trade deals

The UK Government committed in its White Paper to introduce delegated powers for the devolved authorities. These would enable them to implement agreements which “touch on devolved matters”. It indicated these powers would be held concurrently with the UK Government, meaning that its ministers would also be able to exercise the same powers in devolved areas. This decision was taken to enable UK-wide regulations to be made “where it makes practical sense”. The UK Government insisted that these powers would “not normally” be exercised without the consent of the relevant devolved administrations, and said it would consult them where it proposed to do so.

The reasons given for this approach were that:

These powers will help to ensure continuity of our current trade and investment arrangements, support business certainty, provide greater flexibility, minimise legal risk, and reduce the volume of legislation resulting from EU exit.¹⁸⁵

The White Paper indicated that these powers would be used to transition existing agreements signed before EU exit, acknowledging that the legislative framework for implementing future trade agreements has not yet been decided.¹⁸⁶ Regardless of what might be agreed for future trade agreements, the UK Government and the Scottish and Welsh Governments disagree on whether the *Trade Bill* reflects and respects the existing role of devolved authorities. The latter believe that their delegated powers to implement agreements (in devolved areas) between the EU and third countries would be unduly restricted under these transitional arrangements.

Scotland

There are two distinct but related contentions being made in the context of the Scottish devolution settlement by those criticising this Bill and the wider approach of the UK to trade agreements. There is, firstly, an attempt to preserve the Scottish Government’s existing role in implementing the UK’s international obligations in devolved areas.

¹⁸³ See discussion of the legislative consent memoranda (below at 5.7)

¹⁸⁴ National Assembly for Wales Constitution and Legislative Affairs Committee, [UK governance post-Brexit](#), February 2018, p35

¹⁸⁵ Department for International Trade, [Preparing for our future UK trade policy](#), Cm 9470, October 2017, p28

¹⁸⁶ Department for International Trade, [Preparing for our future UK trade policy](#), Cm 9470, October 2017, p28

There is, secondly, an argument being made for prominent devolved involvement in the setting of negotiating priorities and in the approval of trade agreement treaties.

The former does not amount to a “consent” power, but the latter potentially could do so. Where devolved powers of implementation are more robust, it might be expected that the role of devolved authorities in influencing negotiating priorities will be more pronounced.

Scottish Government ministers currently participate along with UK Government ministers in Council of Ministers’ trade discussions with ministers from other EU Member states, in accordance with an agreed UK negotiating line and agreed priorities. This is not the same as them having a “veto” over trade deals, but provides an opportunity to influence negotiations and to articulate concerns, especially as to the implications of implementing deals in devolved areas. It is not clear whether this kind of participation will become a pattern for future international agreements conducted outside of an EU framework.

In its White Paper, [Scotland’s Place in Europe](#), the Scottish Government called for an enhancement of its current role in future trade negotiations with third states after Brexit:

The Scottish Government will need to take part in trade negotiations that impact on devolved competences. It will also need the ability to speak in international forums and to secure agreements with other countries. This could be achieved either through an arrangement with UK Government or by virtue of an independent international legal personality. To a significant extent the co-operation that Scotland will need to develop with other countries will be concerned with existing devolved areas, such as research, education and training and environmental policy. However, it will also need to encompass currently reserved matters.¹⁸⁷

In [written evidence](#) to the Public Administration and Constitutional Affairs Committee, Dr Tobias Lock (University of Edinburgh) has suggested Scotland needed formal external powers as well as internal ones:

In the absence of external powers for Scotland complementing its internal legislative powers, formal powers in areas largely determined by international agreements lead to a ‘policy squeeze’, which may mean that the role for the Scottish Parliament would in many fields be reduced to rubber stamping the implementation of international commitments entered into by the UK.¹⁸⁸

In evidence to the Scottish Parliament’s Culture, Tourism, Europe and External Relations Committee on 1 December 2016, Keith Brown (Cabinet Secretary for the Economy, Jobs and Fair Work) raised working with the UK Government during the process of discussions with third countries on free trade agreements. The committee was told:

¹⁸⁷ Scottish Government, [Scotland’s Place in Europe](#), December 2016, p43

¹⁸⁸ [Written evidence from Dr Tobias Lock](#), Public Administration and Constitutional Affairs Committee, Devolution and Exiting the EU Inquiry, October 2017, para 21

What we are seeking to do—quite successfully so far—is to work with the Department for International Trade to understand what it is working on and to see how best we can provide input to that work and ensure that Scotland’s interests are represented. The dialogue with the department at official level and, as the cabinet secretary mentioned, between ministers has been relatively good so far, and I certainly hope that that continues.¹⁸⁹

Ross Greer MSP, referring to the involvement of the Canadian Provinces in discussing the EU’s Comprehensive Economic and Trade Agreement with Canada (CETA), [asked](#): “Is there a case for the Scottish Government to start arguing for a serious statutory role in the negotiations, or at least in the approval of any final deal?” Keith Brown [replied](#) “It is almost our standing position that we want to have the maximum possible role”, and that “if a confederal country such as Canada can take a substantial cue from the needs of its provinces, we should be able to do that in the UK”.¹⁹⁰ In the conclusions of its report, [Determining Scotland’s future with the European Union](#), the Committee recommended:

... that a means is found to involve the Scottish Government in bilateral and quadrilateral discussions on future trade deals. This could include the creation of a Joint Ministerial Committee on International Trade. This could also include government officials and organisations such as Scottish Development International meeting regularly with their UK counterparts.¹⁹¹

Wales

The First Minister of Wales, Carwyn Jones, [told](#) the Welsh Assembly’s External Affairs and Additional Legislation Committee on 7 November 2016 that it was “hugely important” for Devolved Administrations and Legislatures to have a say in the negotiation of future agreements that will impact on Wales. He gave the example of a free trade agreement with New Zealand:

The impact of that might be to remove the current controls that exist on the import of New Zealand lamb. If they were to go, that would clearly be a great difficulty for Welsh lamb producers. That issue might not be as apparent in Whitehall as it is in Wales, and that’s one example there of why it’s important that the views of the devolved Governments are understood and the interests of the devolved nations are respected.¹⁹²

Mr Jones outlined a proposal for UK Government consultation and consideration of devolved views but, unlike the Scottish Government, did not propose direct Welsh involvement in free trade negotiations:

One way that could work is that the UK Government outlines what it wants to see, takes the views of the devolved

¹⁸⁹ SP OR CTEERC 1 December 2016, c20

¹⁹⁰ SP OR CTEERC 1 December 2016, c18

¹⁹¹ Culture, Tourism, Europe and External Relations Committee, [Determining Scotland’s future relationship with the European Union](#), 5 March 2017, SP Paper 99.1, 4th Report, March 2017 p6

¹⁹² National Assembly for Wales, External Affairs and Additional Legislation Committee, 7 November 2016, c134

Governments as to what the effect is on the devolved nations and then tailors its position accordingly.¹⁹³

In an [oral evidence](#) session for the Welsh Affairs Committee Inquiry on *Brexit: Agriculture, Trade and the Repatriation of Powers* on 24 October, the Chair, David T. C. Davies was concerned about the possibility of a devolved veto power over future trade agreements. He asked ([Q67](#)) whether having “slightly different rules and regulations in the different parts of the United Kingdom” could “effectively give the nation states a veto or at least a huge say over any future trade arrangements that were made”.

He gave a hypothetical example ([Q68](#)) in which the Welsh Assembly decided not to allow chlorinated chicken in Wales although the UK Government wanted to agree a free trade deal with the United States, which insisted on exporting chlorinated chicken to the UK. Would this allow Wales to effectively veto a UK trade agreement with the US?

Dr Llewelyn Jones (Agri Advisor Legal LLP) thought “we are in that position already with GM, though, aren’t we? I do not think it is a thing that we are not coping with at the moment”. Dr Jo Hunt (Cardiff University) (responding to [Q70](#)) similarly thought the consequences of a devolved veto might not prove practically significant:

As things stand, there is not that veto power, so whatever trade deal was done would be done with whatever consequences. Whether Wales then introduced legislation to ban the sale or ensure a certain type of labelling, or whatever, it might be that the trading partner would consider the market was big enough without Wales.

¹⁹³ National Assembly for Wales, External Affairs and Additional Legislation Committee, 7 November 2016, c136

Box 4: Case study – GM crops and implementing EU directives

Regulation of GM crops is a policy area where EU laws (on which trade deals between the EU and third countries are predicated) afford discretion to Member States.¹⁹⁴ Both the Scottish and Welsh Governments (having competence over agriculture) exercised this discretion to prohibit EU approved GM crops from being grown in their territories.

This is an example where making a clear distinction between “negotiation” and “implementation” of trade agreements is constitutionally and practically important. Neither devolved authority “vetoed” something otherwise agreed to by the UK Government and other countries. The discretion enjoyed by the devolved authorities when implementing [EU Directive 2015/412](#) was integral to the instrument imposing obligations on the UK in the first place.

How could compliance with a common standard have been secured?

Had EU law imposed a blanket obligation on Member States, to permit the growing of approved GM crops, neither of the devolved authorities would have been able to defy it under the existing constitutional arrangements. The UK Government can already direct a non-compliant devolved authority to take steps within its competence to comply both with EU and/or international law.¹⁹⁵

Can the UK Government impose a common standard in the absence of an international obligation to do so?

