The Scottish Government—written evidence (PST0011)

Current processes and the need for reform

1. As set out at Annex A, Schedule 5, paragraph 7 of the Scotland Act 1998 sets out the current competence of the Scottish Parliament in the area of international obligations. At present, the Memorandum of Understanding (MoU) on Devolution (and the associated Concordats) between the United Kingdom Government, the Scottish Ministers, the Welsh Ministers and the Northern Ireland Executive Committee sets out the UK Government’s commitments to cooperate with the Devolved Administrations on negotiating and implementing international obligations.

2. The MoU and Concordats have often proven not fit for purpose and will not facilitate the consultation, cooperation and scrutiny required in future, as existing international treaties and agreements are reviewed and new multilateral negotiations initiated. There is an urgent need for reform. The result in Scotland of the 2016 referendum, and the subsequent approach of the UK Government to intergovernmental relations and EU Exit negotiations, provides a very clear illustration of the difficulties Scotland faces in playing a full and equal role in influencing major foreign policy decisions where Scotland has a legitimate interest.

3. Leaving the EU will fundamentally change the nature of the UK as a state. Losing the EU’s negotiating power, scrutiny and expertise will magnify the inadequacies in inter-governmental arrangements within the UK, require a massive step change in the way the UK conducts its international affairs, and necessitate an urgent, fundamental review of inter-governmental arrangements on international relations. 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.

4. The nature of UK engagement with the EU will also fundamentally change, first, through the governance arrangements for the Withdrawal Agreement, including the implementation period and the negotiation of our future trade, economic and security relationship; and then according to whatever governance and consultation arrangements are agreed as part of those relationships.

5. In this environment, the Scottish Government believes that significant changes are required to ensure:

- that the potential impact of international treaties on each of the devolved nations is considered at the outset;
- that Scotland’s voice is heard as the UK Government develops its international ambitions, with appropriate arrangements in place for establishing UK strategic international priorities that take account of Scotland’s best interests;
- that robust governance structures – including dispute-resolution mechanisms – will be in place to prepare negotiating positions for relations with third countries and the EU; and
- that the Scottish Government and Scottish Parliament are recognised as equals with the UK Government and Parliament in their respective areas of competence, and, where necessary to fully carry out their respective functions, full consideration is given to appropriate enhanced powers to negotiate certain international agreements and fulfil international obligations after the UK has left the EU.

Scotland’s role in negotiating and agreeing treaties

6. As the Committee notes, when the UK leaves the European Union, the [UK] Government will seek to rollover and replicate some existing international treaties and begin negotiation on new treaties. These will be both with the EU and with other countries, and on a wide range of topics including aviation, fisheries and nuclear safety, as well as trade. This ‘wide range of topics’, to which we may add human rights and environment to name just two, will include those where there is exclusive devolved competence, or where devolved issues are affected to some extent. The Scottish Government will have responsibility for domestic implementation in many policy areas subject to multilateral agreements. As noted above, the potential impact of international treaties on each of the devolved nations should be considered at the outset.

7. The Scottish Government believes that the full, formal and early involvement of the Scottish Government and Scottish Parliament is necessary to ensure the legitimacy, and effective implementation, of current and future treaties. This applies as much to the negotiations on the future partnership between the EU and the UK as it does to the range of possible international agreements that the UK may wish to negotiate, sign and ratify in the future. Not only would this address a gap in the current devolution arrangements and help get the best agreements possible, it would also help to ensure that the UK’s position in negotiations
is cohesive and appropriately scrutinised, both during the negotiations phase and once agreements have been ratified.

8. One of the most important ways in which the UK will seek to exert influence internationally will be in its new relationship with the EU and other global partners. For more than 40 years, Scotland and the UK have enjoyed the social, economic and cultural benefits of EU membership and people have benefitted from the freedom to live, work, study, trade and travel across the 28 Member States. The Scottish Government, supported by the evidence, believes that continued EU Membership would be the best outcome for Scotland and the UK.

