

UK international agreements after Brexit: A role for the Assembly

Current UK Government policy indicates that, after the UK leaves the European Union, significant new free trade agreements will be sought with a number of international partners. Implementing these agreements has the potential to significantly alter the devolution settlement.

Currently, there is no formal mechanism to ensure that the Welsh Government or the Assembly have any say in the negotiation and confirmation of these agreements, even in circumstances where they engage devolved competence.

This report provides an outline approach for Assembly engagement with, and scrutiny of, significant future UK international agreements. This could include the proposed post-Brexit UK-USA, UK-Australia, and UK-New Zealand trade agreements as well as any wider association agreements the UK may seek to sign.

Depending on how negotiations are configured, this approach could also be considered for the UK-EU future relationship agreement.



1. Background

Our previous work

1. We have been considering the implications for Wales of the UK Government's trade policy since the autumn of 2016.
2. During the first quarter of 2019, we developed an approach to scrutinising international agreements, in response to the increasing volume of trade continuity and other continuity agreements that were being made in preparation for exiting the EU.
3. This approach has been necessarily reactive, due to the tight timescales involved and the limited level of engagement prior to their signature.
4. The outline proposals contained in this report 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.
5. Depending on the approach that is taken, the proposals made in this report may be relevant to engagement with, and scrutiny of, the UK-EU future relationship agreement.
6. In February 2019, we wrote to the UK Government with an initial view of what we might want to see from the perspective of Assembly engagement and scrutiny.¹
7. Since then, the Welsh Government has shared its view that it is seeking significant involvement in the shaping of the UK negotiating mandate.²

¹ Letter from the Chair of the External Affairs and Additional Legislation Committee to Baroness Fairhead, 1 February 2019

² See paragraphs 12-26 of the transcript of the First Minister's appearance before the Committee on 8 July 2019.

8. In early October 2019, we published a paper that provided a draft approach. We discussed this draft with a panel of legal and constitutional experts from across the UK on 14 October 2019.³

9. Following this meeting, one of the participants, Dr Jack Simson Caird from the Bingham Centre for Rule of Law, provided a written submission that has helped inform our work.⁴

10. The outline approach suggested in this report is largely based on the paper that we published in October 2019. However, it has been strengthened in a number of areas thanks to the input of those that participated in the roundtable discussion on 14 October 2019.

2. The UK Government's position

The Memorandum of Understanding

11. The relationship between the UK and Welsh Governments in the fields of EU and international relations is described in a non-binding Memorandum of Understanding ('MoU'), first published in October 2012.⁵

12. The MoU is set within the context of the UK's membership of the EU and provides arrangements for the involvement of the devolved administrations in EU affairs.

13. The MoU's status as a non-binding agreement is made clear from the outset and throughout its text.

14. Appended to the MoU are concordats covering international relations, which are "to be binding in honour only".⁶

³ External Affairs and Additional Legislation Committee, *International agreements: a suggested approach to engagement and scrutiny*, October 2019. This was published as a paper for our meeting on 14 October 2019.

⁴ Dr Jack Simson Caird, *Written evidence to the External Affairs and Additional Legislation Committee of the National Assembly for Wales*, October 2019.

⁵ Cabinet Office, *Devolution: Memorandum of understanding and supplementary agreements*, October 2013

⁶ *Ibid*, paragraph B2.2

15. The concordats recognise the UK Government's sole right to enter into treaties or other international agreements binding on the UK in international law, whilst acknowledging that:

Under the devolution legislation, the devolved administrations are responsible for observing and implementing international obligations which relate to devolved matters.⁷

16. It is worth observing that the above sentence has a long footnote attached to it that explains the powers available to the UK Government to ensure that the devolved administrations take action to give effect to the UK's international obligations and do not take actions which would be incompatible with these obligations. These powers extend to directing certain Assembly functions. We will return to this when we consider the legal position later in this report.

