

**Michael Keating, Professor of Politics, University of Aberdeen**  
**Lindsey Garner-Knapp, PhD candidate, University of Edinburgh**

International Agreements, Common Frameworks and Devolution  
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## **1. The Issue**

The devolution settlement in the United Kingdom is based on the ‘reserved competences’ model; only powers reserved to Westminster are specified. In addition, devolved governments and legislatures are prohibited from acting against the European Convention on Human Rights.

Except in the Northern Ireland Act, there is no provision in the devolution statutes to safeguard the UK internal market. As long as the UK was an EU member, that was largely secured by the EU internal market provisions.

There have been discussions among the UK and devolved governments over common frameworks in order to avoid harmful divergences in regulations after the end of the Brexit transition period. Common frameworks may also be necessary so that the UK meets obligations under future international agreements, where these cover devolved matters.

This poses the question of how far common frameworks will be needed and how they will be agreed and applied.

It has also raised the issue of how the devolved governments might have an input into international agreements covering devolved fields.

Negotiations on frameworks have been proceeding but they have not been concluded or published. At the same time, the UK Government has introduced an Internal Market Bill, intended to secure the internal market. This has not been agreed with the devolved governments.

We do not at the time of writing have details either of new international trade deals or of the proposed policy framework. The paper therefore uses existing international trade agreements to indicate the implications of three scenarios: a trade agreement with the EU; trading without agreements on World Trade Organization terms; and trade agreements with other countries.

## **2. Devolution and International Agreements**

International agreements can nowadays be quite far-reaching. Trade agreements may include flanking measures covering product standards, the environment or labour standards. Other international agreements include those on the environment and climate change.

The negotiation and ratification of international agreements are a reserved competence under the UK devolution settlement. They may cover devolved matters and in that case, implementation will be the responsibility of devolved governments.

While the UK was a member of the European Union, negotiation of trade agreements was mostly the responsibility of the EU. Mixed agreements, covering matters which are national competences, require the consent of member states. While the UK was in the EU, EU law was binding on UK and devolved institutions.<sup>1</sup>

After Brexit, the UK Government is responsible for agreements with the EU and with other countries. Implementation of commitments across the UK is necessary to ensure compliance.

Negotiations are underway on common frameworks among the UK and devolved governments. A UK Internal Market Act has been passed by the UK Parliament but is the subject of a legal challenge by the Welsh Government.

The UK Government has promised that the devolved governments will be consulted on trade agreements but not that they will be involved in the negotiations.

Input from the devolved administrations into international agreements is governed by the 2014 Memorandum of Understanding. This is rather vague. It commits the devolved governments to implement international obligations. In the case of disputes, matters are resolved through the JMC and then in bilateral discussions with the Secretary of State for Foreign and Commonwealth Affairs.

Mechanisms for parliamentary input into, and scrutiny of, international agreements at Westminster are weak. There is no provision for devolved input.

If an international agreement requires legislation to apply its provisions, the relevant laws may be introduced at Westminster (with legislative consent) or by the devolved legislatures in relation to areas of devolved competence.

UK ministers can direct Welsh Ministers to give effect to any international obligation by executive action, statutory instrument or by introducing a Bill into the Senedd and to refrain from action that would be incompatible with such obligations. They cannot direct devolved legislatures to give statutory effect to the agreements. Westminster, however, can legislate in such devolved fields, subject only to the Sewel Convention, which, as the Supreme Court has reminded us, lacks binding effect.

### **3. Policymaking and implementation**

#### *Upstream*

There is a case for input on the part of the devolved governments to negotiations in two circumstances: where devolved competences are at stake; and where sectors of particular importance in the devolved territories are concerned. The UK Government has promised ‘consultation’. There is no formal provision in the Trade Bill for devolved input; amendments to this effect were rejected in the iteration of the Bill introduced during the 2017-19 Parliament. There may be a case for something stronger than this, giving the devolved territories a formal role. It is important that information be freely available not only to devolved governments but also to the legislatures, stakeholders and the public. If the

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<sup>1</sup> Mixed agreements, covering areas of shared competence between the EU and Member States, are discussed below.

devolved institutions are to contribute to international trade deals, this requires that they have the capacity, including information, staff and time.

#### *Downstream*

The UK Government has a number of ways to apply provisions of international agreements in devolved territories. UK Ministers can instruct devolved Ministers, as noted above. The EU (Withdrawal) Act 2018 (to which the then National Assembly for Wales, but not the Scottish Parliament gave consent), allows UK Ministers temporarily to make regulations to freeze devolved legislatures powers related to EU retained law in devolved fields.