Had the UK Government sought to introduce a uniform set of rules on whether GM crops should be allowed to be grown throughout the UK, it would have imposed additional domestic limits on the powers of devolved authorities. This would go beyond taking the necessary steps to ensure that the UK was complying with its international obligations in devolved areas. The devolved authorities argue that it would be inappropriate in those circumstances for the UK Government to legislate in that way without first securing their consent.

What if sub-State bodies had a veto over trade agreements?

If the UK’s constitutional settlements were to give greater influence to devolved authorities at the stage of negotiating or approving a trade treaty, this could affect behaviours and incentives in two important ways. This is more likely to happen in cases, like with GM crops, where the UK Government and devolved authorities disagree on policy grounds.

Firstly, such a consent mechanism would give devolved authorities leverage to demand that UK trade policy is compatible with their policy priorities. As with the treatment of GM crops by the EU, this might mean trade deals the UK agreed to would confer broad discretion as to implementation where policy areas are contentious.

Secondly, and relatedly, this might mean that the UK would not enter into (as comprehensive) trade agreements with countries that sought a guarantee that (e.g.) GM crops could be grown throughout the UK.

Advocates of such a veto would emphasise the former impact. The UK Government’s likely opposition to such a veto reflects anxieties about the latter.

¹⁹⁴ [EU Directive 2015/412](#) on the possibility for the Member States to restrict or prohibit the cultivation of genetically modified organisms (GMOs) in their territory

¹⁹⁵ [s58 Scotland Act 1998](#), [s82 Government of Wales Act 2006](#) and [s26 Northern Ireland Act 1998](#)

Northern Ireland

There are circumstances specific to Northern Ireland, and its land border with the Republic of Ireland, that give its role and prominence in relation to trading relationships particular importance. There are, in addition, a unique set of challenges in relation to Northern Ireland as far as the *Trade Bill* is concerned. These challenges also extend to the working arrangements that may be put in place to involve devolved authorities in future trade deal negotiations and the implementation of those deals in devolved areas.

Three aspects of the political situation in Northern Ireland distinguish it from Scotland and Wales.

- The Northern Ireland Assembly elections of March 2017 failed to create the conditions for a new Executive to be formed: Northern Ireland presently has no devolved authority.
- The House of Commons' Trade Bill Committee includes no MPs from any of Northern Ireland's constituencies.
- The abstentionist policy of Sinn Féin candidates elected to the Westminster Parliament gives rise to an unbalanced representation of Northern Ireland's political composition on two key cleavages: both Unionist/Nationalist and Leave/Remain.

The first difference has two important implications. Firstly, the absence of a Northern Ireland Executive leaves only the UK Government capable of giving effect to international obligations in devolved areas in Northern Ireland. Until that position changes, this means (unlike with Scotland and Wales) there will effectively only be one "appropriate authority" capable of making regulations in Northern Ireland under the *Trade Bill*.¹⁹⁶ Secondary legislation implementing trade agreements may be undertaken, unilaterally, by Ministers of the Crown, covering areas of devolved competence in Northern Ireland.

Secondly, it has not been possible for Northern Ireland to use its devolved institutions to express a view on the devolution provision contained in the *Trade Bill*. No legislative consent memorandum has been published on the Bill, and the Assembly is not in a position either to grant or withhold legislative consent for the provisions that affect the powers of the Northern Ireland Departments.¹⁹⁷ As and when an Executive is formed in the future, it may end up exercising powers conferred by the *Trade Bill's* scheme, the creation of which it had no opportunity to scrutinise.

This second issue might be thought particularly important, given the limited avenues available for Northern Ireland's interests to be represented directly as the *Trade Bill* progresses through the UK Parliament. At Committee Stage, MPs representing both Scottish and Welsh constituencies had the opportunity to, and did, raise concerns about how the Bill would affect the devolution settlement in their

¹⁹⁶ clause 4

¹⁹⁷ Unlike the Scottish Parliament or Welsh Assembly. See below section 5.7

respective nations.¹⁹⁸ There was co-ordination between devolved authorities and Westminster MPs representing devolved constituencies in scrutinising (and proposing amendments to) the Bill.

This was not an opportunity that was available to their counterparts representing constituencies in Northern Ireland. In terms of scrutiny and influence beyond Committee Stage, the abstentionist policy of Sinn Féin MPs means that what influence Northern Ireland's Parliamentarians do have will not necessarily reflect the position that would have been adopted by a power-sharing Executive.

In terms of developing "working arrangements" for trade agreements going beyond the scope of the *Trade Bill*, the same challenges are equally present. Normally, both the First Minister and Deputy First Minister for Northern Ireland attend the Joint Ministerial Committees. A senior civil servant has attended on Northern Ireland's behalf in the absence of a power-sharing Executive.¹⁹⁹ If proposals are brought forward to develop and/or formalise that process of intergovernmental engagement, it is not clear how Northern Ireland can (equitably) influence those changes without an Executive to represent it.

5.4 Impact of the Bill on the devolution settlements

Power to make regulations: limits on devolved authorities

The powers to make regulations under clauses 1 and 2 of the *Trade Bill*, apply to "appropriate authorities". These include not just Ministers of the Crown but also devolved authorities, or a combination of both acting jointly. This means devolved authorities can make regulations to implement or otherwise subsequently give effect to changes to:

- the 1994 GPA;
- the Revised GPA; or
- an international trade agreement to which the United Kingdom is a signatory.

All of the restrictions on Ministers of the Crown making these regulations also apply to the devolved authorities. There are, however, additional restrictions imposed on a devolved authority seeking to make regulations to implement these international agreements.

Devolved competence limitation

Every provision in secondary legislation made by a devolved authority would also have to be within the devolved competence of that authority.²⁰⁰ The tests are defined separately for each devolved authority.

¹⁹⁸ See below at section 7.2

¹⁹⁹ [Joint Ministerial Committee \(EU Negotiations\) Communiqué](#), 12 December 2017

²⁰⁰ Schedule 1, para 1

For Scottish Ministers the test is whether the provisions could be made under existing Ministerial powers to make subordinate legislation, or would be within legislative competence if contained in an Act of the Scottish Parliament, disregarding the restrictions on modifying retained EU law (because the regulations derive from a UK undertaking).²⁰¹

For Welsh Ministers the test is the same as for Scotland, save for the fact it refers to the competence of an Act of the Legislative Assembly.²⁰²

For Northern Ireland departments, the test is modified slightly to take account of differences in the way devolution works there. A provision is within a department's competence if it could be made in other subordinate legislation by a Northern Ireland department or Minister, or if it would be within the competence of the Assembly and would not require consent from the Secretary of State, or if it would be within competence, would require consent, but amends or repeals Northern Ireland legislation.²⁰³

Retained EU law limitation

Unlike Ministers of the Crown, devolved authorities are prevented from making regulations which would either modify or be inconsistent with:

- retained direct EU legislation²⁰⁴;
- retained EU law as defined by section 4 of the *EUW Act*; or
- a modification to EU law made by (or by a Minister of the Crown acting under the authority of) the *EUW Act*.²⁰⁵

This means, for instance, that devolved authorities cannot modify retained EU regulations, nor can they make changes to any part of retained EU law that the UK Government has already modified using its broad powers contained in the *EUW Act*. What they would be able to modify under the *Trade Bill* is domestic derived EU legislation (i.e. that covered by section 2 of the *EUW Act*) for the purposes of implementing the agreements covered by the Bill.

UK Government “veto” over regulations made by a devolved authority

If a devolved authority seeks to make regulations under the *Trade Bill* which:

- come into effect before the UK leaves the EU;²⁰⁶ or
- concern (or would be incompatible with) quota arrangements between different parts of the UK for meeting or benefitting from an international obligation,²⁰⁷

it must first obtain the consent of a Minister of the Crown. The Bill also provides that, if regulations would otherwise have required the consent

²⁰¹ Schedule 1, para 7

²⁰² Schedule 1, para 8

²⁰³ Schedule 1, para 9

²⁰⁴ clause 3 *EUW Bill*

²⁰⁵ Schedule 1, para 2

²⁰⁶ Schedule 1, para 3(1)

²⁰⁷ Schedule 1, para 3(2)

of, joint exercise of powers with, or consultation with UK Ministers if made by a devolved authority, those requirements also apply to regulations made under the *Trade Bill*.²⁰⁸

5.5 Relationship between the *Trade Bill* and the *EUW Act*

Overview

The *Trade Bill* was drafted in the contemplation that the *EUW Act* would be in force and largely on the terms on which it was introduced. However, the *EUW Bill* was amended heavily by the Lords on Report, so as almost completely to replace the original scheme for EU exit and devolution. Those changes were made as the result of a legislative and political compromise reached between the UK and Welsh (but not Scottish) Governments in late April 2018.

Given that these changes were made after the *Trade Bill* completed its Commons Committee consideration (February 2018) this presents several challenges. It is likely that the *Trade Bill* will have to be amended to fit more cleanly with the statutory scheme for devolution in the *EUW Act*. This will be the case even if the UK Government intends to proceed with the *Trade Bill* without either or both of the Scottish Parliament and Welsh Assembly's legislative consent.