9. On a wide range of issues, the UK Government can be expected to attempt to ensure that the direction of travel in the EU is one that supports UK objectives, or at least, does not cut across them. It is therefore vital that the Scottish Government has a route to influence the UK Government’s overall approach, keeping track of evolving global policy issues and making representations on matters of interest to Scotland. We think it is equally vital that the Scottish Parliament has a mechanism to scrutinise both the ambitions and the implementation of treaties.

10. New arrangements on international relations, agreements and obligations should be established, ensuring that they are in place before negotiations get underway in earnest on the future partnership with the EU. Without prejudice to the specific proposals made by the Scottish Government in respect of trade, and the ongoing discussions on future arrangements in that area, these new arrangements should contain principles, structures and mechanisms to ensure that Scotland’s voice is feeding into the UK Government’s international ambitions, from early policy influencing, through negotiations to implementation and scrutiny.

11. Secondly, these arrangements should include robust governance structures – including an effective dispute-resolution mechanism – and be formalised in statute where that would be appropriate.

12. The arrangements should be based on the principles of:

   a) Presumption of interest and participation from the devolved institutions;
   b) A meaningful formal role in decision making;
   c) The right to represent; and
   d) Responsibility to implement
13. In the context of inter-governmental exchanges on the Bill which preceded the Constitutional Reform and Governance Act 2010, the Scottish Government argued for the Scottish Parliament to be given a formal role on treaty ratification where the subject matter of any treaty covered devolved interests. That position would have been consistent with the principle of legislative consent and statutory frameworks for proposed alterations to the devolution settlement under the Scotland Act 1998.

14. A further precedent was established in the context of the Public Bodies Act 2011, section 9, which provided a requirement for the Scottish Parliament’s consent to be sought for any provisions in an order made under Sections 1 to 5 of the Act which: (a) would be within the legislative competence of the Scottish Parliament if it were contained in an Act of that Parliament, or (b) modifies the functions of the Scottish Ministers.

15. And, while the Scottish Government continues to have overarching concerns with the EU (Withdrawal) Act 2018, that statute also makes provisions in recognition of devolved competence.

16. The UK Government and devolved administrations are equals in their areas of competence, and this should be recognised in the level of respect between them. As such, the Scottish Government should be involved in policy development in reserved areas which will impact on devolved areas, whether directly or indirectly. Early involvement would potentially allow the Scottish Government, using its greater knowledge of Scottish circumstances, to flag any unintended consequences of UK policy at a stage where it could be taken into account. It should therefore result in more workable and effective policy, and more transparent negotiations. Further, the UK’s future negotiating partners will have confidence that sometimes difficult and lengthy negotiations are proceeding on a consensual basis within the UK, and will be implemented by all nations of the UK.

17. In areas where it is difficult to determine the exact split between devolved and reserved issues, the UK government and Scottish Government should carry out assessments of the proposed agreement to consider the domestic policy implications. Where the administrations are

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2 Public Bodies Act 2011
unable to reach an understanding, an agreed dispute-resolution mechanism would be triggered.

i) For devolved matters:

- The Scottish Government and Scottish Parliament should have competence to initiate, negotiate, sign and ratify certain international agreements that relate to exclusively devolved matters, on the basis of Scottish Government policy. There should be a statutory requirement of the agreement and participation of the Scottish Government and Scottish Parliament where devolved matters are concerned.

- If, as is the case for the majority of agreements concluded by constituent units of a state, the resulting agreement is required to be endorsed by the UK Government, an appropriate mechanism for this could be that the Devolved Administration acts as an agent of the UK but with the scope of the application of the resulting treaty restricted to the territory of Scotland via a federal-type clause.³

ii) For reserved matters with an impact on Devolved Administration’s interests/Devolved Areas of competence:

- The Scottish Government and Scottish Parliament should have a formal role in establishing the UK’s priorities, policies and positions on international agreements relating to reserved matters that affect devolved Scottish interests. In practice, this is likely to mean formal consultation on almost all such agreements.

iii) For treaties with reserved and devolved elements:

- Where the UK Government concludes treaties which affect devolved areas, there should be prior consent from the Scottish Government on the negotiation priorities, and subsequent consent by the Scottish Government and Parliament prior to ratification. The consent process could build on the Canadian model, in terms of there being no ratification without there being specific, implementing provisions for the provinces.