Westminster may over-ride devolved legislatures and legislate itself. The UK Government can work in partnership with the devolved governments to transpose the provisions of agreements in devolved areas. If international agreements were to impose additional financial burdens on devolved governments, they might reasonably request additional funding. It will also be up to regulatory agencies to ensure implementation of obligations. We do not yet know exactly how new UK regulatory agencies (replacing EU agencies) will work across reserved and devolved matters.

#### *Compliance and Arbitration*

The UK Government is responsible for any non-compliance both in EU law and of international trade agreements. In the case of the EU, it is UK Government policy that any penalties incurred by non-compliance on the part of a devolved government will result in the adjustment of that government's block funding allocation. To our knowledge, this has not happened to date. A similar arrangement might be applied to international trade. In international law, the UK Government would similarly be responsible for any failure to comply with agreements. Experience elsewhere suggests that partners in international trade deals might require guarantees that they would apply in the devolved territories to be written into the agreements. Trade agreements will include dispute resolution mechanisms. These have included arbitration panels drawn from both sides and sometimes from business as well as neutral international members.

For the future agreement with the EU, the Political Declaration proposes a Joint Committee and a dispute resolution mechanism, leading, if need be, to binding arbitration. If the dispute arises from a devolve issue, there needs to be a mechanism for the devolved government to be involved in the resolution, although formally the UK Government will have the responsibility. If countries fail to respect the terms of trade agreements, there may be legal action; the relevant part of the agreement may be suspended; or there may retaliatory sanctions. It would be for the UK Government to decide what the impact of these would be in the devolved territories.

#### *Discretion*

In matters of EU competence within their own competences, the devolved UK bodies generally have the same degree of discretion in the application of policy as do Member States. This has allowed significant variation in, for example, the application of agricultural and rural development policy. This might be an important issue in the negotiation and application of future trade agreements.

## **4. The Scope of International Trade Agreements**

Any international trade regime implies restrictions on what signatory states might do in areas that affect trade.

Membership of the EU entailed a high degree of integration. Within the Internal Market<sup>2</sup> there is free trade in goods (including agricultural products), free trade in services (which is not yet complete) and a high degree of regulatory harmonization as well as free movement of labour. Member States must comply with new regulations in a process of ‘dynamic harmonization’.

At the other end of the spectrum are obligations arising from membership of the World Trade Organization (“WTO”), which covers goods (GATT – General Agreement on Tariffs and Trade), services (GATS - General Agreement on Trade in Services) and intellectual property (TRIPS - Trade-Related Aspects of Intellectual Property Rights).<sup>3</sup> Without free trade agreements, member states are subject to WTO rules and trade on ‘WTO terms’, which means their own commitments within WTO. WTO membership entails ‘most favoured nation’ treatment under which all WTO members must be treated equally. There are some rules about regulation and subsidies. The WTO has no enforcement provisions but where members who are found by WTO panel and Appellate Body to be violating its rules, the complainant state may take retaliatory action.

In between EU and WTO terms lie free trade agreements. Recently negotiated trade agreements include obligations that go beyond WTO membership (WTO+). A general principle is that of the ‘level playing field, so that partners cannot lower standards to boost trade or encourage investment, a phenomenon known as the ‘race to the bottom’. For example, a country cannot reduce the minimum wage or lower environmental standards to encourage foreign direct investment or increase goods for export. Another key principle is ‘non-regression’, so that countries cannot lower existing standards. This does not require dynamic harmonization, to keep up with others’ new commitments. Agreements increasingly include services and agriculture.

To illustrate the last category, we use examples from the Comprehensive Economic and Trade Agreement (CETA) (EU-Canada); the US-Mexico-Canada Agreement (USMCA, replacing NAFTA); the EU-Japan Economic Partnership (EUJEP) and the Comprehensive and Progressive Agreement for Trans-Pacific Partnership (CPTPP).

These include a number of general principles allowing states to maintain standards across a range of issues.

CETA has as one of its objectives ‘to uphold Europe's high standards in areas like food safety, workers' rights and the environment.’

The CPTPP ‘provides recognition of inclusive values, including the importance of corporate social responsibility, environmental protection and enforcement, sustainable development, labour rights, cultural identity and diversity, and the elimination of bribery and corruption.’

CETA also includes a section on The Right to Regulate, which ‘preserves the ability of the European Union and its Member States and Canada to adopt and apply their own laws and regulations that ‘regulate economic activity in the public interest, to achieve legitimate

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<sup>3</sup> The UK in a Changing Europe, *What would ‘trading on WTO terms’ mean for the UK?*, <https://ukandeu.ac.uk/wp-content/uploads/2018/12/What-would-trading-on-WTO-terms-mean-Long-Guide.pdf>

public policy objectives such as the protection and promotion of public health, social services, public education, safety, the environment, public morals, social or consumer protection, privacy and data protection and the promotion and protection of cultural diversity.’