The *Trade Bill's* devolved delegated powers in clauses 1 and 2 are best thought of as an "additional category" to those contained in the *EUW Act*. Whereas Schedule 2 *EUW Act* allows devolved authorities to make regulations (a) for the purposes of correcting deficiencies arising from EU withdrawal, and (b) implementing any withdrawal agreement, it does not confer powers to implement *other international agreements* in devolved areas of domestic law.

Such a power will be especially more relevant now that the *EUW Act* does not contain a general delegated power (for either UK or devolved ministers) to assist with implementing or preventing breaches of international obligations.

The *Trade Bill* interacts closely with the *EUW Act*. The delegated powers conferred on devolved authorities by clauses 1 and 2 of the *Trade Bill*, and the limits imposed upon them by Schedule 1, assume the full force and effect of the *EUW Bill* as introduced.

Similarities

Like the powers in the *EUW Act*, the powers of devolved authorities in the *Trade Bill* are constrained in ways that the powers of UK Ministers are not, even in relation to devolved policy areas. Under both pieces of legislation for example, devolved authorities would not be able to use their new delegated powers to modify direct retained EU legislation. There is also the expectation in both cases that retained EU law

²⁰⁸ Schedule 1, paras 4-6

principles cannot be modified by devolved authorities' regulations.²⁰⁹ In both cases, regulations must also fall within devolved competence.²¹⁰

Differences

There are several key differences in relation to the clauses 1 and 2 powers compared with those in Schedule 2 of the *EUW Act*. The sunset provisions in the *EUW Act* prevent devolved delegated powers being used more than two years after exit day. The *Trade Bill*, by contrast, allows the Scottish Government, Welsh Government and Northern Ireland Executive to make regulations for up to five years after exit day.

There are also "consent requirements" contained in the *Trade Bill* that were not included in the final version of the *EUW Act*. Devolved ministers wishing to make regulations before exit day or in relation to quota arrangements under the *EUW Act* are only required to consult UK Ministers, whereas the *Trade Bill* (as approved at Committee stage) requires consent along the same lines as the *EUW Bill* as introduced. At the time of writing it is not known whether the Government intends to change this to bring the *Trade Bill* into line with the *EUW Act*.

5.6 Scrutiny of regulations made by devolved administrations

The regulations made under the *Trade Bill* will be subject to scrutiny procedures set out in Schedule 2, Part 2.

The regulations that devolved authorities make on their own will be subject to the version of the negative procedure applying in their respective legislature, as with UK Ministers.²¹¹

Regulations made jointly with UK Ministers will be subject to the negative procedure in the UK Parliament and the equivalent of the negative procedure in the relevant devolved legislature.²¹²

If a regulation made jointly is annulled by either House of Parliament or by a relevant devolved legislature, nothing else may be done under that regulation and it may be revoked by Order in Council.²¹³

5.7 Legislative Consent

Under the Sewel convention, it is recognised that the Parliament of the United Kingdom will not normally legislate with regard to devolved matters, (including on the scope of devolved powers), without first gaining the legislative consent of the relevant devolved legislature(s). This principle is set out in the Cabinet Office's [Devolution Guidance Notes](#) for each of the devolution settlements. Part of the convention is

²⁰⁹ Schedule 2 para 3(1) *EUW Act*; Schedule 1 para 2(1) *Trade Bill*

²¹⁰ As approved on Report, the *Trade Bill's* definition of devolved competence is ambulatory, but refers to the original *EUW Bill's* clause 11 restrictions rather than the formulation now used in section 15 of the Act. This is one example of where consequential amendments to the *Trade Bill* would be required.

²¹¹ Schedule 2, para 2

²¹² Schedule 2, para 3

²¹³ Schedule 2, para 3(9)

set out in the most recent iterations of the Scottish and Welsh devolution statutes.²¹⁴

Should consent be withheld by one or more devolved authorities, the UK Government can, as a matter of law, press ahead with a Bill regardless. The devolution statutes merely “recognise” what should “normally” happen. They do not legally proscribe attempts by the Westminster Parliament to legislate without devolved consent. The Supreme Court has confirmed that this rule is a “political convention” rather than a judicially enforceable constraint.²¹⁵

Implications for the Trade Bill

Since clauses 1 and 2 of the *Trade Bill* change the scope the devolved authorities’ delegated powers, the Bill invokes the Sewel convention.²¹⁶

Under the standing orders of their respective legislatures, the Scottish and Welsh Governments submit legislative consent memoranda about relevant Bills. A memorandum indicates a devolved administration’s views on the merits of provisions to which the Sewel Convention applies and recommends whether the legislature should give consent to them.

The Scottish and Welsh Governments have each published a memorandum recommending that legislative consent should not be given to the *Trade Bill* in its current form.²¹⁷ In those memoranda, the devolved administrations indicated they would be preparing amendments to the Bill and that, depending on the progress made with those amendments, a further legislative consent memorandum may be brought forward.

The Scottish and Welsh Governments’ legislative consent memoranda raised specific concerns about the relative influence over regulations made under the Bill when compared with Ministers of the Crown. This concern reaches in both directions. In the view of the Scottish and Welsh Ministers there are:

- insufficient limits and safeguards on the power of Ministers of the Crown to make regulations in areas of devolved competence; and
- excessive restrictions on the powers of devolved authorities to do so within the areas of their devolved competence.

The Scottish and Welsh Governments raised similar concerns about the delegated powers in the *EUW Bill*. Although the Welsh Government ultimately accepted political promises in relation to the exercise of these powers on that occasion, the Scottish Government did not. It is possible that, given the nature and scope of the powers in the *Trade Bill* is different, either or both of the devolved legislatures might come to a different view as to whether consent should be given in this instance.

²¹⁴ [s2 Scotland Act 2016](#) and [s2 Wales Act 2017](#)

²¹⁵ [R \(on the application of Miller and another\) v Secretary of State for Exiting the European Union \[2017\] UKSC 5](#) para 148

²¹⁶ This was accepted by the UK Government in the [Trade Bill Explanatory Notes](#), para 16 and Annex A

²¹⁷ Welsh Assembly Government, [Legislative Consent Memorandum, Trade Bill](#), December 2017 and Scottish Government, [Legislative Consent Memorandum, Trade Bill](#), December 2017

This would have to be judged, however, on the basis of what the *Trade Bill* says once the Government has explained whether and to what extent it will amend it to reflect the changes made to the *EUW Bill*.

6. Parliamentary scrutiny of trade agreements

6.1 Summary

The *Trade Bill* says nothing about Parliament's involvement in scrutinising treaties negotiated by the UK (where it currently has no formal role), or its powers relating to ratification (where it has only a limited, and as yet unused, power to delay ratification).

Yet, given that EU trade treaties governing the UK are currently scrutinised by national legislatures (including for example the Commons European Scrutiny Committee) as well as the European Parliament, Brexit may be seen as diminishing democratic accountability in relation to trade treaties unless new arrangements are put in place.

Parliament could decide to introduce new mechanisms or structures for scrutinising treaties. It has hitherto been reluctant to do so. But when the *Trade Bill* was announced in the Queen's Speech, there were calls for Parliament to be given a greater role in trade agreements.

Possible legislative measures on parliament and treaties could include for example a new duty of government transparency, a duty to consider amendments proposed by Parliament, or a requirement for Parliamentary approval before ratifying trade agreements.

The Trade White Paper says that "decisions have not yet been taken on the legislative framework for the implementation of future agreements".²¹⁸

6.2 EU trade treaties

Both the European Parliament (EP) and the UK Parliament are involved in scrutinising EU trade treaties, and much of the documentation is published. This represents a considerably greater degree of democratic involvement in treaty negotiations than exists currently in relation to UK treaties.

The European Parliament

The EP does not have a formal role in EU treaty negotiations with third countries or organisations, the procedures for which are set out in [Articles 207 and 209 along with Articles 216-218 of the Treaty on the Functioning of the EU \(TFEU\)](#).

However, under Article 218(10) the EP is "immediately and fully informed at all stages of the procedure",²¹⁹ and because its consent is often required, it has developed influential mechanisms.

²¹⁸ Department for International Trade, [Preparing for our future UK trade policy](#), Cm 9470, October 2017, p28

²¹⁹ For example, see ANNEX XIII of EP Rules of Procedure, [Framework Agreement on relations between the EP and Commission](#). Under Annex 3 para. 3, "the Commission shall take due account of Parliament's comments throughout the negotiations".

It will often signal its political position by issuing a resolution. Although the Commission (which negotiates trade agreements with non-EU countries on behalf of the EU and the Member States)²²⁰ is not legally bound to follow the EP's recommendations, it does take them into account when drawing up the EU positions and discussing them with the Council or the third party.²²¹

The EP also questions the Commission, and can invite the Commission to meetings of its [International Trade Committee](#) (INTA). Under Article 218(6), the EP's involvement before the Council concludes non-CFSP agreements is either by way of consent or consultation. The EU Treaty lists five types of agreements, often the more "political" ones, which require EP consent before the Council can formally conclude them.

It is in the interests of the Commission to keep Member States and the EP informed about developments in negotiations. It allows the Commission to gauge political support in the EP, generally avoids surprises and increases the chances of EP consent and adoption by Member States under Article 218(6) TFEU.²²²

The Commission usually briefs the EP before signature of agreements with third countries, but formal consultation comes later. Because formal EP involvement comes after signature, the EP cannot formally suggest amendments – it can only approve or reject the whole treaty.

