

Scotland's Role in the Development of Future UK Trade Arrangements: A Discussion Paper

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MINISTERIAL FOREWORD



**Cabinet Secretary for Government
Business and Constitutional
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**Cabinet Secretary for Finance,
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In June 2016, the people of Scotland voted overwhelmingly to remain inside the European Union.

Despite this vote, and the fact that only two of the UK's nations voted for Brexit, the Prime Minister announced in early 2017 that the UK would be leaving not just the EU, but the Single Market and Customs Union as well.

A range of evidence demonstrates that this 'hard Brexit' would be deeply damaging for Scotland's economy and society. A 'no deal Brexit' would be catastrophic.

The Scottish Government, notwithstanding our continued support for EU membership, has therefore consistently argued that, if Brexit is to happen, then both Scotland and the UK as a whole should remain inside the Single Market and Customs Union.

The economic facts are clear. The EU is the largest single market for our international exports, with exports worth £12.7 billion in 2016, supporting directly and indirectly hundreds of thousands of jobs across Scotland. Trade with the EU represents 43% of our total international exports, more than our exports to North America, Asia, South America and the Middle East combined. In 2016, a further 12% of Scotland's international exports - £3.7 billion - were to countries with which the EU has a trade agreement.

Leaving the world's largest market-place (which by population is eight times the size of the UK alone) and customs union makes no sense. It is clear that any benefits from the ability to pursue new trade deals would be far outweighed by being outside the Single Market and Customs Union.

However, the period since the EU referendum has been characterised by uncertainty and political turmoil at Westminster. There seems little likelihood of that turmoil abating, and therefore the Scottish Government has to prepare for all exit possibilities.

That includes preparing for an eventuality that means the UK is outside of the Customs Union, however unwelcome and damaging that would be.

Outside the Customs Union, we would lose the EU's negotiating power and expertise and operate in a context in which the UK itself would be responsible for trade deals.

This paper sets out the need for a radical overhaul of the arrangements within the UK for developing, scrutinising and agreeing trade deals. Such an overhaul is required even in the UK continues as an EU Member state and a member of the Customs Union, but is particularly urgent in the context of a 'hard Brexit', in which the UK leaves the Customs Union and Single Market.

The primary aim in all circumstances must be to put in place a decision-making process that protects Scotland's economic and social interests.

Given the instability at Westminster, that protection is more important than ever. It would clearly be unacceptable, for example, for a UK Government to impose trade deals that opened up Scotland's NHS to private competition, or opened up our markets to chlorine-washed chicken or hormone-injected beef.

Trade agreements have changed considerably in the last 40 years, and now affect a wide range of devolved interests, which impact on the interests and daily lives of Scotland's businesses and citizens. The conduct and content of future trade policy and agreements will therefore have very important implications for Scotland. Future trade agreements will almost certainly involve devolved issues. Scotland and the rest of the UK could have very different interests in some negotiations, best addressed before reaching the negotiating table.

Against that context, the way trade agreements are developed within the UK cannot simply remain the same. Scotland wants to be a constructive partner to the other nations of UK and a constructive and fair trading partner to countries around the world. The UK Government's approach so far – which appears to place the interests and involvement of the devolved nations on a par with sectoral interests – must change, and roles and responsibilities realigned, to ensure the interests and priorities of all in the UK are properly represented, protected and promoted.

This paper therefore makes the case for a guaranteed role for the Scottish Government and Scottish Parliament in all stages of the formulation, negotiation, agreement and implementation of future trade deals to protect those interests and priorities. Such an approach would ensure better, more transparent trade policy, which would benefit all nations of the UK, and provide reassurance to future negotiating partners that agreements will endure.

This will require a fundamental change in attitude and approach from the UK Government that has not been in evidence so far during the Brexit process. Instead of undermining devolution, the UK Government has the opportunity to demonstrate that Scotland is an equal partner in the United Kingdom and that the views of the Scottish Parliament are respected.

The main purpose of this paper is to encourage a wide ranging discussion about the best way to protect and enhance the interests of Scotland in the development of future trade deals. We urge as many people as possible to take part in that discussion.

This paper complements the work the Scottish Government is doing to boost exports. We are updating our export promotion strategy in the light of Brexit and other developments, and will have more to say on that in the coming months.



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EXECUTIVE SUMMARY

This paper is intended to open a discussion on Scotland's role in the development of the UK's future trade arrangements, so that the interests of consumers, businesses, civic Scotland and others are taken into account.

The Scottish Government believes that the best option for the future wellbeing and prosperity of Scotland, and the UK as a whole, is to remain in the EU. In the event that the UK does withdraw from the EU, the Scottish Government is clear that continued membership of the European Single Market and a customs union would be the least damaging option for the UK. The Scottish Government will therefore continue making the case for Scotland and the UK to remain in the EU, Single Market and Customs Union.

That position notwithstanding, the Scottish Government has to make the necessary preparations for all exit possibilities, in order to support and protect the Scottish economy and our key sectors as much as possible.

Leaving the EU Customs Union would fundamentally alter the nature of Scotland and the UK's relationship with the EU and the world. As a member of the Customs Union, Scotland has tariff-free trade with the EU and benefits from around 40 trade agreements the EU has signed with third countries.

Outside the Customs Union, the UK will become responsible for negotiating its own international trade agreements. The broad and increasing scope of modern trade agreements means that they often deal with, and merge, a range of reserved and devolved policy areas. The conduct and content of future trade policy, negotiations and agreements will therefore have very important implications for Scotland, and it is vital that the Scottish Government is fully involved in the process for determining them.

This paper considers that decision making process and argues that the Scottish Government and Scottish Parliament must play a much enhanced role in the development of future trade policy and the preparation, negotiation, agreement, ratification and implementation of future trade deals, to help industries, protect devolved public services and ensure the highest standards of environmental and consumer protection in Scotland and across the UK. Doing so will require a significant change in the current arrangements for scrutiny and democratic engagement, which are already out of date, under strain and in urgent need of reform.

The paper considers and examines the effectiveness of the current arrangements within the UK for agreeing trade policy and international trade deals, assesses the approach taken so far by the UK Government to future arrangements and sets out specific proposals for Scotland's future role.

Chapter 1 summarises the importance of international trade to the Scottish economy, highlighting the potential effects of leaving the Single Market and the Customs Union on Scotland's trade in goods and services. It also highlights some key differences between Scotland and the UK, which must be taken into account in

considering and negotiating trade deals that work to the benefit of the whole of the UK.

Chapter 2 describes the current arrangements for developing and agreeing trade policy and international trade agreements. In particular, it focusses on the arrangements within the UK for inputting into international trade policy and scrutinising trade deals, and the currently very limited role for the UK Parliament, devolved administrations and legislatures and civic society.

Currently, all international trade deals are negotiated through the EU. Within the UK, the arrangements in place for the development of trade policy and the eventual ratification of trade deals are already inadequate, out of date and in need of reform, even if the UK were to remain in the EU.

If the UK leaves the Single Market and the Customs Union, the UK will be wholly responsible for negotiating and concluding trade deals, including with the EU itself. There is no process currently in place throughout the UK to support that substantial change. While earlier trade deals had a more limited focus on issues such as tariffs, quotas and cooperation, modern trade deals have in general evolved to extend into a wide range of social provision and domestic policy issues, many of which are the responsibility of the Scottish Government and Scottish Parliament. The direction of trade policy and future trade negotiations will have important implications for Scotland, and the other devolved administrations.

Leaving the EU will fundamentally change the nature of the UK as a state. Losing the EU's negotiating power, scrutiny and expertise will require a massive step change in the way the UK conducts its affairs in relation to international matters. The respective roles of the UK Government and Parliament and the devolved administrations and legislatures will have to change substantially to ensure that the interests and priorities of all in these islands are properly represented, protected and promoted.

Chapter 3 describes recent developments in the UK's withdrawal from the EU, focussing on the UK Government's current approach to the involvement of the devolved administrations and legislatures in future trading arrangements.

While the UK Government has made a number of commitments to including the devolved administrations in the development of future trade deals, that has not been borne out by its approach to the EU (Withdrawal) Act 2018, the Trade Bill, and common frameworks, described in this chapter.

If the UK Government is serious about ensuring adequate scrutiny of trade deals and proper consultation with the devolved administrations, it must begin that process now.

Chapter 4 considers the deficiencies in the current arrangements described in Chapter 2. It also outlines the wider policy considerations and ambitions the Scottish Government would seek to protect and promote in any future trading arrangements.

In the light of the issues discussed in Chapters 1 to 4, **Chapter 5** considers international models for future engagement and sets out specific proposals for Scotland's future role in the development of UK international trade policy and international trade agreements, recognising the unique circumstances facing Scotland and the UK today. These proposals are summarised on page 52 and in Annex B.

In particular, the paper proposes a statutory requirement that new trade agreements with otherwise devolved content, or which touch on devolved issues, must be agreed by the Scottish Government and Scottish Parliament. Given the scope of modern trade agreements, in practice, this would almost certainly mean all such agreements. It also proposes the establishment within the UK of a statutory inter-governmental trade committee to discuss all aspects of international trade, along with the establishment of an appropriate dispute resolution process.

Involving the devolved administrations from an early stage in trade negotiations will benefit the UK and any future trading partners. Domestically, it will ensure that Ministers are able to agree a negotiation mandate based on a proper understanding of domestic issues; that negotiations are more transparent; that decisions are taken closer to the people affected and reflect their interests; and that any concerns are addressed quickly. That will provide reassurance to the UK's future negotiating partners that sometimes difficult and lengthy negotiations are proceeding on a consensus and that agreements will endure. Scotland wants to be a constructive partner to the other nations in the UK and a constructive and fair trading partner to countries around the world.

Chapter 5 also discusses a number of specific areas where greater influence over UK policy and systems or the devolution of further powers could help protect and promote Scotland's interests in the event of the UK leaving the EU.

INTRODUCTION

1. The Scottish Government believes that the best option for the future wellbeing and prosperity of Scotland, and the UK as a whole, is to remain in the EU. That position has been consistent since well before June 2016, when the people of Scotland voted overwhelmingly to remain in the EU.

2. There are many reasons why they did so: for the social, employment and environmental protections the EU offers to its citizens and workers; the opportunities afforded by access to a single market of more than 500 million people; and the firm belief that freedom of movement is a good thing, crucial to the development of Scotland as an inclusive, fair, prosperous and innovative country, important to rural Scotland and our economy as a whole. The arguments for remaining in the EU are strong and practical. From an economic standpoint, Scotland's businesses need to sell their products, make investment decisions and operational plans, and to be able to recruit to support that work. Our analysis, supported by an ever-growing body of evidence, has clearly demonstrated that remaining in the EU is the best option for Scotland's future. The Scottish Government has therefore taken every opportunity to put forward that case and to persuade others to support it.

3. However, if that position, and the considerable and mounting evidence supporting it, continues to remain unheeded, and the UK *does* withdraw from the EU, the Scottish Government has also been very clear that continued membership of the European Single Market and Customs Union would be the least damaging option for the UK.

4. The Scottish Government publication, *Scotland's Place in Europe: People, Jobs and Investment*¹, set out our analysis of the implications of leaving the EU, confirming that leaving the Single Market and Customs Union will significantly weaken our economy. It estimated that failure to remain in the Single Market, or to secure a free trade agreement with the EU, would see Scotland's GDP drop £12.7 billion lower by 2030 than it would be under continued EU membership, resulting in a loss equivalent to £2,300 per year for each person in Scotland.

5. More than two years since the EU referendum in June 2016, and with only a matter of months until the UK is due to exit the EU in March 2019, much still remains unclear about the detailed nature of the deal the UK Government wants, how the proposed arrangements will work in practice and how the UK Government intends to achieve it. One thing that is clear however, is its damaging determination to leave the Single Market and Customs Union that have proved so valuable to the economic and social wellbeing of the UK and Scotland, in order, it says, to pursue an independent trade policy. Despite the revised proposals set out by the UK Government on 12 July 2018 in its White Paper *The Future Relationship between the United Kingdom and the European Union*², if it continues to hold its current red

¹ Scottish Government (2018) *Scotland's Place in Europe: People, Jobs and Investment* <http://www.gov.scot/Resource/0053/00530160.pdf>

² UK Government (2018) *The Future Relationship Between The United Kingdom and The European Union* <https://www.gov.uk/government/publications/the-future-relationship-between-the-united-kingdom-and-the-european-union>

lines - in particular around the free movement of people and future trade policy - it effectively has no option but to do so.

6. Whatever label given to it, pursuing the type of Brexit described in the July White Paper would still leave the UK with limited options for how it conducts its trading relationships in the future. The proposals will need to be negotiated and agreed with the European Union and its Member States, with the likely outcomes limited to:

- Membership of some form of customs union, similar to the arrangements applying to Turkey;
- A free trade agreement with the EU, most likely along the lines of one the EU has recently negotiated with Canada, along with a series of bilateral or multilateral trading agreements with 'third countries' outwith the EU; or
- Conducting world trade according to World Trade Organization rules only (a 'no deal' Brexit).

7. As demonstrated in *Scotland's Place in Europe: People Jobs and Investment*³, all outcomes short of full EU membership will damage Scotland's economy. By 2030, the Brexit-associated reduction to Scottish GDP would be between 2.7% under the (least damaging) European Economic Area (EEA) membership option and 8.5% if the UK-EU future relationship is based on WTO terms.

8. Even the most sophisticated and liberal EU free trade agreement - such as the EU-Canada model - largely excludes provisions for eliminating non-tariff barriers and provides nothing like the unfettered access to the European Single Market that we presently enjoy. As Pierre Pettigrew, a former Canadian trade minister, wrote in March 2016 in the Times "*Were Canada to trade as much with the EU as we do with the US we would want a much deeper relationship than CETA*"⁴.

9. The UK and Scotland have benefitted from membership of the Single Market and Customs Union - and the substantial negotiating power of the EU that comes with that membership - for over 40 years. Membership of the EU gives us unfettered access to a market of over 500 million people, as well as the benefits arising from the EU's free trade agreements with more than 50 international trading partners. In 2016, Scottish exports to the EU were worth £12.7 billion, with a further £3.7 billion of exports to countries with which the EU has a trade agreement in place (accounting for a further 12% of Scotland's international exports).

10. The UK Government has suggested that any decline in trade with the EU from being outside of the Single Market could be offset by exporting more to other countries – boosting trade with 'old friends and new allies'. However, fully replacing the value of EU trade will be challenging, as illustrated by trade flows with emerging economies such as the so called BRICS countries (Brazil, Russia, India, China and

³ Scottish Government (2018) *Scotland's Place in Europe: People, Jobs and Investment*
<http://www.gov.scot/Resource/0053/00530160.pdf>

⁴ Article in The Times, 23 March 2016 <https://www.thetimes.co.uk/article/sorry-boris-canada-is-not-a-model-for-post-brexit-trade-xb57hcjh0>

South Africa). *Scotland's Place in Europe: People, Jobs and Investment* showed that these nations accounted for 7% of Scotland's exports:

*"In comparison, the EU accounts for 43% of Scotland's exports. Even small proportionate losses in trade (or lost growth in trade) with the EU would require dramatic increases in trade with such countries. To replace a 5% reduction in Scotland's EU exports with increased trade from the BRICS economies would require a 30% increase in exports to those economies. Even if the UK signed agreements with the ten biggest non-EEA single country trading partners (including USA, China and Canada) - a process which would take many years - this would only cover 37% of Scotland's current exports compared to 43% of current exports that go to the EU."*⁵

11. As Sir Martin Donnelly, former Permanent Secretary in the UK Department for International Trade said in his speech to Kings College in February 2018:

*"Even implausibly favourable market access deals with some third countries are arithmetically unable to make up for the loss of unrestricted access to more local EU markets in which so many UK producers are currently integrated. On current trade flows, a tripling of total services trade with China would not equal a fifth of the UK's current services exports to the single market. Germany already does more than four times as much trade with China as the UK."*⁶

12. It is clear that any benefits accruing from the ability to pursue new trade deals would be far outweighed by being outside of the Single Market and Customs Union. Trade and Investment in an increasingly service-based economy is tied closely to the mobility of skills and labour. No model of international partnership could give anywhere near the same benefit as does the free movement of people, goods, services and capital. Yet that is exactly where the UK Government is leading the UK and Scotland.

13. Scotland voted overwhelmingly to remain in the EU, including the Single Market and Customs Union. The Scottish Government will therefore continue making the case for that position to be respected. Exiting the European Union does not mean that Scotland or the UK must, or should, exit our largest and most secure international marketplace. The UK position should reflect the interests of *all* parts of the UK, either by keeping the whole of the UK in the Single Market and Customs Union, or by establishing differentiated arrangements for Scotland.

14. Remaining in the Customs Union would help protect businesses, communities and individuals from some of the damage that will be sustained from leaving the EU. It would also obviate the need to negotiate a multiplicity of new international trade agreements, when productive and mutually beneficial deals already exist. The Scottish Government will therefore continue making the evidence-based case for the UK to remain in the Customs Union.

⁵ Scottish Government (2018) *Scotland's Place in Europe: People, Jobs and Investment* <http://www.gov.scot/Resource/0053/00530160.pdf>

⁶ Speech to Kings College London, 28 February <https://www.kcl.ac.uk/business/assets/PDF/Sir-Martin-Donnelly-UK-trade-and-exports.pdf>

15. However, that position notwithstanding, it is also right that the Scottish Government makes preparations for all exit possibilities, in order to protect Scottish interests as far as possible.

16. For more than 40 years, the negotiation of trade agreements has been the exclusive competence of the European Union. If the UK, including Scotland, leaves the Single Market and Customs Union, the way in which the UK and devolved administrations approach international trade policy and international trade agreements will have to change radically to reflect a very different, and more challenging, context. The UK will have to negotiate new trading arrangements with the EU and with a number of other 'third' countries before moving on to other agreements. Recent experience in the development of trade agreements suggests that the scope and coverage of any future UK agreements will inevitably mean that the agreements will impact more and more on devolved interests, necessitating a much stronger role for the devolved administrations at all stages.