These regulatory commitments are made more enforceable when tied to trade agreements because signatory partners can be held liable either through dispute settlement or retaliatory action if measures are relaxed.

## **5. Machinery for Managing Common Issues**

These issues will be addressed in various ways: through UK-wide frameworks; in sectoral bills in matters like environment, agriculture and fisheries; and by internal market provisions. Under the EU Withdrawal Act, the UK Government has power temporarily to take control of returning EU competences in devolved areas by statutory instrument. This power has not so far been used. Until the future relationship with the EU and trade agreements with third countries are clear, it is difficult to link these areas directly to trade requirements.

### *Frameworks*

On the basis of principles agreed between the UK and the Scottish and Welsh Governments in October 2017, the UK and devolved governments have been engaged in negotiations about UK-wide framework for specific policy fields. One aim of these is to secure international trade deals.

Under Schedule 3 of the European Union (Withdrawal) Act, the UK Government provides reports to the UK Parliament every three months. These reports indicate progress made on common frameworks. Twenty-seven policy areas have been identified where no further action to create a common framework is required, twenty-two policy areas where non-legislative framework agreements might be needed, and twenty-one policy areas within the competence of the Welsh Parliament where legislation might be needed. Reading the last two reports shows that progress has been made in sixteen policy areas and most significantly on the Hazardous Substances (Planning) framework and Nutrition Health Claims, Composition and Labeling framework (see Appendix 1 for further details). The greatest progress has been made in policy areas where non-legislative framework agreements might be needed.

There is significant overlap with recently signed free trade agreements including the USMCA and CETA and the proposed framework policy areas (see Appendix 1 for further details). As a result, the decisions made during the framework negotiations could have the potential to affect trade negotiations and vice versa. Key areas include environment, government procurement, and agriculture, all of which feature in the USMCA and CETA. Furthermore, when comparing the progress made towards creating framework to the USMCA and CETA, it is evident that there is a lack of progress towards the policy areas of environment, government/public procurement, and agriculture.

Some areas where no further action to create a common framework is required do nevertheless correspond to the USMCA’s Environment chapter (24) and CETA’s Trade and Environment (24) including policies related to energy, forestry, and maritime industries as well as other policy matters related to labour and cooperation chapters.

In policy areas where legislative frameworks might be needed, there has been progress in several environmental and agricultural policy areas predominantly related to foodstuffs and animal husbandry. These correspond to the USMCA's chapters on Agriculture (3), Rules of Origin (4), and Technical Barriers to Trade (11), and CETA's chapters on Intellectual Property (20) and Sanitary and Phytosanitary Measures (5). Framework policy issues including agriculture, labour, and environmental policy cover issues which are also included in the USMCA and CETA have not been finalized.

### *Sectoral Bills*

The Fisheries Act 2020<sup>2</sup> creates a Common UK Framework requiring the four UK Fisheries Administrations to develop a 'Joint Fisheries Statement' detailing policies for contributing to the achievement of the fisheries objectives. The UK Government regards fishing opportunities as a reserved matter but agrees that detailed policy and administration is devolved. The Act received consent from the devolved parliaments in Scotland and Wales. . A Fisheries Bill for Wales is promised.

The UK Environment Bill contains a mixture of measures with different territorial applications. According to the UK Government: 'Most of the Bill extends to England and Wales and applies in England...' this has enabled us to bring forward a number of measures that we expect to see adopted outside of England. These joined up measures will help us manage the environmental challenges we are facing together across the UK.<sup>4</sup> Provisions on waste including producer responsibility, resource efficiency and exporting waste extend and apply to the whole of the UK, as do the provisions on environmental recall of motor vehicles, and the provisions on the regulation of chemicals. The Welsh Government supports the principle of a UK Bill but differs with the UK Government on the extent of legislative consent required.

### *The Internal Market*

Alongside the discussions on sectoral frameworks, there have been discussions between the UK and Welsh Governments on the concept of a UK Internal Market. The Scottish Government was not party to these discussions and after the General Election of 2019, the UK Government proceed to elaborate the proposals on its own. It appears that one motive for bringing forward these provisions was to ensure that the terms of any trade agreement would be applicable across the UK.

It is not clear what the concept of an UK internal market includes. There is no reference to it in the devolution legislation except for the Northern Ireland Act and it has not yet been tested in law. The EU Internal Market is a transversal principle, applying potentially across any policy field, and providing for free movement of goods, services, capital and people. It includes measures brought forward by the European Commission and approved by the Council of the EU and Parliament; decisions of the Commission and Court of Justice; and the principle of mutual recognition whereby if a good satisfies standards in any Member State, it can be sold in all the others, unless there is a good reason for national restrictive measures.