In July 2012 the EP refused to give its consent to the proposed Anti-Counterfeiting Trade Agreement. Its rejection meant that neither the EU nor the Member States could join the agreement. This was the first time the EP had exercised its power to reject an international trade agreement.

Transparency – European Parliament and public access to documents

Under Article 15 TFEU, citizens and residents of EU Member States have, subject to certain conditions, a right of access to the documents of the EP, Council and Commission.²²³ But in 2014 the negotiation of the Trans-Atlantic Trade and Investment Partnership (TTIP) between the EU and the United States was criticised for its secrecy and the lack of access to documentation. A [Communication](#) from Trade Commissioner Cecilia Malmström in November 2014 attempted to address the criticisms,

²²⁰ Under Article 207(3) TFEU the Commission conducts negotiations in consultation with a special committee appointed by the Council to help it and in accordance with any directives the Council may issue. This is usually the Council's [Trade Policy Committee](#) (TPC). The TPC is the main forum for dialogue between the negotiators and the representatives of Member States. See European Commission Factsheet: [Transparency in EU trade negotiations](#), June 2013.

²²¹ European Parliament Research Service (EPRS), [EU procedures for conclusion of international trade agreements](#), October 2016.

²²² For detailed information on EU trade negotiations, see European Commission, [Trade negotiations step by step](#), September 2013, and EPRS [guide to EU procedures for the conclusion of international trade agreements](#), October 2016.

²²³ Regulation (EC) No 1049/2001 on public access to documents from these three institutions sets out the general principles governing this right of access and the limits to it. Jean-Claude Juncker's Commission, which started in November 2014, made institutional transparency a priority and the Commission's [Transparency Portal](#) contains links to its various transparency initiatives.

outlining how trade negotiations would be “de-mystified” and how the Commission would engage further with stakeholders and the public. Arrangements were also made for UK MPs and Peers to view certain TTIP documents in a reading room at the Department for International Trade.²²⁴

In his [State of the Union address](#) on 13 September 2017, announcing the opening of trade negotiations with Australia and New Zealand, Jean Claude Juncker (President of the European Commission) committed to giving the EP “the final say on all trade agreements”, to keeping MEPs “fully informed from day one of the negotiations” and to publishing “in full all draft negotiating mandates we propose to the Council”.

6.3 UK Parliamentary scrutiny of EU trade agreements

The UK Parliament also scrutinises various aspects of the making of EU external agreements in ways that go beyond the UK’s own treaty-making.

The stage when the Commission negotiates with the third party and initials the resulting agreement with the approval of Member States is not subject to parliamentary scrutiny. But Departments are supposed to keep the Committees informed as much as possible about the scope and development of negotiations before signature and/or conclusion of agreements.

When the Commission issues a proposal to the Council for signature of an agreement, these documents are deposited, are subject to the Scrutiny Reserve and may be debated on the Floor of the House or in European Committee. Although a motion of either House can influence how a Minister votes in the Council, even if the Government votes against a proposal in the Council, it may still be adopted by a qualified majority under Article 218(8).

EU proposals for decisions on the provisional application of agreements are usually submitted to Parliament for scrutiny along with the main agreements, but there can be scrutiny problems (as with the EU-Ukraine Association Agreement, for example).

Consultations and impact assessments

During negotiations on free trade agreements, the UK Government consults with business and represents an agreed UK policy to the Commission. UK representatives based in the third country or countries are also consulted. The Government may carry out and publish an Impact Assessment which it attaches to the Explanatory Memorandum (EM) on the agreement and makes available online (see for example the EU-Ukraine AA [Impact Assessment](#)). Or it may decide that an Impact Assessment is not necessary (e.g. for the Stabilisation and Association Agreement with Serbia, the Government EM stated that an IA had not

²²⁴ [PQ 47444 17 October 2017](#)

been prepared as it would have no impact on business, charities or voluntary bodies).²²⁵

UK treaties

Foreign affairs and treaties are a matter for the Government under the Royal Prerogative, and Parliament currently has a very limited role in most types of treaty.²²⁶

There are at least four different possible ways for parliaments to be involved in treaties:

1. Setting the negotiating mandate
2. Scrutinising negotiations
3. Approving or objecting to ratification
4. Passing implementing legislation for those that need changes to domestic law

This Bill deals only with the fourth of these elements: implementation. And here it seeks to minimise Parliament's role on "transitioned" agreements by giving the Government wide powers to implement treaties by secondary legislation, with only a negative resolution procedure. It says nothing about parliamentary scrutiny and/or approval of trade agreements.

However, there have been calls to increase Parliament's role, for trade treaties in particular. These calls generally have two main bases:

- Trade agreements can now cover a wide range of policy areas and affect matters such as consumer rights, environmental protection, workers' rights and dispute resolution where Parliament has a role.²²⁷
- EU trade treaties have a much greater level of parliamentary involvement, both by national parliaments, including the UK's, and by the European Parliament, than UK treaties. Brexit could therefore be seen as resulting in a diminution of democratic scrutiny of trade treaties unless new measures are put in place.

Scrutinising negotiations

The UK Parliament – in contrast to many other parliaments around the world – currently has no formal role in scrutinising most treaties (other than EU ones) while they are being negotiated. This is the only point at which the terms of a proposed treaty could be amended.

Parliament does have some ways of scrutinising trade negotiations, such as through PQs, debates and committees. For example, the Transatlantic Trade and Investment Partnership (TTIP) – the proposed trade agreement between the EU and US – was the subject of a number of

²²⁵ [Explanatory Memorandum](#) to European Union (Definition of Treaties) (Stabilisation and Association Agreement) (Republic of Serbia) Order, S.I. 2011 No 742.

²²⁶ See [Parliament's role in ratifying treaties](#), Commons Library Briefing Paper, CBP 5855, 17 February 2017

²²⁷ See Holger Hestermeyer, [Parliament and Trade Agreements – it's about democracy](#), UK Trade Forum, 21 November 2017.

Parliamentary Committee reports and debates during the negotiations.²²⁸

Parliament could, of course, decide to introduce new procedures, mechanisms or structures for scrutinising trade (and other) treaties. For instance, an existing committee or new sub-committee could sift treaty proposals and forward them to other committees for scrutiny where appropriate. Or a new committee – perhaps a joint Commons and Lords committee – could be established to sift and/or scrutinise treaties. Either would require a specialised secretariat. But Parliament has hitherto been reluctant to set up anything new on treaties.²²⁹

Approving or objecting to ratification

Parliament's formal role on treaties is governed by part 2 of the *Constitutional Reform and Governance Act 2010 (CRAGA)*.

This does not require Parliament's approval for the Government to ratify treaties. Instead, it gives any parliamentary objection to ratification (or similar processes like accession) a limited statutory effect:

- The Government must lay the treaty and an EM before Parliament.
- The Government may not ratify the treaty for 21 "sitting days" (ie days when both Houses were sitting) after it was laid before Parliament.
- If within those 21 sitting days either House resolves that the treaty should not be ratified, by agreeing a motion on the floor of the House, the Government must lay before Parliament a statement setting out its reasons for nevertheless wanting to ratify.
- If the Commons resolves against ratifying the instrument – regardless of whether the Lords did or not – a further 21 sitting day period is triggered from when the Government's statement is laid. During this period the Government cannot ratify the treaty.
- If the Commons again resolves against ratification during this period, the process is repeated. This can continue indefinitely, in effect giving the Commons the power to block ratification.

But Parliament does not have to debate or vote on the treaty, and indeed time to do so is hard to secure given the Government's control over the timetable of the House of Commons. Nor can it make amendments to the treaty, as it will already have been signed – Parliament can only object to ratification of an entire treaty. The Library briefing [Parliament's role in ratifying treaties](#) has more information on this process.