17. The current arrangements for developing trade policy across the UK, and scrutinising, ratifying and monitoring international trade deals, set out in this paper, are already out of date and not fit for purpose in a situation where the UK is a member of the EU. While successive UK Governments have claimed to be acting in the interests of the whole of the UK, there has been little or no opportunity for the devolved administrations and legislatures to examine this claim. Even at Westminster, any scrutiny in the House of Commons or House of Lords has been cursory and rushed. Existing arrangements are under strain and in need of an urgent and substantial overhaul. Even if the UK and Scotland were to remain within the EU, or within a customs union with the EU, those arrangements should be reviewed and enhanced now to ensure proper and transparent consideration and scrutiny of trade arrangements. The circumstances and challenges facing the UK if it leaves the EU, Single Market and Customs Union makes that need for review more urgent.

18. If the UK leaves the Single Market and Customs Union, the current arrangements and infrastructure for scrutiny and democratic engagement will need to be replaced. In those changed circumstances, it will be important that those closest to the impact of trade deals across the UK have a role to play in their development and agreement. At present, this role is largely confined to the UK Government, with limited involvement from the UK Parliament.

19. This paper therefore discusses what the future role of the Scottish Government, Scottish Parliament and others should be in the development of future UK trade arrangements, to help ensure that our economic and other interests can be protected and enhanced if the UK and Scotland leave the EU (or indeed if the UK remains a member). In doing so, it focusses on the decision-making *processes* that should underpin the development and agreement of the UK's future trading arrangements. The Scottish Government's approach to future trade policy and its updated export promotion strategy will be set out in detail in the next few months.

20. In particular, the paper argues that the Scottish Government and Scottish Parliament must have a guaranteed role in all stages of the formulation, negotiation, agreement and implementation of all future trade deals to help industries, protect devolved public services and ensure the highest standards of social, environmental and consumer protection in Scotland and across the UK. That approach will benefit the UK and its future trading partners.

21. The UK Government has said that a future trade policy for the UK must be in the interests of all parts of the UK. That will not happen without changes to the way trade policy and agreements are developed. This paper opens a dialogue and seeks to develop a consensus on what those changes should be, as well as suggesting some specific areas where further influence or powers will enable the Scottish Government to more fully protect and promote Scotland's interests.

CHAPTER ONE - SCOTLAND AND INTERNATIONAL TRADE

22. This chapter summarises the importance of international trade to the Scottish economy, highlighting the potential effects of leaving the Single Market and the Customs Union on Scotland's trade in goods and services. It also highlights some key differences between Scotland and the UK, which will be important in considering and negotiating trade deals that work to the benefit of the whole of the UK.

23. *Scotland's Place in Europe: People, Jobs and Investment*⁷ presents the latest analysis by the Scottish Government of the implications of leaving the EU. The paper demonstrates that leaving the Single Market and Customs Union could significantly weaken our economy, compared to continued EU membership. It estimates that a World Trade Organization rules scenario would lead to a loss of 8.5% of Gross Domestic Product in Scotland by 2030 – equivalent to a loss of £2,300 a year for each individual. A Free Trade Agreement relationship would mean Scotland's GDP would be 6.1% lower by 2030, equivalent to a loss of around £1,600 a year for each individual. Should the UK remain in the Single Market by participating in the EEA, this impact could be significantly mitigated, with Scottish GDP estimated to be around 2.7% lower, or a loss of around £700 a year for each individual.

24. While there is no direct comparator for the approach proposed by the UK Government in its July 2018 White Paper on the future relationship between the UK and EU⁸, several economic commentators have concluded that the White Paper proposal is more similar in scope to a Free Trade Agreement than an EEA. For example, the National Institute of Economic and Social Research⁹ conclude that the trade intensity of the White Paper proposals is more comparable to the existing EU-Swiss or EU-Canada relationship than a Norway Style EEA arrangement. Similarly, Professor Jonathan Portes¹⁰ has argued that, under a 'White Paper' scenario, trade in goods could be deemed to be free of both tariff and non-tariff barriers, while trade in services could be viewed as equivalent to an FTA scenario. Consequently, taking into account the likely fall in migration, and reduction in productivity and Foreign Direct Investment, the economic impact of the UK Government White Paper proposal is therefore likely to be closer to the FTA than EEA scenarios modelled in *Scotland's Place in Europe: People, Jobs and Investment*, implying that the economic impact is likely to be closer to a loss of 6.1% of GDP by 2030 (FTA scenario) than a loss of 2.7% of GDP by 2030 (EEA scenario).

25. The EU is the largest single market for Scotland's international exports, with exports worth £12.7 billion in 2016 supporting directly and indirectly hundreds of thousands of jobs across Scotland. **This represents 43% of total international**

⁷ Scottish Government (2018) *Scotland's Place in Europe: People, Jobs and Investment* <http://www.gov.scot/Resource/0053/00530160.pdf>

⁸ UK Government (2018) *The Future Relationship Between The United Kingdom and The European Union* <https://www.gov.uk/government/publications/the-future-relationship-between-the-united-kingdom-and-the-european-union>

⁹ National Institute of Economic and Social Research (2018) *National Institute Economic Review*, 245, F11-F13, August 2018

¹⁰ Professor Jonathan Portes, senior fellow at The UK in a Changing Europe <http://ukandeu.ac.uk/dont-be-fooled-into-thinking-a-chequers-brexit-would-be-economically-painless/>

exports, and more than exports to North America, Asia, South America and the Middle East combined¹¹.

26. The Scottish Government publication, Export Statistics Scotland 2016¹², showed that six of Scotland’s top ten export destinations are in the EU, emphasising the importance of the future economic relationship with the EU post Brexit. A further two – Norway and Switzerland – are members of the European Free Trade Association (EFTA), with whom the UK may need to negotiate after Brexit. Other countries with trade agreements with the EU are becoming increasingly important destinations for Scottish exports. For example, Scotland’s exports to South Korea – whose agreement with the EU has been provisionally applied since July 2011¹³ - were worth £435 million in 2016, 67% more than in 2012, making South Korea one of Scotland’s fastest growing markets, and now the 20th most important destination for Scottish exports¹⁴.

Table 1: Top 20 Export Destinations, 2016 (£million)

Rank	Destination	Total Exports (£m)	% of Total	Rank	Destination	Total Exports (£m)	% of Total
1	USA	4,775	16.0	11	Belgium	760	2.5
2	Netherlands	2,115	7.1	12	Italy	715	2.4
3	France	1,960	6.6	13	UAE	705	2.4
4	Germany	1,910	6.4	14	Australia	650	2.0
5	Norway	1,365	4.6	15	Canada	610	2.0
6	Ireland	1,025	3.4	16	Sweden	565	1.9
7	Denmark	995	3.3	17	China	555	1.9
8	Spain	855	2.9	18	Singapore	525	1.8
9	Switzerland	795	2.7	19	Japan	460	1.5
10	Brazil	770	2.6	20	South Korea	435	1.5

Source: Exports Statistics Scotland (2018)

Benefits of EU Membership

27. For the Scottish economy, membership of the Single Market has resulted in the removal of formal and informal barriers to trade, ensuring our businesses have unfettered access to a market of over 500 million consumers and the largest single market in the world. After Brexit, the European Single Market will still be around seven times the size of the UK market in terms of population. The progress made by the Single Market in dismantling the obstacles to trade in goods and services has been a key driver of growth and employment in Scotland and across the UK in general.

¹¹ Scottish Government (2018) Scotland’s Place in Europe: People, Jobs and Investment <http://www.gov.scot/Resource/0053/00530160.pdf>

¹² Scottish Government (2018) Export Statistics Scotland 2016 <http://www.gov.scot/Resource/0053/00530678.pdf>

¹³ The agreement was formally ratified in December 2015

¹⁴ European Commission http://ec.europa.eu/trade/policy/countries-and-regions/countries/south-korea/index_en.htm

28. **The Single Market has resulted in the elimination of the vast majority of tariffs and technical barriers to trade in goods** in the form of divergent national rules and regulations governing the sale of the products which businesses buy from each other as part of international supply chains. It is these non-tariff barriers which represent the main obstacle to trade between the EU and “third” countries outside the EU. If the UK leaves the Single Market, then trade is likely to diminish as UK exports become subject to much more restrictive trade agreements.

29. EU Member States and their businesses also benefit from being part of the EU Customs Union, not least the fact that once goods from outside the EU have entered, they can move freely within the EU. Membership of the EU has enabled firms in Scotland to expand their participation in global supply (or value) chains greatly. These are networks of producers across the world which each contribute inputs, in the form of goods and services, to a production process. Even after allowing for the cost and time spent shipping parts across the world, it can be a more efficient and effective production model for companies to import components from the best sources of supply. For instance, the production of an aircraft wing involves multiple parts crossing many EU borders before the wing and the plane is completed.

30. In developing and negotiating future trade arrangements for the UK, it will be vital to recognise the scale and likely impact on Scottish businesses and the Scottish economy. It will be essential to understand the composition, destination and value of Scottish exports and imports, as well as the complexity of global supply chains through which international trade is increasingly carried out. Issues such as the impact of the application of ‘rules of origin’ on exported goods, the particular concerns of the ‘just in time’ production model applied in many industries, as well as the overarching concerns related to regulation and standards post-Brexit, must all be recognised in the Scottish context and steps taken to mitigate them as part of the development of any overall UK deal.

31. The negative impact of leaving the Single Market and the Customs Union will be felt across all sectors of the Scottish economy - in our trade in goods but also in our exports of services to the EU and capacity to attract foreign direct investment. This impact will be significant and damaging. While goods make up the bulk of Scottish trade with the EU, services account for around 75% of Scotland’s economic output. Services are also becoming increasingly important to the composition of Scotland’s exports. For example, service sector exports to the EU have risen from 22% of total EU exports in 2002 to 33% of total EU exports in 2016¹⁵. Presently there are relatively limited regulatory barriers to UK service providers selling their services across the EU. No free trade agreement in the world provides for this degree of freedom of movement of services. According to the latest EY Attractiveness Survey¹⁶, Scotland attracted record levels of foreign investment in 2017, with a 7% increase in the number of Foreign Direct Investment (FDI) projects compared to 2016, and double the number of jobs secured as a result of FDI. Three of the top five sources of foreign direct investment are in the European Economic

¹⁵ Scottish Government (2018) Export Statistics Scotland 2016
<http://www.gov.scot/Resource/0053/00530678.pdf>

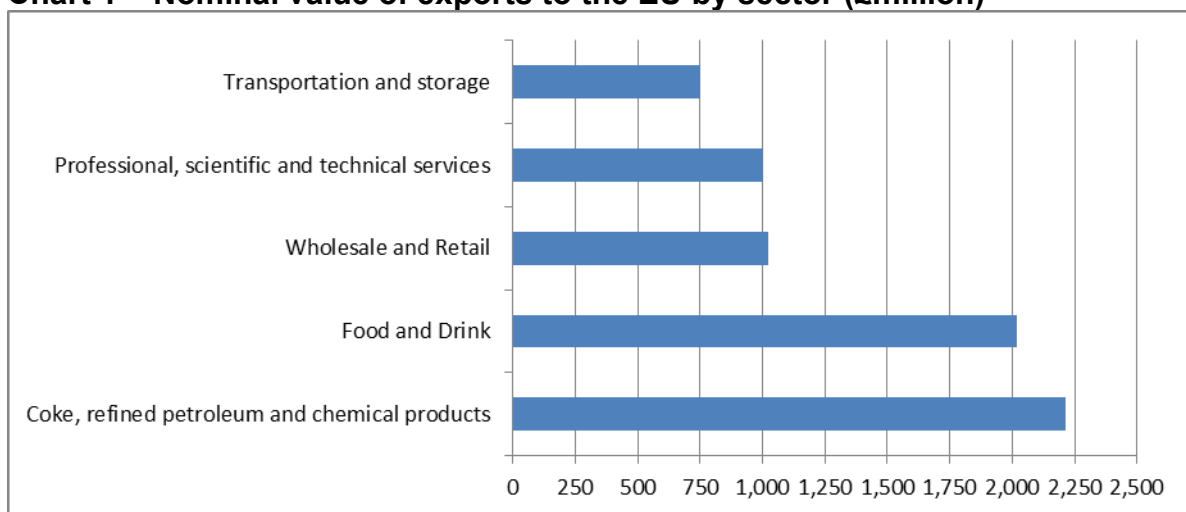
¹⁶ EY Scotland Attractiveness Survey 2017 <https://www.ey.com/uk/en/issues/business-environment/ey-uk-attractiveness-survey-2017-scotland>

Area (EEA), meaning that Brexit and the consequent impact on free movement of capital and right of establishment could have significant implications for attracting future FDI into Scotland.

Exports by Sector

32. Leaving the EU, the Single Market and the Customs Union will cause real and significant issues across the Scottish economy. Exports are just one avenue through which firms will be affected, and the impact of Brexit may be felt differently for different goods. Chart 1 shows the five sectors in Scotland with the largest nominal value of EU exports in 2016. The two largest sectors involve the manufacture and export of goods, while the others are all service sector industries.¹⁷

Chart 1 – Nominal value of exports to the EU by sector (£million)

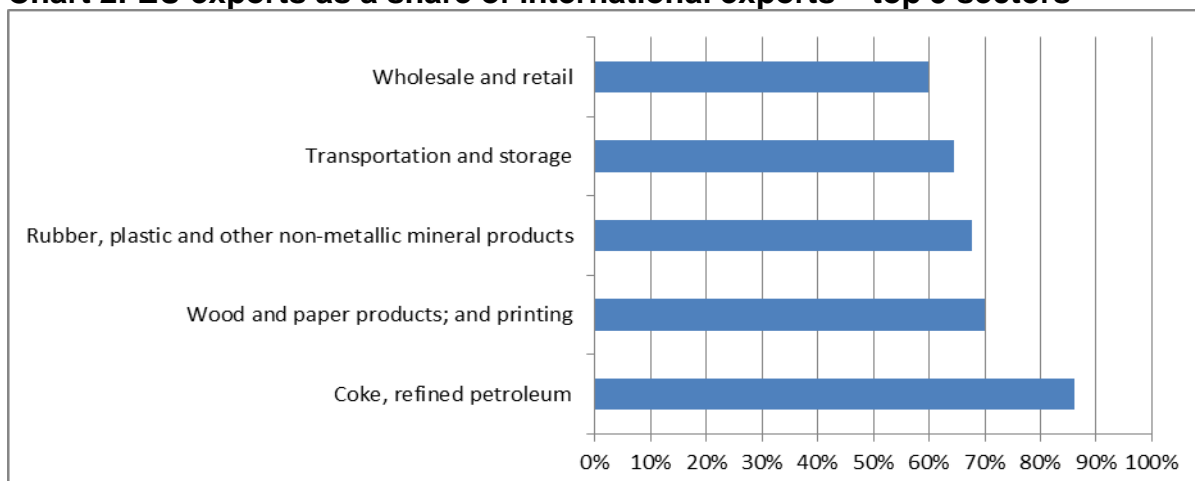


33. The sectors of Scotland’s economy most reliant on the EU as a destination for international exports are outlined in Chart 2 below. This chart shows that the EU market accounts for over 60% of exports for five sectors of the Scottish economy (for sectors with a minimum of a total of £400m of international exports). The EU is particularly important as a destination market for exports from the coke and refined petroleum sector, accounting for more than 80% of international exports in that sector. Although the food and drink sector is the second largest EU export sector in nominal terms, it is less reliant on the EU, with 37% of exports destined for the EU, in large part reflecting the demand for Scottish spirit products internationally.¹⁸

¹⁷ Scottish Government (2018) Export Statistics Scotland 2016
<http://www.gov.scot/Resource/0053/00530678.pdf>

¹⁸ Scottish Government (2018) Export Statistics Scotland 2016
<http://www.gov.scot/Resource/0053/00530678.pdf>

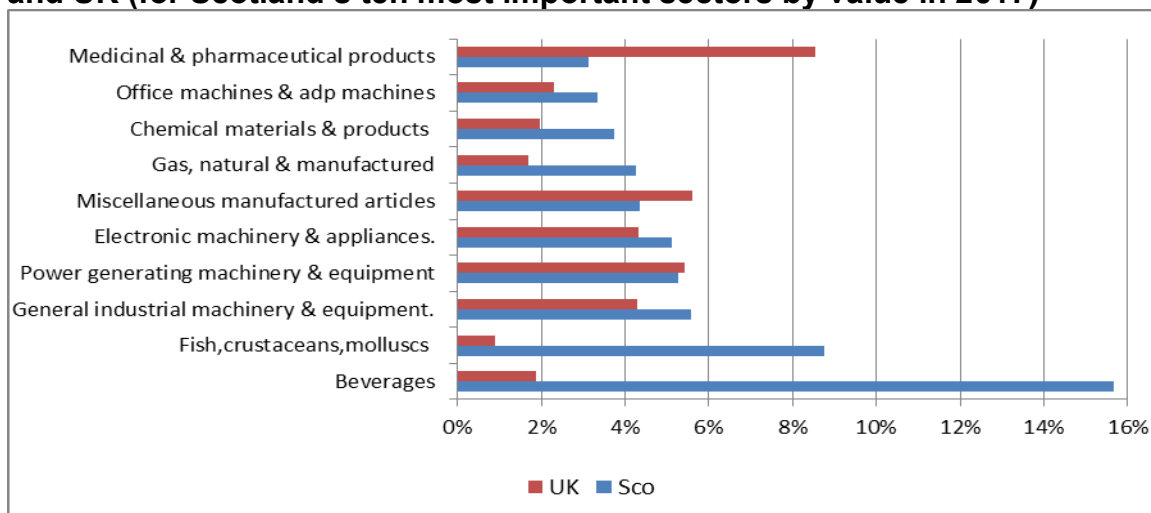
Chart 2: EU exports as a share of international exports – top 5 sectors



Differences with the UK

34. While there are many similarities between Scotland and the UK as a whole, there are also some significant differences in terms of the relative importance of various sectors and markets. Chart 3 shows the relative importance of particular sectors to Scotland and the rest of the UK in terms of their share of EU exports, comparing UK and Scottish data for each of Scotland’s ten most important EU export sectors. While there are some similarities, sectors such as beverages (spirits), and fish, crustaceans, molluscs (seafood) for example, are relatively much more important to the Scottish economy than the rest of the UK.