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<sup>4</sup> (<https://www.gov.uk/government/publications/environment-bill-2020/30-january-2020-environment-bill-2020-policy-statement#environmental-governance>).

EU Internal Market provisions are subject to the tests of proportionality (the measure should be no more detailed than necessary) and subsidiarity (action should be taken at the lowest level possible). The UK devolution settlements have no such safeguards.

The UK Internal Market White Paper focuses on the key principles of non-discrimination and mutual recognition.

Mutual recognition would provide that goods approved in one part of the UK could be sold in the other parts even though it did not meet the standards of that part. This means that, in the event of a free trade agreement with another state, imported goods meeting standards set by the UK Government for England could be sold in the other parts of the UK even though they did not meet local regulatory standards.

The White Paper on the Internal Market indicates that ‘key decisions will be put to the UK Parliament for approval, rather than resting exclusively with the UK Government’. There are no similar guarantees for the devolved institutions. This contrasts with international experience.

Internal market provisions exist in several federal and devolved countries. Typically, these are agreed in intergovernmental negotiations. There is no case where a central government can unilaterally determine what constitutes an internal market and how it should be interpreted.

In 2017 a Canada Free Trade Agreement was negotiated between the federal government and the provinces. It provides for provinces to agree on mutual recognition of standards but allows exceptions and specifies that provinces can legislate to protect legitimate public policy objectives including public health, social services, safety, consumer protection, cultural diversity, the environment and workers’ rights. This agreement includes a dispute resolution procedure, including arbitration.

Switzerland adopted an Internal Market Act to allow compliance with the EU Internal Market. It is based on non-discrimination and mutual recognition but in practice is developed in intergovernmental negotiations. It is monitored by the Competition Commission and can, in the last instance, be enforced by the courts. Measures are subject to a subsidiarity test.

The United States does not have an internal market act but relies on the Interstate Commerce clause in the Constitution, as interpreted by the courts.

Spain’s Law on the Unity of the Market act was introduced in 2013 but the Catalan Government took it to the Constitutional Court, which ruled that a mutual recognition clause was unconstitutional as it allowed autonomous communities to legislate for things happening in other regions. It establishes a Council for the Internal Market, nominated by the central and regional governments, with an independent secretariat. Matters of dispute may be referred to the intergovernmental Sectoral Conferences and, only in the last resort, to the courts.

## **6. Devolution implications**

Some of these matters are devolved or impinge on devolved responsibilities. The principal ones are discussed in the next sections (6a-h). In each case, we consider the implications of an agreement with the EU; WTO terms; a trade agreement; and the devolution aspect.

Generally speaking, the wider the scope of the agreements with the EU and with third countries and the more binding the rules, the more they will affect devolved competences.

## 6a. State aid and subsidies

### *EU Future relationship*

A key element in the level playing field discussion is state aids and subsidies. In principle, this refers to providing state subsidies to economic activities that would give domestic producers a competitive advantage. In practice, it can be interpreted broadly or narrowly. A narrow definition might be limited to direct grants. A broad definition might encompass other government activities including research support, training or land management policies favouring domestic producers. This has become a significant point of difference between the EU and the UK, with the UK resisting pressure to agree on limits in the interest of the level playing field (Financial Times, 27-07-20).

‘State aid’ is defined by the UK Government as follows:

*‘Using taxpayer-funded resources to provide assistance to one or more organisations in a way that gives an advantage over others may be state aid’<sup>5</sup>*

The UK Government’s Internal Market White Paper of July 2020<sup>6</sup> uses the term ‘subsidy’, which it defines in a similar manner:

*A subsidy is, broadly speaking, support in any form (financial or in kind) from any level of government – central, regional or local – which gives advantage to a business which it could not obtain otherwise. This advantage could be in any form, including a grant, a tax break, a loan or guarantee on favourable terms or facilities below market cost.*

### *WTO*

The WTO Agreement on Subsidies and Countervailing Measures defines a subsidy as (i) a financial contribution (ii) by a government or any public body within the territory of a Member (iii) which confers a benefit<sup>7</sup>

It includes financial contributions from the state and includes grants, loans, financial incentives, tax credits, although some countries favoured a broader definition.

The Agreement outlines disciplinary measures for WTO member countries using subsidies as well as a dispute-settlement procedure and countervailing measures (such as charging extra duties).

Agricultural subsidies are regulated under WTO rules, which categorize them in three boxes. Measures in the green box are freely permitted. Those in the amber box are to be reduced. Those in the blue box are restricted.