17. More practically, the concordats establish arrangements for the UK Government to consult the devolved administrations about the formulation of the UK's position for international negotiations, to the extent that the negotiations touch on devolved matters (including non-devolved matters which impact upon devolved areas). The concordats provide for the participation of Welsh Ministers in a UK-led negotiation team.

18. In terms of a role for the devolved legislatures, the Concordat on Co-ordination of EU Policy refers to arrangements for obtaining a view from devolved legislatures on EU issues and to consider this view.

19. In terms of wider international relations, the concordats only refer to the legislatures in so far as they have a role in implementing international obligations. The concordats also raise the possibility of the Sewel convention being disapplied in certain exceptional circumstances.

Command Paper: Processes for making free trade agreements after the United Kingdom has left the European Union

20. In February 2019, the UK Government published a Command Paper: *Processes for making free trade agreements after the United Kingdom has left the European Union*.⁸

⁷ Ibid, paragraph D4.8

⁸ Department for International Trade, [Processes for making free trade agreements after the United Kingdom has left the European Union](#), CP 63, February 2019

21. This paper included a section on devolved administrations and legislatures. Also relevant to this report is the section on the role for Parliament. It summarises the UK Government's position as:

The [UK] Government is committed to working closely with the devolved administrations to deliver a future trade policy that works for the whole of the UK. It is important that we do this within the context of the current constitutional make-up of the UK, recognising that international treaties are a reserved matter but that the devolved governments have a strong and legitimate interest where they intersect with areas of devolved competence.

22. The Command Paper points to:

- the establishment of an officials group;
- ongoing work in relation to the role of the devolved administrations in future free trade agreements, noting that this new work will be set in the context of the existing Memorandum of Understanding (that we have mentioned above); and
- the creation of a new Ministerial Forum for international trade.

23. As with the MoU, the Command Paper acknowledges the responsibility of devolved administrations to observe and implement international obligations in areas of devolved competence. It also reaffirms a commitment to the Sewel convention insofar as it relates to any implementing legislation that might be required for future agreements.

24. There is a paragraph on the role of the devolved legislatures:

We recognise that the devolved legislatures also have a strong and legitimate interest in future trade agreements. It will be for each devolved legislature to determine how it will scrutinise their respective Governments as part of the ongoing process. Equally, the means by which our Parliament in Westminster works with its devolved counterparts is a matter for the legislatures themselves, in line with their existing interparliamentary ways of working. Where appropriate UK Government ministers may engage directly with the devolved legislatures [...]

25. In terms of an approach to future negotiations, the UK Government makes the following commitments:

- **Prior to negotiations commencing** we will publish and lay before Parliament our Outline Approach to each proposed negotiation. This will include the scope of the agreement and our negotiating objectives and be accompanied by a scoping assessment providing an economic analysis of the proposed trade agreement.
- **During negotiations** we will publish and lay before Parliament a Round Report following each substantive round of negotiations. This will provide an outline of talks by policy area. We will also publish an Annual Trade Report covering progress across the full programme of negotiations.
- **At the end of negotiations** we will lay the full treaty text before Parliament and publish an Explanatory Memorandum. We will also publish a full Impact Assessment.

26. In addition, the Command Paper makes commitments in terms of the provision of additional information to specified UK Parliamentary committees during the course of negotiations and to ensure that there is sufficient time between finalising a new FTA and laying it before Parliament under the CRaG procedure⁹ so that the committee(s) can make a report on the final text of the agreement.

27. It is also worth noting that the UK Government is of the view that the legislative framework set by the CRaG Act is appropriate and that it does not believe it necessary to legislate for the wider suite of arrangements described in the Command Paper.