Chart 3: Exports of goods by sector as a share of total EU exports – Scotland and UK (for Scotland’s ten most important sectors by value in 2017)¹⁹



35. Tables 2 and 3 further examine these differences, by comparing the importance of the five most important sectors to Scotland in terms of the value of EU exports to the UK, and vice versa. These tables clearly show that there are some

¹⁹ HMRC Regional Trade Statistics <https://www.uktradeinfo.com/Statistics/RTS/Pages/default.aspx>
 Note - HMRC trade statistics use an alternative methodology based on apportionment of UK data. These statistics include estimates for Petroleum and North Sea related exports. Exports Statistics Scotland does not. Petroleum and related materials have not been included in the chart above.

large differences between Scotland and the UK – for example, beverages and seafood are very important to Scotland, and much less so to the UK, while road vehicles, ranking as the most important EU export for the UK, are only the 31st most important to Scotland.

Table 2 – top 5 Scottish exports to the EU – and UK rank (2017)²⁰

	Scotland		UK
	EU Export Rank	EU Exports (£'000s)	EU Export Rank
Petroleum, & related	1	5,831,842	2
Beverages	2	1,297,531	19
Fish, crustaceans, molluscs	3	725,260	33
General industrial machinery	4	462,005	8
Power generating machinery & equipment	5	435,507	6

Table 3 – top 5 UK exports to EU - and Scottish rank (2017)²¹

	UK		Scot
	EU Export Rank	EU Exports (£'000s)	EU Export Rank
Road vehicles	1	18,155,935	31
Petroleum & related	2	14,704,143	1
Medicinal & pharmaceutical products	3	12,718,686	11
Other transport equipment	4	8,814,111	19
Miscellaneous manufactured articles	5	8,358,099	7

36. The seafood industry is an important example of a sector where Scotland may have very different considerations from the UK as a whole in negotiating a trade deal. In 2017, 92,000 tonnes of fresh Atlantic salmon worth £600m was exported from the UK (of which 99% was Scottish), representing a 35% increase in value and 26% increase in volume from 2016. The EU is a vital market for Scottish seafood products, accounting for 77% of seafood exports in 2017 and, while the UK as a whole is a net *importer* of fish, Scotland is a net *exporter* to the EU and the rest of the world. Disadvantageous non-tariff barriers in particular could have a devastating impact on the export of fresh seafood.²²

37. Understanding and reflecting these - and other - differences between the UK and Scotland will be important when considering and negotiating trade deals that work to the benefit of the whole UK. Food and drink products, for example, have historically been among the small number of products singled out in trade deals for a less than fully liberalised approach. One of the areas of most importance to the Scottish economy is, based on precedent, therefore likely to be a source of considerable concern when trade deals are being negotiated. Those negotiations will determine the future world trading success of Scotland and the UK. Even within specific sectors, there will often be distinct characteristics to be considered for Scotland including distance from ports and a high dependence on migrant labour.

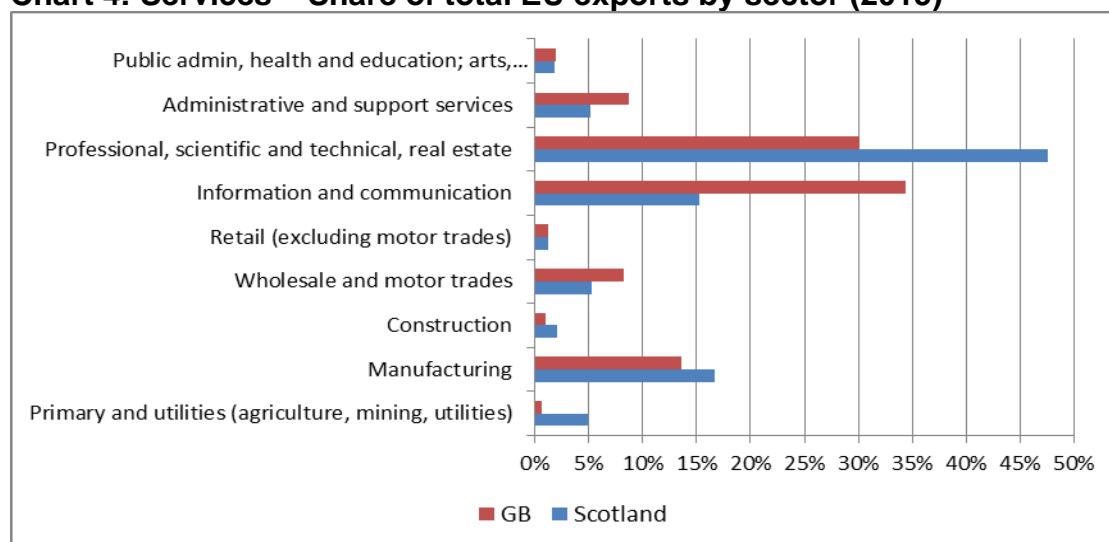
²⁰ HMRC Regional Trade Statistics <https://www.uktradeinfo.com/Statistics/RTS/Pages/default.aspx>

²¹ Ibid

²² Ibid

38. There are also some key differences in the trade in services. Chart 4 below considers the relative importance of service exports by sector as a share of total EU exports, based on ONS regional export data²³. It shows that, for Scotland, professional, scientific and technical and real estate services account for a much larger share of Scottish service sector exports to the EU compared to Great Britain²⁴. Exports of utility-related services are also more important to Scotland, while information and communication exports are relatively much more important to Great Britain.

Chart 4: Services – Share of total EU exports by sector (2015)



Imports and Value Chains

39. Imports are also a vital part of the trade picture. Allowing cross border flows of goods and services increases the range of goods and services that are available to both businesses and consumers. Openness to imports can also be an important avenue under which competition can be increased, providing incentives for businesses to innovate, in order to improve quality and remain competitive.

40. Imports enable businesses to have access to a cheaper and wider range of raw materials, parts, components and services from multiple countries, allowing them to form global value chains. Such global value chains have become increasingly important in recent decades, increasing competitiveness and providing consumers with increased variety and choice. Even after allowing for the cost and time spent shipping materials across the world, it can be a more efficient and effective production model for businesses to import components from the best sources of supply.

²³ ONS Regional Services Export Statistics
<https://www.ons.gov.uk/businessindustryandtrade/internationaltrade/datasets/regionalisedestimatesofukserviceexports>

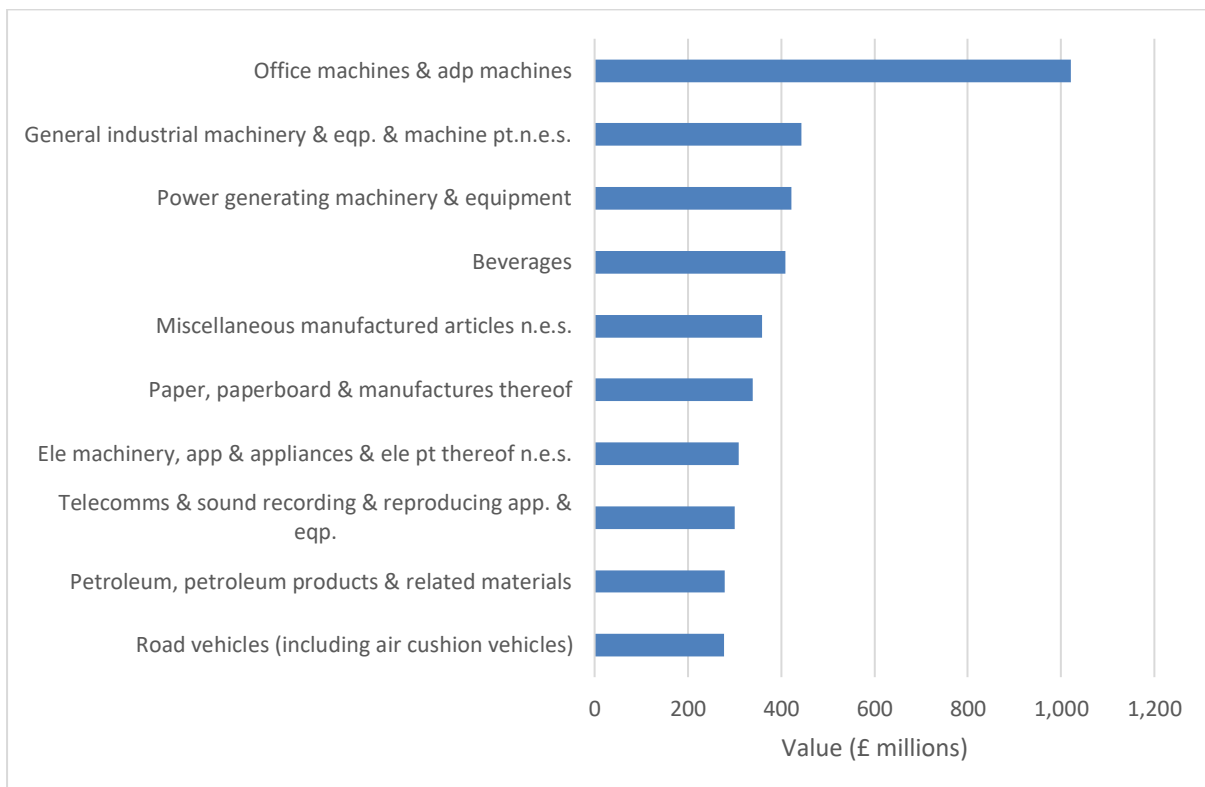
²⁴ Note – comparisons can only be made with GB, rather than UK. Latest data available is 2015, some sectors, including large export sectors such as financial services, are excluded from the EU/Non-EU split provided by ONS.

41. The benefits of this can equally be felt by the public sector, where the ready availability of cheaper raw materials can have a positive impact on the cost and delivery times of government commitments. The delivery of new homes, for example, can be affected by the supply of timber, tiles and boilers from countries across the EU.

42. In these global value chains, goods and services are exchanged between countries, potentially crossing borders a number of times before being combined and sold as a final product. As a result, any increases in tariffs can become cumulative, and any additional customs requirements can become increasingly burdensome.

43. Import data for Scotland are available for goods sectors but not service sectors. Chart 5 shows the ten goods sectors (taken from HMRC Regional Trade Statistics) in Scotland with the largest nominal value of imports from the EU. The two largest sectors are office machinery and general industrial machinery.

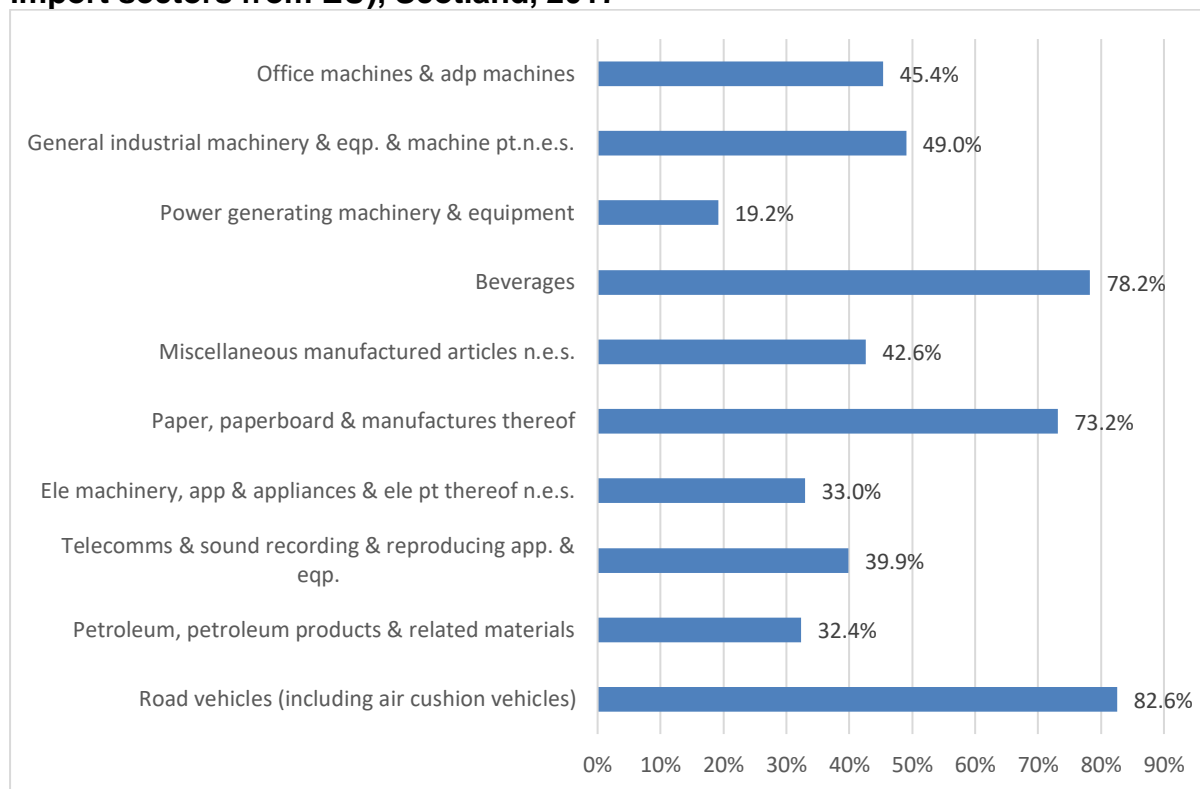
Chart 5 Nominal Value of EU Imports by Sector (For top 10 import sectors from EU), Scotland, 2017²⁵



²⁵ HMRC Regional Trade Statistics <https://www.uktradeinfo.com/Statistics/RTS/Pages/default.aspx>

44. The goods sectors of the Scottish economy most reliant on the EU as a source of imports are shown in Chart 6 below. The chart shows that EU imports account for around three quarters of total imports for the papers sector (73%), beverages sectors (78%) and car industry (83%).

Chart 6 EU imports as a percentage of total imports by Sector (for Top 10 import sectors from EU), Scotland, 2017²⁶



Investment and Productivity

45. Trade integration does not only provide benefits in terms of the flows of goods and services. There is also substantial evidence that trade agreements can help boost investment and can have positive implications for productivity through a number of channels. For example, studies by the Organisation for Economic Co-operation and Development (OECD) and others shows that, as businesses become increasingly international, they become more competitive and productive²⁷.

²⁶ HMRC Regional Trade Statistics <https://www.uktradeinfo.com/Statistics/RTS/Pages/default.aspx>

²⁷ OECD (2008) - Trade and Innovation Project: A Synthesis Paper. Trade Policy Working Paper No.72 <http://www.oecd.org/trade/benefitlib/41105505.pdf> and Harris and Li (2008) - Firm Level Empirical Study of the Contribution of Exporting to UK Productivity Growth <https://onlinelibrary.wiley.com/doi/abs/10.1111/j.1467-9701.2007.01087.x>

CHAPTER TWO - INTERNATIONAL TRADE AGREEMENTS – CURRENT ARRANGEMENTS

46. This chapter describes the current arrangements for developing and agreeing trade policy and international trade agreements. In particular it focusses on the clear, if inadequate in practice, arrangements within the UK for doing so, including the currently very limited role for the UK Parliament, devolved administrations and civic society.

World Trade Organization

47. The World Trade Organization (WTO), established on 1 January 1995, replaced the General Agreement on Tariffs and Trade (GATT). The WTO is a global organisation dealing with trade negotiations, rules and disputes between countries. There are currently 164 WTO members, covering around 95% of world trade. A further 22 countries are currently seeking accession. The UK has been a member of the WTO in its own right since 1995 and will continue to be a member if it leaves the EU. However, as a member of the EU, the UK currently participates in the WTO as part of the EU, rather than as an independent member. Leaving the EU and participating in the WTO in its own right will require a number of practical and legal issues to be resolved, including establishing UK specific tariff rate quotas and securing accession to the Agreement on Government Procurement as an independent member.

48. One of the key principles governing the WTO is that of ‘trade without discrimination’. Trade must be conducted on a ‘most favoured nation’ basis, where all WTO members enjoy equal treatment in terms of market access, tariffs, etc. Exceptions to this general rule are permitted, including allowing the establishment of free trade agreements in goods and, in more limited circumstances, in services, between countries. Article XXIV(8)(b) of the General Agreement on Tariffs and Trade (GATT)²⁸ defines a free-trade area as “*a group of two or more customs territories in which the duties and other restrictive regulations of commerce...are eliminated on substantially all the trade between the constituent territories in products originating in such territories*”.

Role of the European Union

49. International trade is largely an EU competence, and the European Commission (the executive arm of the European Union) is therefore currently responsible for preparing, negotiating and proposing international trade agreements on behalf of the 28 EU Member States. The Council of the European Union is responsible for approving negotiation mandates for the Commission’s trade discussions. The Commission must keep the European Parliament regularly informed of the progress of those discussions. The European Parliament must approve all international agreements.

²⁸ General Agreement on Tariffs and Trade
https://www.wto.org/english/docs_e/legal_e/gatt47_01_e.htm

50. There are broadly three types of EU international trade agreements:

- Customs Unions
- Association Agreements, Stabilisation Agreements, (Deep and Comprehensive) Free Trade Agreements and Economic Partnership Agreements
- Partnership and Cooperation Agreements

51. As an EU Member, the UK currently benefits from around 40 separate Free Trade Agreements with ‘third countries’ (that is, countries outwith the EU), in addition to frictionless trade with fellow EU Member States. The EU has most recently signed an Economic Partnership Agreement with Japan (pending ratification) and is at an advanced stage of finalising trade deals with Singapore, Vietnam and Mexico. It is also negotiating with a number of other countries, including the Mercosur countries, (Argentina, Brazil, Paraguay and Uruguay), Australia and New Zealand. The EU Agreement with Canada has been provisionally in force since 21 September, pending ratification by Member States. In 2016, Scotland exported around £3.7 billion worth of goods and services to countries with which the EU has trade agreements, accounting for 12.4% of Scotland’s international exports.

52. EU Member States operate as a single trading bloc. As such, Member States, including the UK, cannot negotiate free trade agreements independently, benefitting instead from operating as a large market which attracts trade and investment. Like other Member States, the UK plays its part in the policy development, agreement of negotiation mandates, ratification and implementation of those deals. The limitations and drawbacks to the current arrangements within the UK for doing so are considered below.