- Where the Scottish Government concludes treaties which affect reserved areas, there should similarly be prior agreement from the UK Government on negotiation priorities and subsequent consent by the UK Parliament prior to ratification.

³Jennings, R, Watts, A., 1992 Oppenheim’s International Law Vol 1. 9th ed. London and New York: Longman. p. 254., “To meet the difficulties caused, both in the United States, and in some other countries, by constitutions which do not allow for effective federal legislation in matters covered by treaties, there has been a tendency to include in treaties a so-called ‘federal clause’ the result of which is, in effect, to relieve the federal state of the obligations of the treaty in matters which fall within the competence of the members of the federation and which in many cases are coextensive with the scope of the treaty.”
18. There are various examples of international best practice where sub-states have different levels of participation in treaty making depending on the extent of the sub-state’s interests or responsibilities. A number of these are set out at Annex B.

Structures and Governance

19. The Scottish Government believes a fundamental review of intergovernmental structures and governance is required to ensure that Scotland’s best interests are represented internationally and that the Scottish Government and Scottish Parliament are able to fulfil international obligations after the UK has left the EU. The intergovernmental relations review (IGR) process must address the issues raised here.

20. 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. This was outlined in the Scottish Government’s Discussion Paper on future trade arrangements4 but transparency throughout is a principle which should apply to all international agreements and treaties. The Scottish Government has a well-established approach to public consultation and Open Government, and is best placed to seek views of Scottish stakeholders on issues of devolved competence.

21. As an example of the Scottish Government’s thinking on possible future intergovernmental models, a summary of the recent proposals in respect of the development of future trade deals is included at Annex A.

Conclusion

22. The current lack of consideration of Scottish interests is magnified by the lack of a means of input and scrutiny by devolved administrations through existing mechanisms. To ensure that Scotland’s voice is heard and respected, an approach that guarantees a role for the Scottish Government and Scottish Parliament at all stages of the formulation, negotiation and agreement of treaties should be developed.

23. The current devolution settlement does not adequately allow Scotland’s interests to be considered and reflected in international agreements on, inter alia, environment, fisheries and human rights, and Brexit will only

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4 Scotland’s Role in the Development of Future UK Trade Arrangements: A Discussion Paper. August 2018
exacerbate this deficit in representation. In order to fully serve Scotland’s interests, further devolved powers which allow for a meaningful and defined role in the development of international agreements must be considered. The Scottish Government believes these are required. In the absence of further devolution, robust processes which guarantee the right to influence and provide protections for our interests must be established. The Scottish Government is committed to agreeing the changes necessary through the IGR process and is approaching those discussions in good faith.

6 December 2018
ANNEX A: Existing arrangements for change

1. Schedule 5, paragraph 7 of the Scotland Act 1998 sets out the current competence of the Scottish Parliament in the area of international obligations. It provides that observing and implementing international obligations, obligations under the ECHR and obligations under European Union law are not reserved (unless the subject matter is otherwise reserved). This gives the Scottish Parliament the power to legislate for the purpose of observing, and responsibility for and giving effect to those obligations which relate to devolved matters. It therefore follows that the devolved institutions have an interest in the nature and substance of those obligations during the whole negotiation process.

2. At present, the Memorandum of Understanding (MoU) on Devolution (and the associated Concordats) between the United Kingdom Government, the Scottish Ministers, the Welsh Ministers and the Northern Ireland Executive Committee sets out the UK Government’s commitments to cooperate with the Devolved Administrations on negotiating and implementing international obligations. This cooperation is intended to take place in respect of obligations that have potential implications for devolved areas of responsibility; although the UK Government has responsibility for signing treaties, it should be incumbent on the UK Government to ensure that the negotiating position is agreed with, not for, the Devolved Administrations. The MoU is a statement of political intent only and is not legally binding.

3. For some considerable time, it has been clear that the MoU and Concordats are not fit for purpose. Before the June 2016 referendum, discussions had taken place between the administrations on how to update the MoU and the structures for inter-governmental consultation and co-operation. Ultimately, Ministers from the different governments and executives could not reach agreement on the best way to update the arrangements, however it remains clear that significant reform is required. Indeed the consensus from academics, think tanks, independent Commissions and Parliamentary Committees is that the current intergovernmental system is not working and there is an urgent need for reform.

