Dear Baroness Taylor,

Thank you for inviting me to provide evidence to your Committee to help inform its Parliamentary scrutiny of treaties inquiry. I am sorry that I am unable to do so in person but hope that the comments below will be of assistance.

The Finance and Constitution Committee recently published its report on the Trade Bill Legislative Consent Memorandum which considered options for the role the devolved institutions might have in negotiating and agreeing treaties. I intend to restrict my comments to this aspect of your Committee’s call for evidence.

In the report, the Committee expressed disappointment that the Trade Bill remained silent on the role of the devolved institutions in the negotiation of the new arrangements. Whilst recognising that international trade is a reserved competence, the Committee was equally cognisant that trade agreements will include a wide range of issues which fall within devolved areas, meaning that any future trade agreements may well limit the legislative competence of the devolved institutions. In the Committee’s view, it is therefore essential that the devolved institutions are involved at all stages of the trade negotiation process particularly because, as stated by the House of Commons Select Committee on International Trade, “each of the four nations of the UK may differ in their priorities for trade deals.”

The Committee’s view is that it is imperative that robust processes and new institutional mechanisms are urgently developed to allow for the four nations of the UK to develop a consensual position before the beginning of trade negotiations.

The Committee welcomed the views of the Minister of State for Trade Policy that “as far as future trade arrangements are concerned, the devolved Parliaments and Assemblies should be very involved.” It is also helpful that the Minister has welcomed the publication of the Scottish Government’s discussion paper, Scotland’s Role in the Development of Future Trade Arrangements. The Committee recommended that the UK Government should publish a similar discussion paper setting out its views.

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1 Alexander Burnett MSP, Murdo Fraser MSP and Adam Tomkins MSP dissented from this recommendation.
2 https://publications.parliament.uk/pa/cm201719/cmselect/cmintrade/520/52009.htm#_idTextAnchor053
on the roles of the UK’s respective governments and legislatures in the
development of future UK trade arrangements with a view to introducing
legislation which provides a statutory basis for these respective roles. The
Committee also recommended that the UK Government responds publicly
to the recommendations in the Scottish Government’s discussion paper.

The Scotland Act 2012 and Scotland Act 2016 both marked a shift from a
reserved powers model of devolution towards a more complex system
which includes shared powers. If the UK leaves the European Union then
this will undoubtedly add to complex constitutional arrangements which
increasingly depend on close levels of inter-governmental co-operation.
Until now these arrangements have tended to develop on an ad-hoc and
informal basis. The Committee questions whether this approach is
sustainable or whether a more formal and structured approach based on
statutory provision is now required.

The Committee also considered the proposed establishment of a Trade
Remedies Authority (TRA). We agreed with the House of Commons Select
Committee on International Trade that diverse representation is “vital to
ensuring that the TRA is viewed, both domestically and internationally, as
credible and transparent.” The Committee recommended the need for
diverse representation including knowledge of the Scottish, Welsh and
Northern Ireland economics and this should be reflected in the
appointment process.

Following publication of the report, I wrote to the Minister of State for
Trade Policy, the Secretary of State for Scotland and the Cabinet
Secretary for Government Business and Constitutional Relations seeking
their responses to the Committee’s recommendations. These letters and
their responses are available on the Committee’s website. Copies are also
attached for your convenience.

In his response, the Minister of State stated that his Department is
“committed to developing new working arrangements to define the role of
the devolved administrations in future free trade agreements, within the
context of the constitutional framework of the UK.” He further stated that
his officials “are currently considering new protocols for International
Trade that will cover how we engage at both official and ministerial level
on future trade agreements with the devolved administrations.”

The Minister of State described the Scottish Government discussion paper
as “a helpful contribution to this debate” and confirmed that it was being
considered as part of this work. He expressed confidence “that these
discussions will lead to a clear, agreed structure for the devolved
administrations to participate in our future trade arrangements which

4https://publications.parliament.uk/pa/cm201719/cmselect/cmintrade/743/74307.htm#_idTextAnchor029
works for the whole of the UK.” The Minister of State confirmed that his officials “continue to engage with their Scottish counterparts on remaining issues...with a view to seeking legislative consent.” He described the securing of an agreement with all devolved administrations as “the best possible scenario” and “one we will continue to work towards.”

In his response, the Secretary of State for Scotland reiterated the UK Government’s view “that securing an agreement with all devolved administrations is the best possible scenario and it is one we will continue to work towards.” He stated that the UK Government remains fully committed to the Sewel Convention and the related conventions and procedures and was “engaging constructively with the Scottish Government on Exit legislation...and we will of course continue to seek legislative consent where it is appropriate to do so.”

The Secretary of State also noted that the Department of Trade was “actively engaging with their Scottish Government counterparts to ensure that work carried out by DIT is fully understood and that Scottish Government input helps develop an independent trade policy for the UK.” He further noted that “DIT officials are considering new protocols for International Trade that will cover how engagement at both official and Ministerial level on future trade agreements will work with the devolved administrations.” This, he believed, was “a significant step towards clearly defined working arrangements and a defined role for the devolved administrations in future free trade agreements.”

In his response to the Committee, the Cabinet Secretary for Government Business and Constitutional Relations suggested that Brexit “has highlighted significant inadequacies in the current devolution settlement.” He stated that “the Trade Bill as currently drafted...would prevent Scottish Ministers from amending direct retained legislation (in relation to clauses 1 and 2 of the Bill) in areas which, although otherwise devolved, have been subject to ‘section 12 regulations’, which would establish common legislative frameworks across the UK.” In his view, “it is vital that the Scottish Government and Parliament should be able to protect and enhance Scotland’s interests and approach” in the 24 policy areas currently identified as potentially subject to such regulations. He considered that “imposing such constraints on the exercise of devolved powers is not only constitutionally inappropriate, but entirely unnecessary, as demonstrated by the recent progress we have made with the UK Government on frameworks.”

The Cabinet Secretary also expressed concern regarding the proposed composition of the Trade Remedies Authority and stated that the Scottish Government would “continue to make the case for the Trade Bill to be amended so as to require UK Ministers to secure the consent of the Scottish Ministers to one non-executive member of the TRA.”
With regard to international trade agreements, the Cabinet Secretary stated that any differing interests or priorities between the UK and Scotland would be best addressed before reaching the negotiating table. In his view it is “essential to put in place a decision-making process that will protect and promote Scotland’s economic and social interests in all international agreements.” He concluded by stating “while we welcome the UK Government’s repeated commitments to developing an inclusive and transparent trade policy that represents the interests of all nations of the UK, we have seen little evolution in its approach so far, which continues to appear to place the interests and involvement of the devolved nations on a par with sectoral interests.”

The Committee will continue to explore these fundamental questions as part of our ongoing work on common UK frameworks.

6 December 2018