Evolving Nature of Free Trade Agreements

53. The UK has not negotiated its own trade deals for over 40 years. Much has changed since then, not least the nature of free trade agreements. Earlier trade deals had a more limited focus on issues such as tariffs, quotas and cooperation. While the scope of trade deals can vary considerably, **modern trade deals have in general evolved – sometimes controversially - to extend into a wide range of social provision and domestic policy issues, such as labour and environmental protection, product safety regulations, environment and food safety, human rights, intellectual property and procurement (many areas of which are the responsibility of the Scottish Government and Parliament and the other devolved administrations)**. Devolution has allowed the Scottish Government to demonstrate its ambition in pursuing ambitious social and environmental goals. For example, the Scottish Government adopts a unique climate justice approach to tackling the effects of climate change that recognises that it is the poor and vulnerable at home and overseas who are the first to be affected by climate change, and will suffer the most, having done little or nothing to cause the problem. A strong role in developing future UK trading arrangements will allow Scotland to continue to act as a world leader, in its capacity as a good global citizen.

54. Modern trade deals also generally contain governing principles around fairness, for example, which have an impact on both reserved and devolved issues.

As a result of this extension in scope, the effects of modern trade deals are felt widely through different policy areas and parts of the UK.

55. Modern trade deals take a long time to negotiate. The recently concluded Comprehensive Economic and Trade Agreement ('CETA')²⁹, between the EU and Canada, represents a likely model for any potential future trade deal between the EU and the UK. That agreement, which took seven years to agree and is still only provisionally in force, pending ratification by Member States, represents the most comprehensive and ambitious EU trade agreement so far, in both content and scope, covering a wide range of non-tariff issues, as well as services, in addition to those more traditionally associated with trade agreements.

56. While the UK Government has suggested that a trade deal between the EU and the UK could be concluded much more quickly than the CETA, expert opinion differs. In his evidence to the House of Commons Select Committee for Exiting the European Union on 27 February 2018³⁰, Pascal Lamy - the former Director General of the World Trade Organization and former European Commissioner for Trade – estimated that such a deal could take five to six years to conclude, and that third countries may be unwilling to begin their own negotiations with the UK until the detail of its agreement with the EU is known. Even the quickest comprehensive trade agreement ever concluded - between the EU and Vietnam - took just under three years to negotiate and is still pending ratification. Dr Gracia Mañin Durán, University College London, made similar observations in evidence to the Scottish Parliament's Culture, Tourism, Europe and External Relations Committee on 15 March 2018³¹.

Role of UK and Devolved Administrations in International Trade Policy and International Trade Agreements

Constitutional Arrangements

57. Responsibility for foreign affairs, including international relations and the regulation of international trade, is reserved to the UK Parliament and Government under Schedule 5 of the Scotland Act 1998. The Secretary of State for Foreign and Commonwealth Affairs is responsible for the foreign policy of the UK, and has overall responsibility for concluding treaties and other international agreements on behalf of the United Kingdom.

58. But there are important exceptions to this general reservation of foreign affairs, reflecting the wider impact of international actions and decisions. In particular, the Scottish Parliament and Scottish Ministers are responsible for observing and implementing international, ECHR and EU obligations relating to devolved matters.

²⁹ Comprehensive Economic and Trade Agreement <http://ec.europa.eu/trade/policy/in-focus/ceta/>

³⁰ Pascal Lamy evidence to House of Commons Select Committee on Exiting the European Union, 27 February <http://data.parliament.uk/writtenevidence/committeeevidence.svc/evidencedocument/exiting-the-european-union-committee/the-progress-of-the-uks-negotiations-on-eu-withdrawal/oral/79454.html>

³¹ Dr Gracia Mañin Durán, evidence to Scottish Parliament Culture, Tourism, Europe and External Relations Committee, 15 March 2018 <http://www.parliament.scot/parliamentarybusiness/report.aspx?r=11419&mode=pdf>

59. The Scotland Act also enables the Scottish Government to assist the UK Government in relation to international relations (including the regulation of international trade), so far as relating to devolved matters. This means that the Scottish Government could assist the UK Government in the formulation, negotiation and implementation of policy relating to regulation of international trade issues regarding devolved matters. It could also allow the Scottish Government to participate in relevant international negotiations.

60. Modern ‘mixed’ international trade agreements (i.e. those which cover issues which fall within the competence of both the EU and its Member States, for example those dealing with trade and also investment protection matters) must be ratified by the European Parliament and by each Member State legislature before they are fully in place. Agreements which relate to areas of exclusive EU competence require only to be ratified by the European Parliament. Arrangements for ratification of mixed agreements vary widely between Member States, depending on the nature of the agreement and the Member State’s particular constitutional arrangements, with some requiring referendums. For example, in Belgium, each layer of government – federal, regional and community – can be involved in ratifying international trade agreements as part of their wider involvement and responsibilities.

Parliamentary Oversight

61. The current arrangements within the UK for the ratification of international agreements are set out in the Constitutional Reform and Governance Act 2010 (“CRAGA”)³², and are much more limited. Under that Act, subject to certain exceptions, new agreements are laid before the UK Parliament and ratified if neither House objects within 21 days. The UK Parliament (in particular, the House of Commons) can delay consent by objecting to an agreement, in which case the Government is required to lay before Parliament a statement setting out its reasons for considering that the agreement should nevertheless be ratified, and the 21 day period starts again.

62. The ratification provisions set out in CRAGA contain numerous exclusions and limitations. Parliament does not have to debate or vote on ratification and has no power to amend a treaty or be involved in treaty negotiation. In addition, there is no legal requirement to consult the devolved governments and legislatures, stakeholders or the public.

63. It is very rare for treaties to be debated in the Parliamentary time allocated to Government business, and opportunities for debates under other Parliamentary mechanisms are limited. While the arrangements for Parliamentary scrutiny vary according to the type of agreement, there is no general formal requirement to allow Parliament to scrutinise treaty negotiations, although Westminster committees have on occasion considered high profile negotiations, albeit in no great depth, and with no formal locus. In addition to ratifying a treaty, the Government must also arrange to explicitly incorporate treaty provisions, where necessary, into domestic law in

³² UK Government (2010) Constitutional Reform and Governance Act 2010
<http://www.legislation.gov.uk/ukpga/2010/25/contents>

order for it to become part of domestic law. The UK Government's practice is to try to ensure that the necessary legislation is in place before ratification. Any such legislation must follow the usual parliamentary procedures for passing legislation, which will involve the UK Parliament - or the Scottish Parliament in devolved areas - in terms of how a treaty obligation is implemented.

64. **There has been considerable criticism of what currently amounts to very limited Parliamentary and civic oversight of new agreements**, particularly when compared to the considerably more extensive arrangements in some EU Member States and elsewhere, and particularly given that, once in force, international trade deals cannot easily be renegotiated or withdrawn from. A recent example has been the considerable criticism of the very minimal Parliamentary scrutiny of CETA. This approach to scrutiny, which has been adopted more or less without adjustment in the Trade Bill currently proceeding through the UK Parliament, is already inadequate, and will clearly not be sufficient to respond to new circumstances, if the UK leaves the EU and Customs Union and begins negotiating its own trade deals. While the UK Government July 2018 White Paper *The Future Relationship Between the United Kingdom and the European Union*³³ acknowledges that the UK Parliament will need to have a role in overseeing and scrutinising future legislative proposals, this role needs to be extended and applied to the devolved administrations and legislatures.

65. Despite representations from the Scottish Government to the UK Government during the development of the CRAGA, there is currently no formal role for the Scottish Parliament in the ratification of international agreements, aside from its role in scrutinising any devolved legislation arising from implementing such agreements. Clearly, however, **the Scottish Government and other devolved administrations have a legitimate and substantial interest in International and European policy, legislation and procedures both in devolved and non-devolved matters, especially given their responsibility for observing and implementing international agreements**. The Scottish Ministers are directly accountable through the domestic courts and under the Scotland Act 1998 settlement in relation to their implementation and application of European and International law, including in dealing with any infraction proceedings or the payment of fines.

Involvement of the Devolved Administrations: Agreements between the Administrations

66. At present, beyond the relevant provisions of Schedule 5 to the Scotland Act, the role of the devolved administrations in work with the UK Government on European Union policy and International Relations is not protected in law, but is set out in the *Memorandum of Understanding and Supplementary Agreements between the UK Government, the Scottish Ministers, the Welsh Ministers and the Northern Ireland Executive Committee* ("MoU")³⁴. The MoU, last revised and agreed in October 2013, sets out the guiding principles underpinning intergovernmental

³³ UK Government (2018) *The Future Relationship Between the United Kingdom and the European Union* <https://www.gov.uk/government/publications/the-future-relationship-between-the-united-kingdom-and-the-european-union>

³⁴ *Memorandum of Understanding and Supplementary Agreements* <https://beta.gov.scot/publications/devolution-mou/>

relations on these issues. Those arrangements, described below, have proved inadequate in ensuring that Scotland's interests are fully represented at EU and International level. They will require substantial re-evaluation and revision to meet the challenges posed by the UK potentially leaving the EU Single Market and Customs Union and pursuing both a new relationship with the EU as well as trading relationships outwith it. That leaving the EU potentially requires a re-evaluation of intra-UK arrangements was recognised at the meeting of the Joint Ministerial Committee Plenary on 14 March 2018³⁵, when it was agreed that “*officials should review and report to Ministers on the existing intergovernmental structures, including the Memorandum of Understanding, to ensure they are fit for purpose in light of the UK's exit from the EU.*”

67. In practice, under current arrangements, there is limited scrutiny of trade agreements within the UK (and the development of trade policy on which the agreements are based). The UK Government has acknowledged that leaving the EU and developing an independent trade policy for the UK will require new procedures to be put in place. The Secretary of State for International Trade outlined his proposals for the future role of Parliament, the devolved administrations and others in this area in a statement to the House of Commons on 16 July 2018. These proposals are considered in the context of this paper in Chapter 4.

Concordat on Co-ordination of European Union Policy Issues

68. The *Concordat on Co-ordination of European Union Policy Issues*, set out in Annexes B1 and B4 to the MoU, states that “***the UK Government wishes to involve the Scottish Ministers as directly and fully as possible in decision making on EU matters which touch on devolved areas (including non-devolved matters which impact on devolved areas and non-devolved matters which will have a distinctive impact of importance in Scotland)***”. It provides that co-ordination mechanisms should seek to achieve three key objectives:

- They should provide for full and continuing involvement of Scottish Ministers and their officials in the processes of policy formulation, negotiation and implementation, for issues which touch on devolved matters;
- They should ensure that the UK can negotiate effectively, in pursuit of a single UK policy line, but with the flexibility that fast moving negotiations require; and
- They should ensure EU obligations are implemented with consistency of effect and where appropriate of timing.

69. Common Annex B4 of the Concordat states that, in order to contribute effectively to the UK's decisions on EU matters, the devolved administrations need to have information on relevant EU business, including proposals for Treaty change. It further states that the UK Government will provide all such full and comprehensive information, as early as possible. Specifically, on participation in the formulation of UK policy, it states that:

³⁵ Joint Ministerial Committee Plenary Communiqué <https://beta.gov.scot/publications/joint-ministerial-committee-plenary-communicue-march-2018/>

“.....Ministers and officials of the devolved administrations should be fully involved in discussions within the UK government about the formulation of the UK’s policy position on all issues which touch on matters which fall within the responsibility of the devolved administrations.....consultation with devolved administrations includes the upstream opportunities to influence EU proposals in the period before they emerge as well as the period after formal proposals are made and includes the period before approval is sought for a UK line from the European Affairs Committee”

70. **The Concordat anticipates that most issues will be able to be resolved bilaterally or, if not, through the Joint Ministerial Committee on Europe (JMC(E), which meets ahead of meetings of the European Council.** JMC(E) provides a forum for the devolved administrations to scrutinise and contribute to the UK’s proposed priorities for the upcoming Council, and has been an overarching forum for discussing ongoing European business. In addition, meetings provide an opportunity to consider priority issues of on-going EU business, with an agenda agreed jointly between devolved administrations and the UK Government in advance of meetings. There are some examples of where this working practice has enabled the Scottish Government’s position to be understood and reflected in the UK Government’s policy position. One of the key examples where there is regular engagement, both structural and informal, is in relation to agricultural issues, with devolved administrations having substantial input into the position taken at the regular Ministerial Agriculture Councils, and official-led Special Committee Agriculture meetings (which feed into the Council meetings).

71. However, there are also examples of where the UK Government has not anticipated the need to share information – for example, where an issue of devolved competence has not been recognised or understood – in order to support meaningful discussions in sufficient time to allow thorough consideration of the implications of a policy position on the devolved legislatures. Furthermore, in cases where there may be fundamental differences between the positions of the UK Government and any of the devolved administrations, the UK Government position tends to prevail.

72. Following the result of the EU referendum, a further Joint Ministerial Committee was established in October 2016. The terms of reference of the JMC on EU Negotiations (JMC(EN))³⁶ provide that the JMC(EN) should be used to discuss each government’s requirements for the future relationship with the EU; seek to agree a UK approach to, and objectives for, Article 50 negotiations; provide oversight of negotiations with the EU; and discuss issues stemming from the negotiation process which may impact upon or have consequences for the UK Government, the Scottish Government, the Welsh Government or the Northern Ireland Executive. An additional sub-committee of the JMC (EN) - Ministerial Forum (EN) - was subsequently established to discuss negotiation of the UK’s future partnership with the EU, in recognition of the likely volume and speed of negotiations. The Ministerial Forum met for the first time in Edinburgh on 24 May 2018.

³⁶ JMC on EU Negotiations Terms of Reference
<https://beta.gov.scot/publications/joint-ministerial-committee-minutes-october-2016/>

73. The terms of reference and initial work plan of the JMC (EN) set out that the committee should meet on a monthly cycle. As of August 2018, there have been only eleven meetings since the first in November 2016. Furthermore, those meetings have not always followed the pace of the negotiations, or taken place ahead of key events, as the terms of reference envisaged.

74. The joint annex to the Concordat also makes provision for Ministers of the devolved administrations to have a role in meetings of the EU Council of Ministers (meetings of lead portfolio Ministers from each Member State) at which substantive discussion is expected of matters likely to have a significant impact on their devolved responsibilities. The presentation of arguments by Ministers from devolved administrations at such meetings follows an agreed UK negotiating line, established in advance. However, attendance at meetings does not always allow for an active role. On Agrifish issues, for example, the Scottish Government has not been able to secure an active role speaking on behalf of the UK since 2008, despite numerous requests to do so. In other, less high profile, areas such as culture and sport, the Scottish Government has been given a more prominent speaking role.

Concordat on International Relations

75. **The Concordat on International Relations, set out in annexes D1 and D4 to the MoU, provides similar undertakings around the exchange of information, formulation of policy, implementation of obligations and representation of interests.** In particular, it undertakes that the Foreign and Commonwealth Office or, as appropriate another lead UK Department will:

“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 devolved administrations will be sent copies of papers, including relevant interdepartmental correspondence, and be invited to meetings on subjects in which they have a devolved policy interest. Where necessary, the FCO will facilitate contacts and ensure that timely consultation takes place.....and will undertake the negotiations of all binding international agreements and multilateral international arrangements....following the consultation arrangements referred to above”.

76. It also allows for agreements between the devolved administrations and foreign national or sub-national governments or organisations, to facilitate co-operation on devolved matters, within certain constraints (i.e. provided such agreements don’t purport to bind the UK in international law, affect the conduct of international relations or prejudice UK interests). It envisages that, where international negotiations bear directly on devolved matters, Ministers or officials from the devolved administrations can form part of the UK negotiating team, and speak for the UK in international meetings.

77. In terms of trade and inward investment promotion, the Concordat notes that the devolved administrations and the UK Government have concurrent powers to promote international trade and inward investment.

78. International relations and the UK's relationship with the EU was considered as part of the Smith Commission's consideration of the devolution of further powers to the Scottish Parliament, which reported in November 2014³⁷. In evidence to the Commission³⁸, the Scottish Government argued that the Scottish Parliament and the Government should play a greater role in decision making on issues within their responsibilities or which affect their interests, to enhance their ability to promote Scottish products and businesses internationally. The Smith Commission report concluded that:

*"The parties recognise that foreign affairs will remain a reserved matter. They also **recognise the need to reflect fully the views of the other devolved administrations** when drawing up any revised governance arrangements in relation to Scottish Government representation of the UK to the EU. In that context, the parties agree that the implementation of the current Concordat on the Co-ordination of European Union Policy Issues should be improved. This should be achieved by:*

(1) ensuring that Scottish Ministers are fully involved in agreeing the UK position in EU negotiations relating to devolved policy matters. For example, it may be appropriate as part of this process for a UK Government Minister to chair a meeting of devolved administration Ministers where another UK Government Minister represents the position of England (or England and Wales in certain policy areas) while devolved administration Ministers represent their respective interests.

(2) ensuring that Scottish Ministers are consulted and their views taken into account before final UK negotiating positions relating to devolved policy matters are agreed.

(3) presuming that a devolved administration Minister can speak on behalf of the UK at a meeting of the Council of Ministers according to an agreed UK negotiating line where the devolved administration Minister holds the predominant policy interest across the UK and where the relevant lead UK Government Minister is unable to attend all or part of a meeting.

Future Change

79. The Smith Commission Report in November 2014 came in the aftermath of the Scottish Independence Referendum, and must be viewed in that context. At the time there was no prospect that the UK would leave the EU - indeed much of the debate prior to the Referendum had centred on the benefits of Scotland and the rest of the UK remaining in the EU.

³⁷ Smith Commission Report on the devolution of further powers to the Scottish Parliament (2014) http://webarchive.nationalarchives.gov.uk/20151202171029/http://www.smith-commission.scot/wp-content/uploads/2014/11/The_Smith_Commission_Report-1.pdf

³⁸ Scottish Government (2014) More Powers for the Scottish Parliament: Scottish Government Proposals <http://www.gov.scot/Resource/0046/00460563.pdf>

80. Leaving the EU will fundamentally change the nature of the UK as a state, and will have an inevitable impact on the UK's current constitutional arrangements. EU law is currently a major source of functions, rights and powers within the UK. **With the dramatic change of circumstances brought about by the EU Referendum in 2016, comes the need to re-examine the future arrangements and establish new ways of working which ensure that Scotland is able to contribute effectively in the development of the UK positions on international agreements.**

81. Currently, all international trade deals are negotiated through the EU. Within the UK the established arrangements in place for their development and eventual ratification are already inadequate in practice, as outlined earlier in this chapter. If the UK leaves the EU and Customs Union, the UK will be wholly responsible for negotiating and concluding trade deals, including with the EU itself. The direction of trade policy and future trade negotiations will have important implications for Scotland, and the other devolved administrations.