Recent developments

28. From our scrutiny sessions with the Minister for International Relations and the Welsh Language, we are aware that the discussion of the role of the devolved administrations in future free trade agreements, raised in the Command Paper, had initially moved in the direction of developing a concordat.¹⁰

⁹ [The Constitutional Reform and Governance Act 2010 c.25](#)

¹⁰ For example, see EAAL RoP [10 June 2019](#) c.102

29. In correspondence to us, dated 5 November 2019, the Minister for International Relations informed us that she has “[...] *not been able to progress the Concordat following the last change of Ministers in the UK Government*”.¹¹

30. We also understand that the Ministerial Forum for international trade has not yet met, though the first scheduled meeting in October 2019 was cancelled as a consequence of a general election being called.¹²

3. The Welsh Government’s position

31. The Welsh Government remains a party to the Memorandum of Understanding that has been referred to in the previous section of this report.

32. During the course of the current Assembly, the Welsh Government has published a number of policy papers that relate to international relations.

33. *Securing Wales’ Future*, published in January 2017, set out the Welsh Government’s position that:

Policy areas which are not devolved, but which have major implications for devolved functions, notably international trade negotiations and competition policy, should [...] have robust shared sovereignty arrangements.¹³

34. The Welsh Government proposes that these arrangements include a means of raising issues ahead of agreements being entered into and independent mechanisms of dispute resolution.

35. In February 2018, the Welsh Government provided a more detailed policy position in its paper *Trade Policy: the issues for Wales*.¹⁴

36. This paper called for the creation on a Joint Ministerial Committee on International Trade and the establishment of a new Memorandum of Understanding for engagement between the UK Government and devolved administrations.

¹¹ [Letter from the Minister for International Relations and the Welsh Language](#), 5 November 2019

¹² Ibid

¹³ Welsh Government, [Securing Wales’ Future](#), January 2017

¹⁴ Welsh Government, [Trade Policy: the issues for Wales](#), February 2018

37. The Welsh Government, in this paper, also points to the example of the Federal Government in Canada as providing a useful model for engagement on trade deals.

38. In October 2019, the Welsh Government published a further paper, *Reforming our Union: Shared Governance in the UK*.¹⁵ In part, this paper considered future intergovernmental relations in relation to international relations and trade.

39. *Reforming our Union* called for formal intergovernmental machinery to ensure that devolved administrations are engaged ahead of the UK negotiating position being finalised. Whilst similar to previous positions, the Welsh Government goes further by stating that “*the UK Government should not normally proceed with negotiating mandates on devolved matters which have not been agreed with the relevant devolved administration*”.

4. The legal position

40. Whilst it is apparently recognised that the Welsh Government and the Assembly have a legitimate interest in future UK international agreements, there is no statutory basis for their involvement in the negotiation or confirmation of international agreements.

41. International relations, regulation of international trade, and international development assistance and co-operation are reserved matters under Schedule 7 to the Government of Wales Act 2006.¹⁶

42. There is a carve out that does not reserve “*observing and implementing international obligations*”.

43. Section 82 of the Government of Wales Act 2006, gives the UK Government power to order that a proposed action by a devolved administration should not be taken if it would be incompatible with any international obligation of the UK or direct that action be taken to give effect to any such obligation.

44. Section 114 of the Government of Wales Act 2006 provides the Secretary of State with powers to intervene in certain cases. The Secretary of State may by order prohibit the Presiding Officer from submitting an Assembly Bill for Royal

¹⁵ Welsh Government, *Reforming our Union: Shared Governance in the UK*, October 2019

¹⁶ The *Government of Wales Act 2006* c.32

Assent, if the Bill contains provisions that the Secretary of State has reasonable grounds to believe would be incompatible with any international obligation.

45. The UK Government may also revoke any subordinate legislation made by a devolved legislature if it contains provisions which would be incompatible with any international obligations.

46. The UK Parliament could also legislate to implement an international obligation in areas of devolved competence.

5. The evidence we received

47. In summary, we received a clear message from a number of those that contributed to our roundtable discussion on 14 October: we should strengthen our proposed approach to engagement with, and scrutiny of, UK international agreements.