²²⁸ Negotiations on TTIP stopped at the end of 2016. Examples of Committee reports on trade negotiations include: House of Lords European Union Committee Report, [The Transatlantic Trade and Investment Partnership](#), 13 May 2014, HL 179, 2013-14 and Business, Innovation and Skills Committee, [Transatlantic Trade and Investment Partnership](#), 25 March 2015, HC804, 2014-15

²²⁹ See [Parliamentary Scrutiny of Treaties: up to 2010](#), Commons Library Standard Note SN/IA/4693, 25 September 2009

6.4 Calls for change

When the *Trade Bill* was announced in the Queen's Speech, there were calls for Parliament to be given a greater role in trade agreements. For example, the Institute for Government argued:

It [the government] should use the Trade Bill to give a statutory guarantee that it will always schedule time for parliamentary debate, and for a vote on any future trade deals under the Constitutional Reform and Governance Act 2010. This would be a departure from the UK's standard approach to approving international treaties, but given the political sensitivity for trade, and the far-reaching implications of deals for domestic policy, it would be prudent to give Parliament a greater role in agreeing deals.²³⁰

The Trade Justice Movement called for the *Trade Bill* to establish various rights of information, consultation, amendment, rejection and review:

- The right of parliament to set a thorough mandate to govern each trade negotiation, with a remit for the devolved administrations
- The right of the public to be consulted as part of setting that mandate
- Full transparency in negotiations
- The right of parliament to amend and to reject trade deals, with full debates and scrutiny guaranteed and a remit for the devolved administrations
- The right of parliament to review trade deals and withdraw from them in a timely manner.²³¹

Early Day Motions 128 and 166, signed by 125 and 38 MPs respectively²³², call for a greater role for Parliament in the scrutiny and approval of trade agreements.²³³

The Trade White Paper included commitments on future trade policy:

- To continue to respect the role of Parliament, and the importance of the business and the wider stakeholder community in preparing for and giving effect to an independent UK trade policy;
- To seek the input of the devolved administrations to ensure they influence the UK's future trade policy, recognising the role they will have in developing and delivering it;
- To take views from all the English regions to acknowledge the important part they will play in the future prosperity of the UK;
- To seek the input of all stakeholders to ensure we design the most effective mechanisms for engaging with them;
- To build our understanding of the interests, attitudes and concerns about our future trade policy – across Parliament, the devolved administrations, devolved legislatures, local government, business, trade unions, civil society, and the public from every part of the UK;

²³⁰ Oliver Illott, Ines Stelk and Jill Rutter, [Tacking back control of trade policy](#), Institute for Government, 2017, p28

²³¹ Trade Justice Movement, [Democracy and transparency in the UK trade bill](#)

²³² As of 27 June 2018

²³³ [EDM 128](#) and [EDM 166](#)

- To put the Industrial Strategy at the heart of our trade policy, to build a global economy that works for everyone; and
- To ensure that our commitment to scrutiny and engagement that is inclusive, meaningful and transparent is coherent with the need to ensure we do not undermine our negotiating position.²³⁴

The Government said it would be engaging with these groups over the coming months. The White Paper also called for views on these commitments and how they could be delivered, saying that “decisions have not yet been taken on the legislative framework for the implementation of future agreements”.²³⁵

Following publication of the Bill, a number of NGOs expressed concern about the lack of provision for Parliamentary scrutiny. For example, War on Want said that it:

remains deeply concerned that the approach the government displayed to parliamentary scrutiny during EU trade deals, TTIP and, more recently, CETA, highlight its willingness to bypass parliament in order to secure trade deals crafted in the interests of big business.²³⁶

The Trade Justice Movement (TJM) said:

What is most vital is what is missing from the bill – the absence of anything to ensure that trade policy is accountable to the public and parliament.²³⁷

Further evidence was given to the International Trade Committee on this point by Nick Dearden of Global Justice Now and Derrick Wyatt QC.²³⁸

TJM said that 11,500 had responded to the Government’s consultation to call for trade policy to be accountable to Parliament with another 50,000 responding through a petition.

In an interview in The House Magazine, Dr Fox said the Bill was not concerned with future trade agreements:

“What the Trade Bill doesn’t do, is to deal with future free trade agreements. We haven’t set out in legislation how we will do that. We want to put it in stages, so that we have got stability and continuity first of all, and then we will want to set out major consultation mechanism for new free trade agreements,” he says.

The government will seek to gain approval from business, parliament and the devolved nations at the start of trade talks, rather than at their culmination, to avoid a deal being rejected late on.

“Clearly, at the end the government has to have a balanced view over the whole country and the whole economy. But I think we’re

²³⁴ Department for International Trade, [Preparing for our future UK trade policy](#), Cm 9470, October 2017, pp22-23

²³⁵ Department for International Trade, [Preparing for our future UK trade policy](#), Cm 9470, October 2017, p28

²³⁶ War on Want Press Release, [UK trade bill launched within hours of public ‘consultation’ closing](#), 7 November 2017

²³⁷ Trade Justice Movement, [The gaping hole in the Trade Bill](#), 7 November 2017

²³⁸ International Trade Committee, [The Trade Bill, Oral evidence](#), HC603i, 29 November 2017

going to have to be willing to consult more widely than governments have done in the past," he says.

"What we don't want to do is to do what happened with TTIP, for example – invest a great deal of time and effort in a negotiation only to find it is not acceptable to either public opinion or parliament. So, we will want to get that consensus at the beginning of the process, not the end."²³⁹

In a debate in the House of Lords in December 2017, Baroness Fairhead, the trade minister, reiterated this point:

I say right from the beginning that, while the Trade Bill is intended to cover transitioning of existing agreements, not future ones, we will consult widely on future trade policy and the appropriate means of ensuring parliamentary scrutiny. I am very keen to work in particular with noble Lords across the House to help the UK get in the best possible position as we leave the EU. That is why this debate today, which is very much part of the early engagement, is particularly important.²⁴⁰

She also drew a distinction between the *Trade Bill* (and the *Taxation (Cross-Border Trade) Bill*) and the White Papers which preceded them. The Minister said the former were about preparing for exit from the EU while the latter were about preparing for the UK's future trade policy:

The Bills are a vital step towards getting us ready for exit, and the White Papers help us prepare for the future and the future trade agreements that we want to forge outside the EU. The White Papers provide a starting point for our engagement and discussion, both on future trade agreements and on the scrutiny arrangements for such agreements. On these, and on the Bills, we are keen to hear as many views as possible.²⁴¹

This issue was raised in the Public Bill Committee. Professor Alan Winters of the Trade Policy Observatory at Sussex University told the Committee:

You cannot have a position where Parliament can unpick a trade agreement that has been concluded. If Parliament claimed that right, no one would negotiate with us. That means that Parliament and the devolved Administrations need to have an important role in setting mandates, and there need to be consultation and information during the process. Civil society would certainly claim that it, too, ought to be consulted, and I would advocate that, to the extent that one can generate one, there should be a discussion publicly.²⁴²

²³⁹ Liam Fox: "[I can agree as many trade agreements as I like. But if British business doesn't want to export, then that doesn't do us any good](#)", by Sebastian Whale, The House Magazine, 23 November 2017

²⁴⁰ [HL Deb 5 December 2017 c989](#)

²⁴¹ [HL Deb 5 December 2017 c991](#)

²⁴² Trade Bill Deb 23 January 2018 c58

7. Summary of Second Reading and Committee Stage

7.1 Second Reading debate

The [Second Reading debate](#) on the *Trade Bill* took place on 9 January 2018. For the Government, Dr Fox, the International Trade Secretary, said that the Bill put in place the “essential legal powers and structures that will enable the UK to operate an independent trade policy.”²⁴³ Furthermore, the Bill would enable the UK to continue existing trading relationships “allowing us to provide certainty and to reassure international partners, businesses and investors.”²⁴⁴ Dr Fox said that the Bill had four main aims:

- To prevent disruption to UK businesses and consumers by seeking continuity in trade relations
- To maintain UK businesses’ access to global procurement markets
- To create a new UK trade remedies framework, overseen by the Trade Remedies Authority
- To allow HMRC to collect and share data on UK trade.²⁴⁵

Members raised a variety of issues during the course of the debate, including the need for greater openness and transparency.²⁴⁶

The Labour front bench moved a reasoned amendment criticising the Bill for failing to give Parliament sufficient powers in relation to trade agreements. The Labour spokesperson, Barry Gardiner, said that the Bill had failed to provide sufficient parliamentary oversight and scrutiny of trade agreements.²⁴⁷ He criticised the powers the Bill gave Ministers, the use of Henry VIII powers and the centralisation of power in Westminster brought about by the Bill.²⁴⁸ Labour also had concerns about the composition of the Trade Remedies Authority, arguing it should include stakeholders, such as business and union representatives, affected by unfair trade practices.²⁴⁹

For the SNP, Hannah Bardell said the Bill was “lacking in any real detail” and threatened the devolution settlement in Scotland.²⁵⁰ She said that Scotland and the other devolved nations should be treated as equal partners in trade negotiations.²⁵¹ Plaid Cymru called for trade agreements to be ratified by devolved Parliaments, as well as Westminster. The TRA should include representation from Wales, Scotland and Northern Ireland.²⁵²

²⁴³ HC Deb 9 January 2018 c210

²⁴⁴ HC Deb 9 January 2018 c211

²⁴⁵ HC Deb 9 January 2018 c212-16

²⁴⁶ HC Deb 9 January 2018 c213

²⁴⁷ HC Deb 9 January 2018 c221

²⁴⁸ HC Deb 9 January 2018 c222-23

²⁴⁹ HC Deb 9 January 2018 c231

²⁵⁰ HC Deb 9 January 2018 c234, 235

²⁵¹ HC Deb 9 January 2018 c236

²⁵² HC Deb 9 January 2018 c259

A number of contributions criticised the lack of Parliamentary involvement in rolling over existing EU trade deals and called for greater Parliamentary scrutiny of trade deals with Parliament being able to debate and vote on them.²⁵³ The use of Henry VIII powers was also criticised.²⁵⁴ Others rejected the idea of a “power grab” by Ministers and argued that the Government’s approach was due to practical constraints.²⁵⁵

Some Members argued that there was no guarantee that existing EU trade agreements could simply be rolled over as the partner countries might wish to renegotiate.²⁵⁶

Concerns were expressed that the proposed structure for the TRA gave the Secretary of State too much power²⁵⁷ and that it would not be sufficiently independent.²⁵⁸ There were calls for the TRA to be answerable to Parliament rather than the Government.²⁵⁹

The Opposition reasoned amendment was rejected by 313 votes to 281. The Bill was given a Second Reading by 313 votes to 280.