82. Losing the EU's negotiating power, scrutiny and expertise would take the UK into new, uncharted territory and will require a massive step change in the way the UK conducts its affairs in relation to international matters. The UK will need new processes to support that. The respective roles of the UK Government and Parliament and the devolved administrations and their legislatures in foreign policy development, and the making and ratification of international agreements, will have to change substantially, to reflect the magnitude and significance of change, and the loss of the EU as an additional scrutiny body. The UK Government has itself acknowledged the importance of giving the Scottish Government and Scottish Parliament a meaningful role in developing future trade policy, and how future trade agreements will be reached:

“Our approach to developing our future trade policy must be transparent and inclusive. Parliament, the devolved administrations, the devolved legislatures.....and the public from every part of the UK must have the opportunity to engage with and contribute to our trade policy.”³⁹

83. While this issue was raised in the context of the European Union (Withdrawal) Act and Trade Bill, the UK Government has done little or nothing to allay concerns that it will react to the scale of this challenge by centralising power and diminishing, rather than enhancing, the role of the UK Parliament and devolved administrations. A number of high level commitments have been made by the UK Government about the need for the future development of trade policies and agreements to be inclusive and to meet the requirements of all parts of the United Kingdom, but no detail has yet been proposed.

³⁹ UK Government (2017) Preparing for our future UK trade policy <https://www.gov.uk/government/publications/preparing-for-our-future-uk-trade-policy/preparing-for-our-future-uk-trade-policy>

84. The Trade Bill currently before the UK Parliament deals with the transitioning of any EU-third country trade agreements that have been signed before the UK exits the EU. In particular, it seeks to ensure continuity in the UK's trading arrangements at the point of exit from the EU, by making provision to allow for the implementation in domestic law of any non-tariff elements of agreements reached between the EU and third countries before that date. **It will do that using broad regulation-making powers, with limited opportunity for input or scrutiny, by the devolved administrations, or UK or Scottish Parliament, stakeholders or wider interests.**

85. That approach must change, with roles and responsibilities re-aligned, to ensure that the interests and priorities of all in these islands are properly represented, protected and promoted if the UK leaves the EU and Customs Union.

CHAPTER THREE - FUTURE UK TRADING ARRANGEMENTS

86. This chapter describes recent developments in the UK's withdrawal from the EU, focussing on the UK Government's approach to the inclusion of the devolved administrations in future trading arrangements.

EU Position

87. On 7 March 2018, the EU27 published draft guidelines for the negotiations on the future EU-UK relationship, having agreed in December 2017 that sufficient progress had been made in Phase 1 discussions to enable the EU and UK to move on to Phase 2 of the Brexit negotiations. This phase, which followed the release of the European Commission's draft Withdrawal Agreement on 28 February⁴⁰, is focussing on the framework of a trade deal and other future relationship issues.

88. The European Commission and UK Government's subsequent partially agreed joint legal text of the Withdrawal Agreement, was published on 19 March 2018. That text states that there will be a transition period for the UK leaving the EU, which will end on 31 December 2020. During that period, the UK will be bound by the obligations stemming from international agreements concluded by the EU, including free trade agreements, but will not participate in any bodies set up by those agreements, unless invited to do so. The UK will be able to negotiate, sign and ratify new trade agreements during the transition period, provided that these do not enter into force or apply during the transition period (unless authorised by the EU). The UK will continue to participate in the Customs Union and Single Market, but will generally not be permitted to participate in any decision making.

89. The UK Government's White Paper *The future relationship between the United Kingdom and the European Union*⁴¹ was published on 12 July 2018 and sets out what the UK Government would like to see in terms of future economic and security partnerships as the UK leaves the EU. While there will continue to be debate, discussion and negotiation around the detail of the future relationship the UK Government is seeking with the EU and what it will achieve, the UK Government's intention to leave the Single Market and Customs Union is clear. In the Prime Minister's Foreword, she confirms that leaving the European Union will involve "*leaving the Single Market and the Customs Union, ending free movement and the jurisdiction of the European Court of Justice in this country*". The White Paper is said to underpin the vision set out by the Prime Minister at Lancaster House, in Florence, at the Mansion House and in Munich and in doing so address questions raised by the EU in the intervening months. The White Paper says that the UK Government is determined to build a new relationship that works for both the UK and the EU and that the relationship needs to be:

⁴⁰ European Commission Draft Withdrawal Agreement on the withdrawal of the United Kingdom of Great Britain and Northern Ireland from the European Union and the European Atomic Energy Community. https://ec.europa.eu/commission/sites/beta-political/files/draft_withdrawal_agreement.pdf

⁴¹ UK Government (2018) *The Future Relationship Between The United Kingdom and The European Union* <https://www.gov.uk/government/publications/the-future-relationship-between-the-united-kingdom-and-the-european-union>

“broader in scope than any other that exists between the EU and a third country” to “reflect the UK’s and the EU’s deep history, close ties and unique starting point”.

“In designing the new trading relationship, the UK and the EU should therefore focus on ensuring continued frictionless access at the border to each other’s markets for goods. To deliver this goal the Government is proposing the establishment of a free trade area for goods”.

“The free trade area ... and ‘just in time’ processes that have developed across the UK and the EU over the last 40 years” and would “see the UK and the EU meet their shared commitments to Northern Ireland and Ireland through the overall future relationship”.

“The phased introduction of a new Facilitated Customs Arrangement... would remove the need for customs checks and controls between the UK and the EU as if they were a combined customs territory, which would enable the UK to control its own tariffs for trade with the rest of the world”.

“The UK’s proposal for its future economic partnership with the EU would provide a strong foundation for the UK to establish a broad and ambitious independent trade policy with the rest of the world”. Among other things, the UK would *“boost trade relationships with old friends and new allies”* as it seeks to grow trade contacts with markets outside of the EU.

90. While neither the European Commission nor the EU 27 have commented in any detail on the UK Government’s proposals, in its draft negotiating guidelines for the future EU-UK relationship⁴²- which were approved on 23 March 2018 - the European Council specifically countered some of the previous suggestions made by the Prime Minister and which have been incorporated into the July 2018 proposals. While calling for *‘as close as possible a partnership with the UK in the future’*, the guidelines stated that the European Council would not agree to any ‘cherry picking’ through participation on a sector by sector approach, as that would undermine the integrity and proper functioning of the Single Market:

“Being outside the Customs Union and the Single Market will inevitably lead to frictions. Divergence in external tariffs and internal rules as well as absence of common institutions and a shared legal system, necessitates checks and controls to uphold the integrity of the EU Single Market as well as of the UK market. This unfortunately will have negative economic consequences.”

91. More recently, Michel Barnier, following a meeting with the Secretary of State for Exiting the EU, Dominic Raab, was quoted on 26 July 2018 as saying:

“The EU cannot and will not delegate the application of its customs policy and rules, VAT and excise duty collection to a non-member who would not be subject to the EU’s governance structures”

⁴² European Council Draft Negotiating Guidelines <https://g8fip1kplyr33r3krz5b97d1-wpengine.netdna-ssl.com/wp-content/uploads/2018/03/European-council-Art.50-23-March-2018-Draft-Guidelines-1.pdf>

“ Any customs arrangements or customs union – and I have always said that the EU is open to a customs union – must respect this principle and in any case a customs union which would help to reduce friction at the border would come with our common commercial policy for goods.”

“Any customs arrangement will have to be workable and must protect EU and national revenue without imposing additional costs on businesses and customs authorities. This is the framework in which we will work with the UK in the coming months.”

92. The guidelines confirmed that the EU is ready to work towards an ambitious and wide-ranging free trade agreement to be finalised and concluded once the UK is no longer a Member State. The UK Government’s July White Paper makes it clear that it is seeking to agree a free trade area in goods. The EU guidelines specify that there is scope for trade in goods to cover all sectors, seeking to maintain zero tariffs and no quantitative restrictions, but with appropriate accompanying rules of origin. On services, the EU envisage only limited market access, given that the UK will no longer share a common regulatory and legal framework with the rest of the EU.

93. A treaty on the future relationship cannot be formally negotiated by the EU until the UK becomes a third country on 29 March 2019. However, preliminary meetings on the structure of the future partnership discussions began in late April, with the UK Government and European Commission jointly publishing on 4 May 2018 a list of topics for discussion on the future framework at forthcoming meetings⁴³. Discussions between the UK and the EU are continuing, and the aim is to negotiate the full legal text on withdrawal and transition and reach political agreement on the EU and UK’s future relationship in time for the European Council meeting in October 2018.

UK Government approach to inclusion of devolved administrations in future trading arrangements

94. The UK Department for International Trade’s White paper *Preparing for our future UK trade policy*⁴⁴, published on 9 October 2017, which committed to consulting the devolved administrations on the conduct of future trade policy, explored the UK Government’s emerging approach to establishing an independent international trade policy, guided by three strategic objectives, all of which were reiterated in the Prime Minister’s speech on 2 March 2018:

- ensuring UK-EU trade is as frictionless as possible;
- avoiding a hard border between Ireland and Northern Ireland;
- establishing an independent trade policy.

⁴³ UK Government/European Commission (2018) Topics for Discussions on the Future Framework at Forthcoming meetings https://ec.europa.eu/commission/publications/topics-discussions-future-framework-forthcoming-meetings_en

⁴⁴ UK Government (2017) Preparing for our future UK trade policy <https://www.gov.uk/government/publications/preparing-for-our-future-uk-trade-policy/preparing-for-our-future-uk-trade-policy>

95. The consultation ended on 6 November 2017 and the UK Government published its response to comments made during the consultation on 5 January 2018⁴⁵. The response noted that the UK Government’s proposed approach was that future trade arrangements should be transparent and inclusive, and acknowledged that a number of stakeholders highlighted their support for *“a remit for the devolved administrations in future trade agreements, and raised the importance of ensuring the input of the devolved administrations in trade negotiations and developing governance arrangements to support this effectively.”*⁴⁶

96. The UK Government’s response to the consultation acknowledged this appetite for the inclusion of the devolved administrations in future trade deals stating that it is:

“fully committed to the devolution settlements and recognises the devolved administrations’ direct interests in our future trade arrangements. That is why we will continue to work closely with them to deliver an approach that works for the whole of the UK, reflecting the needs and individual circumstances of England, Scotland, Wales and Northern Ireland and drawing on their essential knowledge and expertise.”

97. Its response goes on to say that the devolved administrations should *“...continue to take the opportunity to engage with and contribute to the development of trade policy.”*

98. The Prime Minister’s three strategic objectives mentioned above remain relevant following the publication of the UK Government’s July 2018 White Paper, which contained some further high level references to working with the devolved administrations, but no detail as to how this would work in practice. The Secretary of State for International Trade’s statement to the House of Commons on 16 July gave an undertaking to *“work closely with the Devolved Administrations on an ongoing basis to deliver an approach that works for the whole of the UK”*. This Scottish Government discussion paper is intended to play an important part of the process for developing enhanced and effective arrangements to allow the Government (and other devolved administrations) to shape the development of future trade policy and trade arrangements. Given the commitments made by the UK Government, the Scottish Government hopes and expects to have full and timely involvement in the development of future trade policy and future trade negotiations with the EU and third countries, if the UK and Scotland leave the EU and Customs Union.

99. However, aspiration alone will not put these commitments into practice and provide the step change needed to ensure the UK can meet the scale of the challenge facing it. Discussions on future arrangements must begin now.

⁴⁵ UK Government (2018) Trade White Paper: Preparing for Our Future UK Trade Policy – Government response <https://www.gov.uk/government/publications/trade-white-paper-preparing-for-our-future-uk-trade-policy-government-response/trade-white-paper-preparing-for-our-future-uk-trade-policy-government-response>

⁴⁶ Ibid

Approach to Devolution

UK European Union (Withdrawal) Act, UK Withdrawal from the European Union (Legal Continuity) (Scotland) Bill

100. The UK leaving the European Union will mean increased devolved competencies in areas for which the Scottish Parliament is wholly or partly responsible, such as agriculture, fisheries, environmental policy and justice. The European Union (Withdrawal) Act 2018⁴⁷ aims to provide legal continuity during Brexit by preserving EU law existing at the point that the UK leaves the EU, and allowing it to be amended to continue to work in a UK context. However, in doing so, it adopts a centralising approach to devolution issues which is unacceptable, by conferring power on Westminster to restrict the Scottish Parliament's legislative competence, and allowing UK Ministers to make changes in devolved policy areas without the consent of either the Scottish Government or Scottish Parliament. The result of the Act is to leave to the UK Government and Parliament ultimate decisions on UK-wide frameworks in areas affected by EU law that are otherwise devolved. The Scottish Parliament therefore voted on 15 May 2018 by a majority of 93 votes to 30 to refuse legislative consent to the Bill, the first time in the history of the Scottish Parliament such an action has taken place. Notwithstanding this vote, the legislation was passed by the Westminster Parliament.

101. The Scottish Government has been very clear about the serious implications for the Sewel Convention (and the future of devolution) of the recent actions of the UK Government. In particular, we have made it clear that urgent discussions are required on how to protect the Convention before any further legislative consent motions on Westminster Bills related to EU withdrawal, including the Trade Bill, can be brought forward to the Scottish Parliament.

102. In the meantime, the Scottish Parliament passed the UK Withdrawal from the European Union (Legal Continuity)(Scotland) Bill⁴⁸ on 21 March 2018, a contingency to ensure devolved laws can continue to operate if no agreement on the way forward is reached. The Bill, which would ensure that EU laws currently in force will be retained after withdrawal, and able to operate effectively, has been challenged by the UK Government and a two day hearing in the Supreme Court took place on 24 and 25 July.

Common Frameworks

103. Through the Joint Ministerial Committee (EU Negotiations), the Scottish Government and other devolved administrations have been developing with the UK Government an approach to agreeing common frameworks in those areas that are currently governed by EU law, but that are otherwise within areas of competence of the devolved administrations or legislatures. This might include common goals, minimum or maximum standards, harmonisation, limits on action, or mutual recognition, depending on the policy area and objectives being pursued. The UK Government published on 9 March 2018 a revised analysis, identifying 24 areas

⁴⁷European Union Withdrawal Act 2018 <http://www.legislation.gov.uk/ukpga/2018/16/contents/enacted>

⁴⁸ UK Withdrawal from the European Union (Legal Continuity)(Scotland) Bill <http://www.parliament.scot/parliamentarybusiness/Bills/107725.aspx>

where it considered a new legislative framework may be required. That analysis was compiled without consulting the Scottish Government and does not reflect an agreed position. While the Scottish Government recognises that common frameworks to replace EU laws across the UK may be needed in some areas, the competence for matters which are otherwise devolved should revert to the Scottish Parliament, enabling the scope and content of any UK-wide frameworks to be agreed, not imposed.

Trade Bill

104. Originally described by the UK Government as legislation which would build a future UK trade policy after Brexit, the UK Trade Bill⁴⁹, introduced into the House of Commons on 7 November 2017 - one day after the consultation on future trade policy ended - is much more limited in scope. It will operate alongside the EU (Withdrawal) Act to help ensure continuity in the UK's existing trade and investment relationships with third countries, by allowing steps to be taken to carry over, or 'grandfather' existing agreements between the EU and third countries when the UK leaves the EU.

105. The UK Government envisages that, in most cases, the implementation of any obligations within existing international trade agreements can be dealt with through the European Union (Withdrawal) Act. The Trade Bill deals with the circumstances where that will not be possible, and confers powers on the Scottish Parliament and Scottish Government to do so in devolved areas in those cases. The Bill also creates powers to enable the UK to be an independent member of the WTO Agreement on Government Procurement (GPA) after it leaves the EU and establishes a Trade Remedies Authority, to deliver a new UK trade remedies framework.

106. The UK Government has indicated that the development of future trading arrangements will be dealt with through the European Union (Withdrawal) Act, or in separate legislation. It has made no commitments on the timing or content of such legislation and the Trade Bill is silent on the role of the devolved administrations in negotiating the future trade agreements which will be needed in the longer term, if the UK leaves the EU and Customs Union. Some tax-related (i.e. customs) elements of the UK's trade policy are being legislated for in the Taxation (Cross-border Trade) Bill⁵⁰, which was introduced into the House of Commons on 20 November 2017.

107. As the Trade Bill makes provision within the legislative competence of the Scottish Parliament and alters the executive competence of the Scottish Ministers, the UK Government is seeking the legislative consent of the Scottish Parliament. The Scottish Government submitted its legislative consent memorandum⁵¹ to the Scottish Parliament in December 2017. That memorandum made it clear that, notwithstanding its views on withdrawal from the EU, and the manner of that withdrawal, it accepted that proper, responsible preparations should be made for

⁴⁹ Trade Bill <https://services.parliament.uk/Bills/2017-19/trade.html>

⁵⁰ Taxation (Cross-border Trade) Bill
<https://services.parliament.uk/Bills/2017-19/taxationcrossbordertrade.html>

⁵¹ Scottish Government (2017) <http://www.parliament.scot/SPLCM-S05-12-2017.pdf>

withdrawal, including maintaining important continuity in trading arrangements in the event of the UK leaving the EU. The Scottish Government therefore accepted the main purpose of the Trade Bill, and welcomed the recognition of the role of and conferral of powers on the Scottish Parliament and Scottish Ministers contained within it. However, the memorandum made it clear that the Scottish Government could not accept the constraints on competence contained within the Bill, analogous to those within what became the European Union (Withdrawal) Act, and therefore could not recommend the Parliament consents to the Bill in its current form.

108. The Scottish and Welsh Governments published draft amendments to the Bill in January 2018, which could have made it acceptable in terms of devolution issues, by ensuring: that UK Ministers could not legislate in relation to devolved matters without the agreement of the Scottish Government; that the Scottish Ministers have the same implementation powers in relation to devolved matters as the UK Government has; and that Scotland's interests are adequately represented in the important work of the future Trade Remedies Authority. These amendments were tabled at Westminster and debated during the House of Commons committee stage of the Bill in February, but were not supported. Following further discussions between the UK Government and the devolved administrations, the Trade Bill was amended during its final stages in the House of Commons on 17 July to bring the relevant provisions in line with the EU (Withdrawal) Act 2018.