Early engagement

48. Our proposed approach, as explained in our October 2019 paper, advocated early engagement i.e. ahead of the UK's negotiating position being finalised.¹⁷

49. Dr Jack Simson Caird, from the Bingham Centre for the Rule of Law, appeared to agree with this, summarising:

[...]the primary moment for substantive influence for Assembly Members is before the Executive's negotiating position has been finalised and anything has been formally presented.¹⁸

50. Dr Simson Caird highlighted the difficulty experienced by the UK Government in obtaining agreement to the Article 50 Withdrawal Agreement as an example that illustrates the need for a 'front loading' of the scrutiny process:

The experience of the meaningful vote veto in the House of Commons highlights the value of having a scrutiny structure which front-loads the process so that it can be established whether there is a majority on the executive's negotiating position at the early stages of the process.¹⁹

At the end of the negotiations

51. In the model we published for discussion on 14 October, we provided two options for the end of the process. We suggested:

- seeking an Assembly 'veto' along the lines of the Sewel convention i.e. that the UK should not normally enter into an international agreement

¹⁷ External Affairs and Additional Legislation Committee, *International agreements: a suggested approach to engagement and scrutiny*, October 2019.

¹⁸ Dr Jack Simson Caird, *Written evidence to the External Affairs and Additional Legislation Committee of the National Assembly for Wales*, October 2019.

¹⁹ Ibid

that affects devolved matters without the consent of the relevant devolved legislature; or

- ensuring that the Assembly is able to express a view on the agreement to help inform UK Parliamentary scrutiny of an international agreement, but stopping short of suggesting a veto power.

52. Dr Simson Caird was clear in his view that:

[...] it is vital that the National Assembly for Wales is granted formal veto powers in order to ensure that informal scrutiny mechanisms are effective.²⁰

53. This point, that the Assembly will only be treated seriously during the earlier phases of scrutiny if it has a formal power of veto at the end, was supported by Dr Andrew Blick:

[...] the only way you're going to get the power of the mandate is for the people setting the mandate to actually know that if they get the mandate wrong, they're going to be blocked. So, the whole point about avoiding trouble – it's 'anticipated reaction' I think they call it in political science. If they know you've got the power to mess things up for them further down the road, they're going to take you seriously all the way along the line. If they don't think that, they're not going to take you seriously.²¹

54. Professor Aileen McHarg agreed with a statement from one of our options for the end of the process, that “*adjusting the devolution settlement through acceding to international agreements is as constitutionally significant as adjusting it through UK legislation*” and that our proposals for addressing this (a ‘veto’ along the lines of Sewel) could be stronger.²²

55. Professor McHarg also made the case for seeking something stronger than a convention, noting the distinction in this case between issues of UK parliamentary sovereignty and the role of the UK Government:

When we're talking about international agreements, we're not talking about the role of the UK Parliament, we're not talking about

²⁰ Dr Jack Simson Caird, *Written evidence to the External Affairs and Additional Legislation Committee of the National Assembly for Wales*, October 2019.

²¹ EAAL RoP 14 October 2019 c.118

²² Ibid c.110-111

parliamentary sovereignty; we're talking about the role of the UK Government, which is not sovereign. And I think in those circumstances it is reasonable at least to seek something stronger than a mere convention; something that has legally binding duties to seek the consent of at least the devolved Governments. Whether that involves the devolved Assemblies as well is a different view [issue], but a legally binding commitment to devolved consent [to secure devolved consent] does not conflict with parliamentary sovereignty here. This is about control of the UK Government, and the UK Government is not sovereign.²³

OUR VIEW

56. We understand the case for seeking a statutory role for the Assembly, and the case was well made by attendees at our roundtable session. We must also acknowledge that the UK Parliament does not currently have an absolute veto over international agreements (though it has more power in terms of the eventual implementation of an agreement than the devolved legislatures).

