OFFICIAL REPORT
AITHISG OIFIGEIL

# Finance and Constitution Committee

**Wednesday 23 September 2020**

Session 5

The Scottish Parliament
Pàrlamaid na h-Alba

# Wednesday 23 September 2020

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## FINANCE AND CONSTITUTION COMMITTEE
**21st Meeting 2020, Session 5**

**CONVENER**

*Bruce Crawford (Stirling) (SNP)

**DEPUTY CONVENER**

*Murdo Fraser (Mid Scotland and Fife) (Con)

**COMMITTEE MEMBERS**

George Adam (Paisley) (SNP)
*Tom Arthur (Renfrewshire South) (SNP)
*Jackie Baillie (Dumbarton) (Lab)
*Alexander Burnett (Aberdeenshire West) (Con)
*Angela Constance (Almond Valley) (SNP)
*Patrick Harvie (Glasgow) (Green)
*Dean Lockhart (Mid Scotland and Fife) (Con)
*John Mason (Glasgow Shettleston) (SNP)
Alex Rowley (Mid Scotland and Fife) (Lab)

*attended

**THE FOLLOWING ALSO PARTICIPATED:**

Professor Michael Dougan (University of Liverpool)
The Rt Hon Greg Hands MP (Minister of State for Trade Policy)
Dr Emily Lydgate (University of Sussex)
Ivan McKee (Minister for Trade, Investment and Innovation)

**CLERK TO THE COMMITTEE**

James Johnston

**LOCATION**

Virtual Meeting

# Scottish Parliament

## Finance and Constitution Committee

*Wednesday 23 September 2020*

*[The Convener opened the meeting at 09:00]*

## Decision on Taking Business in Private

**The Convener (Bruce Crawford):** Good morning, and welcome to the 21st meeting in 2020 of the Finance and Constitution Committee. I have apologies from Alex Rowley and George Adam.

The first item on our agenda is to decide whether to take in private at future meetings consideration of a draft report on the legislative consent motion on the United Kingdom Internal Market Bill. Do members agree to take that in private?

I see no disagreement, so that is agreed.

## United Kingdom Internal Market Bill

09:01

**The Convener:** The next item on our agenda is to take evidence on the UK internal market from Professor Michael Dougan, who is professor of European law and Jean Monnet chair of European Union law at the University of Liverpool, and Dr Emily Lydgate, who is a senior lecturer at the University of Sussex law school. I warmly welcome both our witnesses.

I remind members to direct their questions to a named witness. If either of our witnesses wants to add something to the other's response, they should please request to speak using the chat function.

We will go straight to questions from the committee, and I will start. The Public Administration and Constitutional Affairs Committee at Westminster has said that the proposals in the internal market white paper to set in law the principles of mutual recognition and non-discrimination

"will effectively create new reservations in areas of devolved competence."

Professor Dougan, in your written submission, you state that, although

"on paper, devolution might continue to look the same",

and

"might even look more extensive ... in practice, the operation of the UKIM has real potential to limit the capacity of the devolved institutions to pursue different economic or social choices from those made in London."

I ask both witnesses to explain why devolution can simultaneously appear to look more extensive and more constrained. What is the reality?

**Professor Michael Dougan (University of Liverpool):** Thank you for the invitation to participate.

It is helpful to explain the distinction between the situation on paper and that in practice by pointing out that that is how many internal market rules operate. That is most certainly true in the EU context, which is the internal market with which we are most familiar.

On paper, the devolution competences will not particularly change as a result of the United Kingdom Internal Market Bill. Obviously, there is a new addition to the list of reserved competences, in that the act will be added to the list of provisions that cannot be modified by the devolved Parliaments. However, it looks as though the other devolved competences will remain the same. In

addition, the UK Government has repeatedly promised that, after the transition period ends and the full effects of Brexit become clear, there will be an increase in competence for the devolved institutions, because many of the issues that might previously have been subject to regulatory intervention by the EU will become more fully subject to the competence of those devolved institutions.

In practice, of course, internal market principles operate by imposing restrictions and limitations on competence exercises, and that is universal. All internal markets work by establishing a set of horizontal principles that seek to at least influence and in most cases restrain and restrict the way that the competences are exercised in practice. That is definitely true of the United Kingdom Internal Market Bill. By imposing widespread obligations of non-discrimination and, more important, mutual recognition, the bill seeks to restrict the way that devolved competences operate in practice.

It is fair to say that there are two main factors that are particularly striking under the United Kingdom Internal Market Bill. The first is that it is in effect a cassis de Dijon on steroids. It takes the idea of mutual recognition, multiplies and magnifies it, and makes it a far stronger principle of mutual recognition than EU lawyers would recognise in the context of the single market. Secondly, it does not acknowledge the simple empirical fact that the UK internal market is unique in the world, due to the size of the English economy and population relative to the size of the other participating territories. That means that a principle such as mutual recognition, which might operate in a relatively neutral manner in the context of a large organisation such as the EU, will not operate in a relatively neutral manner in the context of a relatively small number of territories, such as the UK, where one territory is not only relatively but absolutely dominant over the others.

When you put those two factors together—the cassis de Dijon on steroids and the simple, inescapable, empirical fact of the size of the English economy and population—it means that principles such as mutual recognition will, in practice, have an impact on devolved competences that makes a real distinction between what exists on paper and what might actually happen in practice.

**The Convener:** Thank you. Dr Lydgate, would you like to add anything?

**Dr Emily Lydgate (University of Sussex):** In terms of new reservations of powers, specific concerns arise with respect to subsidies in the provision of public funds.

I can probably best illustrate the question of the seemingly paradoxical nature of both giving and taking powers using the example of post-Brexit secondary legislation on the free movement of goods. As Professor Dougan said, the basic approach of the EU is that, where harmonisation is necessary to achieve free movement, product regulation is harmonised and that is managed at EU level. In the absence of that, a lot of the post-Brexit legislation devolves powers that were previously harmonised. Issues such as the maximum residue levels for pesticides, or new genetically modified organism authorisations, were managed at the EU level and were harmonised, but they are now devolved in secondary legislation. That seems to give greater powers to devolved Administrations but, perversely, I think that you could say that in practice it might do just the opposite, due to, as Professor Dougan said, the asymmetry in the size and market power of the devolved nations. For example, England might authorise a new active substance for pesticides, or a new GMO, and would then be able to freely export those products to devolved nations, even if they had controls domestically. In so doing, England could competitively undercut producers and in effect undermine permitted divergence.

**The Convener:** The Scottish Government's view is that the UK internal market proposals are completely unnecessary, as common frameworks provide arrangements to manage the intersection of EU law and devolved competence in areas of policy and regulation that are relevant to UK internal trade. Do the witnesses agree with that view?

**Dr Lydgate:** The core of any approach to an internal market that is as integrated as the UK's has to be harmonised rules that have a strong joint consultative process underlying them. The rules cannot be set by one of the countries. The EU provides quite a formalised approach that involves EU bodies—the Council, the Commission and the Parliament—setting regulations that apply to all member states. The UK is trying to replicate that approach with a non-statutory process of setting out common frameworks. If those frameworks are agreed, the scope of the market access principles will be dramatically reduced.

I have a lot of questions about how the common frameworks process sits in the United Kingdom Internal Market Bill, because there would be a statutory basis for the market access principles, but not for the common frameworks. There is probably a role for both.

There is, of course, a balance between harmonisation and devolution, and that might involve hard choices in respect of erecting new market access barriers or allowing products that would not be the regulatory choice of one nation

for the good of free trade. However, as in the EU, that should be a process that happens around the margins of a broadly harmonised framework.

I would raise specific concerns about how legislation might undercut common frameworks with respect to trade agreements and trade negotiations. I think that the UK Withdrawal from the European Union (Continuity) (Scotland) Bill also raises issues in that respect. Perhaps we will come to that later.

**Professor Dougan:** I certainly would not describe the proposals as completely unnecessary. I mentioned in my written submission to the committee why, historically, an internal market has not been much of an issue for the UK. When the UK joined the EU and began to participate in the EU internal market, there was no devolution, so it was not really an issue pre EU membership. Devolution happened within the context of EU membership and the EU internal market rules in effect provided a framework to regulate not just the EU single market but, in many respects, internal trade within the UK. The problem is therefore a direct consequence of Brexit.

We will have a UK with devolved settlements in Scotland, Wales and Northern Ireland, but in which the EU framework that previously helped to regulate trade relations, not just within the EU but within the UK, has been taken away. It is a genuine problem.

I suppose that the main issue is not so much the common frameworks that are being discussed or negotiated, but how the economy and society will evolve in the future. In the EU context, for example, every time that a member state changes its product requirements or introduces new restrictions on alcohol or cigarette consumption, every time new scientific developments, changes in technology or changes in consumer preferences occur, and every time a regulatory regime changes, trade implications are automatically created for all the other member states that want to do business with that country. It is useful to bear it in mind that internal markets are not static. A set of common frameworks is not established and then left for time immemorial. Internal markets involve constantly managing developments in local and national regulation and their impacts on trade relations with the other territories that are being worked with.

As I said, there is a genuine problem, and it needs some sort of solution. It is fair to say that the solution is not the one that I would have picked if I had a free hand in designing it. My complaints about the bill are not to do with the fact that there is a problem that genuinely needs some sort of solution to address it; my problem with the bill is that the solution is not necessarily a very desirable one within the context of the UK's particular situation.

**Murdo Fraser (Mid Scotland and Fife) (Con):** Professor Dougan, I will follow up the convener's line of questioning and look at the impact of the bill's provisions on devolved powers and your concerns about how the ability of devolved Administrations to act might be constrained. How could the bill be amended to try to address those concerns? Would, for example, the introduction of a provision on proportionality be part of the solution?

**Professor Dougan:** If we take the fundamentals of the bill as a given and I were seeking to amend it, my amendments would go much further than simply tinkering with the bill. Let us take the fundamentals of the bill as they are and the idea that we will have some system of mutual recognition and non-discrimination that applies across broad sectors of the economy and goods and services. If we wanted to make that a more attractive proposition from the point of view of Scotland and Wales in particular, the first thing that I would do would be to drastically expand the system of potential justifications and derogations from the principles of mutual recognition, in particular.

09:15

In the EU context, mutual recognition in the absence of harmonisation is only a presumption, and a member state can rebut the presumption of mutual recognition because it has higher or better standards than its peers on any legitimate public interest ground. The main grounds are usually public health, environmental protection and the protection of consumers, but there are potentially an infinite number of public interest grounds on which mutual recognition can be derogated from under EU law, including the protection of workers, the protection of particularly vulnerable children, the protection of the reputation of national institutions—there is a huge variety of such grounds. The first thing that I would do, therefore, would be to significantly broaden the range of legitimate public interests that were capable of rebutting a presumption of mutual recognition.

The second thing that I would probably do, particularly from Scotland's point of view, would be to argue for a principle of functional equivalence. In other words, as long as standards are basically the same as each other, and they are not particularly higher or appreciably lower, they should be treated as functionally equivalent, so that the mere technical differences—the simple differences in the way that particular requirements are phrased or have to be met—do not become barriers to trade in themselves. That is a familiar

principle in the EU context, but we do not see it in the internal market bill.

If the first two things that I would introduce were wider justifications for derogation and the principle of functional equivalence, the third would probably be more difficult to achieve other than by my describing it fairly loosely. It is probably to be taken for granted that Scotland is not looking to lower standards significantly below those that exist. Fears have been expressed that, in due course, Westminster might well go down regulatory diversions from existing standards in a way that Scotland feels less comfortable with. In that case, I would argue for a right to free movement for Scottish, Welsh and Northern Irish goods within England, based on their compliance with existing minimum standards. In effect, Scotland and Wales would have free access to the English market as long as they meet the minimum standards that have been agreed by everybody.

That is obviously a much broader proposition, because it would require processes of legislative dialogue, and, if not harmonisation, then at least an understanding of what the minimum standard should be. In effect, however, I do not think that Scotland wants Scottish goods and services to be excluded from the English market because the English market has decided to go down a technically different route and the Scottish standards remain higher in substance. That would probably be an undesirable outcome for Scotland.

**Murdo Fraser:** I would like to ask Dr Lydgate the same question.

**Dr Lydgate:** That was a very complete answer and I underscore Professor Dougan's points.

I will propose one additional amendment to the bill, which would be about the scope of delegated powers. In the bill's current formulation, the Secretary of State can change a number of things through secondary legislation, including the types of regulations that are covered by the non-discrimination principle, the list of exemptions from findings of indirect discrimination, and the overall schedule 1 exemptions for market access principles. That all seems to consolidate quite a lot of power at the UK level.

**Angela Constance (Almond Valley) (SNP):** I have separate questions for each of the witnesses, but I have no doubt that the convener will keep me right about time.

I will start with Professor Dougan. In your submission, you say that the problem is not that Scotland or Wales want to do things differently; it is the risk of magnifying the economic and "constitutional dominance" of England. Can you say first how the bill will, in practice, limit the opportunities for devolved Administrations to enforce their own laws and, secondly, how it will limit their capacity to pursue different economic and social choices?

**Professor Dougan:** I will answer your question in two stages. First, I will highlight a straightforward practical example that clearly illustrates the potential risks, then I will draw out some of the key lessons that we can see in that example.

An example that I give in my written submission is about what would happen if the Scottish Government were to be minded to introduce a ban on single-use plastics. To be frank, it could be almost any measure to protect the environment, or any consumer driver, but that is the example that I gave. When we work that measure through the scheme of the bill, we find that the Scottish authorities could introduce such a ban and enforce it against Scottish producers, but could not enforce it against imported goods from England or Wales.