4. The result of the June 2016 referendum on EU membership, with the people of Scotland voting by a 24 percentage point margin to remain in the EU, serves to illustrate the need for reform, to ensure Scotland's voice is heard and interests represented in major constitutional and foreign policy decisions.

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6 Based on key publications recommended by the Joint Ministerial Secretariat for the literature review for the IGR
5. 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. To give a recent example, Department of International Trade consultations on potential future free trade agreements with Australia, New Zealand and the US were not approached on the basis of early, full and formal involvement of the devolved administrations as equal partners. The Scottish Government has nonetheless submitted a substantial response to the issues raised and have been clear that this should be the starting point of our involvement in the process of developing future trade arrangements.

6. In relation to trade agreements specifically, we note the evidence presented to the Scottish Parliament’s Finance and Constitution Committee in its recent scrutiny of the UK Trade Bill. The Committee heard compelling evidence in support of a formal role for the Scottish Parliament in the process for negotiating trade agreements, and agreed in their subsequent report on the Legislative Consent Motion that devolved administrations must be involved.

7. The Scottish Government 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 agreement, in practice this would almost certainly mean all such agreements. Similar principles may be applied to other forms of international treaty.

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

Across the world, there are good practice examples of sub-state administrations having a formal right to participate in foreign policy decisions which impact on their interests. While no one model could or should be replicated wholesale in the UK context, the most appropriate of these could inform the development of new intergovernmental processes within the UK.

In addition, the devolution of further powers which give the Scottish Government and Scottish Parliament competence in respect of the international elements of devolved issues must be formally considered in order that the devolved administrations can operate internationally and negotiate international agreements, sign treaties and fulfil international obligations on all matters of devolved competence.

The selected international examples fall broadly in to the principles for future arrangements outlined earlier in this paper.

Presumption of interest

Full, early and formal involvement in policy formulation, including consistent information sharing and upstream opportunities to influence international policy agreements and negotiating mandates where devolved issues are impacted should be the starting point for future intergovernmental arrangements in the UK.

In Switzerland, the cantons have the formal right to participate in the ‘preparation of decisions of foreign policy which concern their powers or their essential interests’. This gives them rights of participation and of negotiation in foreign policy. In Belgium, “…the regions or communities have been made competent for certain policy domains internally, then they are also competent for these matters externally”8, while in Germany, varying levels of participation are seen depending on the extent to which the Länder's interests or responsibilities are concerned.

A meaningful formal role in decision making

In Germany and the United States there are frameworks in place for the involvement and representation of state interests in international negotiations. Building on these and other examples of international best practice, as outlined in the Scottish Government’s recent trade discussion

paper⁹, the Scottish Government considers that a new statutory intergovernmental international trade committee should be established. This would play a similar role to the ‘C-Trade’ Committee in Canada, would consider all aspects of international trade, and may be a model for wider involvement in decision making on international agreements.

**Right to represent**

Ministerial and official involvement during international summits and negotiations, including, where appropriate, the opportunity for a Minister from Scotland to represent the UK in formal meetings and for officials to attend early influencing meetings, is the best way to ensure Scotland’s interests are protected.

Again, we can learn from the processes in place in Canada, where representatives of the Canadian provinces made up part of the Canadian official delegation for the EU-Canada Comprehensive Economic Trade Agreement negotiations. This direct participation successfully enabled the dynamic incorporation of provincial interests in the pan-Canadian positions put forward to the EU negotiators.

**Responsibility to Implement**

Devolved administrations already have wide ranging responsibilities for issues subject to international agreements, and intergovernmental arrangements should allow them to play their part in the governance of treaties, including involvement in decisions about sanctions and noncompliance measures.

The Faroe Islands have power to negotiate and conclude agreements with foreign states and international organisations on all devolved issues, formally recognised with the 2005 Authorisation Act.

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⁹ Scotland’s Role in the Development of Future UK Trade Agreements