57. For there to be the political will to adjust the devolution settlement, or to impose as significant a statutory constraint as suggested on the executive competence of the UK Government, there would need to be a seismic change in the devolution relationship and a much enhanced role for the UK Parliament in this area.

58. Movement in this direction might be possible in the longer term, but we must consider what can be done in time to address the possibility of needing to consider new international agreements in the early months of 2020.

59. Within that timescale, we believe that the Assembly can seek greater control in terms of developing a scrutiny reserve-type function for the Welsh Government's input during the mandate setting phase of a negotiation and to seek, in the medium term at least, a commitment to ensuring the view of the Assembly can be considered after a stable agreement text is available but ahead of the CRaG Act process beginning.

²³ EAAL RoP 14 October 2019 c.113

60. This would allow members of both Houses of Parliament to consider an international agreement in the knowledge that, in areas of devolved competence, it does or does not hold the support of the devolved legislature.

61. We reflect this view in our revised approach.

6. Our revised approach

62. This part of the report provides a revised version of the scrutiny model we published in October 2019. It has been revised on the basis of the evidence we have discussed in the previous part of this report.

1. Early engagement and the UK mandate

63. 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.

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

65. Early engagement is vital if the Assembly is to be in a position to add value to the process 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.

66. 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.

67. For these reasons, we believe this type of early engagement can make a positive contribution to UK trade policy objectives.

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

69. 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.

70. 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 Welsh Government should seek the Assembly's consent before making such representations to the UK Government.

RECOMMENDATIONS

Recommendation 1. To enable this scrutiny to take place, we recommend that the Welsh Government lays a UK Outline Approach²⁴ at the same time as the Outline Approach is laid before the UK Parliament. The Outline Approach should be accompanied by an additional 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.

Recommendation 2. We recommend that, 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 Welsh Government should seek the Assembly's consent before making such representations to the UK Government.

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

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

72. 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.

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

74. 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

²⁴ As referred to in the UK Government's Command Paper

for International Trade, but that it has not yet met. We await details of this new Forum's terms of reference, and the role that is anticipated for it.

75. 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.

76. 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.

77. 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.

Recommendation 3. We recommend that the Welsh Government continues to engage with the UK Government to ensure that negotiation documents laid in Parliament can be laid in the Assembly at the same time. Additionally, where the UK Parliament is offered enhanced access to negotiation documents, we recommend that the Welsh Government ensures equivalent access is granted for Assembly Members insofar as the documents relate to devolved areas and areas that might affect devolved competence.

3. At the end of the negotiations

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

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

80. 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.

Recommendation 4. In these circumstances, we recommend that any proposals for a revised process of UK Parliamentary scrutiny incorporates the need to consider the views of the Assembly before the ratification of an agreement. We hope that both the UK and Welsh Governments will undertake to support this.

4. Differential implementation of international agreements

81. 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.

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

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

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

85. 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.

Recommendation 5. We recommend that the Welsh Government pursues differential implementation of international agreements as a means of ensuring devolved interests are observed without causing impediment to the progress of a UK agreement.

5. Implementation of devolved aspects of international agreements

86. The Assembly and/or Welsh Ministers are responsible for the domestic implementation of devolved aspects of international agreements, including any legislative measures that might be necessary.

87. 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.

Recommendation 6. We recommend that the Welsh Government seeks a commitment from the UK Government to notify Welsh Ministers and the Assembly if it intends to give provisional effect to an international agreement (in part or in full).

6. Governance and development after ratification

88. We 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.

89. Assembly committees are likely to want 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.

7. Conclusion

90. This report provides an outline of the type of involvement that we believe the Assembly should expect in relation to the development of international agreements.

91. Further work will be needed to develop a detailed proposal once we have received a view from the Welsh and UK Governments on this outline proposal.

92. We will be writing to the Welsh and UK Governments to seek a response to our proposal.