In the reality of the UK market, the simple fact is that England has 80 or 85 per cent of the population and the economy, and has a huge manufacturing base. If Scotland could enforce such a rule only against its domestic producers and not against imports from England, it might as well not have the rule at all. In practice, it would have no means of preventing non-recyclable plastic from flooding its market and being fully and freely available for sale. All that it would be doing is imposing on its own producers an extra compliance cost that they would have to satisfy, which would put them at a competitive disadvantage. That example shows that the bill's provisions would operate so that Scottish producers would be disadvantaged and Scotland could not deliver on the public interest objective that the regulation was intended to achieve.

We learn from that example that it is not just the detailed principles that are potentially problematic; the bill's underlying assumptions strike a balance between trade and local democracy, or local autonomy, that many of us who are discussing the bill in academic circles find quite problematic.

The starting assumption for the bill seems to be that regulatory divergence by Scotland and Wales is a problem; it is not an expression of local democracy or a valid search for different solutions to societal problems in Scotland and Wales, but a problem that needs to be managed. That starting assumption runs throughout the bill's provisions on non-discrimination, and especially on mutual recognition.

We see it in another way, subtly, when it comes to the legal effects of the principles of mutual recognition and non-discrimination. The assumption is clearly that those principles could be directly enforced before the courts, but primarily against Scotland and Wales. The bill

makes no provision to deal with disapplication of an act of Parliament; it appears that it simply did not enter the consideration of the drafters of the bill that Westminster might create barriers to trade for Scottish and Welsh goods. The assumption is clearly that Scotland and Wales will create barriers to trade for English goods.

We can talk about the problem in relation to the details of the bill, and of course we should do that, but it is also important to recognise the underlying assumption that characterises the bill. The expression of divergent preferences by Scotland and Wales is the problem that the bill seeks to address.

**Angela Constance:** Thank you for that, professor. So we are not even starting on an even playing field.

Do you have views on whether the United Kingdom Internal Market Bill discourages regulatory innovation? Is there any scope in the bill for Scotland to refuse mutual recognition for the sake of broad public interest objectives? For example, the EU single market rules currently recognise public objectives including public health considerations, alongside pure market considerations.

**Professor Dougan:** I will first answer your question about whether the bill discourages regulatory innovation. You should bear in mind everything that I have just said about the fact that the bill's impacts, in practice, on many proposed exercises of devolved competence, in relation to trade in goods or trade in services, would be to penalise domestic producers or traders and to remove the ability to enforce the same standards against imported goods or service providers. That means that you would not achieve your public interest objectives and would only end up penalising your own domestic producers. The natural consequence of that is that the exercise of devolved competences will be discouraged. For example, what is the use of Scotland banning single-use plastics if the Scottish authorities know that the ban will be totally ineffective in practice and will only penalise Scottish producers of packaging?

It is worth pointing out that the bill offers a limited protection for existing restrictions or provisions that might cause barriers to trade, but it does not apply to any new exercises of devolved competence that introduce novel regulatory requirements, or to existing requirements that are substantively—not "substantially"—changed. In my written evidence, I give the example of a change in the calculation of the minimum unit price for alcohol. At the moment, if that rule were to change, it would be protected. However, if Scottish authorities in the future were to decide to change the rules on minimum unit pricing, that would be caught by the bill and would be subject to its provisions.

On your question about whether there is any scope for refusing mutual recognition on broad public interest grounds, that comes back to the question that Murdo Fraser asked. In a way, the bill is cassis de Dijon on steroids. It takes the idea of mutual recognition—the very strong principle that if something is good enough for the English it should be good enough for the Scots, and they should have it, too—but it strips away almost all of the public interest justifications that would be familiar under EU law for restricting the sale of imported goods unless they comply with its domestic standards.

In relation to goods, pretty much the only exception to mutual recognition involves stopping the spread of pests, diseases or unsafe foodstuffs. General public health interests are not a valid justification, and neither are issues around environmental protection, consumer protection or children's rights.

Similarly, in respect of services, when it comes to mutual recognition for authorisation requirements, the only derogation involves dealing with a public health emergency that poses an extraordinary threat to human health. Again, there are no derogations for environmental concerns, consumer issues, general health concerns, children's rights or anything else. There is an extremely limited set of public interest justifications.

**Angela Constance:** Although there is a lot in the bill for politicians like me to complain about—big sweeping powers for UK ministers, reservation of state aid and difficulties around mutual recognition that have been discussed already—could the bill be repaired? You have spoken about what some of the solutions might be. Does the UK Government need to go back to the drawing board? To me, the bill seems to be a fundamental attack on devolution as we know it.

**Professor Dougan:** In response to Murdo Fraser's question, I identified some reforms that I suggest should be made if we are to try to work with what we have been given and to make it better than it is at the moment. I also agree with Emily Lydgate's observations about the scope of delegated powers for UK ministers to change the terms of the game virtually at will.

09:30

I also said to Murdo Fraser that if I were sitting down to design a UK internal market, I would probably have done it very differently. Principles such as mutual recognition and non-discrimination would certainly have a role, but my preference would have been to have had a system of pre-

legislative dialogue between the four territories, which would involve them sitting down as equals to discuss the potential impact of regulatory changes on trade in the UK, and seeking to find the best solution for that particular situation, based on a range of what I call in my briefing paper the "toolbox of trade law". We have a range of principles, from harmonisation through to mutual recognition, and all sorts of ways to nuance and qualify them.

My solution would have been to find pre-legislative understandings of how to manage the potential trade barriers that might arise from the exercise of competences across the UK. If a solution can be found that satisfies everybody, everyone can proceed on the bases of that solution and exercise of their respective competences. However, that means that everyone just has to live with whatever solution comes out of the process. If it were to mean that there were barriers to trade for certain English manufacturers, they would just have to put up with them. That is true in virtually every other internal market in the world; in virtually every other system, there are trade barriers and people just have to live with and adapt to them.

If I were redrafting the bill, I would keep bits of it—some of the underlying principles and tools—but I would probably take a radically different approach to how the tools should be employed, the institutional ways in which that is done, the processes and the legal effects.

**Angela Constance:** Do I have time to ask Dr Lydgate a question?

**The Convener:** I would prefer to let others in at the moment, but I can come back to you, if that is okay.

Dr Lydgate—perhaps you could give an overview in response to what Professor Dougan has just said. I know that that is a big ask, but is there anything particular that you would like to add that would differ from what we just heard?

**Dr Lydgate:** I will just make a supplementary comment. In a sense, the process problems with the bill are the substantive problems. Previous witnesses have questioned why the bill was presented with such urgency, given that it does not apply to existing legislation, and that legislative changes in the immediate aftermath of Brexit are likely to be small.

I have a slightly different perspective on why the UK Government might be feeling some urgency. At the end of the transition period, on 1 January, a raft of Brexit legislation will come into force. The broad understanding is that those pieces of legislation will simply transpose EU law, but in fact they present some dramatic changes with respect to the internal market. I gave an example of that with respect to food safety and food standards, which is now devolved rather than harmonised. In that context, even though the new powers might not be used, I expect that the UK Government wants the legislation to be in place before those statutory instruments come into force, in case the common frameworks fall apart.

What we are seeing is the UK Government responding to a threat by trying to centralise power or create a system that will function in case there is a problem. However, in a sense, that exemplifies the issues that are at play here, which involve the lack of a strong consultative process.

**John Mason (Glasgow Shettleston) (SNP):** Dr Lydgate, you make the point that the United States would look at trade negotiations with the UK differently from the way in which the EU would. Could you expand on that a little? There is a lot of variation between he different states in America, so I would have thought that that would be a factor.

**Dr Lydgate:** Is your question about how the United States, as opposed to the EU, manages internal divergence?

**John Mason:** Yes, in terms of how that will feed into a new negotiation with the UK.

**Dr Lydgate:** The US has a lot of internal divergence, and that is an issue for internal trade. However, its objectives for the UK negotiation are centralised. In fact, they are set out in legislation—Congress has said in law what the US negotiating objectives will be. Therefore, those are not contingent on a Trump Administration or a Biden Administration. Some of the phrasing of the objectives and their strongly unilateral orientation is definitely a reflection of Trump, but the objectives are centralised.

**John Mason:** Would those be different from the EU's, in that the EU is trying to push up standards and the US is trying to push them down?

**Dr Lydgate:** On the substantive issues of what the two parties are looking for from the UK, those are definitely in contrast. The EU has, essentially, accepted that we will have a fairly basic free trade agreement that does not have very much in the way of regulatory alignment. We do not have a demand to continue any single market, or quasi-single-market-style arrangement with the EU, so it is really down to the UK to decide what concessions it wants to make to achieve a trade agreement. However, if it wants to achieve a trade agreement with the US, that implies some changes to its domestic regulation, particularly on agriculture.

**John Mason:** Thank you very much.

I now switch my questioning to Professor Dougan. You have already touched on the

question of minimum unit pricing for alcohol, which has been a major issue in Scotland. In paragraph 15 of your paper, you talk about action being allowed in the bill only against serious health threats. Will you expand on that? Am I right in saying that, in the European Union, action against general threats to public health is allowed?

**Professor Dougan:** I will double-check my notes. In the field of goods, we are dealing with the principle of mutual recognition. In my analysis, I suggest, and most of my colleagues would agree—a few other people might suggest otherwise—that a change in the mandatory minimum price for a good is a product specification that would be governed by the principle of mutual recognition under the bill. In that case, the only justification that would be available to, for example, the Scottish Government to enforce its minimum prices against English imports of alcohol would be to prevent the spread of a pest, a disease or an unsafe foodstuff. That clearly does not apply in the case of minimum unit pricing for alcohol. In effect, you would be left with no potential justification whereby the Scottish Government might enforce a change in minimum unit pricing against imported English alcoholic goods.

There is no general public health justification that would allow any part of the UK to reject mutual recognition in the fields in which it applies. By contrast, under EU law, general public health considerations are a valid public interest requirement. We know that from, for example, the Scotch Whisky Association case, in which the Scottish Government relied on public health grounds to justify its policy on minimum unit pricing for alcohol.

**John Mason:** There was quite a lot in that. Could you explain to me, as a layperson, the idea of product requirement? When I read those words, I think that that means that a product must have in it a certain amount of water or whatever it may be. However, you are saying that the product requirement could include the price.

**Professor Dougan:** The bill includes an indicative list of what will be covered by mutual recognition. I should point out that I am using the term "product requirement" because that is the shorthand that we use in EU law. That terminology is not used in the bill. The bill refers to an indicative list of rules relating to mutual recognition, which cover physical characteristics, packaging and labelling, production, plant requirements, identification and tracing of animals, and so on.

The bill identifies a second set of rules relating to trading goods that will not be subject to mutual recognition but will be subject to the principle of non-discrimination, which is obviously a lower trade threshold than mutual recognition. Again, it gives an indicative list, including

"the circumstances or manner in which goods are sold"

and requirements relating to transportation and storage.

The problem is that the bill creates a clear distinction between the two categories of rules. One set of rules comes under mutual recognition and another comes under non-discrimination, but there is not an exhaustive list to show which rules fall into which category. We have to decide which category those rules that are not listed as illustrative examples fall into.

Minimum price controls are not explicitly listed, so we have to figure out the underlying philosophy that distinguishes one group of rules from another and justifies the very different statutory treatments under the bill. The assumption that we would make, using our inherited EU law head, is that mutual recognition applies to any rule that would prevent the sale of a good unless changes were made to its innate or inherent characteristics, or any rule that would prevent the lawful sale of the good if the requirement was not complied with. It is not about the advertising or the shop premises; it is about the good itself.

It would be completely orthodox, in trade law terms, to say that insisting that a good must have a minimum price before it can be placed in the market lawfully is no different from saying that it must have recycled packaging or that it cannot contain dangerous chemicals. Price is such an inherent part of the good that you can align minimum price controls with inherent product requirements, such as those relating to packaging, labelling or composition. It is an open question, but in trade law terms it would be completely orthodox to make that distinction.

**John Mason:** If a bottle of English beer was being sold at the same price as a bottle of Scottish beer of the same strength, could that be counted as discrimination?

**Professor Dougan:** We are talking about mutual recognition.

**John Mason:** Right.

**Professor Dougan:** If the English beer, having been lawfully produced, marketed and sold in England, would have a significantly lower price than the Scottish equivalent, changing its price would mean that you were reregulating a product that had already been lawfully placed on the market in England. That is what mutual recognition is all about.

The underlying idea of mutual recognition is that, if a product has been lawfully placed on the market in one territory, it should be free for sale in

every other territory without any further regulatory requirements that limit access to the market. By taking that bottle of English beer, which might have been on sale for £1, and insisting that in Scotland it has to be on sale for at least £1.50, you are reregulating the beer and imposing an extra regulatory requirement that has to be complied with before the beer can be lawfully placed on the Scottish market. That type of situation is what mutual recognition is all about.

It is unfortunate that the bill does not give us a more definitive list of which rules fall into which category, but in trade law terms that analysis would be seen as completely orthodox.

**The Convener:** Before you continue, John, I see that Emily Lydgate would like to make a comment on that area.

**John Mason:** I would like to put a final question of Professor Dougan, if I may, and then we can come back to Emily Lydgate.

From what you said, Professor Dougan, if a beer can be sold for £1 in England and we want it to be sold for £1.50 here, that is okay at the moment, because that is an existing rule, but if we want to put it up to £2, we might be challenged in the courts.