### *Free Trade Agreements*

Modern free trade agreements make reference to the WTO agreements either in specific ‘Subsidy’ chapters or in articles woven throughout the document. However, within negotiations, countries have the opportunity to include exceptions to the rule. In the EU-Japan agreement, articles from Chapter 8 (services and investment) are exempt, while the

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<sup>5</sup> <https://www.gov.uk/guidance/state-aid>

<sup>6</sup> ([https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment\\_data/file/901225/uk-internal-market-white-paper.pdf](https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/901225/uk-internal-market-white-paper.pdf))

<sup>7</sup> ([https://www.wto.org/english/tratop\\_e/scm\\_e/subs\\_e.htm](https://www.wto.org/english/tratop_e/scm_e/subs_e.htm))



USMCA has some exceptions on culture. In the CETA the parties are obliged to consult each other about subsidies and seek to eliminate them.

Some trade agreements allow special measures to support Small and Medium-sized Enterprises (SMEs).

In the CETA and the USMCA, subsidies on agricultural exports are prohibited.

#### *Devolution implications*

There has been disagreement between the UK and devolved governments as to whether state aid (subsidies) is devolved (but hitherto regulated by the EU) or reserved. There is an intergovernmental Concordat on Financial Assistance to Industry.<sup>8</sup>

The Internal Market Act, legislates to expressly reserve subsidy control.

Depending on how tightly they are defined, state aid provisions could affect the economic development policies of the Welsh Parliament and Government. Were the Welsh Government to take stakes in private enterprises, this might also come under subsidy and state aid rules.

Agricultural support is devolved but hitherto governed by EU rules. These allow a certain margin of variation, which in the UK is exercised separately for England, Wales, Scotland and Northern Ireland. Under the Agriculture Act 2020 the UK Government has asserted that it will determine what will go in each of the WTO's boxes. The Welsh Government has indicated that it will remove direct support payments along with England, which would reduce the scope of conflict over that issue. There may, however, be questions about whether and how measures support rural communities might be considered subsidies.

## **6b. Government Procurement**

Public procurement is currently regulated by EU rules.

#### *EU Agreement*

The UK Government did not include procurement in its mandate for negotiating a future relationship, apparently preferring to rely on WTO rules. The EU is seeking to go beyond this.

#### *WTO*

Within the WTO there is a plurilateral Agreement on Government Procurement (GPA), to which 48 members subscribe. There is a general agreement and schedules for individual members. The UK Trade Bill gives UK and devolved ministers concurrent powers to implement the GPA.

#### *Devolution*

Rules on procurement will affect all public bodies in Wales.

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<sup>8</sup> <https://gov.wales/sites/default/files/publications/2018-09/memorandum-of-understanding-and-supplementary-agreements.pdf>.

## **6c. Investor Protection**

Investor protection provides guarantees for foreign investors. Such measures prohibit expropriation; ban prioritising local companies; establish minimum standards of treatment and transparency practices to avoid, for example undervaluing investments; and regulate banking practices that facilitate ease of transferring funds between countries.

### *EU Agreement*

The UK has investor protection agreements with many countries, including EU Member States although since 2010 this has been an EU competence. It is likely that investor protection will form part of any new agreement with the EU, although, according to the law firm FIETTA, this may be less than in existing agreements.<sup>9</sup>

### *WTO*

Investor protection is not guaranteed by WTO rules.

### *Trade agreements*

Provisions in modern agreements often have investor protection. CPTPP provides investment regulation and protections for the eleven signatory countries and the USMCA has maintained provisions from its predecessor NAFTA.

Investment protections could restrict governments from regulatory action that might be seen to adversely affect these assets. Investor-State Dispute Settlement (ISDS) mechanisms in trade deals allow foreign companies to sue governments for actions that distort the investment market or discriminate. This has been one of the most controversial aspects of recent trade agreements. During the Trans-Pacific Partnership (TPP) negotiations, the prequel to CPTPP, the USA argued successfully for ISDS to be included in the agreement. US firms have a track record of suing foreign governments under these provisions.

### *Devolution*

Investor protection mechanisms could potentially affect Welsh Government actions to favour local producers, to regulate activities and to acquire private assets for public purposes related to devolved matters. Much will depend on exactly how investor protection mechanisms are defined and applied.

