

# External Affairs and Additional Legislation Committee

## International agreements: a suggested approach to engagement and scrutiny

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### 1. Purpose

1. This paper provide an outline approach for Assembly engagement with, and scrutiny of significant future UK international agreements (e.g. the proposed post-Brexit UK-USA, UK-Australia, and UK-New Zealand trade agreements).
2. It has been prepared to inform discussion with a range of constitutional and legal experts at a roundtable discussion on 14 October 2019.

### 2. Background

#### Previous work

3. The Committee has been considering the implications for Wales of the UK Government's trade policy since the autumn of 2016.
4. During the first quarter of 2019, the Committee developed an approach to scrutinising international agreements, in response to the increasing volume of trade continuity agreements that were being made in preparation for exiting the EU.
5. This approach has been necessarily reactive, due to the tight timescales involved and the limited level of engagement prior to their signature.
6. The proposals contained in this paper are made in preparation for the post-Brexit period and the significant international agreements that the UK Government intends to negotiate with partners such as the USA, Australia, and New Zealand.
7. In February 2019, the Committee wrote to the UK Government with an initial view of what it might want to see from the perspective of Assembly engagement and scrutiny.



**8.** Since then, the Welsh Government has shared its view that it is seeking significant involvement in the shaping of the UK negotiating mandate.<sup>1</sup>

**9.** The model below is provided as a starting point for discussion. It is written from the perspective of the Committee.

## 3. The model

### 1. Early engagement and the UK mandate

**10.** Our institutional experience of engaging with EU negotiations on significant reforms (such as those to the Common Agricultural Policy and Common Fisheries Policy for the post 2013 period) has demonstrated the need for engagement at the earliest phases of the process, ahead of the UK's negotiating position being settled or a mandate agreed.

**11.** For the Assembly to be in a position to engage in this way, it would need to be consulted by the UK Government ahead of the UK Government finalising its negotiating position and, ideally, be notified in advance of plans for forthcoming international agreements through a published multiannual forward work programme.

**12.** The model would emphasise the importance of this early engagement and the value that this can add in terms of the early identification of any Wales-specific technical, legislative or policy issues. Addressing issues upstream should lead to a clearer route through subsequent phases of engagement and scrutiny.

**13.** It would also enable the Assembly to engage with the other party to any agreement, and/or relevant sub-state regions that exist should it wish.

**14.** The Committee could outline that for these reasons, it believed that this type of early engagement can make a positive contribution to UK trade policy objectives.

**15.** We would also emphasise the importance of engaging with the Assembly and not solely with the Welsh Government to ensure a complete understanding of the devolved position.

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<sup>1</sup> See paragraphs 12-26 of [the transcript of the First Minister's appearance before the Committee on 8 July 2019](#).

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**16.** As set out above, the Welsh Government has emphasised the importance of being involved in the setting of the UK negotiating mandate. It follows that the Assembly will also want to scrutinise the position taken by the Welsh Government and any compromises it has had to make in seeking agreement with the UK Government on the mandate.

**17.** In circumstances where the Welsh Government is seeking to reach an agreement that would constrain the future legislative competence of the Assembly once implemented, then the model would suggest that the Welsh Government should seek the Assembly's consent before making such representations to the UK Government.

**18.** To enable this scrutiny to take place, the Assembly could seek a commitment from the Welsh Government to lay the text of UK mandates, accompanied by a memorandum that explains the Welsh Government's position and the effect of implementing the eventual agreement on the Assembly's legislative competence and/or the Welsh Ministers' functions.

### Questions

- Is the approach suggested above for engagement with the setting of a mandate sufficient to ensure the possible implications for the devolution settlement and the views of the Assembly are adequately considered?
- Should the proposals be strengthened to seek the establishment of a parliamentary convention, along the lines of Sewel, that would normally require the Assembly's consent to the setting of a mandate that covers areas of devolved competence?

## 2. Negotiation phase: timely provision of information and engagement during the negotiating phase, including parity of access to negotiation texts

**19.** On commencement of the negotiating phase, the timetable and format of the negotiations should be transparently communicated by the UK Government.

**20.** Once a structure for negotiations has been developed, the Assembly should receive regular pre- and post- negotiation briefing from the Welsh Government on the position taken and the outcomes achieved at each negotiating round, with particular emphasis on how issues of concern raised during the early stage of scrutiny/position development have been addressed.

**21.** This approach will rely on the UK Government ensuring that the Welsh Government has a meaningful role in the process.

**22.** In the absence of more formalised intergovernmental relations, our preference would be to see the establishment of a JMC International Trade, as called for by the Welsh Government. We note the creation of a Ministerial Forum for International Trade, but that it has not yet met (as far as we are aware). We await details of this new Forum's terms of reference, and the role that is anticipated for it.

**23.** We understand the need to maintain a degree of confidentiality around aspects of the negotiating process and that the degree of confidentiality can vary. For example, there might be a need to restrict certain information absolutely. In other cases, a controlled sharing of information through the use of e.g. reading rooms might be appropriate.

**24.** For the Assembly to play its part in holding the Welsh Government to account, and representing the interests of the people of Wales, it must have the same level of access to information as UK Parliamentarians in cases where negotiations relate to devolved competences, or matters that might affect devolved competences.