**Professor Dougan:** Yes.

**John Mason:** Okay—that is a simple answer. Dr Lydgate, do you want to come in?

**Dr Lydgate:** I wanted to raise a question that I have about the bill, which is about how these market access principles would apply in situations of divergence in labelling. That is explicitly identified in the internal market white paper as an area of concern. I understand that there is an agreement on a harmonised approach. Let us say that a divergence in labelling occurred. It is confusing to sort out the areas in which the mutual recognition provisions apply from the areas in which non-discrimination applies but, in this case, I argue that mutual recognition would apply, because the issue is to do with how the product is produced rather than how it is sold. However, I flag that question.

09:45

The principle of mutual recognition simply requires that the product be sold and not that it be standardised. For example, there could be a situation in which England decided to change the threshold at which genetically modified organisms need to be labelled. I believe that the current figure is 1 per cent, but England could decide to change it to 5 per cent. The relevant labels would then disappear from some goods. I presume that those goods would be imported and would be exempt from the labelling requirement, or there could be something more cosmetic, such as different labelling requirements. That is an example of where a harmonised approach is more effective than just having mutual recognition, which would allow the proliferation of different approaches.

**Dean Lockhart (Mid Scotland and Fife) (Con):** I want to come back to the question of how and when the internal market legislation might apply in practice. The UK and Scottish Governments have both committed to common frameworks which, as we have heard, will cover the vast majority of the trade in the internal market. Those common frameworks will set out common standards, areas of divergence for devolved regulation and areas where it is competent for the devolved Administrations to diverge.

Evidence that has been given to the committee previously has suggested that, in reality, the internal market proposals will potentially apply only to a relatively small area of trade that falls outside the common frameworks. In effect, the proposals will act as an insurance policy or sweep-up mechanism for trade that is not dealt with in the common frameworks. Do you agree that, if and when the common frameworks are in place, the internal market legislation will in reality apply to a relatively small element of trade in the internal market?

**Dr Lydgate:** That would be the ideal landing ground, but there are a lot of questions about how the common frameworks are constituted and integrated into the United Kingdom Internal Market Bill.

I will give an example that picks up on what Professor Dougan said about the dynamic nature of common frameworks. You cannot have a static agreement about what regulations will be, because they change. Scotland has the UK Withdrawal from the European Union (Continuity) (Scotland) Bill, which proposes continued alignment with EU rules, although it does not specify which rules. That is of course significant.

For example, let us say that the EU decides to expand its restrictions on endocrine disruptors—that has been in the pipeline for a while and would entail new product restrictions on a whole host of sectors, such as toys, cosmetics and food contact materials—and then the UK decided not to introduce those restrictions. That would put Scotland in an interesting position vis-à-vis common frameworks. Would it integrate or diverge? If it diverged, it would be in the unfortunate situation of imposing stricter requirements on its manufacturing sector than those being imposed in the rest of the UK, and Scotland would also be required to import those non-complying products.

Common frameworks are definitely the way forward, but there are still a lot of questions about how they operate.

**Dean Lockhart:** Professor Dougan, what are your views on that?

**Professor Dougan:** I am glad that you came to me second, as I have had the chance to jot down four quick points—he said, holding up five fingers. It is four quick points, though. First, I endorse what Emily Lydgate said. Yes, of course this is an insurance policy, but that makes it sound like something that might be used only as a last resort or in rare circumstances. It is an insurance policy in the sense that it is a default position, but that position need not necessarily be rare or unusual; it just means that, as trade develops, regulatory preferences change, science and consumer demand throw up new challenges that regulators have to address and new barriers to trade will arise that fall outside the scope of the existing common frameworks. The whole point of internal market principles such as non-discrimination and mutual recognition is that they provide the default solution, which is a better phrase than "insurance policy".

My second point is that the UK Government has promised that Brexit will lead to a significant increase in the devolved competences of Scotland and Wales. If that promise is true, it means that the default insurance policy will have a more significant role to play. You cannot have it both ways: you cannot say that Brexit will lead to a significant increase in the powers of the devolved institutions but then deny that the United Kingdom Internal Market Bill will be more than a marginal phenomenon. The more devolved powers you have and the more trade barriers you are capable of creating, the more you will need this bill to address them. If Brexit leads to a significant increase in devolved powers, the bill will have a commensurately greater role to play in regulating the way in which those devolved powers operate in practice.

The third point is that we are still in the process of negotiating and finalising the common frameworks. Obviously, if that process falls apart, begins to break down or does not produce the results that are required, the bill's scope of application will be commensurately greater. I am not by nature a cynical person, but if I were being cynical, I would suggest that, in a way, the bill is the insurance policy against the need for common frameworks. In trade law terms, we would ordinarily pitch two absolutes in competition with each other; we would say that, if you want to solve barriers to cross-border trade, you can harmonise them, which is common frameworks, or you can use a strong principle of mutual recognition. However, you do not need both, because one or the other will do the job. If the harmonisation—or common frameworks—process fails, then a strong principle of mutual recognition will, in effect, do the job for you. You do not need harmonised frameworks any more if goods are simply free to be produced wherever they are produced and sold wherever you want them to be sold.

In a way, we can describe the bill as an insurance policy but, in a very different way, it is an insurance policy that almost removes the need for common frameworks for harmonisation if that process does not deliver the desired results.

**Dean Lockhart:** I thank you both for your responses. I want to follow up on the issue of the dynamic nature of common frameworks. Once they are agreed, significant areas of regulatory divergence will be recognised. It will involve not just existing static areas in which regulations are divergent across the UK but whole areas of devolved competence in which future changes in devolved regulation can be made. Does the panel recognise that the common frameworks will build in future flexibility for the devolved Administrations to change regulations in those areas and decide whether to harmonise or diverge within those areas of devolved competence?

**Professor Dougan:** It is a bit like the distinction between things on paper and things in practice that I mentioned at the start. Yes, on paper the common frameworks can leave scope for the exercise of devolved competences and divergent choices, but nothing in the bill prevents those divergent choices or exercises of devolved competence, even within the scope of common frameworks, from being subject to the principles of mutual recognition and non-discrimination in the field of goods, for example.

In a way, then, what you are saying is completely true, in that, on paper, the common frameworks are not some monolithic harmonisation that imposes uniform rules across all the territories; they leave room for devolved competence. However, the bill will subject the exercise of those devolved competences to the principles of non-discrimination and mutual recognition. Ultimately, therefore, common frameworks are not the answer to the problem that we have highlighted; they are simply the application of those problems in a slightly different regulatory context.

**Dean Lockhart:** Dr Lydgate, you mentioned the potential impact of the UK Withdrawal from the European Union (Continuity) (Scotland) Bill and Scotland keeping pace with EU law in future. What impact could the keeping pace powers have on the objective of common frameworks and harmonisation in the UK internal market?

**Dr Lydgate:** That will depend entirely on what the UK does with its regulation in future, which is a question that interests many of us.

The approach opens up wide scope for potential market access barriers between Scotland and the rest of the UK. Of course, those would be addressed under the internal market bill—meaning that if EU regulations led to product-related restrictions or bans, Scotland would still need to import the products from the rest of the UK and not discriminate against them on the basis of how they were labelled or presented. There is certainly scope for direct conflict there.

**Dean Lockhart:** Convener, I appreciate that I have taken up a bit of time, so I will stop there.

**The Convener:** Thank you.

**Patrick Harvie (Glasgow) (Green):** I will follow up on the notion of the bill providing either a default position or an insurance policy, as Professor Dougan described it, in the context of the negotiation of common frameworks. I suggest that the situation is even worse than that, because if this is a default, surely it weakens any incentive for the UK Government to sit down, negotiate and compromise in order to reach a common framework by mutual agreement.

If there is no incentive to do that, because the UK Government can always fall back on the default expectation of centralising power, surely we are less likely to reach agreement by negotiation and compromise. We will get that only if all parties and Governments in these islands recognise that reaching agreement is a way of solving or avoiding a problem that they all find disagreeable. Surely the bill makes it less likely that we will agree a negotiated, mutual resolution to some of the issues.

**Professor Dougan:** When I suggested, in answer to Dean Lockhart, that the cynical bit of me might suppose that the bill is, effectively, a way of not having to worry too much about common frameworks or future needs of harmonisation, I might have been expressing the same point in a more diplomatic way. I agree. The bill cuts across the whole debate about not just common frameworks right now but the framework for future common frameworks or harmonisation—or whatever term we want to use.

If we accept that internal markets are dynamic phenomena that need to be constantly managed, and that the process of managing the internal market is just as important as the substantive outcomes that are reached, the question that we have to address is this: what is the right balance in having principles of mutual recognition and non-discrimination, whereby different territories can go their own way but we find a method of managing the trade implications of that divergence, and how far we decide to harmonise and establish common frameworks and somehow come up with the same or similar solutions to comparable problems?

Many systems, including the EU system, are engaged in constantly striking a balance between those two things: when should the EU harmonise and when should it leave it to cassis de Dijon and the operation of market forces through the control of the principle of mutual recognition?

10:00

In a way, what Patrick Harvie says is completely right. A very strong principle of mutual recognition, or cassis de Dijon on steroids, weakens the need for common frameworks and harmonisation because the same result can effectively be achieved through the operation of market forces rather than centralised regulatory intervention. A default solution weakens the incentive to engage in the more complicated process of negotiation and compromise. Maybe I have just made the point in a more diplomatic way, but I agree with what was said.

**Patrick Harvie:** It sounds as though it will leave us in a similar position to the legislative consent mechanism, in which the Scottish Government or the Scottish Parliament is asked, “Please consent to this, or we will do it anyway.” That is the kind of power imbalance that we will have.

The witnesses have recognised that there is a bit of an assumption that any kind of regulatory divergence or difference is an unacceptable trade barrier, and that internal markets do have differences and divergences. Surely there is a strong case for working to the principle that it is only when the rules or standards are incompatible that we have a problem that cannot be resolved in the normal democratic way.

For example, one of the first policy areas that was mentioned in the internal market white paper that preceded the bill was building regulations. They have been fully devolved for more than 20 years and were separately administered even before devolution. If two jurisdictions within the UK have different standards about how efficient insulation products need to be, a manufacturer can decide whether to meet one standard or both. Manufacturers are free to decide whether they will comply with both standards. We only really have a problem if one jurisdiction says that the insulation has to be made from a minimum of 60 per cent organic material and the other jurisdiction says that it has to be made from a minimum of 60 per cent synthetic material, because a manufacturer is incapable of meeting both standards.

Is there not a case for saying that that is the principle that we should be identifying, and that

there is a problem only when it is impossible to comply with both sets of standards?

**Dr Lydgate:** The EU's approach has been to allow divergence where possible but, when harmonisation is necessary for free movement, it will be required. Within that, there is scope for divergence as long as countries are willing to put up with the market access barriers that you have identified.

That is where market power comes in. If you have a much larger economy with much more construction going on, it makes more sense for manufacturers to produce products to that standard than have a separate supply chain. An example of that would be in the trade agreement between the EU and Canada. Canada got increased low-tariff access for beef, but it has not used that and it has not exported to meet anywhere near its quota, because its supply chains are all set up to feed into the US market. It is just simply not economical for those farms to set up a separate supply chain just for the EU market. That is where the logic of market size comes in.

**Professor Dougan:** This is a useful point at which to draw a direct contrast between EU practice and the proposals in the bill. Everything depends on our starting assumption. Trade law gives us a toolbox. It provides us with a range of ways that we can manage markets, but it does not tell us what the best combination of those tools should be. We still have to make a value judgment when we start about which tools we want to use.

In the EU context, the basic assumption is that we want a well-regulated market that is left to the member states, unless the barriers to trade that are created are of such a nature and scale that they require centralised formalisation. The EU system works by member states, by default, regulating their marketplaces as they see fit, subject to the principle of mutual recognition. However, mutual recognition provides a broad range of exceptions and derogations, through which member states can justifiably maintain trade barriers for all manner of legitimate public interest reasons.

When a member state does that, it effectively flags up to the European Commission that there is a trade barrier, that it is a legitimate trade barrier, and that maybe the Commission should think about harmonisation. In that way, the emergence of legitimate trade barriers acts as a kickstart to the process of political dialogue, whereby the member states and the other EU institutions begin to think about just how serious a problem it is, what the best solution is to adopt in relation to it, and so on. We can almost say that mutual recognition in the EU context is a problem-identifying principle. It basically says, "Here is a problem. How are we going to solve it?"

The problem with the bill is that mutual recognition is not being used as a way of identifying problems so as to help find a political solution for their resolution. In effect, the bill is saying, "We have identified a problem, and we are going to sweep it aside through the operation of market forces." We can think about the bill as effectively subjecting the exercise of devolved competence to market forces, in a market where England makes up 80 or 85 per cent of market share.

That answers your question in a roundabout way. The starting assumption of the bill is not that the exercise of divergent regulatory preferences is an issue that we need to redress through political dialogue in order to identify legitimate public interests and decide when barriers to trade are justified or unjustified and how best to address them. The underlying starting point of the bill is that the exercise of devolved competence creates problems that we need to sweep away, and the tool that we will use to sweep them away is market forces, through the sheer size of the English economy. In practice, it is the English choice which will prevail, not the Scottish or the Welsh choice. That is a very different starting assumption from that of the EU.

**Patrick Harvie:** That is quite powerfully put. The last question that I want to explore with you both leads on from that. I have a concern that this process is about sweeping away not just devolved competences but democratic accountability. The judgment about whether a form of divergence or a potential market barrier is acceptable should be a democratically accountable judgment. Whether we see decisions being taken into the courts, being centralised to the UK Government or otherwise being taken away from parliamentary accountability, we have a problem.