109. In addition to concerns about the way in which devolution issues are dealt with in the Bill, the Scottish Government is concerned about the approach taken to the scrutiny of trade agreements. In particular, the Bill appears to envisage a process whereby existing agreements between the EU and third countries are seamlessly 'grandfathered' following Brexit. The UK Government justifies the lack of robust scrutiny arrangements for such agreements on the basis that arrangements need to be put in place quickly, and that trade agreements dealt with under the Bill have already been scrutinised by the UK Parliament's EU Committees or ratified through the normal parliamentary scrutiny process.

110. However, a number of reports have suggested that third countries are likely to seek concessions either now or as part of a future FTA with the UK as a condition of agreeing to grandfather existing agreements. The possibility of such concessions being made and the resulting changes to the terms of the existing agreements highlights the need for proper scrutiny. As many of those who spoke during the Bill's second reading in the House of Commons on 9 January 2018, and the House of Commons' International Trade Committee's⁵² report into *Continuing application of EU trade agreements after Brexit* date made clear, the UK Government is therefore proceeding on the basis of a very optimistic assumption that the process of grandfathering existing agreements will be straightforward or quick.

111. Dealing only with the *implementation* of obligations, rather than the *negotiation* of trade deals, the Bill makes no provision for circumstances where the terms of existing agreements change as a result of negotiations from third countries or to ensure workability. Under current proposals, the devolved administrations

⁵² House of Commons International Trade Committee (2018)
<https://publications.parliament.uk/pa/cm201719/cmselect/cmintrade/520/52002.htm>

would not be involved in those negotiations, which would be conducted by the UK alone. Those negotiations could be prolonged and involve trade-offs to ensure acceptability to both sides. The risk to the Scottish seafood industry, for example, could be significant given the extensive third country salmon trade which exists under current arrangements. Changes to existing agreements could potentially be substantial, but the Bill contains no mechanism for Parliamentary scrutiny of such negotiations and adjustments, or for the involvement of the devolved administrations or others in agreeing them, allowing the UK Government to make potentially sweeping changes to existing agreements (some of which could be detrimental to Scottish interests) and forcing the devolved administrations to implement them.

112. The House of Commons International Trade Committee has already registered its concern about that, saying that

“Our evidence strongly suggests that substantive changes will be necessary when EU trade agreements are rolled over. The Government should set out provisions for both more extensive parliamentary scrutiny and enhanced involvement by the devolved administrations in situations where such changes do occur, particularly in the light of the fact that each of the four nations of the UK may differ in their priorities for trade deals.....The Government must show what it is doing to foster a cross-departmental approach to the issue of rolling over trade, and other trade-related, agreements and to involve fully the devolved administrations.”⁵³

113. While the Secretary of State for International Trade has undertaken to bring forward new proposals to ensure adequate scrutiny of *new* trade agreements, which he has said will involve consulting widely with a range of interest groups, those arrangements will not apply to agreements dealt with under the EU (Withdrawal) or Trade Bill.⁵⁴

114. Wide ranging consultation with stakeholders and others about potential trade deals happens successfully elsewhere, and we will argue later in the paper that it should happen across the UK, giving the people of Scotland the opportunity to shape trade policy and individual trade agreements. Current arrangements are not fit for purpose against the scale of what needs to be achieved. If the UK Government is serious about ensuring there is adequate scrutiny of trade deals and proper consultation with the devolved administrations about those deals, it should begin now, by agreeing and putting in place proper measures in relation to any changes to existing agreements dealt with under the Trade Bill. Chapter 5 outlines the Scottish Government’s proposals for the future.

⁵³ House of Commons International Trade Committee (2018)

<https://publications.parliament.uk/pa/cm201719/cmselect/cmintrade/520/52002.htm>

⁵⁴ Hansard, 9 January 2018, col 213 <https://hansard.parliament.uk/Commons/2018-01-09/debates/582F83B5-0943-4BE2-A473-599C6C4897F9/TradeBill>

CHAPTER FOUR – DEFICIENCIES IN CURRENT AND PROPOSED PARLIAMENTARY SCRUTINY

115. This chapter considers the deficiencies in the current arrangements - the democratic deficit created by the absence of any real scrutiny of trade agreements and the development of trade policy by the UK Parliament, devolved legislatures and the devolved administrations - described in chapter 2. It also outlines the wider policy ambitions the Scottish Government would seek to protect and promote in any future trading arrangements.

116. As discussed earlier, the current arrangements for scrutiny of trade agreements at Westminster are based on the provisions of the Constitutional Reform and Governance Act 2010. These arrangements are limited, in that Parliament does not have to debate or vote on ratification and has no power to amend a treaty or be involved in treaty negotiation.

117. The Secretary of State for International Trade's statement to the House of Commons on 16 July 2018 outlined his proposals for the future role in agreeing trade policy of the UK Parliament, the devolved administrations, the public, business and civil society. The Secretary of State made a distinction between new free trade agreements - to which his statement applied - and continuity trade agreements which are being legislated for in the Trade Bill (and the EU (Withdrawal) Act 2018). He said that the UK Government was committed to providing Parliament with the ability to inform and scrutinise new trade agreements "*in a timely and appropriate manner*". He went on to say that the UK Parliament will be given the opportunity to consider the level of ambition of the Government's approach to negotiations and the potential implications of any agreement, possibly through a general debate. The Government would keep both Houses updated on the progress of negotiations through statements and updates to the International Trade Committee as the negotiations progress. He said this will include timely analysis at appropriate points to support decision making.

118. While these commitments are welcome, they appear largely intended to *inform* the UK Parliament, rather than give it an active role in the development of policy and subsequent agreements. In outlining the proposals to keep Parliament informed, Dr Fox included the caveat that a certain level of confidentiality would be necessary, and that these updates will be given with that in mind.

119. As outlined by Dr Fox in his statement, at the end of any negotiation process (and the completion of the proposed new arrangements described above) the provisions of CRAGA 2010 will continue to apply. Under those provisions, the Government will lay before Parliament any treaty it intends to ratify alongside an Explanatory Memorandum which will summarise the content of each trade agreement. However, as discussed previously, the current CRAGA arrangements provide only that the Government must lay a treaty it plans to sign before Parliament and give MPs and peers 21 days to object to it. There is no legal obligation to hold a parliamentary debate and, while the ratification process can be delayed, it is highly unlikely that the House of Commons would be able to delay ratification indefinitely.

120. The proposals outlined by Dr Fox do not therefore amount to any significant increase in scrutiny of trade deals at Westminster, let alone by the devolved administrations. The day after his statement, during the third reading debate on the Trade Bill on 17 July, the UK Government voted against amendments which would have required the Government to publish texts of proposed trade agreements prior to ratification, required the consent of devolved authorities to UK Government trade negotiations after Brexit and required all free trade deals after the UK leaves the EU to be subject to Parliamentary scrutiny and consent.

121. In the absence of amendments of this nature, the UK Government's plans, in effect, mean that the House of Commons will have less scrutiny and influence over the UK's post-Brexit independent trade policy than that currently enjoyed by MEPs, where all EU trade negotiations are subject to the European Parliament Trade Committee's democratic monitoring, scrutiny and oversight, and a final European Parliament assent motion.

122. The UK Government has so far been less specific about the future role of the devolved administrations and others. Dr Fox said on 16 July that his department was taking steps to draw on the knowledge and expertise of devolved administrations and key stakeholders, recognising their role in helping to deliver the objectives of the UK trade policy and future trade negotiations. The Scottish Government was not consulted on the Secretary of State's proposals for the future role of devolved administrations, nor on the Department for International Trade's subsequent four public consultations on possible future trade deals with USA, Australia, New Zealand and the Comprehensive and Progressive Agreement for Trans-Pacific Partnership (CPTPP)⁵⁵. These are high level exercises with little or no background information about, for example, why the UK has chosen these as priority areas or the underlying policy the UK Government is seeking to deliver through the deals themselves. The consultation process also appears to treat the interests of the devolved nations as on a par with specific sectoral interests. During the 14 week consultation period, consultees, including the devolved administrations, are asked the following questions in relation to each potential agreement:

- What would you want the UKG to achieve through a free trade agreement (or related trade talks), and why?
- Which of a number of listed areas (including tariffs, rules of origin etc.) in free trade agreements best describe the priorities that you have outlined?
- What concerns, if any, do you have about a free trade agreement (or related trade talks), and why?
- Which of a number of listed areas in free trade agreements best describe those concerns?

⁵⁵ UK Government, 18 July 2018 <https://www.gov.uk/government/news/new-public-consultations-announced-for-future-trade-agreements>

123. There is not currently, and nor is there proposed to be, any legal requirement to consult the devolved administrations and legislatures, stakeholders or the public. The MoU and Concordats provide the only articulation at present of Scotland's rights and responsibilities in protecting and promoting its interests in the field of international relations and international trade.

124. In its interim report on what was then the EU (Withdrawal) Bill⁵⁶, the Scottish Parliament's Finance and Constitution Committee considered the ways the Scottish Government and Scottish Parliament currently input into EU policy, and how that might need to change in the future, if the UK, including Scotland, leaves the EU and Customs Union. The Committee noted that a number of witnesses had queried the input the devolved administrations would have into negotiating the international agreements needed if the UK leaves the EU, emphasising the vital role of existing EU mechanisms in allowing sectoral organisations and devolved administrations to influence EU policy.

125. The Committee found that the

“EU policy-making process is relatively open and based on a number of treaties agreed by the Member States. Both the devolved institutions and devolved stakeholders have the opportunity to influence the process both directly with the EU institutions and indirectly via the UK Government. The European Parliament also has a scrutiny function”.

126. However, there is no guarantee that this sort of input into international matters will continue after the UK's exit from the EU. In her evidence to the Committee, Professor Aileen McHarg articulated this concern, emphasising that it is important that the current mechanisms which *‘allow the devolved Governments to influence EU policy making are replicated in relation to international trade policy, because this will become so much more important as an issue’*⁵⁷. **The Committee reported that a number of witnesses were concerned that no similar policy-making process to the internal, substantial EU-policy making process currently exists within the UK, and suggested that something similar - within the UK – will be required, in order to ensure that the devolved administrations, as well as wider interests, are able to have a role in the negotiation of international trade agreements.** The Committee reached three conclusions in this area:

102. *The Committee also believes that significant further work is required in considering arrangements to replace the current EU policy-making processes across the UK. Consideration will also need to be given to addressing the governance gap in relation to the monitoring, implementation and enforcement of common UK frameworks.*

⁵⁶ Finance and Constitution Committee European (Withdrawal) Bill LCM – Interim Report <https://sp-bpr-en-prod-cdnep.azureedge.net/published/FCC/2018/1/9/European-Union--Withdrawal--Bill-LCM--Interim-Report-1/FCCS052018R1.pdf>

⁵⁷ The Scottish Parliament. (2017, November 1). Official Report, Col. 25. Retrieved from <http://www.parliament.scot/parliamentarybusiness/report.aspx?r=11171&mode=pdf>

103. *Consideration will also need to be given to the interaction between the Bill, common frameworks and the negotiation of new international agreements including trade deals. In the first instance it is anticipated that the Committee will have a role in scrutinising the Trade Bill LCM.*

104. *The Committee also intends to examine further the impact of the new international obligations including trade agreements on the devolved settlement with regard to the role of the devolved institutions, stakeholders and the wider public in influencing and informing the UK Government's negotiations.*

127. The Scottish Government welcomes and supports these conclusions, as we made clear in our response to the Committee's report. While it will be important to retain any *strengths* of the current arrangements, it is clear that they are not adequate for ensuring that Scotland's interests are taken into account in the development of EU trade agreements and the UK's formulation of its policy input into them. These inadequacies, already damaging, could have a disastrous impact following the UK's exit from the EU if they are not addressed through the greater involvement of the devolved administrations, stakeholders and others in policy formulation. Current arrangements must be enhanced now to meet future challenges.

128. For example, the UK failed to consult on or put forward any current UK protected food names (PFNs) for inclusion in the EU-Canada Comprehensive Economic and Trade Agreement with Canada, with the result that CETA protects many European PFNs but none at all from the UK. Nor did the UK consult the Scottish Government in the trade negotiations with Japan and Mexico with regard to PFNs for inclusion in those deals. Protected Food Names play an important role as exemplars of fine produce, and Scottish Farmed Salmon and Scotch Beef are two of the most valuable PFNs in the EU. This pattern has been repeated more recently, with a lack of discussion between the UK Government and Scottish Government over the EU Trade negotiations in relation to the Mercosur countries. We welcome the Secretary of State for the Environment, Food and Rural Affairs' commitment to ensure that the devolved administrations will be consulted fully on similar agreements in the future, but such consultation must be entered into at an early stage and must be meaningful.

129. Weaknesses in the current system already need to be addressed now. The need to do so will become all the more crucial if the UK becomes solely responsible for trade policy and the agreement of international trade deals, and subject to competing pressures from a multiplicity of interest groups around the UK. The European Commission confirms⁵⁸ that reaching a final agreement on a trade deal usually takes several years and involves over thirty stages including preparation and impact assessment, negotiation and reporting to the Council of Ministers and Parliament, finalising and reviewing the text, signing, decision making, application and review. Scotland's interests must be protected and promoted at all stages of the process.

⁵⁸ European Commission Negotiating EU Trade Agreements – Who does what and how we reach a final deal http://trade.ec.europa.eu/doclib/docs/2012/june/tradoc_149616.pdf

Environmental and Social Protections

130. As *Scotland's Place in Europe: People, Jobs and Investment*⁵⁹ observes, the European Single Market is more than just an economic arrangement. It has also become a framework for protecting and advancing individual and collective rights, as well as a range of broader societal interests. Not only does the European Single Market protect the interests of workers through a variety of measures, it also ensures a high level of environmental protection, measures to combat climate change, and high regulatory and animal welfare standards.

131. Scotland recognises that the EU has been a key player in international efforts to secure a global, legally-binding agreement to address climate change; with EU legally-binding renewable energy and energy efficiency targets playing a defining role in stimulating the huge growth in renewable energy, which has seen significant inward investment flows into Scotland. Scotland has a strong record mitigating climate change and delivering clean energy, as well as applying a climate justice approach to tackling the effects of climate change. In 2009, the Scottish Parliament passed what was the most ambitious climate change legislation anywhere in the world at the time, setting targets for reducing emissions by 42% by 2020 and 80% by 2050. We are well on track to meet that 2020 target and, in May 2018, we introduced a new Climate Change Bill to increase our targets in direct response to the Paris Agreement, and maintain our position at the forefront of global ambition. The Bill will give Scotland the most ambitious statutory targets of any country in the world for 2020, 2030 and 2040, and will ensure Scotland is carbon neutral by 2050. Building on our success to date in meeting our electricity needs from renewables, our new Scottish Energy Strategy⁶⁰, published in December 2017, commits us to delivering 50% of all Scotland's energy needs – electricity, heat and transport – from renewables by 2030. We also announced bold new plans for transport in our Programme for Government 2017-2018⁶¹, with a target to end sales of new petrol and diesel cars by 2032 – eight years ahead of the UK Government. Scotland has shown its commitment to international action on climate justice by committing £21 million from 2012-2021 to aid the most vulnerable people across the globe to build resilience to climate change. Future trade agreements should seek to enhance, not hinder, our abilities to deliver these targets and reap the economic benefits of the low carbon transition.

132. Action on Climate Change is just one of the reasons why the Scottish Government is determined to secure a further devolution of powers. But there are a number of other areas where we will seek to protect wider, devolved interests and to continue to promote issues such as social protection and social inclusion. But, to ensure there is no race to the bottom, we also need to ensure that ethical concerns, such as maintaining existing environmental and social protections, form part of future trade arrangements and agreements, and honour our commitment to social democracy. For example, the Scottish Government argued in relation to the

⁵⁹ Scottish Government (2018) *Scotland's Place in Europe: People, Jobs and Investment* <http://www.gov.scot/Resource/0053/00530160.pdf>

⁶⁰ Scottish Government (2017) *Scottish Energy Strategy: The Future of Energy in Scotland* <http://www.gov.scot/Resource/0052/00529523.pdf>

⁶¹ Scottish Government (2017) *A Nation With Ambition: The Government's Programme for Scotland 2017-18* <http://www.gov.scot/Resource/0052/00524214.pdf>

Transatlantic Trade and Investment Partnership (TTIP) - the proposed trade agreement between the EU and the US - that any potential economic benefits should not be at the expense of vital public services, like the NHS, that the right of governments to regulate should be protected, and that trade agreements should not result in any lowering of standards. The Scottish Government has also responded to suggestions that future trade deals might result in a lowering of existing standards in relation to human and employment rights and environmental safeguards, as well as areas such as food safety and consumer confidence, for example by raising concerns in relation to trade deals which could potentially allow the importation of chlorinated chicken or hormone-injected beef. **To ensure that Scotland's voice is heard and respected, the Scottish Government and Scottish Parliament must have a guaranteed role in all stages of the formulation, negotiation, agreement and implementation of future trade deals and future trade policy.**

133. If the next generation of free trade agreements - with CETA as a model - continues the trend to more comprehensive and wide ranging coverage, the ambit of those agreements will stray more and more into areas of (largely) devolved responsibility, or where Scotland might take a distinctly different approach. That will inevitably increase the need for Scotland to have more of a say in shaping future arrangements, not least in order that we can protect and develop those areas where Scotland leads the way.

CHAPTER FIVE - SCOTLAND'S FUTURE ROLE IN UK INTERNATIONAL TRADE POLICY AND TRADE AGREEMENTS

134. This chapter considers international models for future engagement and sets out specific proposals for Scotland's future role in the development of international trade policy and international trade agreements, recognising the unique circumstances facing Scotland and the UK today. In doing so, it focusses on the decision making processes which should underpin the development of future UK trade arrangements. More detail on the Scottish Government's policy in relation to trade and an updated export promotion strategy will be set out in the next few months.

135. Leaving the EU, Single Market and Customs Union would fundamentally and profoundly alter the nature of Scotland and the UK's relationship with the EU and the world. The UK Government and devolved administrations will have to work together to ensure that the best interests of all parts of the UK are represented in the development and agreement of future trading policy and international trade agreements. Alterations to the Scottish Parliament's powers mean that the tax revenue devolved under Scotland Act 2016 will make up approximately 50% of the Government's funding once fully implemented. Growing our economy and in turn increasing tax revenues for Scotland is key to supporting and enhancing the range of public services that we provide.