**25.** On occasion, the opportunity to discuss progress with UK Ministers directly can be of considerable assistance to the Assembly's work. We would hope that UK Ministers would continue to look favourably on reasonable requests to participate in the work of Assembly Committees.

### Question

- Would the arrangements described above provide the Assembly with sufficient opportunity to exercise oversight and scrutiny of the Welsh Government's role and to effectively respond to any deviation from the mandate that might emerge during negotiations?

### 3. Ratification

#### Option 1: Assembly consent requirement

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**26.** In our view, adjusting the devolution settlement through acceding to international agreements is as constitutionally significant as adjusting it through UK legislation.

**27.** It follows, therefore, that a consent convention is needed to cover this area of shared competence as the point when a stable text emerges from the negotiations.

**28.** As international agreements have the potential to adjust the devolved competence of the Assembly, we believe that the convention should (as with the legislative consent convention) be a convention between legislatures.

**29.** In these circumstances, we hope that any proposals for a revised process of UK Parliamentary scrutiny will incorporate the need to consider the consent decisions of the Assembly before the ratification of an agreement. We hope that both the UK and Welsh Governments will undertake to support this.

#### Option 2: No Assembly consent requirement

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**30.** Once a stable text emerges from the negotiations, the Assembly will want to consider how it compares to the mandate and whether any new implications for Wales, and the devolution settlement, have arisen as a consequence of compromises made.

**31.** As with the current process followed for international agreements, an Assembly committee could consider the draft agreement and report on it to the Assembly and seek to raise any issues with the Welsh Government, UK Government and committee colleagues in the UK Parliament.

### Questions

- What are the different benefits and advantages of the two options described above ? Or is there an alternative approach that can be taken?
- How does a decision on managing the ratification stage of scrutiny relate to decisions taken when considering the mandate?
- How might this work in circumstances where there was an Assembly election between the point at which it expressed a view on a mandate and any consideration at ratification phase?

## 4. Differential implementation of international agreements

**32.** Ultimately, UK international agreements that incorporate the particular needs of Wales and that respect the devolution settlement have the potential to be of significant benefit to the people of Wales.

**33.** We would hope that a UK international agreement would work in the best interests of all of the UK.

**34.** However, we recognise that there could be circumstances in which a particular Welsh issue cannot be addressed through a more general UK approach.

**35.** In such circumstances, well-established mechanisms exist to accommodate differential implementation of agreements. For example, the inclusion of annexes of reservations to an agreement.

**36.** We believe that the scope for differential implementation of future UK international agreements should be considered seriously by the UK Government as it develops its approach.

### Question

- Could differential implementation of international agreements work in the context of the UK and devolution?

## 5. Implementation of devolved aspects of international agreements

**37.** We would expect the Assembly and/or Welsh Ministers to be responsible for the domestic implementation of devolved aspects of international agreements, including any legislative measures that might be necessary.

**38.** In circumstances where the UK Government intends to give provisional effect to an international agreement (in part or in full) then it should be required to notify Welsh Ministers and the Assembly of this intention.

## 6. Governance and development after ratification

**39.** We would anticipate the Assembly wanting to be engaged in the ongoing process of monitoring the governance arrangements associated with an international agreement and any interinstitutional arrangements it establishes e.g. dispute resolution mechanisms.

**40.** The Assembly might wish to periodically review an agreement to ensure that it has delivered the benefits it was designed to provide for Wales and to learn lessons for engagement with subsequent international agreements.

### Questions

- What documentation should be laid before the Assembly to enable effective scrutiny at the different stages?
- To what extent (if at all) should the Assembly's consent be sought at:
  - mandate stage (paragraph 17); and/or
  - ratification stage (options set out in paragraphs 26 - 31)
- In tandem with the development of a scrutiny procedure, is there a case to be made for seeking changes to the devolution settlement?
- For example, the repeal or amendment of Section 82 of the Government of Wales Act 2006, due to the change in the UK's foreign policy as a consequence of Brexit?

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# Summary of key stages

## Stage 1 Early Engagement:

- Publication by UK Government of a multiannual forward work programme for forthcoming international agreements.
- Consultation by UK Government with the Assembly in the development of its negotiation mandates.
- Scrutiny of the Welsh Government position on any mandates.
- Welsh Government required to seek the consent of the Assembly prior to agreeing any mandate that may constrain the future legislative competence of the Assembly.

## Stage 2 Negotiation Phase:

- UK Government to transparently publish the timetable and format for negotiations.
- Welsh Government commitment to regularly brief the Assembly pre and post each negotiation round on the position taken and outcomes achieved.
- Assembly to be provided to the same access as UK Parliamentarians to negotiating texts.
- UK Ministers to commit to continue to appear before Assembly committees where relevant to discuss negotiations.

## Stage 3: Ratification of final text:

- Consent convention developed between UK legislatures where the final text of any agreement reached adjusts the devolution settlement (under 'Option 1' only).
- Scrutiny of Welsh Government on how the final text compares to any mandates between the Welsh Government and UK Government.





## Stage 4: Implementation and Governance post-ratification

- Assembly scrutiny of any domestic legislation needed to implement any agreements reached.
- Assembly scrutiny of governance arrangement of international agreements e.g. dispute resolution mechanisms.
- Assembly scrutiny of the impact of the agreement on Wales and lessons learnt for future agreements.