It seems to me that, even if we had system of derogations and justifications added to the bill, it would still be unacceptable in terms of democratic accountability, because the devolved Government would have to apply for a derogation before it was able to make a regulatory proposal to Parliament. There has been only one session since devolution began in which a single political party had a majority in the Scottish Parliament. If we accept the principle that ministers do not represent a majority until Parliament has voted, surely the existence of derogations for which ministers have to apply are an inadequate democratic lock on the kind of legitimate choices that the Scottish Parliament or other Parliaments ought to be able to make.

**Professor Dougan:** In response to a couple of earlier questions, I indicated that, taking the bill as it stands and seeing how it could be readily amended, my bare minimum baseline for

improving the bill would be to widen the system of derogations and justifications.

One of the problems with the bill is that it tries to replace the processes of dialogue and negotiation to find political solutions to how we address the problem of barriers to trade, not only with the starting assumption that that is a problem that needs to be swept aside, but in the way that it proposes using automatic, legally enforceable principles, applicable before the courts, to do the job for it.

That is why I suggested that my preference would be that the trade issues that are created by the UK internal market are managed through a system of pre-legislative dialogue. It is not for me to speculate on whether that is best done by governments or parliamentary committees but, to me, a system of pre-legislative dialogue that tries to encourage an accountable political debate about whether a problem exists, its nature and scale, and the most appropriate solution to that problem, would be far preferable to an automatic legal rule—it is not even an assumption—that regulatory divergence is a problem that needs to be swept aside in practice.

**Dr Lydgate:** I will call attention to the fact that that brings up the question of who is deciding and who gets to determine whether a derogation is legitimate. The courts have quite a lot of power.

The complexity in the drafting of the bill struck me when I was reading it. Many terms, such as "relevant connection", "relevant requirement", "direct and indirect discrimination", need to be interpreted. I therefore agree that the bill replaces a political process with a judicial process and that there should be some other way of resolving those issues on an intergovernmental level.

The Competition and Markets Authority has been empowered with an advisory oversight role, which strikes me as being beyond the type of competences that it has now. Not to malign that body, but it seems to me that it would be appropriate to make sure that the CMA has representation from devolved nations so that it has a range of competence to be able to oversee some of the issues, which can be technical and specific to certain sectors.

**Patrick Harvie:** I presume that that would require expertise in environmental governance, public health and so on, which are not factors in the appointment of the CMA's board?

**Dr Lydgate:** Exactly.

**Jackie Baillie (Dumbarton) (Lab):** Patrick Harvie's questions lead neatly on to the area that I will explore.

Both our witnesses have talked about the need for new governance structures, dialogue and negotiation and the complexity of that. What do you think the institutional architecture needs to be to make that work?

**Dr Lydgate:** I will bring up the question of transparency. I have no idea what is going on in the common frameworks discussion. A lot of us are interested in how robust those discussions are and how they are progressing. The role of the devolved nations in trade negotiations is an analogous problem. We know that there is some discussion about a concordat on international trade, but I do not think that that has appeared and I do not have a sense of what that could look like, in contrast to the Internal Market Bill, which sets out procedures and competences.

There is some asymmetry and simply putting some of the devolved nations' inputs into legislative form would be useful in the context of a lack of trust, as would developing dialogues that have a formal role in the end result. I am not sure how exactly that would happen because devolution is not my area—I am a trade lawyer—so I am a little bit hampered in spelling it out, but that is the gist of it.

10:15

**Jackie Baillie:** Professor Dougan talked earlier about pre-legislative dialogue. However, I am conscious that the European Union has the European Commission, which has a neutral, independent governance architecture that appears to be missing from this bill. It is almost a dispute resolution mechanism. Do you think that there is a need for that?

**Dr Lydgate:** Yes, and the question is not only about having a body like that; it is about defining the powers of devolved nations, in essence, to steer the discussion. I am again not sure what would be the best way to do that, so I will refer to Professor Dougan.

**Professor Dougan:** Like Emily, I am not a devolution specialist. Therefore, I will use the EU system—which I know very well—as an example, and I will then draw out the features that distinguish it from the situation in this bill.

The starting point is the fairly essential proposition that the principle of mutual recognition depends on trust. Indeed, most trade principles do, but that one does in particular: the two go completely hand in hand. It is very difficult to have a situation in which a territory is simply expected to let imported goods and services be freely available to its citizens and consumers without any further or additional regulation and without those goods and services having to comply with the territory's own local legislation unless there is a high level of mutual trust between all of the participating territories that they will all respect

certain common values and standards, and that the rules will apply fairly between them.

A huge amount of the EU's institutional and governance effort goes into creating the underlying mutual trust that makes the system of mutual recognition and harmonisation work. It is why, for example, there is a very complicated legislated process at EU level that tries to balance the interests of the large member states and the small ones. It is why the independent Commission, which is meant to oversee the operation of the single market without any influence from any given member state, exists.

There is an independent dispute settlement mechanism through the European Court of Justice so that there is a judicial body that is independent of any of the participating territories. Even then, we can see what happens when mutual trust breaks down. We have seen it in fields like criminal law co-operation and, more recently, in the field of medical supplies when the pandemic hit the EU. When mutual trust breaks down, mutual recognition breaks down as well.

Therefore, the key challenge that the UK has to think about is how it maintains a system of mutual trust that will justify and make operational the core principle of mutual recognition, which underlines this bill. The problem is that the bill does nothing about that. It simply assumes that the principle of mutual recognition can be transposed on to the UK's existing empirical and constitutional structures and that it will operate automatically as a set of rules to deal with trade problems. I am not sure that that is a sustainable political or constitutional proposition.

I mentioned having a pre-legislative dialogue whereby the four territories would sit down and think about potential trade barriers and how best to resolve them through an agreed political solution. However, even that pre-supposes a level of mutual trust and cooperation between the political actors that are involved to make that system work. I suppose that one of the concerns that has been raised about the UK internal market as a phenomenon is that, at present, there does not appear to be that mutual trust between the Administrations that currently govern different parts of the UK. To a private citizen such as me, it certainly appears that way.

My answer is that mutual recognition requires mutual trust, and one of the big lacunae in the bill is that it does nothing to create the institutional framework that would generate the mutual trust that could possibly justify a market system as strong as the one that the bill proposes.

**Jackie Baillie:** Thank you, Professor Dougan. That is very helpful indeed.

**The Convener:** I thank Professor Dougan and Dr Lydgate for their very helpful evidence.

I will suspend the meeting to allow our next panel of witnesses to join us. We will recommence at 10.30.

10:20

*Meeting suspended.*

10:30

*On resuming—*

# Trade Bill

**The Convener:** We now turn to evidence on the UK Trade Bill 2019-21 and its associated legislative consent motion. First, we will hear from the Rt Hon Greg Hands MP, who is the Minister of State for Trade Policy with the UK Government. I warmly welcome Mr Hands and I invite him to make a short opening statement, if he so wishes.

**The Rt Hon Greg Hands MP (Minister of State for Trade Policy):** Thank you, convener, and thank you for inviting me to attend the committee. I hope that you can hear me okay. I look forward to the discussion and to assisting the committee today with its scrutiny of the Trade Bill. As you know, I first appeared in person at your committee in March 2016 to talk about the fiscal framework. I take my interactions with the Scottish Parliament very seriously, so it is good to be back with you again today.

In relation to the trade bill, I emphasise that, as with the Trade Bill 2017-19, which the committee considered in 2018, this Trade Bill covers only trade agreements that the EU had in place as at 31 January 2020. As such, and as the Scottish Government has noted in its legislative consent memorandum, the bill is essential for providing certainty, continuity and stability in our existing trading relationships, and for businesses and consumers in all parts of the UK.

Throughout the passage of both Trade Bills, we have taken significant steps to address the issues and concerns that were raised by the Scottish Government and by the committee. I am pleased that that has led to the Scottish Government recommending consent for all the relevant clauses, and I hope that our discussion will also lead the committee to support that.

The main clauses for which we are seeking consent are those that relate to the concurrent powers in the bill, which will be used to implement the trade agreement that we are transitioning. Because parts of those agreements touch on devolved matters, we have put in place concurrent powers to provide greater flexibility in how continuity agreements will be implemented. That will allow each devolved Administration to implement the agreements, independently in some cases, while also allowing the UK Government to legislate on a UK-wide basis when it makes practical sense for it to do so.

When the committee scrutinised the previous bill, some members expressed uncertainty about how or whether the agreements would be transitioned. However, since then, 20 continuity agreements have been signed with 48 countries, covering trade worth more than £110 billion, in 2018 figures. That represents 74 per cent of the trade with countries with which we were seeking continuity before the withdrawal agreement was signed.

The UK Parliament has had the opportunity to scrutinise fully all the continuity trade agreements that we have signed, in line with the framework that was set out in the Constitutional Reform and Governance Act 2010, also known as CRAG. Parliamentary reports have been laid alongside each continuity trade agreement to explain our approach to delivering continuity with each partner after the transition period ends. Those reports make it clear that all the agreements that have been signed to date provide for the maximum level of continuity. Any changes that have been required in order to achieve that in practice have been set out and explained.

I hope that that provides the committee with greater clarity about what the concurrent powers will and will not be used for, but I also recognise that the devolved Administrations and legislatures want additional reassurance that the powers will be used appropriately. That is why we have committed to not normally using the concurrent powers in areas of devolved competence without the consent of the relevant devolved Administration or Administrations, and never without consulting them first. That is one of the many commitments and amendments to the bill that we have made at the request of the devolved Administrations. Those are set out in full in the Scottish Government's memorandum.

In particular, I would like to highlight the amendment that we have made in relation to the restrictions on devolved ministers' use of the powers in the bill. The Scottish Government and the committee raised concerns about the restriction in the Trade Bill 2017-19 relating to section 12 of the European Union (Withdrawal) Act 2018. We have listened to those concerns and have removed that restriction for the Trade Bill 2020. We have taken great steps to ensure that the bill reflects the views of the devolved Administrations and legislatures, and I am confident that the bill respects the devolution settlement.

I know that, although it is outside the scope of the bill, the wider role of the devolved Administrations in international trade is of great interest to the committee. We have now established with devolved ministers a ministerial forum for trade that meets regularly to discuss all aspects of our trade policy. It had its inaugural meeting in January and has met twice since then. I chaired its most recent meeting in July, when we

discussed the progress of all of our negotiations in detail.

I also have regular bilateral discussions with Scottish Government minister Ivan McKee—I think that you will hear from him after me—the most recent of which was on the conclusion of the Japan agreement the week before last.

We have also established structured engagement at official level; every six weeks the senior officials group meets, and there are regular updates to devolved Administrations' officials from our chief negotiators. That engagement is supplemented by day-to-day engagement on the technical detail of our policy.

The impact of that engagement can be seen in how the Scottish Government's perspective has been reflected in key parts of the UK-Japan comprehensive economic partnership agreement, which was agreed in principle earlier this month. The Scottish Government made it clear that it wanted priority to be given to greater ambition in financial services. That is reflected in the improved market access that we have secured for UK financial services, including greater transparency and streamlined application processes for UK firms seeking licences to operate in Japan.

The deal also creates an annual dialogue between Her Majesty's Treasury, UK financial regulators and Japan's Financial Services Agency that will explore ways to further reduce regulatory friction—which would be impossible were the UK still to be in the European Union. Financial services are one of Scotland's largest exports, so that example clearly demonstrates the benefits that Scotland stands to gain as part of the agreement and our wider independent trade policy.

I will give another example. Scottish stakeholders have emphasised the importance of geographical indications. Again, the agreement secures additional benefits beyond the EU-Japan deal that mean that iconic Scottish products such as Scotch beef and lamb could for the first time be protected in the Japanese market.

In essence, the bill is about continuity and certainty: continuity of the existing trade agreements that we have through our membership of the EU, and the certainty that continuity offers for businesses in Scotland and throughout the UK, which is especially important in this time of global economic uncertainty. We are determined to continue to engage effectively with the devolved Administrations across all areas of trade policy in order to achieve that, so I look forward to continuing our dialogue to ensure that that co-operation is successful.

Thank you, again. I look forward to questions from the committee.

**The Convener:** Thank you for that detailed and helpful opening statement. If you do not mind, I will begin the questions.

During House of Commons scrutiny of the bill, you explained that because trade agreements under the bill had previously been scrutinised as EU agreements, it would not be proportionate use of parliamentary time to give those agreements further scrutiny. However, as the Government notes in its LCM, the powers could also be used in implementation of entirely new trade arrangements in circumstances in which the trading partners in those agreements have existing agreements with the EU. Why does the bill not provide for devolved parliamentary scrutiny of each rolled-over agreement, in order to enable proper scrutiny of new parts, on devolved areas of responsibility, of rolled-over agreements?

**Greg Hands:** You are right: that has been an area of question that has featured throughout the Trade Bill process. As I may have mentioned, I have, rather unusually for a minister, taken a trade bill through the House of Commons twice—the Trade Bill 2017-19 and the current one.

The only such countries that would be in the scope of the powers are ones with which the EU had a trade agreement signed before 31 January. That excludes, for example, the United States, Australia and the Mercosur countries. We should be clear that the powers would be purely for agreements with countries such as I have described.

The purpose of the continuity programme is, in general, to stick as closely as possible to the original agreement. That takes us all the way back to 2016. The UK Government made a judgment call that trying to reopen all 40 agreements would be practically rather difficult, and might mean that we would be unable to roll over enough of the agreements in time. That time was originally envisaged to be by March 2019, of course. Basically, we decided to stay as close as possible to the original agreement.