## **6d. Climate Change and the Environment**

### *EU Agreement*

The EU's negotiating mandate uses EU standards as the reference point for agreement on environmental standards. It requires measures to ensure 'that the common level of environmental protection provided by laws, regulations and practices is not reduced below the level provided by the common standards applicable at the end of the transition period in, at least access to environmental information; public participation and access to justice in environmental matters; environmental impact assessment and strategic environmental assessment; industrial emissions; air emissions and air quality targets and ceilings; nature and biodiversity conservation; waste management; the protection and preservation of the aquatic environment; the protection and preservation of the marine environment; health and product

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<sup>9</sup> (<https://www.fiettalaw.com/brexit/brexit-insight-the-protection-of-eu-uk-investment-in-the-future-partnership-agreement/>).

sanitary quality in the agricultural and food sector; the prevention, reduction and elimination of risks to human and animal health or the environment arising from the production, use, release and disposal of chemical substances; and climate change.

The UK's position is to give assurances that it does not intend to lower standards but will not give up its regulatory independence.

#### *WTO*

The WTO recognises the importance of the environment and supports members in developing commitments to its protection. The WTO does not regulate the environment but offers a supportive framework for environmental provisions.

There are, moreover, international environmental agreements like the UN Framework Convention on Climate Change and the Paris climate agreement, sustainable development goals, and environmental cooperation provisions.

#### *Trade Agreements*

Modern trade agreements include provisions committing the parties to these international agreements. Within the USMCA, all parties agree to recognise each state's authority to regulate and uphold legislation, protect human, flora (plants) and fauna (animals) lives, and promote environmental cooperation and develop sustainable policies. Environmental commitments are woven throughout a number of commitments in the EU-Japan agreement.

#### *Devolution*

Environmental policy in Wales is devolved. Wales has its own climate change strategy and targets and there would be concern if international agreements seemed to permit lower standards. The UK Government has stated that this would not be the case.

## **6e. Food and Agriculture Standards**

#### *EU Agreement*

In the EU-UK negotiations, food and agricultural standards have been an issue. Again, the EU has proposed binding commitments to high standards while the UK has merely promised that it has no intention of lowering standards.

#### *WTO*

The WTO's Agreement on the Application of Sanitary and Phytosanitary Measures stipulates that no Member should be prevented from adopting or enforcing measures necessary to protect human, animal or plant life or health, subject to the requirement that these measures are not applied in a manner which would constitute a means of arbitrary or unjustifiable discrimination between Members where the same conditions prevail or a disguised restriction on international trade. Regulations must be based on science. They should be applied only to the extent necessary to protect human, animal or plant life or health. They should not arbitrarily or unjustifiably discriminate between countries where identical or similar conditions prevail.'

#### *Trade Agreements*

As WTO agreements, agreements like CETA, CPTPP, EU-Japan, and the USMCA incorporate the SPS measures. Agricultural exports must meet the standards of importing countries; there is no harmonization or mutual recognition of standards. The US-Canada-

Mexico Agreement specifically allows the parties the right to regulate products of biotechnology, with a mechanism for consultation and cooperation.

#### *Devolution.*

Agriculture and food standards are devolved to Wales. These have hitherto been regulated largely by EU standards and principles of mutual recognition.

Fears have been raised that international trade deals could mean a lowering of standards, with chlorine-washed chicken, hormone-treated meat and genetically-modified foods being cited. This could happen if UK negotiators accept these lower standards in return for market access for other items. The Internal Market Act 2020 establishes a system of mutual recognition of standards. This could mean that imported agricultural products approved for sale in England could qualify for sale in Wales, Scotland and Northern Ireland even if they did not meet higher standards in force in those territories.

### **6f. Fisheries**

#### *EU Agreement*

This has become a major issue in the Brexit negotiations. The UK is pressing for a stand-alone agreement on access and quotas. The EU wants to make this part of the overall agreement, including trade in fish.

#### *WTO*

Negotiations at WTO to reduce fisheries subsidies have been continuing for several years now but there are no binding rules.

#### *Trade Agreements*

Access to fisheries do not usually feature in trade agreements, but as stand-alone agreements, within regional organizations for managing fisheries or bilateral treaties.

#### *Devolution*

During the UK's membership of the EU, fisheries management was devolved but within policy parameters set by the EU, which was also responsible for international fisheries negotiations.

### **6g. Culture**

#### *EU Agreement*

Cultural products have not been an issue in the Brexit negotiations.

#### *WTO*

The question of whether cultural products should be exempt from trade rules has been one of the most contentious issues at the WTO.

#### *Trade Agreements*

Some modern trade agreements include provisions to protect and promote cultural identity. In the CETA, cultural products and services are exempted from restrictions on government procurement, state aid, and investment. In the CPTPP agreement, cultural protections are supplementary annexes to the agreement. The USMCA includes cultural protections for indigenous people.

### *Devolution*

Culture is devolved in Wales. The protection of the Welsh language and of economic as well as cultural activity in Welsh has been a priority for successive governments. There are no proposals for frameworks on this field.