136. The Scottish Government's position on membership of the Single Market and Customs Union has been set out extensively in *Scotland's Place in Europe*⁶² and *Scotland's Place in Europe: People, Jobs and Investment*⁶³. The Scottish Government's legislative consent memorandums on what was then the EU (Withdrawal) Bill and the subsequent Trade Bill set out its views on how 'devolution issues' arising from the UK's exit from the EU should be dealt with, as does the UK Withdrawal from the European Union (Legal Continuity) (Scotland) Bill, passed by the Scottish Parliament on 21 March 2018.

137. The conduct and content of future trade policy, negotiations and agreements will have very important implications for Scotland. **The broad and increasing scope of modern trade agreements means that they often deal with and merge a range of reserved and devolved policy areas, and touch on many areas of life.** In addition, the Scottish Parliament and Scottish Ministers are responsible for observing and implementing international obligations, and would be responsible for the payment of any compensation costs arising from, for example, claims under investor state dispute settlement, present in many modern trade deals. Given these responsibilities, it is important that Scottish Ministers have full, early and formal involvement in policy formulation and opportunities to influence the development and agreement of international negotiations, including in formulating and negotiating mandates. The UK Government must involve the devolved authorities at each step to ensure any future agreements deliver for the whole of the UK.

⁶² Scottish Government (2016) *Scotland's Place in Europe*
<http://www.gov.scot/Resource/0051/00512073.pdf>

⁶³ Scottish Government (2018) *Scotland's Place in Europe: People, Jobs and Investment*
<http://www.gov.scot/Resource/0053/00530160.pdf>

138. **Involving the devolved administrations from an early stage in trade negotiations will deliver many tangible benefits. It will ensure that decisions about trade agreements and negotiating lines are made closer to the people affected by those decisions, and that their views are incorporated from an early stage, increasing public understanding of trade deals and providing an early warning of public concerns.** This view is shared by many stakeholders. Members of the Trade Justice Scotland Coalition⁶⁴ argue that there is currently a ‘democratic deficit’ in the way that trade deals are dealt with in the UK, with no requirement for consultation with the public and stakeholder groups. This must change. Engaging the wider community will ensure that there is greater transparency around trade deals, and can help to ensure that the wishes and concerns of the wider community are well understood and used to inform negotiations. The benefits of such consultation were highlighted by Dr Liam Fox⁶⁵, when he committed to producing proposals for consultation on future trade deals:

“I am keen not to get to the position we got to in, for example, the Transatlantic Trade and Investment Partnership, where a whole negotiation was undertaken only to find there was insufficient public support. It is much better to seek support for a trade agreement mandate by having as wide a consultation as possible across the country with various ranges of stakeholders before we enter such negotiations. That is more democratic, and the process is more efficient. Consumers will in future take a greater interest in trade agreements than they have perhaps taken in the past, so consultation is also politically prudent.”

139. Involving the devolved administrations at an early stage of developing a trade deal will mean that Ministers will be able to agree and present a negotiation mandate to the EU and third countries based on a proper domestic understanding of the issues at stake. It will help build consensus across the UK for difficult and lengthy trade negotiations. It will also provide reassurance to our trading partners that any agreement reached will endure.

140. The need for greater scrutiny and involvement enjoyed wide support among those who have given evidence to the Finance and Constitution Committee’s inquiry into the Trade Bill and associated Legislative Consent Memorandum. The Committee concluded that *“The main common theme to the responses received was the need for transparency, accountability and parliamentary scrutiny of trade negotiations including a role for the UK Parliament and devolved administrations in influencing and signing off trade deals.”*⁶⁶

141. A range of mechanisms were proposed to enable that greater scrutiny, which many witnesses felt should incorporate a greater role for wider civic society and public consultation. For example, the Scotch Whisky Association’s written evidence noted that:

⁶⁴ Trade Justice Scotland Coalition submission to Scottish Parliament Finance and Constitution Committee http://www.parliament.scot/S5_Finance/General%20Documents/Trade_Bill_20180309.pdf

⁶⁵ Hansard, 9 January 2018, col 214 <https://hansard.parliament.uk/Commons/2018-01-09/debates/582F83B5-0943-4BE2-A473-599C6C4897F9/TradeBill>

⁶⁶ Scottish Parliament Finance and Constitution Committee (2018) Overview of Written Evidence http://www.parliament.scot/S5_Finance/Meeting%20Papers/20180418_Agenda.pdf

*“We believe that consultation with stakeholders will lead to more successful trade policies. We are therefore calling for systematic engagement with a wide range of relevant parties – business, devolved administrations, parliamentarians and NGOs – in developing and implementing policy related to trade. It is essential that a structured stakeholder engagement mechanism must fully involve the devolved administrations.”*⁶⁷

In their oral evidence, they suggested that such a mechanism should have a statutory basis, and should involve the devolved institutions “*from the outset and throughout the process*”, pointing out that “*When it comes to trade negotiations, the obvious time for consent is at the outset, when the mandate is being defined*”.⁶⁸

142. More recently, in its evidence to two ongoing UK Parliamentary Committee Inquiries⁶⁹, the Law Society for Scotland highlighted an “*...opportunity to review the procedures in place for negotiation of international trade agreements and consider how these might best be modernised to take account of changes in the UK’s political landscape, particularly those brought about by devolution and also in recognition of the increased public interest in and engagement with trade negotiations in recent years.*” Emphasising the advantages of wide consultation, transparency and formal processes, and setting out a range of possible options for greater involvement of the devolved administrations, Law Society for Scotland’s evidence called for a ‘*whole of government approach*’ to determining the UK’s position on international trade, saying that

“...rather than seek to engage with devolved administrations on an ad hoc basis, to enable the smoothest possible design and operation of trade policy (and to minimise uncertainty for industry and trade partners), it would be advisable for formal structures to be established to facilitate trade-related confidence-building and good-faith collaboration across devolved and Westminster administrations.”

143. The greater involvement of ‘sub-states’ in general in trade deals enjoys support both within the EU and internationally. While not directly comparable to Scottish circumstances, because of its focus on the role of regional and local authorities, the European Parliament’s International Trade Committee’s support for calls from the European Committee of the Regions for greater consultation and engagement with a wider range of stakeholders in trade negotiations and more detailed impact assessments to show regional and sectorial impacts demonstrates

⁶⁷ Scottish Whisky Association response to Finance and Constitution Committee (2018) http://www.parliament.scot/S5_Finance/Meeting%20Papers/20180420Public1.pdf

⁶⁸ Scotch Whisky Association oral evidence to Finance and Constitution Committee (25 April 2018) <http://www.parliament.scot/parliamentarybusiness/report.aspx?r=11487&mode=pdf>

⁶⁹ Law Society of Scotland evidence to the House of Commons International Trade Committee Inquiry into UK Trade Policy Transparency and Scrutiny <https://www.lawscot.org.uk/media/360663/22-06-18-con-tra-trade-policy-transparency-and-scrutiny.pdf> and the Scottish Affairs Committee Inquiry into Scotland and Brexit https://www.lawscot.org.uk/media/360726/lss-response_tra_scotland-and-brexit-trade-and-foreign-investment-inquiry_july-18.pdf

the value the EU places on creating a broad base of support for trade deals. A report⁷⁰ considered by the Committee stated that:

“The pivotal role of the LRAs (Local and Regional Authorities) in terms of bridging the legitimacy gap between citizens, national and European authorities is central to this study. Indeed, bringing up citizens’ concerns and underlining the territorial specificities of regions impacted by EU trade negotiations is of utmost importance to ensure the comprehensiveness, coherence and acceptance of trade agreements, notably when ratified following a mixed-agreement procedure.”

144. The EU and Canada have recently demonstrated the value they place on such an approach by ensuring that representatives from the Canadian provinces were fully involved in the CETA negotiations. As Dr Melo Araujo (School of Law, Queens University Belfast) said in his evidence to the Finance and Constitution Committee *“...the evidence suggests that the involvement of representatives of devolved administrations would add a layer of legitimacy to the negotiation process and improve the chances of successful outcome”*.⁷¹

145. Chris Southworth, the Secretary General of the International Chambers of Commerce UK, supported greater transparency generally, saying that

*“In a rare display of unity, business groups, NGOs, unions and consumer groups all agree that to move forward on trade, the UK needs a more transparent, inclusive and democratic framework to handle trade policy if there is any chance of ensuring trade benefits everyone.....If the government wants to deliver new trade deals at the pace and scale required, fresh thinking and reinvented processes are required – those who generate trade will need to be consulted on what works, not only because it is necessary, but because it is democratic. To deliver a trade model that works for everyone means giving stakeholders a say in the decisions.”*⁷²

146. Working with the devolved administrations to ensure greater legitimacy and transparency must begin with making the necessary amendments to the Trade Bill and other legislation to ensure that the principles of devolution are respected, that the agreement of the devolved administrations is required for any legislation to implement trade deals in devolved areas, and that there is adequate scrutiny of any significant adjustments to existing trade deals. Amendments must also ensure that the interests of the devolved administrations are fully represented on the new Trade Remedies Authority, which will be a key institution in UK future trade defence policy, providing a safety net to domestic industries against injury caused by unfair trading practices, after the UK has left the EU.

⁷⁰ European Union Commission for Economic Policy (2017) The democratic dimension of EU negotiations on trade agreements: the role and responsibilities of citizens and Local and Regional Authorities <https://publications.europa.eu/en/publication-detail/-/publication/0b0045f6-ff3b-11e7-b8f5-01aa75ed71a1/language-en>

⁷¹ Written submission to Scottish Parliament Finance and Constitution Committee (2018) http://www.parliament.scot/S5_Finance/Meeting%20Papers/Public_Agenda_and_papers_21_February_2018.pdf

⁷² Chris Southworth (March 2018) <https://www.uscib.org/post-brexit-trade-an-opportunity-to-set-new-standards/>

147. There must also be a thorough re-examination and revision of the current apparatus governing Scotland's input into trade policy and international agreements to improve governance mechanisms and to ensure formal arrangements for an effective dispute resolution mechanism is in place. This is particularly important, given the profoundly different context if the UK, including Scotland, leaves the EU, Single Market and Customs Union.

Future Inter-governmental relations

148. The existing MoU and Concordats were devised to support the UK in the EU, where the EU was responsible for negotiating and making international trade deals. If the UK, including Scotland, leaves the Customs Union, that responsibility will shift to the UK Government. As recognised by all administrations at the JMC Plenary of 14 March 2018, the principles and arrangements set out in the MoU must be fundamentally reviewed, renewed and strengthened to address existing inadequacies, reflect the magnitude of change caused by Brexit and the loss of an important layer of scrutiny and expertise, and to recognise the impact on Scotland, Wales and Northern Ireland. Those revised arrangements must begin by setting out formal mechanisms – underpinned by legislation - for representing Scotland's interests, and those of the other devolved administrations, in future UK trade arrangements.

149. The Welsh Government set out its priorities for future trade discussions in its paper *Trade Policy: the issues for Wales*⁷³. It said that, as a minimum, a revised MoU should include a formal method for engaging with devolved governments; principles of engagement to ensure adequate and timely consultation on UK trade policy and any agreements; and the development of overarching principles that should underpin any trade policy. It also proposed the establishment of a new Joint Ministerial Committee on International Trade to agree joint approaches on trade.

150. The Scottish Government agrees with this analysis, but believes a more fundamental rethink about the level of engagement across all aspects of trade policy and trade agreements - including implementation, monitoring, ongoing information exchange and dispute settlement - is required. As an illustration of the required levels of engagement, **Annex A** sets out the typical stages in negotiating an EU trade deal. The Scottish Government believes that formal arrangements should be put in place to ensure that the devolved administrations, the full range of stakeholders and the public are involved at all key stages.

151. As discussed earlier, the content of trade agreements often does not align neatly with the boundaries of devolution settlements. An individual agreement may include a mix of fully reserved areas, reserved areas that touch on devolved areas, as well as devolved areas. The interest and role of the Scottish Government and Scottish Parliament in individual areas of the agreement may therefore vary between and within agreements. However, the presumption should be that agreement and the direct participation of the Scottish Government will be required.

⁷³ Welsh Government (2018) Trade Policy: the issues for Wales
<https://beta.gov.wales/sites/default/files/2018-01/180202-trade-policy-the-issues-for-wales.PDF>

152. The Scottish Government proposes a statutory requirement that the agreement and participation of the Scottish Government and Scottish Parliament should be required where new UK trade agreements would have devolved content, or touch on devolved issues. Given the scope of modern trade agreements, in practice this would almost certainly mean all such agreements. This should apply to any significant changes to existing trade agreements, as a result of the 'grandfathering' process, in addition to any new trade agreements. Using the description of the process for agreeing trade deals set out in Annex A as a template, that would entail a process up until the point of implementation along the following lines (summarised in Annex B):

Preparation

- Assessing the desirability of new trade deals, determining target countries or blocs for new agreements;
- Assessing the likely impact of new deals, on a sectoral and geographic basis;
- Consulting stakeholder groups and the public;
- Identifying offensive and defensive priorities;
- Agreeing a negotiation mandate - areas to be covered by the new agreement, negotiating aims, social and environmental protections. **Agreement should be required from the devolved administrations for the mandate in its entirety.**

Negotiation

There should be a formal role for the devolved administrations in the negotiations that impact on devolved areas, as UK representatives currently have in agreements proposed by the EU. That role would involve:

- Initial engagement with third countries;
- Participation in negotiation rounds;
- Monitoring role for the Scottish Government and Scottish Parliament on the progress of negotiations, **with a vote on any significant changes to the agreed negotiating mandate.**

Finalisation/Decision Making

- Finalisation of text;
- Creation of new Parliamentary committees, both within the UK and in devolved administrations, to scrutinise agreements and their implementation;
- **A role for both the UK Parliament and Scottish Parliament in the ratification and implementation of international trade agreements (including a requirement for consent), to ensure that the interests of all nations of the UK are reflected in any trade agreements;**
- **Any new deals to be signed by all the countries of the UK;**
- Implementation by relevant legislature

The same principles should apply to the Scottish Government's and Scottish Parliament's role in governance and dispute resolution arrangements applying to any future agreements.

153. In order to establish these new arrangements and ensure they work well, **a new statutory intergovernmental international trade committee should be established as soon as possible** to consider all aspects of international trade, agree priority regions and sectors for international trade agreements, agree negotiating positions in relation to those agreements and consider trade issues and disputes. That new committee would play a similar role to Canada's 'C-Trade' Committee, and could provide advice directly to the relevant legislatures which would in turn improve the effectiveness of their consideration of trade matters. Working groups should also be established to support the work of Committee and focus on specific issues. Informed involvement from the beginning of the process, continuing through the various key stages, with time to consider the implications of developments and influence the direction of travel will be key to ensuring that the proposed wider involvement in this area is effective and adds value.

154. With greater involvement in the development and agreement of future trade deals, will of course come greater responsibility, and the Scottish Government recognises the need to ensure that it makes the necessary investment in expertise and resource in order to contribute effectively to any future arrangements. That process has already begun with the establishment of a new Directorate for International Trade and Investment within the Scottish Government, responsible for all trade and investment matters and playing an important role in the Scottish Government's response to the economic impact of Brexit.

International Models for Future Engagement

155. **There are many different models for involving 'sub-states' in the negotiation, making and ratification of international agreements.** Those models are based on a range of factors including, but not wholly dependent on, wider constitutional arrangements, for example competence within the state and relationship to central state government. Whether a sub-national entity has international legal personality, and thus the authority to enter into binding international agreements, depends on whether it has relevant devolved competence within domestic law, and the extent to which that is recognised by the state and the international community.

156. The role of a sub-state which cannot make binding international agreements, and the existing mechanisms for its participation in international trade matters, depends on a number of factors and can change, depending on the nature of the agreement. For example, while the Canadian provinces have no direct competence in foreign policy, they took on an enhanced role during the development of the Comprehensive Economic and Trade Agreement with the EU, reflecting the likely impact of elements of the agreement on areas within their jurisdiction and a desire on the part of EU negotiators to ensure effective and enduring implementation of the agreement.

157. **There are broadly four models for the involvement of ‘sub-states’** in the development, negotiation and ratification of treaties, including international trade agreements:

- powers exclusively assigned to federal government, e.g. Australia, the United States of America and Spain;
- powers assigned to federal government, but requiring implementation or consent where they impinge on constituent units, e.g. Canada and Austria;
- powers assigned to federal government, requiring consultation but not consent where they impinge on constituent units e.g. India, Malaysia and Pakistan; and
- powers assigned, in areas within their competence, to constituent units, e.g. Germany, Belgium, Denmark (the Faroes) and Bosnia and Herzegovina.

158. The Wales Centre for Public Policy’s evidence review of *Sub-national government involvement in international trade negotiations*⁷⁴ concluded that

“...the involvement of sub-national governments in international relations, especially around trade.....is an emerging global norm....Globalised supply chains mean that “the substantive focus of trade agreements is evolving from the removal of tariffs and related border measures to non-tariff, behind-the-border measures, including regulatory harmonization” – areas often the responsibility of sub-national governments. As a result, the classic distinction between international and domestic policy spheres can no longer be upheld and new multi-level governance approaches that involve sub-national governments are essential”.

159. As Professor Andrew Lang, Chair of International Law and Governance, Edinburgh School of Law, said in his evidence to the Finance and Constitution Committee, *“there is an increasing recognition that, even where there is no formal role for sub-national Parliaments or authorities and they have no veto powers, it is in the interest of the national Government to have full consultation and consent”*⁷⁵.

160. Both the Wales Centre for Public Policy paper, and SPICE’s paper, *Negotiation of Trade Agreements in Federal Countries*⁷⁶, consider a number of very different examples of where sub-national governments have had a strong role in the negotiation of recent trade agreements, focussing in particular on the role of the Canadian provinces and Belgian regions in recent EU Negotiations with Canada. Their findings are summarised in the following case studies.