So far, 20 of the 40 agreements that have been rolled over stick very close to the original agreement. As you have rightly pointed out, they have been through the existing House of Commons and House of Lords scrutiny system, and have been scrutinised as EU agreements. However, as you have also rightly pointed out, there is scope for a new agreement or a substantially changed agreement that is based on the original agreement. That is close to what we have just done with Japan, which I talked about in my opening statement.

We have laid on additional scrutiny at UK level and are having additional interaction with the Scottish Government and the other devolved

Administrations. At all stages, I have talked through what we have been doing with Japan with the Scottish Government's Minister for Trade, Investment and Innovation, Ivan McKee. As I mentioned, I had a call with him just last Monday, I think, in which I took him through a lot of the detail of the agreement.

In the UK Parliament, we have had additional scrutiny of the Japan agreement. The Secretary of State for International Trade has made an oral statement and, before we made the agreement, we tabled a scoping assessment on the negotiation objectives for the agreement. All those things were on top of what one would normally have expected for a simple roll-over agreement.

The House of Commons has the ability to scrutinise the agreement further, of course. We will publish the impact assessment next month. There will then be the opportunity for both UK Houses of Parliament to scrutinise the agreement. The House of Commons will have the opportunity to do so through the CRAG process, and the House of Lords will have the opportunity to do so, as well, if it wishes to do so.

The convener was right to ask the question. As you rightly pointed out, it has been asked a few times during the passage of the bill. However, the arrangements that are in place are proportionate and allow sufficient parliamentary scrutiny—in particular, of new agreements with countries with which the EU had an existing agreement on 31 January 2020.

**The Convener:** You can probably see the Scottish Parliament's dilemma. If there is a new part of a rolled-over trade agreement that engages devolved areas, although there might be consultation of a Scottish Government minister, there is no formal role in legislation that enables the Scottish Parliament to give a view on whether that new part is appropriate or otherwise. I ask you and the UK Government to have another look at that to ensure that the proper scrutiny role of the devolved institutions is recognised.

**Greg Hands:** I am very happy to have a further discussion with Ivan McKee in particular about how your scrutiny might be able to kick in. I am keen to work with you and to make sure that the Scottish Parliament is involved in our trade policy. It is important.

10:45

I mentioned the Japan deal and the US deal. The scoping assessment shows that Scotland will benefit more from that than any other nation or region of the UK. I am keen for you to have an appropriate role. We respect the devolution settlement—while remembering that international trade is a reserved matter—and we know that trade has consequences at the devolved level. I am happy to take that away and to reflect on what you have said. I could perhaps also speak with the Scottish Government to see what we can do.

**The Convener:** Thank you for that commitment. It is helpful.

The committee has stated in a number of reports—including in the Trade Bill LCM report—that provisions that would allow UK ministers to make statutory instruments in devolved areas, without any statutory requirement to seek the consent of Scottish ministers or the Scottish Parliament, cut across the devolution settlement.

You have confirmed in the House of Commons your commitment that UK Government ministers will not normally use the powers that will be conferred by the bill in devolved areas without the consent of Scottish and other devolved Governments' ministers, and that you will never do so without consulting them. That is helpful. Why is that commitment not in the bill?

**Greg Hands:** You are right; we have come to a good arrangement. We will not normally use the powers within areas of devolved competence without the agreement of the devolved Administrations, and never without consulting them. That is the right course.

That arrangement is not in the bill because of the legal status of international trade, which is a reserved matter. It is important for us to keep that and to make sure that the two Governments work well together on that. I do not think that it is necessary or desirable to put the confirmation that you asked for in the bill because that would create the potential to erode the legal status of international trade as a reserved matter.

The arrangements that we have in place will work well, and have done so already. We have had discussions with the Scottish Government on the 20 agreements that we have so far rolled over.

**The Convener:** I hear your answer, but I am a bit sceptical about whether what I suggest would undermine the position of the UK Government in the way that you have outlined. It is already enshrined in various pieces of legislation through the Sewel convention; this would be no different, whatever we think of the Sewel convention.

**Murdo Fraser:** I have a follow-up to the convener's line of questioning. You rightly said that it is important that we respect the devolution settlement, and that trade policy is reserved to Westminster. You also said that there is an undertaking that UK ministers will consult the devolved Administrations. Do you agree that to give the devolved Administrations an effective right of veto over future trade agreements would not be in line with the devolution settlement?

**Greg Hands:** That is right. There should not be a veto. That is important because Scottish producers and consumers also need access to those important UK trade agreements. We must make sure that the trade agreement will apply throughout the four nations and all the regions of the UK. That is also important for those who want to export from Scotland—I mentioned Japan earlier—and for consumers in Scotland.

It is important that the reserved nature of trade policy be respected. There should be no veto for any of the three devolved Administrations.

**Murdo Fraser:** Thank you for that. Let us move on to the background to the bill and why it is required. What would be the impact for Scottish businesses and exporters if the Trade Bill were not put in place? For example, would there be a risk of damaging competition from competitor countries such as China?

**Greg Hands:** If the Trade Bill did not get on to the statute book, there would be major implications. It is currently going through the House of Lords. It completed its passage through the House of Commons in July and has had its second reading in the Lords, so it is going well so far.

There are four principal areas of the bill, and there would be implications for all four if the bill were not passed. For example, it could endanger the UK's accession to the Government procurement agreement, which is what is called a plurilateral World Trade Organization agreement of 20 countries allowing access to each other's procurement market—which would allow UK businesses to have access to procurement bids in other countries such as the United States, Australia and Japan. There would also be an impact on organisations doing tenders in Scotland—for example, Government bodies would not necessarily be able to get the best price or service if the UK was no longer in the Government procurement group.

Secondly, there would be an impact in terms of the 40 EU trade agreements, some of which are extremely important. We have already talked about the agreement with Japan. There is also a considerable amount of trade with Canada, Switzerland and South Africa—the figure is about £110 billion—which could be at risk if the Trade Bill did not become law.

On trade remedies and defences, not having the trade remedies authority set up in statute could have significant implications for our trade defences. When we are taking action against something like the dumping of steel goods or ceramics into the UK market by producers in countries such as China, the legal basis for those actions could be called into question without a legally set up trade remedies authority.

The fourth area concerns data-sharing powers. The ability to share trade data at Her Majesty's Revenue and Customs and beyond could also be called into question if the bill did not become an act. It is very much about continuity. The implications for a lot of the UK's current trade practices could be very severe if the Trade Bill did not become law.

**Murdo Fraser:** Thank you for that comprehensive answer. I have one final question. The bill deals only with trade agreements that have already been entered into. If any new trade agreements are negotiated, is it correct that those will require a separate mechanism and legislative vehicle?

**Greg Hands:** That is absolutely correct. It applies only to countries with which the EU had a trade agreement prior to the withdrawal date of 31 January 2020. The convener pointed out, rightly, that it could theoretically apply to a new trade agreement with one of those partners, which is what we have with Japan, but it does not apply to countries with which the EU does not have a trade agreement, such as the United States, Australia, Mercosur or India.

**Murdo Fraser:** Thank you. That is very helpful.

**Tom Arthur (Renfrewshire South) (SNP):** Good morning, minister. I have a brief supplementary question on a point raised by Murdo Fraser, with which I understand that you agreed. The devolved Parliaments do not have a power of veto, and the view of the UK Government is that they should not have such a power. The corollary of that is that the UK would and should have a power to impose agreements. If a scenario arose in which the Scottish Government, Scottish Parliament and a majority of Scottish MPs were opposed to a trade proposal by the UK Government, under either the bill that we are discussing or any future agreements, would the UK Government be minded to press the pause button and seek to engage in discussions to find consensus, or is its view that it is a reserved matter and for the UK Government and Parliament to decide?

**Greg Hands:** Thank you, Mr Arthur. That is a good question. The answer is that we should always engage in discussion. First, as I mentioned earlier, it has always been a priority of mine, since I began at the department, at its inception, to ensure that our international trade policy has support in all four nations of the United Kingdom. The policy is designed to benefit all four nations. As I mentioned earlier, the scoping analysis for the US agreement shows that Scotland will benefit more than any other nation or region of the UK by

having a free trade agreement with the United States. My starting point has always been that it is our firm policy to ensure that all four nations of the UK benefit.

Secondly, we interact frequently and directly with Scottish businesses and consumers. Last week, I was talking to the Scottish Chambers of Commerce; later today I am doing a British-American webinar with businesses in Scotland on the UK-US free trade agreement. As you probably know, NFU Scotland is on our Trade and Agriculture Commission. I have recently met the NFUS, the Scottish Smoked Salmon Producers Association and lots of other Scottish bodies directly.

The third area is direct interaction with the Scottish Government. Since I returned to the post of minister with responsibility for the devolved aspects of trade, in May, I have had five meetings with Ivan McKee, whom you will hear from later. I am not telling you anything that you do not already know when I say that Ivan McKee and I do not agree on everything, but that interaction is very strong and frequent.

I do not think that we would get to a position where we would have a trade agreement that would meet strong opposition from any of the four nations of the UK or any of the English regions. That would not be the case. However, it is important for the devolved Administrations not to have a veto. We will not be in a position where we have done a trade agreement that is wildly unpopular in one of the four nations of the UK.

**Tom Arthur:** Are you absolutely committed to avoiding a scenario in which the Scottish Government, the Scottish Parliament and the majority of Scottish MPs are opposed to a trade deal that the UK Government chooses to go ahead with anyway? Is that something that you want to avoid, and will you strain every sinew to ensure that that does not happen?

**Greg Hands:** As I said, our objective is to have a trade policy that works for the whole of the UK. That is what we have had so far in the 20 rolled-over agreements. No one has pointed out anything in those rolled-over agreements that would be unpopular or detrimental to Scottish interests. It is our intention to negotiate on behalf of the UK, exactly as the Scottish people would expect us to do, and to get agreements that work for the whole of the UK.

I am acutely aware of the importance of Scottish goods and services in our trade policy. As I mentioned, I meet Scottish producers and businesses very regularly in relation to both goods and services, and we need to ensure that they benefit from those trade agreements. In my slightly wonkish world of trade policy, people can get bogged down in the esoteric side of it, but the most important thing is to deliver things that will benefit businesses and consumers. That applies to all four nations and all regions of the UK.

**Angela Constance:** We all understand that the essence of the bill is about rolling over current agreements, but, on several occasions today, the minister has made quite loose statements about how Scotland should be involved in trade policy. I want to highlight to the minister that, in 2019, the Constitution Committee at Westminster recommended a role for the devolved nations in the negotiation and scrutiny of trade agreements and said that the devolved nations should "be effectively involved".

I put it to Mr Hands that the involvement of the devolved nations surely amounts to something more than Greg and Ivan having a wee chat on the phone; or more, indeed, than the minister doing his job by engaging with Scottish business—which we would all accept as vitally important but which, I suggest, is the bare minimum of his job description. Does Mr Hands agree with the House of Lords Constitution Committee? How will he—or will he not—implement the recommendations of that committee?

11:00

**Greg Hands:** I will go into a little more detail about our interaction. It is not just at ministerial level; it is important for us to involve Scottish Government officials as well.

We have a senior officials group of UK Government and Scottish Government officials, which meets every six weeks to discuss trade policy. That has been going well. We also have the ministerial forum for trade, which has had three meetings so far this year and which is also going well. That involves me, Ivan McKee, Baroness Morgan and Diane Dodds in Northern Ireland.

Those kinds of things enable us to have regular and frequent interactions. As I have said, I talk to the Scottish Government minister on the specific agreements that are coming up. For example, we had a very good discussion on Japan. As you can ask him, I am constantly asking what his main asks are, from the Scottish Government's perspective, in the different agreements that are coming up. I make sure that the asks of the Scottish Government and the other devolved Administrations—and also, directly, as you would expect of me, the asks of Scottish businesses—are listened to.

I think that that structure is working well. The committee's involvement and scrutiny are also very welcome.

**Angela Constance:** What about the Constitution Committee's recommendation that the devolved nations should be involved in the negotiation and scrutiny of future trade agreements? Do you have a view on that?

**Greg Hands:** I do not agree that the devolved Administrations should be at the table when the negotiations are happening; however, I agree that there should be regular interaction and regular briefing of ministers and Scottish Government officials about what is going on at a negotiation and what we think is happening with an agreement.

We will share the text of the Japan agreement, which is currently going through legal scrubbing. Throughout the process, we allow significant access by the Scottish Government and the other devolved Administrations. That is the appropriate level; it respects the fact that international trade is a reserved matter.

**Angela Constance:** Okay. You disagree with your own Westminster committee about involvement in negotiations and scrutiny; your idea is just to stick to a little bit of chat.

I will move on, convener, to my final question for Mr Hands. Although I recognise the scope of the bill—what it is and is not about—it is crucial that we all look to the future. When it comes to establishing future economic and trading agreements, how does Mr Hands propose to overcome the reputational damage that the UK has inflicted on itself as a result of its United Kingdom Internal Market Bill? By the admission of UK Government ministers, that bill breaches international law.

As we have heard from Tory grandee after Tory grandee, who on earth is going to believe, when it comes to establishing future arrangements, that the UK Government will, indeed, uphold what it signs up to? Michael Howard has expressed his concern at the UK Parliament using its sovereignty to break international law. What is Mr Hands going to do to repair the damaged reputation of the UK Government, for future trade agreements?

**Greg Hands:** The United Kingdom Internal Market Bill is an entirely separate piece of legislation that is not being led on by the Department for International Trade.