## **6h. Public Services**

### *EU Agreement*

Public services do not feature in negotiations with the EU or in the framework negotiation. They could, potentially, arise in trade agreements. Public services are often caught up in broader aspects of trade agreements, depending on how far they are actually traded.

### *WTO*

Governments are free to choose those services on which they will make commitments guaranteeing access to foreign suppliers. Each Member must have a national schedule of commitments, but there is no rule as to how extensive it should be. Some Members have made commitments only on tourism, and there is great variation in the coverage of schedules, reflecting national policy objectives and levels of economic development. There is agreement among all Governments that in the new round of negotiations the freedom to decide whether to liberalize any given service and the principle of progressive liberalization will be maintained.<sup>10</sup>

### *Trade Agreement*

The possibility of US suppliers gaining access to public services in EU countries was one of the main controversies in the failed Transatlantic Trade and Investment Partnership (TTIP). It was also raised during discussions about the US-Canada Trade Agreement in the late 1980s.

CETA discusses public services under the chapter on Domestic Regulation and in relation to ensuring that these services do not hinder or create a barrier to trade (such as licences and bureaucratic processes). CPTPP and EU-Japan includes public services under a State-Owned Enterprise and Designated Monopolies chapter and Trade in Services chapters respectively, which recognises essential public services and their role outside of the market.

### *Devolution*

Health is devolved to Wales, Scotland and Northern Ireland, but does not feature directly in international trade agreements. Two possible effects, however, have been suggested. Where provision of health services has been contracted out, trade agreements might stipulate that providers from the other state should be allowed to tender for contracts. Suggestions have been made the providers from the USA could come into the NHS. It is up to governments, however, to decide whether to open up their health services in this way. It has further been suggested that other countries, notably the USA, might insist on extended Intellectual Property Rights for medicines. This could push up prices in the NHS. A similar issue arises in relation to education.

## **7. Comparative Experience**

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<sup>10</sup> [https://www.wto.org/english/tratop\\_e/serv\\_e/gats\\_factfictionfalse\\_e.htm](https://www.wto.org/english/tratop_e/serv_e/gats_factfictionfalse_e.htm)

The role of sub-state governments in international treaty making arises in a number of federal states. The internal division of competences frequently cuts across responsibilities arising from treaties. No country has found a complete institutional answer to this question but they have arrived at various forms of compromise.

### *Germany*

As an EU Member State, Germany does not negotiate international trade agreements deals and is limited to the role of its representatives at the EU's institutions. However, it can be required to ratify agreements between the EU and third states which include areas of shared EU-Member State competence. Yet it does have to ratify mixed agreements, where national competences are concerned. Germany has a well-developed system of cooperative federalism, in which legislation is mostly done at the federal level, while implementation is the responsibility of the Länder. There are two interpretations of the treaty-making power: that the federation can make binding treaties using its foreign polity powers; and that treaties in matters of Land competence can only be achieved by the Länder themselves. The issue has never been resolved but procedures were agreed under the Lindau Agreement of 1957. The Länder agreed that the federal government could negotiate treaties within their field of competence. The federal government, in return, agreed that treaties in matters of Land competence would only be reached with their consent. This includes matters administered by the Länder, so the scope is wide. If there is a matter of exclusive Land competence involved, the agreement of all the Länder governments must be obtained. If it is a matter that touches on shared Land competences or is a shared competence, then they must be consulted but do not have a veto. Treaties must be ratified by the lower chamber of Parliament, the Bundestag and, where matters of Land competence are involved by the Bundesrat, which represents the Länder governments. There is a Permanent Treaty Commission of the Länder. The process is governed by the principle of *Bundestreue*, or federal good faith. The German Constitutional Court enforces both the strict law of the constitution and the principle of *Bundestreue*. This institutional underpinning ensures that the Länder are fully informed of, and involved in, negotiations. The particular culture of German cooperative federalism makes it difficult to transfer this experience directly to other countries.

### *United States of America*

The USA gives few opportunities for the states to engage and influence foreign policy. The federal government has been able to use the supremacy and pre-emption doctrines to sign trade agreements covering matters within the competence of the states. This has caused a lot of concern among state governors and legislators and in the US Senate. The 2002 Trade Promotion Authority Act requires communication between Congress and the executive branches before legislation on trade agreements is passed. Congress is assisted by the Intergovernmental Policy Advisory Committee on Trade (IGPAC). The IGPAC was created to liaise with state governments and report to the President, the US Trade Representative (USTR), and Congress on trade agreement negotiations. It is argued that IGPAC has been underfunded and struggles to obtain expert-level staff. US states can influence international trade policy through the Single Point of Contact (SPOC), which communicates between State governors and the USTR. These meetings are opportunities for the SPOC to identify priorities and voice concerns and for the USTR to share information on trade negotiations. However, because of the limited role of the States in trade agreements, most states provide little resources to these roles.