7.2 Committee Stage

Summary

The Public Bill Committee met on eight occasions between 23 January and 1 February. The Committee heard and received [evidence](#) from a variety of witnesses before its line-by-line scrutiny of the Bill. The Hansard record of the Committee Stage debates is available on the Bill Page on Parliament’s website [here](#). Proceedings on the Committee Stage of the Bill are [here](#).

While a number of amendments were pushed to a vote, none succeeded. The Bill therefore will be reported without amendment. At the end of the Committee Stage, the Opposition spokesperson, Barry Gardiner, said that “lacunae” remained in the Bill and that the Opposition would return to it on Report.

The main issues discussed during the Committee Stage were Parliamentary scrutiny, Henry VIII powers, the role of the devolved administrations and the composition of the Trade Remedies Authority.

²⁵³ HC Deb 9 January 2018 c250, c254 ,c268, c269, c275

²⁵⁴ HC Deb 9 January 2018 c266

²⁵⁵ HC Deb 9 January 2018 c250, c256

²⁵⁶ HC Deb 9 January 2018 c269

²⁵⁷ HC Deb 9 January 2018 c257

²⁵⁸ HC Deb 9 January 2018 c279

²⁵⁹ HC Deb 9 January 2018 c266, c279

Clause 1: Implementation of the Agreement on Government Procurement

There was little argument about the value of joining the GPA or about the broad aims of clause 1.²⁶⁰ Hannah Bardell, for the SNP, said that “we agree with the provision in clause 1 that aims to ensure continued access to Government procurement markets after the UK leaves the EU”.²⁶¹

Clause 2: Implementation of International Trade Agreements

Parliamentary scrutiny/future agreements

The Opposition moved a number of amendments/new clauses to this part of the Bill. These were designed to widen the scope of the clause beyond existing free trade agreements. A number of new clauses were put forward covering Parliamentary scrutiny of free trade agreements (including before signature), sustainability impact assessments, Parliamentary consent to launch trade negotiations, and the availability of agreement texts during the negotiations.

Barry Gardiner said that the Bill should cover future agreements in addition to existing EU agreements. Mr Gardiner said that the Government had “repeatedly told us that the Bill would provide the basis for this country’s future trade policy once we had left the EU.”²⁶²

More Parliamentary involvement in free trade agreements and better scrutiny would be an improvement on the current system where members can either accept or reject an agreement in its entirety. Mr Gardiner outlined six stages of Parliamentary involvement:

- A sustainability impact assessment before the start of trade negotiations, including consultations with the devolved administrations and others
- Setting the mandate for objectives of the negotiations
- Transparency and access to negotiation text during the negotiations
- Regular progress reports to Parliament after each negotiating round
- Submission to Parliament of the full text of the agreement before signing
- A resolution of the House of Commons before signing

These would apply to new free trade agreements. Agreements corresponding to an existing EU agreement would go through a streamlined procedure.²⁶³

For the Government, Mr Hands said that the Government was not looking to renegotiate existing trade agreements. He reiterated that the

²⁶⁰ There was also relatively little evidence received by the bill committee that focussed on this topic, with the exception of that from [Dr Kamala Dawar \(TB03\)](#) and to a lesser extent [St Andrews TTIP Action Group \(TB11\)](#).

²⁶¹ Trade Bill Deb 25 January 2018 c114

²⁶² Trade Bill Deb 25 January 2018 c138

²⁶³ Trade Bill Deb 25 January 2018 c150

Bill's powers would only be used to transition existing agreements and did not relate to future trade agreements. The Government would bring forward proposals "in the coming months" on Parliament's interaction with future trade deals. Mr Hands said that consultation on future trade policy was ongoing. The Opposition's amendments would pre-empt consideration of the response to its consultation that the Government has received so far.

The Opposition amendments were withdrawn but Mr Gardiner said that the Government should bring forward its own amendments on Parliamentary scrutiny. The Opposition would return to this issue later if the Government failed to do so.

Ratified vs signed agreements

The Opposition also introduced amendments which would limit the scope of the Bill to agreements which the EU had *ratified* immediately before Brexit, rather than those which had been *signed*. Mr Gardiner argued that EU agreements which had been signed would not have gone through the full EU scrutiny process and therefore should not simply be rolled over into new UK agreements with little scrutiny in the UK. For example, the EU's trade agreement with Japan may be signed before Brexit but not ratified. Furthermore, Mr Gardiner argued, there was no requirement in the Bill for the UK agreement with the third country to be the same as the EU's agreement with that country.

Mr Hands said that this could prevent, for example, CETA (the EU's trade agreement with Canada) being rolled over to the UK. As this agreement is in force provisionally, the benefits from the agreement would be lost if it could not be rolled over. It would also exclude agreements ratified by the UK but not by other EU Member States.

A further Opposition amendment sought to remove the Henry VIII power in clause 2. The Government said that this power was very restricted, could not be used to amend most primary legislation which is not retained EU law and that the Government's intention was to use the power only to provide continuity with existing trade agreements.²⁶⁴

Amendment 5 which restricted the scope of the Bill to ratified agreements was put to a vote and defeated by ten votes to nine.²⁶⁵ The amendment seeking to remove the Henry VIII powers in clause 2 was defeated by ten votes to nine.²⁶⁶

Human rights, labour and environmental standards

Judith Cummins introduced an amendment which would require that international trade agreements are consistent with international laws and conventions on human rights, the environment and the rule of law. She spoke against the use of Investor State Dispute Settlement (ISDS) clauses which allow overseas investors to sue governments in special tribunals.

²⁶⁴ Trade Bill Deb 30 January 2018 c168

²⁶⁵ Trade Bill Deb 30 January 2018 c169

²⁶⁶ Trade Bill Deb 30 January 2018 c198

In response, Greg Hands said that the Government agreed with the motivation behind the amendment but believed it was unnecessary. The UK had always sought to comply with international law and uphold high standards in relation to human rights, labour and environmental standards, and sustainable development.

The amendment was pushed to a vote and defeated by ten votes to nine.²⁶⁷

Protection of public services

Bill Esterson moved an amendment designed to make sure that trade agreements could not restrict the freedom to deliver public services, for example, by bringing them back into public ownership. This amendment was supported by the SNP. In response, the Minister said that many EU agreements already provided protection on this issue and that the Bill would not undermine the right to regulate public services.

The amendment was pushed to a vote and defeated by ten votes to nine.²⁶⁸

Food safety

Judith Cummins moved an amendment to ensure that trade agreements maintain or enhance UK food standards. She highlighted comments by US politicians that a UK-US trade deal would require changes to UK food regulations.

The Government said that it was committed to high standards of environmental protection and public health and that the Bill would not be used as a backdoor way of reducing them.

The amendment was pushed to a vote and defeated by ten votes to seven.²⁶⁹

Sunset clause

Three amendments were proposed by Labour and the SNP about the sunset clause in clause 2.²⁷⁰ These sought to make the sunset clause non-renewable or renewable only once or to ensure consultation with the devolved administrations. Opposition Members asked why a renewable sunset clause was needed given the Government's intention to rollover trade agreements quickly.

In response, the Minister said that these powers might be needed beyond five years if, for example, changes to bodies recognised by mutual recognition agreements were needed. He also pointed out that extending the duration of the sunset clause was subject to the affirmative procedure.

All three amendments were defeated by ten votes to nine.²⁷¹

²⁶⁷ Trade Bill Deb 30 January 2018 c178

²⁶⁸ Trade Bill Deb 30 January 2018 c186

²⁶⁹ Trade Bill Deb 30 January 2018 c197

²⁷⁰ Trade Bill Deb 30 January 2018 c198-206. One of the amendments, Amendment 35, is discussed in the section below on devolved issues.

²⁷¹ Trade Bill Deb 30 January 2018 c204-06

Schedule 2: Regulations under Part 1

Affirmative procedure for GPA

Labour proposed an amendment which would require regulations implementing the GPA to be subject to the affirmative procedure as this would allow for greater Parliamentary scrutiny. This would include when new countries joined the GPA in future – when new countries join the GPA, some UK contracts will be opened up to suppliers in those countries and vice versa.

The Minister argued that the GPA had already been scrutinised by the European Scrutiny Committees in Parliament (as well as at EU level), that the power would need to be used quickly in certain circumstances and that new accessions to the GPA will be covered by “a clear and significant role for Parliament in scrutinising future trade agreements” that the Government wants to ensure exists. The amendment was defeated by ten votes to nine.²⁷²

Super-affirmative procedure for free trade agreements

Labour proposed another amendment which would require free trade agreements to undergo a super-affirmative procedure prior to ratification. Barry Gardiner said that the Bill as originally drafted did not require the new UK trade agreements with countries with which the EU already has an agreement to resemble those EU agreements. Other countries might wish to renegotiate.

The Minister argued that this was unnecessary. The aim of the Bill was to secure continuity of existing trading relationships, not an opportunity to re-open them. The agreements had already been through a scrutiny process. The amendment was put to a vote and defeated.

A similar amendment was tabled by the Opposition requiring the regulations implementing international trade agreements to be subject to the super-affirmative procedure. The amendment was defeated.