I would say two things. First, the UKIM bill is central for the good operation of the UK's internal market, which is incredibly important for Scottish businesses. The amount of goods that leave Scotland and go to the rest of the UK is vastly larger than the volume that I am talking about in relation to international trade. Therefore, in terms of the impact on Scottish businesses and their ability to sell their produce and services into the UK market, the UKIM bill is incredibly important.

**Angela Constance:** Forgive me for interrupting, but the nub of my question really is about who is going to trust you if your Government is not going to stick to its word. When you have to traipse round the world to negotiate trade agreements on all our behalf, whether I like it or not, who is going to trust that you will stick to your word?

**Greg Hands:** I absolutely stick to my guns that the United Kingdom Internal Market Bill is an essential piece of legislation and an important piece of legislation for businesses in Scotland. Since the row about that bill, we have made an agreement in principle with Japan on the UK-Japan trade deal. Therefore, the Japanese clearly trust our word when it comes to international trade agreements. That deals with the basis of your question and is the proof of the pudding.

**Angela Constance:** We have heard interesting evidence on the Japanese agreement, but I will leave it there.

**Dean Lockhart:** I want to follow up on the economic partnership agreement that was signed with Japan. Last week, I chaired a meeting of the cross-party group in the Scottish Parliament on Japan at which the consul general of Japan highlighted that, under the EPA, there will be increases in the number of Scottish products that benefit from protected geographical indication. That means that Scottish produce such as salmon, cheese, wool and beef will have much better and freer access to the market in Japan. Will the minister expand on the opportunities that are available to businesses in Scotland under the EPA? Is it a good example of how future free trade agreements will be concluded after the transition period?

**Greg Hands:** Yes, that is a good example. It takes the EU's existing agreement, for which obviously the UK was part of the EU's negotiation team at the time, locks in all the gains and goes significantly further. I think that 98 per cent of UK goods that currently go to Japan will remain tariff free when our new agreement comes into effect, on 1 January.

There are three areas in particular in which we have been able to go further than the EU. One is on data and digital. We have removed requirements for data localisation. Those are important in Brussels but, in a UK context, we want tech innovation, and removing those requirements enables our tech providers to innovate more and do more cross-border digital trade with Japan, in particular.

The second area is financial services, which again are important for the Scottish economy. We have gone further than the EU's existing agreements on financial services to ensure that it is easier for UK businesses to get a licence to

operate in Japan, which will be of great benefit to Scottish financial services providers. We also have better rules of origin within the deal.

The final area, which you have mentioned, is geographical indications. The EU-Japan deal had only seven UK geographical indications; we now have the potential for 70 geographical indications, which includes a lot of Scottish produce, such as beef, lamb, Arbroath smokies and, I think, Stornoway black pudding, which Angus MacNeil, the chair of the International Trade Committee here in London, was particularly pleased to hear about. There is potential for that to have a geographical indication when it is sold in Japan. The agreement will increase recognition among consumers in Japan of high-quality UK produce, and produce from Scotland will be a big part of that.

That is a good example of how we can go further than the EU. The UK's ability to do its own independent trade agreements—we are, after all, the world's fifth largest economy—is one of the biggest opportunities that the United Kingdom and all its nations face.

**Dean Lockhart:** That sounds as though there are genuine and significant opportunities to explore under the EPA with Japan, and I know that the consul-general of Japan was very excited about those opportunities.

I want to turn to future free trade agreements that will be entered into after the transition period. Some concerns have been raised about the potential for the UK Government to lower standards as part of the negotiations to secure future agreements. However, UK regulatory standards already go beyond EU standards in many areas, including health and safety, maternity and paternity leave and flexible working, to name but a few. Will the minister expand on the UK Government's strategic priorities when negotiating and entering future free trade agreements? Will maintaining world-leading regulatory standards be central to the UK Government's approach to those future agreements?

**Greg Hands:** The answer is clearly yes. We were absolutely clear in our manifesto for the election last December about the importance of maintaining and not compromising the UK's excellent standards. We were explicit that there would be no compromise with any of our trade partners on standards in areas such as animal welfare, the environment and food safety. That is very important to us and to consumers right across the UK. Those standards will remain very high.

Nothing in any trade agreement would force the UK to change its domestic or import standards. It is entirely for the UK Government and devolved Administrations to set those standards. Nothing in a trade agreement would prevent us from keeping or setting our own high domestic standards. I am absolutely confident on that front. The UK Government is absolutely committed to keeping those standards.

**Patrick Harvie:** You are clearly satisfied with your engagement with the Scottish Government. You believe that your approach meets the expectation and is agreeable. However, passing such legislation does not require us to agree that there is good intention; it is about setting the rules by which not only you but the UK Government and your successors will operate. This could have been an opportunity to set the new approach—a modern, democratic approach—to how such matters are handled not only in relation to the trade agreements with the limited range of countries that are under current consideration but in the future.

You could have introduced a bill that, for example, required UK ministers to negotiate within the UK prior to the establishment of their trade objectives, which would allow civil society to contribute to or comment on draft negotiating objectives. You could have required that a negotiating mandate for a trade agreement be signed off by a joint ministerial committee, following genuine input, dialogue and agreement by negotiation at an intergovernmental level within the UK. You could have introduced a bill that required parliamentary scrutiny of successive draft negotiating texts. The European Parliament has the opportunity to scrutinise similar texts when the EU is negotiating agreements.

You could have introduced a bill that required multiple levels of parliamentary sign-off which, even if the devolved input were limited in scope to devolved matters, would have established a modern, democratic approach to the making of trade policy and agreements. The bill does not do any of that. Why not?

11:15

**Greg Hands:** Thank you for that question, Mr Harvie—let me deal with each part of it.

On the interaction that we have had with the Scottish Government on the bill, as I said in my opening statement and again emphasise, we have listened to the Scottish Government and the other devolved Administrations in key areas. The amendment that we made to the restriction in the bill on the devolved ministers' use of powers was an important change—we listened in that regard and made the change. We also listened to the concern about the restriction in the bill relating to section 12 of the European Union (Withdrawal) Act 2018 and removed that restriction. If there is any suggestion that we have not interacted well with

the devolved Administrations in regard to the Trade Bill, I point out that the changes that we have made to the bill have come as a direct result of representations from the Scottish Government and other devolved Administrations.

We could have introduced lots of things into the bill—that is not an unreasonable point of view—but our most important objective has been to secure continuity. In reply to Murdo Fraser, I talked about the importance of the continuity aspects of the bill, such as the EU trade agreements, the World Trade Organization's agreement on Government procurement and the ability to defend UK and Scottish producers from unfair trade practices in relation to dumping and so on, which is a very important aspect of our trade continuity and is currently an EU competence. As I said, our principal objective for the bill since the beginning—it remains the case—has been to secure trade continuity.

The third area of Patrick Harvie's question was parliamentary scrutiny. We are confident that our offer on parliamentary scrutiny stands up well against comparator countries with a similar constitutional set-up to ours, such as Canada, Australia and New Zealand. Our offer on parliamentary scrutiny is as least as good as those in any of the three democracies that are most analogous to the UK system of parliamentary democracy.

It would be worth looking at the whole process that we follow in the UK Parliament for each of the proposed negotiations. We publish a scoping assessment, which is an assessment of what we think the impact of the trade deal might be, including on the economy overall. It is an interesting exercise, because it is an assessment of a trade deal that we have not even started negotiating at that point. It shows the scope for doing a trade deal with, for example, Australia and looks at the opportunities and challenges of that.

So far, we have had an oral statement from the secretary of state—[*Inaudible*.] We publish at the end of each negotiation round a written ministerial statement on how the negotiation round was proceeding. There are frequent interactions with the International Trade Committee throughout the process. For the agreement with Japan and other countries, we will publish comprehensive impact assessments that will be scrutinised by Parliament, which then has the opportunity, under the Constitutional Reform and Governance Act 2010, to have a vote on the deal or, at least, to give it further scrutiny.

As I said, we are confident that our overall offer on parliamentary scrutiny is strong and at least as good as those of comparator systems.

**Patrick Harvie:** I will have one more attempt to explore this matter, although I suspect that we will not agree.

I suggest that, although continuity is your objective, we will not get continuity in the democratic accountability of power when compared with the way in which the EU makes trade agreements. Most famously, the transatlantic trade and investment partnership raised serious concerns, and people across many European countries, including Scotland and the rest of the UK, campaigned against it, because they regarded it as harmful. Civil society, non-governmental organisations, trade unions and others campaigned, held power to account and prevented the Governments of the EU from doing something that they regarded as harmful. Under the Trade Bill, we will not have continuity of democratic accountability of power when it comes to the making of trade policy or trade agreements.

**Greg Hands:** I am not sure that I caught the end of that question, but there is complete continuity here with the system that the UK has for the approval of international treaties. There is the Constitutional Reform and Governance Act 2010. On top of that, we have added in a lot of additional layers of scrutiny, for example, through the involvement of the International Trade Committee and the publication of the relevant documents, which goes way beyond continuity. If it was purely a case of continuity, I could just refer you to the Constitutional Reform and Governance Act 2010, which has been in operation for the past 10 years, but we have gone significantly further through our interaction with Parliaments, through publication, through our transparency and through the involvement of the International Trade Committee. I am confident that, in this case, when it comes to our offer on parliamentary scrutiny, we are going much further than continuity.

**Patrick Harvie:** Can you point to any example where the proposed legislation requires agreement in the joint ministerial committee, for example, in relation to trade matters that will impact on devolved competence?

**Greg Hands:** As it happens, the new Japan deal does not need a change in primary legislation to make it effective, but if it did, that primary legislation would have to go through the relevant legislatures in the UK. That is an example of a case in which Parliaments would have a clear say on any resulting legislation. As it happens, we do not believe that primary legislation is required for the Japan deal.

In answer to your question, we are confident that, where Parliament previously had a role in implementing or changing legislation, that remains as much the case today as it did then.

**Alexander Burnett (Aberdeenshire West) (Con):** Good morning, minister. Despite the fact that there are those who would wish it otherwise, it has been very reassuring to hear that countries such as Japan still trust us and are keen to make deals. What other lessons have you learned from the Japan agreement? Is it a template for the remaining 20 or so agreements?

**Greg Hands:** That is a good question. Quite a few of the agreements were opposed by a number of Scottish members of Parliament when they went through Parliament. To the best of my knowledge, the Scottish National Party Westminster MPs did not vote for any of them. [*Inaudible*.]—abstained on the Japan and the Singapore agreements. Others might complain about continuity of trade agreements, but it is worth remembering that, in the case of the SNP, at least, they often opposed those agreements in the first place.

In response to your broader question, the Japan agreement shows that the UK has the ability to roll over current EU trade agreements and make them still operable in a way that involves everybody and does not dilute or diminish our standards. Secondly, it shows our ability to improve on those agreements. I mentioned the three or four key areas of improvement in the Japan agreement. Thirdly, it shows that the UK is back on the world stage with its own independent trade policy, which has not been the case since the early 1970s, and that is has the ability to sign international trade agreements and to retrieve our independent seat at the WTO.

Those are all incredibly important things for our trade policy going forward and the position of the UK—and all the nations of the UK—in favour of free trade and free markets around the world. Once again, the UK is now a leading voice at the WTO and other forums in making the case for free trade and the international system. On a number of fronts, the Japan deal was important for showing the direction of travel for UK independent trade policy.

**Alexander Burnett:** Thank you.

**John Mason:** I will follow up on that point. Would Mr Hands accept that, when negotiating with the United States, the EU would have more clout than the UK?

**Greg Hands:** Not necessarily, but I could throw that question back to you: would Scotland have more clout than the UK? With the Japan deal, the UK has shown our ability to get a better agreement and to go further, which is a tribute to our skilful negotiating team.

We have just finished the fourth round of our US talks and we have exchanged market access offers. That work is in a good place and we are making good progress. Earlier, I mentioned that Scotland, according to our scoping analysis, is set to be the nation or region of the UK that benefits the most from it, so the whole of Scotland should look forward to that deal.

**John Mason:** I will ask about the Japan agreement. I am not an expert on these things, but you said that legal scrubbing is going on and that it is being done in principle. How long does that take? What is the timescale for finalising that agreement?

**Greg Hands:** I expect the agreement to be signed next month in October, but it is rare that anything of big substance changes between the agreement in principle and the signing. It needs further work on both sides, but I am confident that the deal will be signed and in place for 1 January 2021, which is the date that we need it on.

**John Mason:** On the question of implementing trade agreements, from what I understand, there are powers to implement the regulations for five years, which could be extended for a further five years. That is a total of 10 years, which seems like a long time. Why does it need to be as long as that?

**Greg Hands:** Thank you, Mr Mason. I remember fondly our interactions when you were at the UK Parliament 10 years ago.

First, there is often a misunderstanding about the sunset clause; the UK Labour Party in the House of Commons thought that it was about the agreements. It is not about rolling over the agreements and, every five years, having another look at, for example, the CARIFORUM-UK agreement and whether to roll it over. It is just about the powers to make amendments to primary legislation to keep those agreements operable. The power is limited in scope and, on balance, we think that the right way to do that is to have the clause in place for five years and then, with the agreement of both UK houses of Parliament—as well as honouring our commitment to consult the devolved Administrations—roll over those powers for a further five years. That sunset provision would be under the affirmative procedure in both houses of the UK Parliament, as well as requiring consultation with the devolved Administrations. I think that that is proportionate. Not having those powers and, therefore, not having the ability to keep those agreements operable could be damaging to our businesses and consumers. It is a proportionate power to be able to roll the clause over every five years.