⁷⁴ Wales Centre for Public Policy (2018) Sub-national government involvement in international trade negotiations https://docs.wixstatic.com/ugd/f06571_b20d3a00b784412abc9c0e813002f006.pdf

⁷⁵ Professor Lang oral evidence to Finance and Constitution Committee, 21 February 2018 <http://www.parliament.scot/parliamentarybusiness/report.aspx?r=11373&mode=pdf>

⁷⁶ Scottish Parliament Information Centre (2018) Negotiation of Trade Agreements in Federal Countries <https://sp-bpr-en-prod-cdnep.azureedge.net/published/2017/11/17/Negotiation-of-Trade-Agreements-in-Federal-Countries/SB17-79.pdf>

161. Despite the very different constitutional arrangements between the UK, Canada and Belgium, they offer useful models for what an enhanced role for the devolved administrations in UK trade policy and the agreement of future trade deals could look like. In particular, the level of influence of the Canadian provinces in the development of the CETA trade deal provides a useful starting point for considering the sort of role Scotland could have at all stages of developing trade deals in the future. These international examples, and others such as the USA and Germany, while helpful, while helpful in informing our consideration of future models for the UK, should not constrain our options or ambition. The circumstances currently facing the UK are unique, and the response must be too. If the UK leaves the EU and Customs Union, the Scottish Government wants a system that works for the four nations of the UK in the context of the political and constitutional circumstances of the UK, and for the EU and other future trading partners. We have therefore refrained from basing our argument - for a much increased involvement in the development of future UK trading arrangements - on any one model. Others may wish to consider examples from other jurisdictions in greater detail as part of the continuing debate in this area.

CASE STUDY 1 – CANADA

Powers are distributed between federal and provincial governments in Canada, with the former responsible for foreign policy and international trade. The provinces are responsible for policy areas such as health, education and agriculture. The federal government can negotiate and ratify free trade agreements without involving the provinces, but does not do so, and looks to provincial governments for information on regional and sectoral interests. Provincial governments are responsible for compliance with international obligations within their jurisdiction, but not accountable if they fail to comply. The Canadian Free Trade Agreement, signed in 2017, is aimed at reducing trade barriers between Canadian provinces.

The Federal-Provincial-Territorial Committee on Trade, ‘C-Trade’, provides a forum for federal and provincial officials to discuss trade matters. Generally, it meets up to 4 times a year, and “*Subjects of discussion include updates on negotiating issues, on trade disputes, and higher level analysis of trade patterns and issues. These meetings provide provinces and territories direct access to federal technical experts and/or lead negotiators.*”⁷⁷

In evidence to the Finance and Constitution Committee, Dr Melo Araujo described the Canadian system as being seen as the ‘*most effective and successful form of intergovernmental co-operation in terms of trade*’.⁷⁸

⁷⁷ High Commission of Canada source, quoted in Scottish Parliament Information Centre (2018) Negotiation of Trade Agreements in Federal Countries <https://sp-bpr-en-prod-cdnep.azureedge.net/published/2017/11/17/Negotiation-of-Trade-Agreements-in-Federal-Countries/SB17-79.pdf>

⁷⁸ Dr Melo Araujo oral evidence to the Finance and Constitution Committee, 21 February 2018 <http://www.parliament.scot/parliamentarybusiness/report.aspx?r=11373&mode=pdf>

Role in developing CETA

- Canadian negotiators supported the involvement of representatives of provincial government in CETA negotiations, given that negotiations would include policy areas under provincial jurisdiction.
- Mandate for negotiations in areas of provincial jurisdiction was drafted with provincial input, with provincial governments consulted on areas of interest and expertise. Agreement to share information, including draft negotiating texts, as freely as possible.
- Provinces nominated own representatives, who took part in Canadian delegation.
- Provincial officials attended meetings of C-Trade to discuss priorities and develop common Canadian positions, ahead of each negotiation round.
- Provincial representatives sometimes participated in negotiations in areas under their jurisdiction (in the room but not at the table), but often acted more in a consultative role. Some provinces, most notably, Quebec, met informally with the EU on specific areas of interest during the course of the negotiations.
- Trade deals are ratified by the federal Parliament, which was the sole signatory from the Canadian side. Quebec is the only province requiring regional parliamentary approval to agree to the adoption of a free trade agreement. This occurs only after the federal government has ratified the agreement, so the Quebec assembly cannot veto its adoption nation-wide. It can however refuse to adopt the provisions in its jurisdiction, within Quebec.
- Provinces are responsible for implementing provisions falling within their jurisdiction, through executive order or parliamentary legislation.

CASE STUDY 2 – BELGIUM⁷⁹

Belgium is a Federal Parliamentary Constitutional Monarchy. The constitutional arrangements in Belgium are complex and non-hierarchical, with the three tiers of governance – federal government and parliament, regional parliaments and governments and community governments and parliaments – each responsible for their own area of competence, although there are some overlaps. Article 35 of the Belgian Constitution determines that the federal, regional and community governments are responsible for the policies that are assigned to them by the Constitution. In the Special Law on the Reform of the Institutions, a few general policies relating to foreign policy are assigned to the federal level but, in general, the principle ‘*in foro interno in foro externo*’ applies. This means Regions and Communities have authority in international affairs related to their respective competences inside the Belgian Constitutional arrangements and affecting the areas under their jurisdiction. The Directorate General for Coordination and European Affairs meets informally at least once a week, and formally once a month and brings together federal, regional and community representatives to discuss and agree a common position and mandate for trade negotiations. The agreed Belgian position is communicated to the Council of the European Union by the Federal Minister of Foreign Affairs.

Where trade agreements are ‘mixed’, and deal with issues within the jurisdiction of the different tiers of governance, the competent levels of power must give their consent to the agreement before the federal government can. Regional parliaments must also ratify such agreements. Implementation of mixed trade agreements is carried out by all three tiers of government, according to their competence. In the event of disagreement, the Belgian system has a comprehensive and escalating system of dispute resolution, designed to deliver an agreed position.

SPECIFIC FURTHER POWERS

162. **The proposals in this document are intended to encourage debate about how we can improve and enhance arrangements** within the UK to ensure that the UK trade policy and subsequent trade agreements genuinely reflect the interests of all parts of the UK. Alongside the overarching improvements that are necessary to the way in which the UK Government works with the devolved administrations, legislatures and others, the Scottish Government will continue to develop its own measures to support the Scottish economy and boost trade.

163. Exporters are amongst our most productive and innovative businesses. Scotland’s Trade and Investment Strategy, *Global Scotland*⁸⁰, sets out the key actions and commitments the Scottish Government and its partners are taking to boost export performance and attract inward, capital and risk investment. Since

⁷⁹ Scottish Parliament Information Centre (2018) Negotiation of Trade Agreements in Federal Countries <https://sp-bpr-en-prod-cdnep.azureedge.net/published/2017/11/17/Negotiation-of-Trade-Agreements-in-Federal-Countries/SB17-79.pdf>

⁸⁰ Scottish Government (2016) Global Scotland – Scotland’s Trade and Investment Strategy 2016-2021 <http://www.gov.scot/Resource/0049/00495491.pdf>

2007, Scotland's international exports have increased by 45%, but more needs to be done to identify and exploit international market opportunities using existing powers. We have already:

- Established a Trade Board to provide advice on practical ways to improve Scotland's exporting performance;
- Appointed a number of Trade Envoys to champion export market opportunities, representing Scotland both at home and overseas;
- Established offices in Dublin, London, Brussels, Berlin, Toronto, Beijing and Washington. Further offices in Paris and Ottawa will be opened later this year, as Scotland's External Network continues to provide a platform for collaborative activity to increase trade, attract investment and boost innovation and inter-governmental relations;
- Provided funding to double the number of Scottish Development International staff working in Europe;
- Funded the establishment of a number of pilot local/regional Export Partnerships across Scotland, to support SMEs with little or no previous exporting experience;
- Launched *Scotland is Now*, a new international marketing collaboration to promote Scotland across the world.

164. Despite these achievements, more needs to be done and so, in addition to the step change in inter-governmental relations set out earlier in this paper there are a number of other specific areas where greater influence over UK policy and systems or the devolution of further powers could help protect and promote Scotland's interests in the event of the UK leaving the EU, Single Market and Customs Union.

Trade Remedies Authority

165. At present, the European Commission is responsible for investigating and monitoring claims of unfair trade practices, such as dumping and subsidising, and for enforcing remedial measures, in compliance with WTO law. They will no longer be able to do so if the UK leaves the EU. The Trade Bill therefore establishes a new non-departmental public body, the Trade Remedies Authority, to deliver the new UK trade remedies framework following withdrawal from the EU. The Taxation (Cross-border Trade) Bill⁸¹ creates a new UK trade remedies framework and gives the Trade Remedies Authority additional functions.

166. Although the functions of the Trade Remedies Authority will be reserved, it will undertake trade remedies investigations across the UK, which inevitably affect devolved interests. It is therefore important that the devolved administrations should have a role in the Trade Remedies Authority. The Scottish and Welsh Governments have already proposed an amendment to the Trade Bill requiring UK Ministers to secure the consent of the Scottish Ministers and Welsh Ministers to one non-executive member of the Trade Remedies Authority. That amendment has been

⁸¹ Taxation (Cross-border Trade) Bill
<https://services.parliament.uk/Bills/2017-19/taxationcrossbordertrade.html>

rejected by the UK Government, along with other amendments intended to identify and protect Scottish interests in this area.

167. We regret that UK Government has rejected these amendments and would urge them to think again about how best to ensure that the new Trade Remedies Authority reflects and represents the interests of all producers and consumers throughout the UK, perhaps through the establishment of offices throughout the UK.

Migration

168. Migration is crucial to the development of Scotland as an inclusive, fair, prosperous and innovative country. The Scottish Government's discussion paper *Scotland's population needs and migration policy: Discussion paper on evidence, policy and powers for the Scottish Parliament*⁸² examined in detail the importance to Scotland's economic prospects and demographic sustainability of Scotland continuing to attract the level and nature of migration it needs.

169. The paper demonstrates how migrants contribute to economic growth, bringing new skills, expertise and perspectives to the labour market. Migrants also make a positive fiscal contribution: for example, each EU citizen working in Scotland contributes on average £10,400 to government revenue and £34,400 to Gross Domestic Product. As importantly, migrants also make a positive contribution to Scottish society, helping sustain communities and ensure that Scotland is an open, modern European nation.

170. That is particularly important because population projections from the National Records of Scotland and Office for National Statistics estimate that the number of deaths in Scotland will be greater than the number of births over the next 25 years, and therefore all of Scotland's population growth will come through migration. The age profile of the population will also change, with people aged 75 and over projected to be the fastest growing age group in Scotland, increasing by 79% over the next 25 years, while the working age population will grow by only 1%. Migration is essential to sustaining and growing the working age population in Scotland.

171. The Scottish Government wants to see continued free movement of people from Europe, through the UK as a whole remaining in the European Single Market and Customs Union. However, even with current free movement maintained, it is clear that UK migration policy and systems do not meet Scotland's distinctive challenges and needs and that a tailored approach for Scotland in relation to international migration is required. However, powers over immigration are reserved to the UK Government. The paper therefore calls for greater involvement in UK migration policy in support of Scotland's needs, alongside options for new powers for the Scottish Parliament to allow Scottish Ministers to set rules and criteria for a new route to enable long-term migration to Scotland.

⁸² Scottish Government (2018) *Scotland's population needs and migration policy: Discussion paper on evidence, policy and powers for the Scottish Parliament*
<http://www.gov.scot/Resource/0053/00531087.pdf>

Scotland's representation overseas

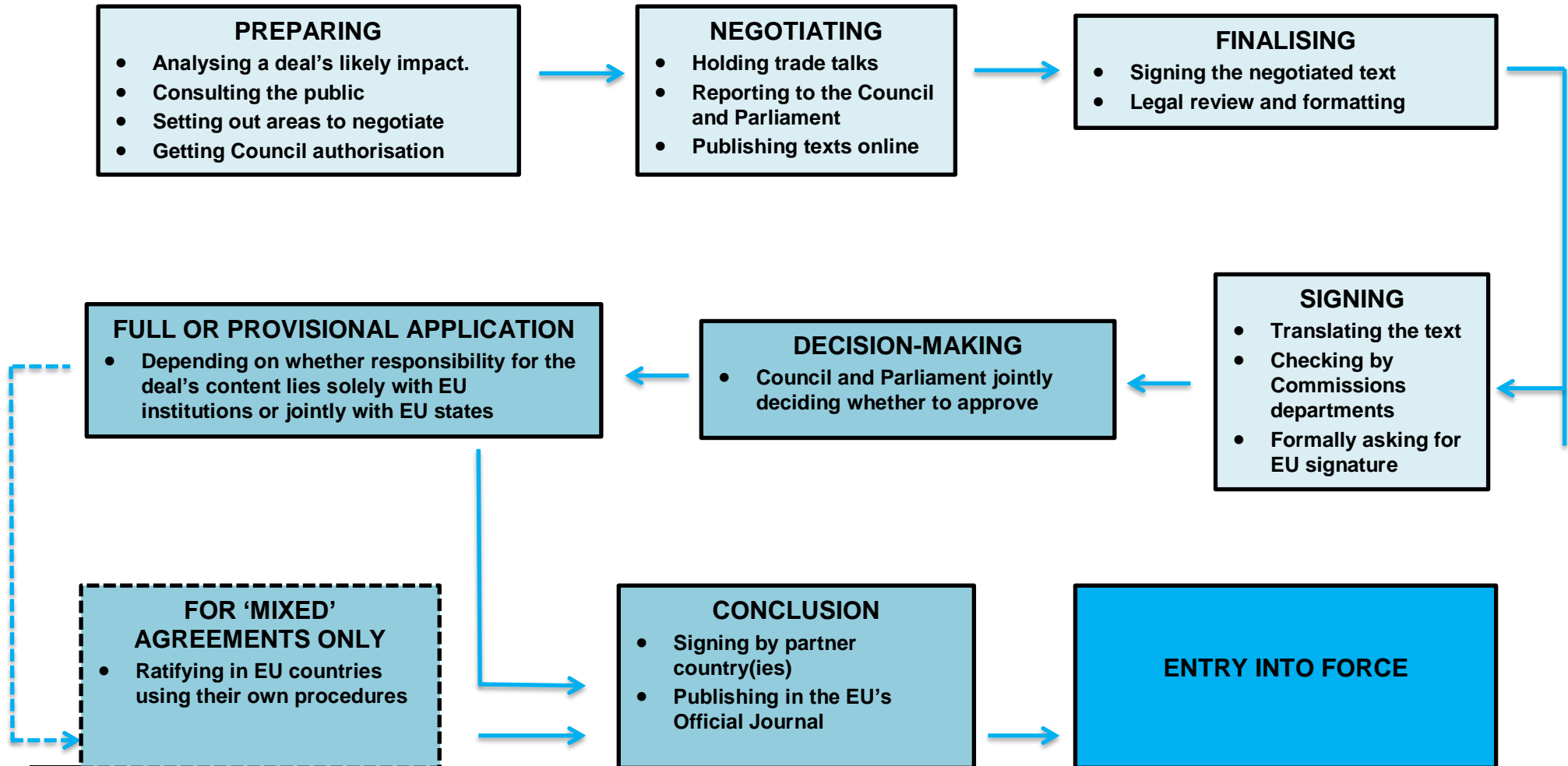
172. The Foreign & Commonwealth Office (FCO) has a worldwide network of embassies and consulates, employing over 14,000 people in nearly 270 diplomatic offices. In addition to aiding UK citizens overseas, their primary role is to represent the UK's interests in a wide range of matters, including in relation to trade. Staff from the Department for International Trade (DIT), based in British Embassies, High Commissions and Consulates have a primary role in helping overseas companies to locate or invest in the UK. According to the DIT website, this international network:

- Identifies market opportunities in the UK and Europe
- Provides advice on setting up in the UK (providing advice on tax, employment, marketing and visas)
- Identifies events and networking opportunities for British suppliers
- Provides specialist help for entrepreneurs and ongoing support to help companies grow their business after setting up in the UK.

173. The UK Government has recently appointed the last of 9 Trade Commissioners to represent the UK in key markets across the world, after the UK leaves the EU. Their role will be to head DIT's global operations, leading on export promotion, inward and outward direct investment and trade policy overseas, on behalf of the UK Government. They are expected to coordinate closely with Ambassadors and High Commissioners, and the wider diplomatic network, in doing so.

174. It is vital that embassies, consulates and other offices overseas represent the interests of the whole of the UK. **The Scottish Government and Scottish Parliament - and other devolved administrations - must therefore be involved in setting their priorities, and in business planning, to ensure that Scotland's interests are fully represented and promoted.** UK agencies and overseas operations should be accountable to the Scottish Parliament for their pursuit of these interests.

STAGES IN NEGOTIATING AN EU TRADE DEAL⁸³



⁸³ Negotiating EU Trade Agreements
http://trade.ec.europa.eu/doclib/docs/2012/june/tradoc_149616.pdf

SUMMARY OF PROPOSALS FOR SCOTTISH GOVERNMENT AND SCOTTISH PARLIAMENT ROLE IN FORMULATING NEW UK TRADE AGREEMENTS⁸⁴⁸⁵

STAGE	Role of Scottish Government/Parliament		
	Agreement Required	Participation in process	Consultation
PREPARATION	All proposed trade deals		
Assessing desirability of new trade deals, determining target countries/trading blocs			
Assessing likely impact of new deals on particular sectors of the economy or regions.		Where deal covers devolved areas or touches on devolved issues	Where deal covers only reserved areas.
Consulting stakeholder groups		As above.	On reserved matters only
Agreement of negotiating mandate	All proposed trade deals		
NEGOTIATION			
Initial engagement with third countries		As above.	On reserved matters only
Participation in negotiation rounds		As above.	On reserved matters only
Monitoring progress of negotiations		As above.	On reserved matters only
Changes to negotiating mandate	All proposed trade deals		
FINALISATION/ DECISION-MAKING			
Finalisation of text	Where deal covers devolved areas or touches on devolved issues		On reserved matters only
Scrutiny by Parliament of agreements and their implementation	As above.		On reserved matters only
Ratification	All proposed trade deals		
Signing	All proposed trade deals		
Implementation	Where deal covers devolved areas or touches on devolved issues		On reserved matters only.

⁸⁴ In practice, all trade agreements will cover a range of reserved and devolved issues.

⁸⁵ These principles should apply to any changes to existing trade agreements as a result of the 'grandfathering' process, in addition to any new trade agreements including the proposed UK-EU Future Economic Partnership. As future arrangements develop, further consideration will need to be given to address the Scottish Government and Scottish Parliament's role in governance of trade agreements and wider trade policy, which should observe these same principles.