### *Canada*

Canada's federal Constitution affords the provinces significant leverage in international trade agreements. The courts have ruled that where the provinces have jurisdictional authority, the federal government cannot legislate and provincial governments can refuse to implement the agreement. On the other hand, the Canadian government is liable for any provincial noncompliance with international trade obligations. To deal with this, in the 1990s the federal and provincial governments developed two non-binding, cooperative mechanisms: the joint Federal/Provincial/Territorial Committee on Trade (CTrade) with meetings held quarterly; and ad-hoc subject specific meetings held as needed. These cooperation mechanisms have developed 'trust ties' as well as underpinned Canada's competence to implement trade obligations, between the two levels of government as well as with international partners.

Canada has large regional differences in population, geographic, and economic size as well as variation in economic composition. As a result, provinces have invested resources into developing intergovernmental ministries and departments to consult, coordinate, and communicate with other provinces and to develop trade and negotiation expertise. These subnational networks often have regular subject-specific meetings (for example on labour, agriculture, oil and gas policy) which support discussions during CTrade and ad-hoc meetings with the federal government. Some provinces have invested more resources and have become leaders in particular industries. Ontario and Quebec are experts in dairy, financial services, and advanced education; Alberta and Saskatchewan are experts in oil and gas, agriculture, beef and pork; British Columbia leads with Alberta on softwood lumber; and New Brunswick and Nova Scotia lead on fisheries. When there are overlaps in sector interests, provinces consult one another yet this does not always result in agreement.

CETA offers a useful case study on the importance of having sub-state actors' direct involvement in the negotiation processes and implementation of a free trade agreement. The precursor to CETA, the Canada-EU Trade and Investment Enhancement Agreement (TIEA) collapsed in 2006, and some European countries blamed a lack of provincial involvement in negotiations. The EU had an interest in creating an agreement with deep integration including access to municipal and provincial government procurement, dairy exports, and non-tariff measures. The EU recognized that they required provincial consent on these matters. Because of the previously failed negotiation process, which took several years and significant resources from all negotiating parties, the EU insisted on the provinces and territories having a seat at the table during the CETA negotiations. Several provincial level trade negotiators described the CETA experience as novel and unlikely to become standard, even though the experience was successful in creating provincial level buy-in to the final agreement.

### *Belgium*

As an EU Member State, Belgium's role in international trade agreements is limited to the role of its representatives at the EU's institutions. However, it can be required to ratify agreements between the EU and third states which include areas of shared EU-Member State competence. Belgium does have to ratify mixed trade agreements, where Member State competences are involved. It has a complex system of federalism in which power is shared between the federal government and three regions (Flanders, Wallonia and Brussels) and three language communities (Flemish, French and German). Because international trade is a regional competence and items within trade agreements also impinge upon the competences of both regions and the language communities, these agreements need approval from the legislatures of Belgium, Flanders (as a region and language community), Brussels, the French Community, Wallonia and the German Community.

## 8. Conclusion

There are substantial overlaps between devolved competences and the scope of potential trade agreements. The extent will depend on the depth and breadth of those agreements.

Trading on WTO terms would require adherence to some rather general principles.

WTO+ trade agreements would entail more commitments, although these vary across other cases.

Until the shape of trade agreements is known, it is not possible to make definitive judgements on how far they will affect devolved competences.

The UK Government has recently shown great reluctance to accept binding rules in a future agreement with the EU. The EU, for its part, has pressed for more binding commitments.

There is broad agreement between the UK and devolved governments about the need for some UK frameworks and some progress on agreeing those. Part of this need arises from trade agreements with the EU and third countries and even trading under WTO terms.

There is less agreement on what these agreements should cover and how far they should be legislative.

The frameworks process has proceeded in line with discussions about sectoral bills, including those on agriculture, fisheries and environment.

The Internal Market process has followed a rather different track and, since the General Election of December 2019, has not been conducted in cooperation with the devolved administrations. The Internal Market Act 2020 raises new questions, which have not yet been resolved.

This means that issues outside of the existing frameworks process could arise in relation to international agreements covering devolved competences.

There is, as yet, no formal process to engage devolved governments in the negotiation of international agreements.

International experience shows that in federal or quasi-federal countries they have developed intergovernmental mechanisms to deal with the issues raised in this paper.

Mechanisms for involving the UK devolved administrations and legislatures in international agreements are very weak when compared with comparable countries.