**John Mason:** Thank you; I appreciate you remembering me from being there 10 years ago.

**Greg Hands:** I do.

**John Mason:** I got promoted after that. [*Laughter.*]

My final point is that the bill sets up the trade remedies authority, which is a new body that—I think—is within the CMA. How would you envisage the trade remedies authority relating to the Scottish Parliament and the other devolved Parliaments?

**Greg Hands:** It is not actually set up within the CMA; it is an entirely different statutory body that is in place solely to look at measures taken on subsidies, dumping and other unfair trade practices. The idea is that it carries out an investigation. The WTO regulates quite a lot of those—[*Inaudible.*]—and we would obviously follow the WTO rules.

11:30

Your question was on the involvement of the devolved Administrations. They would be involved on various fronts. When an investigation is initiated, we would speak to devolved Administrations when we think that it is relevant. For example, if it affected producers from that sector or in any of the devolved Administrations, we would certainly look to speak to the relevant devolved Administration.

When the process starts, a call for evidence will also be sent to the three devolved Administrations. If any want to register an interest in that particular investigation—for example if producers or consumers in Scotland might be particularly impacted by it—the Administration can register an interest and the trade remedies authority will need to take evidence from the devolved Administration and formulate that as part of its proposal.

When the TRA makes its proposal—which, under the act, the Secretary of State for International Trade has the right to disagree with—we will ensure that it is sent to other UK Government ministers at the same time as it is sent to the devolved Administrations. Although the proposal will be sent to the Secretary of State for International Trade, it might also have an impact on the Department for Business, Energy and Industrial Strategy, or the Foreign, Commonwealth and Development Office due to international relations. At the same as it is sent to those departments, we will send it to the devolved Administrations. That will happen once it has reached our secretary of state. The devolved Administrations will be very heavily involved at all stages of the process of a trade remedy investigation.

**John Mason:** I take your point that on an individual investigation there could well be a relationship. However, I wonder whether there would be a Scottish representative on the TRA and whether there would be an annual report? I ask that because we have had mixed experiences with some UK bodies. For example, we have a very good relationship with the OBR. However, our relationship with HMRC was tricky to start with because it felt that it did not answer to the Scottish Parliament, although over time that relationship has also improved. Can you reassure us that there would be a good relationship between the TRA and the Scottish Parliament?

**Greg Hands:** The trade remedies authority is set up in shadow form at the moment and is based in Reading. I will check in with my ministerial colleague Ranil Jayawardena, who is in charge of the TRA, but I believe that a relationship has already been set up between the TRA and the Scottish Government.

We have sought devolved Administrations' views on the appointment and recruitment of non-executive members of the trade remedies authority. However, we do not have specific representatives from the devolved Administrations on the board. Let me try to explain why. It is not a representative body; instead, the board is there to advise on international trade issues. I totally agree that some of those issues can have more impact on one nation or region of the UK than they have on another. However, the idea of the board is that none of the members is appointed to represent any of the devolved Administrations. It is not a representative body. We have said the same about broader producer interests and the trade unions. This is not a body for interests, it is a body of experts in international trade, trade remedies and the actions that might be taken. We have been very clear about that. However, nonetheless, I would expect the trade remedies authority to have a very good relationship with the Scottish Government and—I hope—the Scottish Parliament, and also with Scottish businesses and consumers.

**The Convener:** I will ask one final question. In answer to my opening questions to you, you very helpfully said that you would have another look at how the Scottish Parliament might get more involved in scrutiny over new parts of rolled-over agreements in devolved areas.

Could the trade remedies authority be looked at again, to consider how it might be made more accountable, not to the Scottish ministers but to the Scottish Parliament—perhaps "accountable" is the wrong word; I am asking whether the Scottish Parliament could undertake more effective scrutiny of the authority, where it is involved in devolved matters. For instance, would it be possible for the authority to lay a report before the Scottish Parliament when it is involved in such activity? At least that would draw the Scottish Parliament's

attention to the activity that was going on and provide an opportunity for greater scrutiny.

**Greg Hands:** You make a fair point, convener. The trade remedies authority's annual report could perhaps be deposited with the Scottish Government and the other devolved Administrations, which would give the Scottish Parliament the opportunity to scrutinise the TRA's work. I am all in favour of your committee and the Scottish Parliament looking at how the trade remedies authority is working; the best way to do that is by having the TRA deposit documents so that they are available for scrutiny by you, through the Scottish Government. That is probably the best way, procedurally, to enable that to happen.

**The Convener:** Thank you for coming to give evidence this morning, minister—we are grateful to you. Enjoy the rest of your day.

**Greg Hands:** Thank you, convener—and thank you to the committee members, too.

11:36

*Meeting suspended.*

11:42

*On resuming—*

**The Convener:** We continue with evidence on the Trade Bill. I welcome Ivan McKee, the Scottish Government Minister for Trade, Investment and Innovation, and the officials from the Scottish Government who join him: Reuben Aitken is head of the trade policy division; and Francesca Morton is a solicitor.

Minister, I invite you to make brief opening remarks, should you wish to do so.

**The Minister for Trade, Investment and Innovation (Ivan McKee):** Good morning, convener and committee members. I hope that you can hear me.

**The Convener:** We can hear you fine.

**Ivan McKee:** Thank you. I will take the opportunity to make brief opening remarks and I will then stand ready to take your questions.

I am pleased to be here today to discuss the Scottish ministers' recommendation that the Scottish Parliament consent to the UK Government's Trade Bill, where consent is required on limited aspects of the bill. The bill was introduced in the House of Commons on 19 March 2020 and completed its second reading in the House of Lords on 8 September.

The committee will recall that the Trade Bill that was introduced in November 2017 fell at the dissolution of the UK Parliament in autumn 2019. The scope and policy objectives of the bill that is before us today broadly correspond with those of the 2017 bill, but there is a significant change in the area that gave us the greatest concern in 2017.

The Scottish Government lodged a legislative consent memorandum in December 2017, which made clear that we could not recommend that the Parliament approve the bill as introduced. Our main concern at the time related to constitutionally inappropriate constraints on the Scottish ministers' powers to implement provisions in devolved areas. The provisions in clauses 1 and 2 that constrained devolved authorities' powers have been removed.

The Trade Bill's purpose is to enable the UK Government to provide continuity for businesses by continuing to benefit from trade agreements that the EU had with third countries, to avoid a cliff edge for businesses that are competing internationally under the WTO's agreement on Government procurement, and to enable trade remedies to be pursued now that the UK has left the European Union.

Before I set out our reasons for recommending consent, it is important that I make clear that the Scottish Government does not support the UK Government's approach to trade policy, which so far has excluded any substantive and meaningful role for the devolved Administrations.

Irrespective of the extent to which UK trade policy engages with and impacts on areas of devolved policy and competence, the Scottish Government has had no meaningful involvement in trade negotiations, nor has it had any input into the identification of priority partners for trade negotiations. We do not support the UK Government's intended light-touch approach to engagement with, and parliamentary scrutiny of, trade agreements.

11:45

The Scottish Government is concerned by the absence of a statutory commitment by UK ministers not to legislate in devolved areas without first consulting—and, ideally, obtaining the consent of—the Scottish ministers. Although this is not a measure for which legislative consent is required, the absence of devolved Administration involvement in the trade remedies authority also does little to reflect a collective approach to the conduct and administration of trade investigations.

The wider context is that the UK Government has left the EU against the will of the people of Scotland and has also decided, in an extraordinarily reckless move, to end the Brexit transition period during a global pandemic and deep economic recession that will inevitably cause huge disruption. Unlike the UK Government, the

Scottish Government is seeking to do all that it can to minimise damage to business and jobs. That is why we recommend consent to relevant clauses of the bill, which, contrary to what the title suggests, is narrow in scope and largely technical. In the main, it seeks simply to maintain current trade arrangements from which the UK has benefited by virtue of its previous membership of the EU.

The provisions of the bill for which the legislative consent of the Scottish Parliament is required will enable full implementation of the rollover of trade agreements from which Scotland benefited through EU membership. They will insure against potential gaps in Scotland's ability to access current and future procurement markets. Withholding consent where it is required on the technical aspects of the Trade Bill would not benefit Scottish businesses or consumers. It is in Scotland's interests to mitigate damage to existing trade relationships, so it is our view that recommending consent is the appropriate way forward, despite the fact that we should never have faced this situation.

We will push for a greater role in the development and definition of UK-wide trade policy and arrangements, from the formulation of mandates to the negotiation, finalisation and implementation of trade agreements and compliance with the enforcement of obligations at both domestic and international level. We want to ensure that those serve Scottish needs and interests, that they drive and support sustainable and inclusive growth and that they maintain strong ties with the EU. However, we are under no illusion: the only way to truly protect Scotland's interests—particularly given the UK Government's behaviour over the United Kingdom Internal Market Bill—is to become an independent country and a full member of the EU.

We are also committed to publishing our trade vision for Scotland before the end of 2020. That will set out our vision for trade and the principles and values that will shape the trading relationship that we want Scotland to have in the future. That vision will underpin how we take forward the implementation of our three cornerstone international economy plans on exports, investment and capital. It will reflect the Scottish Government's aims of fair work, inclusive growth, supporting the wellbeing of people and communities and making the transition to net zero. The vision will also include a set of indicators against which future trade-related decisions, on both import and export, can be tested.

Now more than ever, as we begin to develop new policies and strategies to recover from the unprecedented and deeply damaging impacts of the coronavirus pandemic on our economy, it is important that we do all that we can, in the short and long term, to protect Scottish interests. That principle underpins the Scottish Government's approach to the bill.

**The Convener:** I start with approach and tone. The tone from the Scottish Government is somewhat different from the tone that we heard earlier from the UK minister, who spoke about—I hope that I characterise what he said correctly—a process of positive engagement with the Scottish Government on this bill. In that light, how would you, as a Scottish Government minister, characterise relationships where this bill is concerned?

**Ivan McKee:** Minister Hands also said that, although we have engagement, we do not always see eye to eye. That is true for the issues that you are talking about. When it comes to meaningful engagement, we do not see eye to eye. We have frank exchanges of views when we meet. I am grateful to the minister for the fact that there is engagement and discussion, but that does not go far enough. It is one thing to have "wee chats", as Angela Constance characterised them, but there must be far deeper and more meaningful engagement.

We have produced a paper that sets out the role that we see for the devolved Administrations in that process, from choosing who the partners should be and setting up the negotiation mandate to being involved through the three-room process that Mr Russell talked about for the negotiation and implementation of the deals. We think that that is good for Scotland and the devolved Administrations and, frankly it is good for the UK and the partners with whom the UK seeks to negotiate trade deals. It is fair to say that the sharing of information has been partial and limited, and the level of engagement that we have had in the process is not what we would have sought to have on behalf of Scotland.

**The Convener:** As you know, under the Trade Bill, rolled-over trade agreements could differ from the original EU agreements, but there is no scope in the bill for the devolved Governments or Parliaments to scrutinise any new aspects of the agreements in devolved areas. You might have heard the exchange that I had earlier with the UK minister on that.

In its LCM, the Scottish Government calls for

"enhanced procedures for parliamentary scrutiny and engagement with the devolved administrations".

What kind of enhanced scrutiny and engagement do you wish to see included in the bill?

**Ivan McKee:** The issue is, of course, that the UK Government has not put anything on the face of the bill that would require it to engage with us in devolved areas. That is clearly a concern. The UK

Government has said that it intends not to do that, but we are concerned that it is not in the bill.

Modern trade deals cover much more than trade. They impact on a whole range of areas, including many devolved areas, as we know. We want the UK Government to face deeper scrutiny from the UK Parliament, and that is something that is being discussed at length at Westminster, and to have greater engagement with the Scottish Government as I have outlined. The devolved Parliaments should also have scope to be able to input into the process and scrutinise the bills.

The problem is that, if we take the Japan deal as an example, Greg Hands said that that is now going through legal scrubbing. We, as a devolved Administration, have not yet seen the text of the Japan deal so, in the current environment, we are not in a position to comment on the detail of that deal because we have not seen it. If we could see what has been negotiated, that would be a good start for the scrutiny process but, as I have said, we want to be involved in the whole process right through from setting up negotiation mandates, through the negotiating process, to the implementation of the deals.

**The Convener:** I hear what you say about the Scottish Government not having seen the Japan deal. You might not have not seen any of the text, but Parliament does not even know what the cover looks like. I pushed Mr Hands on that, but is there scope for discussion between the Scottish Parliament and the Scottish Government about how the Scottish Government could enhance our ability in the Parliament to scrutinise when it can the various arrangements around trade agreements?

**Ivan McKee:** Absolutely. Work is being done on a protocol between the Scottish Government and the Scottish Parliament on how such engagement could and should work across a broader range of areas. I would be supportive of that and I am very keen that there is as much scrutiny as possible of future trade deals in the Scottish Parliament's committees.

**The Convener:** I am now going to hand over to Murdo Fraser. I apologise to him, as I should have said that that was my final question.

We seem to have a problem with Murdo Fraser's sound. I will move on to the next question and come back to Murdo Fraser if and when his technical issues are sorted.

**John Mason:** I do not know whether Mr McKee heard my earlier questions to Mr Hands, but these will be on similar grounds.

On the issue of the previous Trade Bill compared to the current one, Greg Hands was very reassuring and said that all our problems and concerns have been removed. However, he said that the UK Government will not "normally" use the powers without consent, and that phraseology worried me a little, because "normally" can mean almost anything. Does the Scottish Government have concerns about that?