Clauses 1 and 2: Devolution issues

Summary

SNP members of the Trade Bill Committee tabled five amendments in relation to these parts of the Bill, all of which related directly to the concerns raised in the Scottish and Welsh Government’s legislative consent memoranda.²⁷³ Four amendments concerned the limits and safeguards in place where concurrent delegated powers exist. These were called together and all rejected on a division (except Amendment 34 which was not called).²⁷⁴

Amendment 35 concerned the role of devolved authorities in constraining the power of the Secretary of State to extend the life of delegated powers under the Bill. This amendment was called separately

²⁷² Trade Bill Deb 30 January 2018 c215

²⁷³ The SNP also tabled a number of new clauses and amendments to other parts of the Bill such as those relating to the TRA.

²⁷⁴ Trade Bill Deb 25 January 2018 c134, 30 January 2018 cc205-07

and was also rejected on a division by ten votes to nine.²⁷⁵ The Bill is therefore unchanged in relation to its devolution-specific provisions. This has implications for the likelihood of legislative consent being given by either the Scottish or Welsh Governments.

Limits and safeguards on delegated powers of UK Government Ministers in devolved areas

UK Government Ministers would have concurrent powers to introduce regulations under clauses 1 and 2, even where they include provisions that relate to devolved matters.

The Welsh Government's legislative consent memorandum accepted that legislation was necessary to provide clarity and certainty for businesses and consumers in relation to trade as the UK leaves the EU. It also accepted there would be situations where UK-wide delegated legislation in devolved areas would "make sense". It insisted, however, that "this should only be with the consent of the Devolved Governments and this should be made clear on the face of the Bill."²⁷⁶

The Scottish Government's legislative consent memorandum made similar observations. It emphasised the lack of reciprocity of the consent arrangements: that there are circumstances in which UK Government Ministers must first consent before a devolved authority can make regulations, but the reverse is not true.²⁷⁷

Two of the rejected amendments at Committee would have imposed tighter consent-based limits on the regulatory powers of Ministers of the Crown in the Bill.²⁷⁸ These amendments would have given devolved authorities a veto over a decision by UK Government ministers to seek to determine "how" an agreement covered by clause 1 or 2 would be implemented in an area of devolved competence. They would not have provided a sub-State "veto" on whether the UK could implement such agreements.²⁷⁹

Although the Minister for Trade Policy opposed these two amendments in committee, he reiterated the UK Government's undertaking in the White Paper:

We will not normally use these powers to amend legislation in devolved areas without the consent of the relevant devolved Administration, and we will certainly never do so without first consulting them.²⁸⁰

Restrictions on the devolved authorities' delegated powers

The Welsh Government's legislative consent memorandum observed that there would be a number of restrictions on their use of powers

²⁷⁵ Trade Bill Deb 30 January 2018 c206

²⁷⁶ Welsh Assembly Government, [Legislative Consent Memorandum, Trade Bill](#), December 2017, para 16

²⁷⁷ Scottish Government, [Legislative Consent Memorandum, Trade Bill](#), December 2017, para 18

²⁷⁸ Amendments 33 and 34

²⁷⁹ The UK Government can still insist on implementation of international obligations in devolved areas under [s58 Scotland Act 1998](#), [s82 Government of Wales Act 2006](#) and [s26 Northern Ireland Act 1998](#)

²⁸⁰ Trade Bill Deb 25 January 2018 c128

provided for in the Bill that were not imposed on UK Ministers. They regarded this to be:

...a matter of principle, that devolved Ministers should have the same powers in respect of matters falling within devolved competence as UK Ministers are being given.²⁸¹

The Scottish Government's legislative consent memorandum expressed a similar sentiment.²⁸² It noted that its basis for opposing the restrictions placed on their delegated powers in the *Trade Bill* was substantively the same as the objection raised in relation to the same restraints imposed under the *EUW Bill*:

The Scottish Government cannot accept the restrictions on the exercise of its competence in devolved areas as set out above. As with the European Union (Withdrawal) Bill, these objections to the basic approach of the Bill, and the view of the future governance of the UK after withdrawal which the Bill reflects, are so fundamental that the Scottish Government cannot recommend that the Scottish Parliament gives consent, even conditionally, to the Bill in its current form.²⁸³

Two unsuccessful amendments in Committee sought to address this underlying objection:

Amendment 36 would have removed for devolved authorities the restrictions on their power to regulate that relate to:

- retained direct EU legislation;
- retained EU law; and
- modifications made by UK Government Ministers to retained EU law under the *EUW Bill*.²⁸⁴

Amendment 37 would have removed the requirement for Scottish or Welsh Ministers to seek the consent of UK Government Ministers before making regulations where they would either come into force before the UK leaves the EU or where it would relate to or be incompatible with quota arrangements.²⁸⁵

In calling for those amendments to be rejected, the Minister for Trade Policy emphasised the need not to raise new barriers to living and doing business internally within the UK, so as to maximise continuity and certainty for business and consumers. On the question of UK-wide quota arrangements in particular, he stressed the view that decisions about these should be taken at a UK level. He reiterated his commitment to consult the devolved authorities "on the most appropriate way to legislate" in areas of retained direct EU law otherwise having effect in devolved areas.²⁸⁶

²⁸¹ Welsh Assembly Government, [Legislative Consent Memorandum](#), Trade Bill, December 2017, para 14

²⁸² Scottish Government, [Legislative Consent Memorandum, Trade Bill](#), December 2017 para 18

²⁸³ Scottish Government, [Legislative Consent Memorandum, Trade Bill](#), December 2017 para 20

²⁸⁴ disapplying Schedule 1, para 2 as it relates to the Scottish and Welsh Governments

²⁸⁵ disapplying Schedule 1, para 3 as it relates to the Scottish and Welsh Governments

²⁸⁶ Trade Bill Deb 25 January 2018 c129-30

Sunset provisions in clause 2 and devolution impact

The Bill currently restricts the exercise of delegated powers, including those of the devolved authorities, under clause 2 to a five-year period.²⁸⁷ However, the Secretary of State may extend that period by up to five years at a time with the approval of both Houses of Parliament.²⁸⁸

The Scottish Government's legislative consent memorandum noted that this power does not require any consultation with the devolved authorities.²⁸⁹ Rejected Amendment 35 would have inserted a requirement for the Secretary of State to consult with the Scottish and Welsh Ministers before introducing any measures to extend the delegated powers under clause 2.

In calling for the amendment to be rejected, the Minister for Trade Policy said:

We are obviously talking to the devolved Administrations so that we can work towards delivering a Bill that will benefit the whole UK. Given that, we do not think that the formal commitments on consultation and engagement in amendment 35 would add substantively to the Bill.²⁹⁰

Clause 5 and Schedule 4: Trade Remedies Authority

No amendments were proposed to clause 5 which was ordered to stand part of the Bill.

Labour and the SNP moved a number of amendments to Schedule 4. These required:

- the consent of the International Trade Committee or the devolved administrations to the appointment of the Chair and non-executive members of the TRA.
- the TRA's non-executive members to include representatives from producers, trade unions and the devolved administrations. They also required the consent of each devolved administration before a chief executive of the TRA could be removed and that the TRA maintain offices in Scotland, Wales and Northern Ireland.
- The TRA's Annual Report to be sent to the devolved administrations
- The TRA's Annual Report to be published by a certain date
- The TRA to report to Parliament on its individual recommendations to the Secretary of State on trade defence cases, within five days of those recommendations being made to the Secretary of State.

All these amendments were voted on and all were defeated.²⁹¹

Clause 7: Collection of exporter information by HMRC

²⁸⁷ clause 2(8)(a)

²⁸⁸ clause 2(8)(b) and (9)

²⁸⁹ Scottish Government, [Legislative Consent Memorandum, Trade Bill](#), December 2017 para 19

²⁹⁰ Trade Bill Deb 30 January 2018 c204

²⁹¹ Trade Bill Deb 30 January 2018 cc245-48, c255-56

Information that can be collected and disclosed

The Labour front bench put forward a number of amendments to clauses 7 and 8, often seeking to avoid burdens on business.

One amendment that was pressed to a vote was intended to avoid duplication by restricting a power to request data from exporters so it did not overlap with a power in the *Small Business Enterprise and Employment Act 2015*. The Government argued that the two powers were different. The amendment was defeated.²⁹²

Henry VIII power

The other Labour front bench amendment on these clauses that went to a vote was intended to remove a “Henry VIII” power in relation to requests for exporter information. The Government said that it was not possible to anticipate all future data needs and did not know whether “the collection of such currently unknown data might, for example, require the modification of an Act of Parliament”. The amendment was defeated.²⁹³

Clauses 8-12

There was no debate on these clauses which were ordered to stand part of the Bill.

New Clauses

New Clause 3: Sub-committee of Joint Ministerial Committee

Plaid Cymru and the SNP proposed a new clause (NC3) which would establish a sub-committee of the Joint Ministerial Committee to review the impact on the devolved nations of trade agreements implemented under this Bill. The Government opposed this amendment arguing that the Bill aimed simply to maintain the status quo and that Scotland, Wales and Northern Ireland should not be affected disproportionately. The Government also said that it would continue to engage with devolved administrations and that the new clause was therefore superfluous. The new clause was pushed to a vote but defeated.²⁹⁴

New Clause 8: Review of Free Trade Agreements

The Opposition proposed a new clause which would require a review every ten years of free trade agreements that fall within the scope of the Bill. The Government opposed this new clause on the grounds that the Bill dealt only with existing trade arrangements and could require the government to undertake around 80 reviews if each agreement were reviewed twice. The new clause was defeated by ten votes to nine.²⁹⁵

New Clause 9: Transition period

The SNP proposed new clause 9 which would require the Government to report to Parliament before exit day on how the Act would work during any transition period. The Minister said that he understood the

²⁹² Trade Bill Deb 30 January 2018 cc257-263

²⁹³ Trade Bill Deb 30 January 2018 cc263-265

²⁹⁴ Trade Bill Deb 30 January 2018, c270

²⁹⁵ Trade Bill Deb 30 January 2018, c273

wish for clarity. Parliament would, however, have plenty of opportunity to scrutinise the agreement between the UK and EU, including the implementation period. This new clause was defeated by ten votes to nine.²⁹⁶

New Clause 10: Impact on HMRC

New clause 10 was proposed by the SNP and supported by Labour. It would have required the government to produce a report on the impact of the trade information clauses (7 and 8) on the spending and staffing of HMRC within a year of the bill coming into force. Alan Brown explained that this was in the context of additional demands on HMRC, including those due to Brexit, along with HMRC staffing and office changes. The Minister said that the cost of collecting the data would be below the level at which an impact assessment must be published. The proposed new clause went to a vote and was defeated by nine votes to eight.²⁹⁷

New Clause 11: Role of Joint Ministerial Committee

The Opposition proposed this new clause which would provide a mechanism for consultation with the devolved administrations. The new clause was defeated by nine votes to six.²⁹⁸

New clause 12: Animal welfare

The Opposition proposed a new clause to ensure that animal welfare and food production standards are at least maintained in international trade agreements. Mr Gardiner said:

The new clause seeks to ensure that no regulations may be made under clause 2(1) of the Bill unless they are compatible with the UK's legal requirements on animal welfare—particularly as they relate to animals farmed for food. By introducing the new clause, we seek to ensure that, where the commercial aspects of a free trade agreement come into conflict with the principles of animal welfare, the animal welfare principles prevail.²⁹⁹

In response, the Minister said that “all existing commitments relating to animal welfare will remain when these agreements are transitioned.”³⁰⁰ He also pointed out that the Government was legislating separately on animal welfare in the draft *Animal Welfare (Sentencing and Recognition of Sentience) Bill*. The new clause was defeated by nine votes to five.³⁰¹

²⁹⁶ Trade Bill Deb 30 January 2018, c275

²⁹⁷ Trade Bill Deb 1 February 2018, c286

²⁹⁸ Trade Bill Deb 1 February 2018, c295

²⁹⁹ Trade Bill Deb 1 February 2018, c297

³⁰⁰ Trade Bill Committee 1 February 2018, c303

³⁰¹ Trade Bill Committee, 1 February 2018, c305

Annex 1: Treaties in EU federal states

EU States where regional governments and/or parliaments have treaty-making powers

The three federal States in the EU are Germany, Belgium and Austria.

Germany

Under Article 32 of the [German Constitution](#) (the Basic Law), Germany's Länder have the right to conclude treaties with foreign States. Article 32(3) states: “[i]nsofar as the Länder have power to legislate, they may, with the consent of the Federal Government, conclude treaties with foreign states”.

Although the Federal Government can conclude treaties on subjects falling within its field of exclusive legislative competence (Article 73 of Basic Law), it may also ratify or accede to treaties concerning subjects over which it has concurrent legislative powers (Article 74 of Basic Law), or where it has the right to enact general rules (Article 75 of Basic Law).

Austria

Article 16 (1) and (2) of the [Austrian Constitution](#) has a similar provision, which grants the Länder an international treaty-making power. But this power is limited to matters falling within their exclusive competence and only with neighbouring States. It is also subject to certain residual rights of the federal State. The Constitution provides:

Article 16

(1) The Länder can conclude treaties within their independent area of competence, State treaties with states bordering on Austria with their constituent states.

(2) The Land must inform the Federal Government before the initiation of negotiations about such treaties. In advance of their conclusion the Land Governor must obtain the consent of the Federal Government. Consent is deemed to have been given, if the Federal Government, within eight weeks from the day that the request has reached the Federal Chancellery, has not communicated to the Land Governor that the consent is denied. The authorization for the initiation of negotiations and conclusion of a state treaty is incumbent on the Federal President on the proposal of the Land government and with the countersignature of the Land Governor.

Belgium

Belgium's [Constitution](#) (as amended in 2014) enshrines a principle by which domestic divisions of competence between different regions and between linguistic communities can operate in international relations (Articles 167–9 of Constitution). So if the Flemish or Walloon regional government is competent internally for a matter, it is competent externally to enter into internationally binding agreements relating to that matter. This resembles the EU's own competence under Article 3(2) TFEU, which grants it exclusive external competence where an

international agreement “is necessary to enable the Union to exercise its internal competence”.

Article 167(3) states in relation to international treaty-making powers:

The Community and Regional Governments described in Article 121 conclude, each one in so far as it is concerned, treaties regarding matters that fall within the competence of their Parliament. These treaties take effect only after they have received the approval of the Parliament.

Regional ratification of treaties

In some federal states the regional parliaments also need to give their consent if the agreement concerns competences of those regional parliaments. So although the regional entities in an EU Member State cannot negotiate trade agreements separately, they may be obliged to ratify them separately.

Of the EU-28, Belgium is usually the State which has the most ratification requirements. All the different Belgian regions must ratify an international agreement where it relates to their competences. This legal requirement was used by the Walloon Government to delay ratification of CETA (the EU’s recent trade agreement with Canada) in order to clarify some of its questions about the treaty.

In the other federal EU Member States – Austria and Germany – regional ratifications are not required. Spain, which has a high level of decentralisation but is not federal, does not require the Autonomous Communities to ratify international agreements.

For further analysis of regional treaty-making powers in Europe, the United States and Canada, see Scottish Parliament Information Centre briefing, [Negotiation of Trade Agreements in Federal Countries](#), James Walker, 17 November 2017.

Some examples

In practice agreements between the German Länder and foreign states are rare. The most important ones deal with the protection of frontier waters or the use of water resources. For example, the [Agreement on the Protection of Lake Constance against Pollution](#) was concluded on 27 October 1970 between Austria, Switzerland and the German Lander Baden-Württemberg and Bavaria.

Other examples of international agreements with states or regions/cities in other states include:

- the 1998 Agreement between Sachsen-Anhalt and the Holy See
- a Memorandum of Understanding to create the Wisconsin-Bavaria Regulatory Reform Working Partnership
- the 1976 partnership agreement between Wisconsin and Hessen
- the 2011 cooperation agreement between Israel and Bavaria in the sphere of education

- the 1988 Frankfurt - Guangzhou partnership agreement³⁰²

Belgian regions have been able to conclude treaties since the signing of the Special Act of 5 May 1993 under the 1992 St Michael's Agreement. This contained constitutional reforms which dismantled the unitary state and established Belgium's modern federal structure. The [Flanders Government website](#) states:

At present, Flanders is a partner in more than 600 treaties and other agreements. The treaties are very diverse in terms of theme and impact. They go from cooperation agreements between Flanders and organisations such as UNESCO or FAO, over treaties with the Netherlands with regard to the management of the Scheldt and the accreditation of higher education, to agreements with the French and German-speaking Communities with respect to the medically justified sports practice.

Examples of Belgian regional agreements with third countries include:

- Cooperation between the Flemish Government and the Government of the Republic of Poland (1994)
- Cooperation between the Flemish Government and the Government of the Republic of Hungary (1994)
- Agreement on cooperation in the fields of culture, education, science and welfare between the Kingdom of the Netherlands and the Flemish Community in the Kingdom of Belgium (1995)
- Treaty between the Flemish Region and the Kingdom of the Netherlands on the drainage of water from the Meuse (1995)
- Cooperation between the Flemish Government and the Republic of Estonia (1996)
- Agreement between the Government of Flanders and the Government of the Republic of South Africa on cooperation in the fields of education, arts, culture, science, technology and sports (1996)
- Agreement on cooperation in the fields of culture, language, education and science between the Flemish Government and the Government of the French Republic (2000)
- Convention between the Flemish Community of Belgium and the Kingdom of the Netherlands on the transnational University Limburg (2001)
- Treaty between the Flemish Region and the Kingdom of the Netherlands concerning the termination of the interconnection of the pilotage rates (2005)
- Treaty between the Flemish Region and the Kingdom of the Netherlands on the joint nautical management in the Scheldt area (2005)
- Agreement between the Flemish Community and the Government of the Kingdom of Morocco establishing the Flemish-Moroccan Centre of Cultures in Brussels (2206)
- Treaty between the Flemish Region and the Kingdom of the Netherlands regarding the construction of the new lock Terneuzen (2015)

³⁰² UK cities and regions have also signed partnership agreements with other cities or regions. For example, on 19 April 1966 Birmingham, Frankfurt and Lyon signed a partnership agreement that started a period of enhanced collaboration.

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