**Ivan McKee:** Yes. The view that we took was that, on balance, it was right to give consent. However, one factor that weighed on our minds was that there was no requirement in the bill to have consent for the use of the powers in devolved areas. We have pushed on that and gained commitments in that regard from Minister Hands in writing and on the floor of the House of Commons, but you are absolutely right about the word "normally". We have spent many happy hours debating the meaning of that word in committee and beyond, and of course there are concerns there.

**John Mason:** I also asked Mr Hands about the issue of timescales for implementing trade agreements. Five years plus an extension of five years to 10 years seems quite a long time. What are your thoughts on that? Is it too long?

**Ivan McKee:** To be clear, that issue is about rolling over existing trade deals that the EU has made with third countries, so it is about deals that are already in place. A number of those have already been rolled over and a number of the key ones are still to be done, so we will see how those progress. Clearly, we hope that a lot of that work happens quickly, because it allows businesses not to have further disruption as a consequence of leaving the EU. Of course, all this is caused by our leaving the EU. If we were not leaving it, we would not be having this discussion.

The length of time is there to catch those of the 40-odd deals that could fall into a situation of prolonged negotiation and discussion. We understand that it could take a lengthy period—obviously, international trade deals can be complex. Of course, the issue is then about the provisions in the bill that allow the implementation of those aspects to be taken into domestic law across the UK and in devolved areas.

We are not overly exercised about the issue, given the narrow scope of the bill. We understand that there could be a situation in which, for a small number of countries, the process could be lengthier than we would like.

**John Mason:** I confess that I would be concerned if we did not have those agreements in place within five years, but I take your point.

The final issue that I want to touch on, as I did with Mr Hands, is the trade remedies authority. That is a new body and, as I said to Mr Hands, committees in the Parliament have a mixed experience of dealing with UK bodies. Some of

them do not have regard to the Scottish Parliament although, to be fair, others, such as the OBR, have been very good. Should there be a Scottish representative on the trade remedies authority, even though Mr Hands said that it is not that kind of body, or should the authority be required to report to the Scottish Parliament? What is your thinking on that?

**Ivan McKee:** We have pushed and argued on the TRA at every meeting that I have had with Greg Hands and his predecessors—he is the third trade minister I have engaged with in my time as Scottish trade minister. We have made the point clearly that we believe that the Scottish Government should have a say on a Scottish representative or provide input to a Scottish representative who can understand the depth and complexity of issues as they relate to the Scottish context. In many ways and in many sectors, the context in Scotland is different from that across the rest of the UK.

The UK Government has taken the position that that is not what it intends to do. We hope that the engagement with the TRA will be productive and constructive. However, frankly, it is far too early to say how that is going to roll out. We are not as comfortable as we would be if there were a specific Scottish representative on the TRA. As it is set up, we will watch and engage with the process so that we can understand what it will look like.

12:00

Greg Hands's comments about our being involved in that process speak to some of the disconnect around how we all see the process. When he said that, I checked with officials, and I can confirm that the advert for recruitment for members of the TRA was shared with us, so we were involved in the process in so far as we were able to circulate that advert within Scotland so that people here could apply for one of those positions. However, that was the limit of our involvement.

**John Mason:** I take your point that it is a new body. Could you and the Scottish Government keep us updated on any issues or concerns that arise in relation to the TRA?

**Ivan McKee:** Absolutely, as we will do on all other aspects of the bill and the wider trade agenda.

**The Convener:** Murdo Fraser has rejoined us following his connection challenges. Over to you, Murdo.

Well, I thought that he was back on. He seems to still be experiencing problems. In that case, Dean Lockhart can ask the next questions.

**Dean Lockhart:** Good morning, minister. As you know, the United States is the largest source of direct investment in Scotland, after the rest of the UK, and is Scotland's single largest international export destination market. Given the importance of trade and investment between Scotland and the United States, do you agree that a free trade agreement with the US should be an important priority for the UK and Scottish Governments?

**Ivan McKee:** Dean Lockhart is right to say that the US is the largest individual single-country market in terms of our exports and export potential, and I know that he will have read in detail the export plan that we published last year, which highlighted that that was absolutely the case. Of course, the EU as a whole is a much larger export market than the US alone and presents more opportunities.

The interesting point to recognise is that the trade that we do with the US at the moment takes place in the absence of a free trade agreement, and there is plenty of potential and scope for businesses to trade with the US. I visited the US around this time last year, and we continue to work closely with Scottish businesses with regard to exports to the US, and Scottish Development International provides us with a significant infrastructure across the US to support those export and investment opportunities.

As we have demonstrated, we are perfectly capable of having significant export success in the US and attracting investment from the US in the absence of an FTA. The question is what value an FTA would add. There are some potential upsides around the possibility of removing specific market access barriers to trade. You must remember that a lot of the activity in the US in the areas that we are particularly focused on involves services, and regulations in that regard are controlled at state, not federal, level, which makes it difficult to access those opportunities. It is also important to recognise the position that many Scottish products are in with regard to tariffs as a consequence of actions by the US that are problematic for Scottish business.

Leaving aside the many issues that members would have concerns about, including the well-rehearsed ones around chlorinated chicken and access to the national health service, one of the largest issues that exercise us from a trade perspective concerns things that the UK might negotiate as part of a US FTA that would put barriers in the way of our on-going trade with the EU. One of those areas involves data flows. We have free data flows with the EU, but the US has a different regime in place for the management of data and there is a risk that things could be put in place that might be problematic for our on-going

trade with the EU, especially with regard to important sectors such as services, and financial services in particular.

**Dean Lockhart:** I am glad that you, too, recognise the importance of a potential free trade agreement with the US. The programme for government that was published a few weeks ago mentioned a potential US free trade agreement on page 125. It said:

"These proposals would force Scotland to accept lower food safety, animal health and environmental standards, effectively imposed by a UK Government in pursuit of a US trade deal."

What empirical evidence do you have for that statement? As we heard from our exchange with Greg Hands, UK regulatory standards already go beyond EU standards in many areas, including health and safety, maternity and paternity leave and flexible working, to name but a few. There was absolutely no prospect of lowering trade standards or any other standards to secure the free trade agreement with Japan. Will you explain the factual background for the statement in relation to a US free trade agreement on page 125 of the programme for government?

**Ivan McKee:** The key word is "agreement". The whole point of an FTA is that there is discussion to move both sides forward in an environment that results in a deal being done. By its virtue, a deal involves give and take. As Dean Lockhart articulated, we are concerned that there are areas in which the US would push for access that would conflict with the very important requirement in Scotland and across other devolved areas to protect standards.

Why do we think that? Last year, I met people from the Office of the United States Trade Representative in Washington and representatives of the US Government at its embassy in London, and I have had other engagement with the US. We have seen the signals and the messaging from the US, as well as its actions on tariffs, which were mentioned earlier. The US has made it clear that its primary focus is agriculture, and standards are clearly different in that area. The US has also made it clear in its messaging that it requires to export its agricultural products to its standards—that is the US's primary negotiating objective.

When we take that in the round and consider the communication from the US, we see that, at all levels, agriculture is the most important area for the US. It wants any trade partner to conform to its standards, and not vice versa. Therefore, you can understand why we have concerns, not least by virtue of the fact that the UK Government has been very reluctant to share with us its negotiating mandate and the overall negotiation positions that it is taking with the US. That does not allow us to have comfort that such issues are being taken on board as part of the negotiations.

For example, the market access offers that the UK Government has made to the US through the current FTA negotiations have been shared with the US but not with us, so we do not know what is in them and what the UK Government is putting on the table.

**Dean Lockhart:** You have raised hypothetical concerns and have not pointed to anything in the free trade discussions that might lower standards. We heard from Greg Hands that the UK Government's strategy is to maintain high standards, and, in the negotiation process, the UK Government has said time and again that it will not lower food standards or other standards in the UK as part of a US free trade agreement. Do you recognise that your concerns might be hypothetical?

**Ivan McKee:** All concerns are hypothetical; that is why they are concerns. If we look at the evidence, we see that the UK Government's sharing with us of its negotiating positions and trade-offs is not at the level that we want. The US has signalled that agriculture is the most important issue and that it will require other countries to conform to its standards. Those issues are all on the table.

You can therefore see why we would have concerns. Clearly, those concerns can be allayed by the sharing of that information and by greater involvement of us in that process. However, given that landscape and those facts, it is perfectly legitimate for us to have concerns.

**Dean Lockhart:** That is all that I had to ask, convener.

**The Convener:** I am crossing my fingers that we will now go to Murdo Fraser. I hope that his connection issues are completely sorted.

**Murdo Fraser:** Thank you, convener. I hope that you can see and hear me and that I am back and reconnected.

Good morning, minister. I missed some of the previous exchanges, so I apologise in advance if I go over some ground that has already been gone over.

I will go back to a comment that Greg Hands made in the earlier evidence session. He said that, when previous EU trade agreements—including with countries such as Japan—went through the House of Commons, SNP MPs either abstained on or voted against them. Does the minister know whether that is true? If it is true, why did they take that stance?

**Ivan McKee:** I am not sure about the specifics of that question. The devil is in the detail in those

areas—in which Murdo Fraser is hugely experienced. We would need to trawl back and look at exactly what proposition was on the table at the time and what the specific concerns about it were.

It is important to recognise that the deals that we are talking about were negotiated by virtue of Scotland and the UK being part of the EU. All that is really happening is that the UK Government is running to catch up, to get us back into the position that we enjoyed as part of the EU negotiating power globally. Clearly, we are supportive of that, because the fact that we were members of the EU allowed us to benefit from those deals, and we hope to minimise the already significant impact that Brexit will cause for Scotland.

**Murdo Fraser:** The minister will appreciate the reason that I asked the question. He is telling us that he wants to see those agreements rolled over, that he views them as important and that he wants to have more of a say. I am simply interested in whether he sees the irony in the fact that we are talking about agreements that his own colleagues at Westminster either abstained on or voted against. If those agreements are so important now, why was it not important to support them when they were entered into?

**Ivan McKee:** I will say again what I said before, which is that we would need to go back and look at the detail of that. No trade deal is perfect—there are always aspects that we want to be improved. However, I draw a distinction because you are talking about those deals when they were negotiated originally, and we would need to go back and look at the specifics. I am sure that there would have been areas in relation to which we would have argued that more could have been done to protect and promote Scottish interests.

With regard to the Trade Bill, there are concerns in the devolved remit that we have articulated clearly. We have also articulated concerns at Westminster in relation to parliamentary scrutiny and so on. This is by no means a perfect scenario—we have concerns about it, which we have raised. Nonetheless, considering all the other things that would flow from there not being consent, on balance, the marginal decision of the Scottish Government has been to take the position that it makes sense to give consent to the bill at this time.

**Murdo Fraser:** Perhaps the minister might write to the committee subsequently with an answer to that question.

I will ask one more question. We heard from Mr Hands—and we have heard previously—that trade policy is a reserved matter. We have also heard from a lot of the minister's colleagues over a long time that he and the Scottish Government believe that the devolution settlement should be respected. Does the minister accept that the devolved Administrations, including the Scottish Government, should not have a right of veto over UK trade policy or UK trade agreements?

**Ivan McKee:** We are not asking for a veto; we are asking that, with regard to devolved areas, there should be due process that takes us into account. Our position is a legitimate one, given that trade deals now cover a wide range of aspects and go beyond what traditional trade deals covered in the past. Modern trade deals cover a whole range of areas that impinge on devolved matters, which is why it is only right and proper that there is due process in those aspects for the Scottish Government and other devolved Administrations, and that the devolved Parliaments have their say in that process.

12:15

**Patrick Harvie:** I find your position on the bill a bit bewildering, minister. Even in your answer to Murdo Fraser about your modest asks in relation to a role in respect of devolved competence, your position sits completely at odds with your recommendation that the committee should give consent to the bill. Even in relation to devolved competence, the bill does not address the concerns that the Scottish Government seems to be setting out.

The bill could—but fails to—establish an input for the devolved Administrations or Parliaments on the setting of negotiating mandates. It could—but fails to—provide for devolved, or even UK, scrutiny of negotiating texts and the various iterations of a trade agreement as it is negotiated. It could—but fails to—give the devolved Parliaments the ability to say yea or nay to the devolved aspects of a trade agreement once it has been signed off by the UK Government. It does not do any of those things. Why should we agree to it?

**Ivan McKee:** It does not do lots of things, but that is not the bill's purpose, which is clear and narrow. There are many things that you and I could say would be good things to load on to the bill.

The purpose of the bill is clear: it is to enable the continuation after the Brexit cliff edge of the deals with third countries that we benefited from as a member of the EU. That is its primary purpose, along with allowing the UK and Scotland to be part of the WTO GPA and to access procurement opportunities. The bill's purpose is to ensure continuity with those trade deals, to enable us to avoid falling off another cliff or to make the fall slightly less impactful, as we go through the Brexit process.

What else we could get in those trade deals, what other trade deals we could do and what our wider trade policy should and should not include are much bigger issues, and I am sure that there will be a lot of common ground when we engage on those matters. However, the Trade Bill is narrowly focused on the trade deals that we benefited from due to our being a member of the EU, and its purpose is to ensure that no further damage is done as a consequence of the Brexit process and our no longer having the benefit of those EU trade deals.

**Patrick Harvie:** Just a few minutes ago, you complained that the Scottish Government has still not seen the text of the agreement with Japan. Even in relation to the bill's narrow scope regarding the range of countries that it will directly affect—notwithstanding any precedent that it sets for the future approach—and even purely in relation to the devolved competencies, it is clear that the bill largely and significantly fails to achieve the role in devolved scrutiny and accountability that your Government says is necessary.

**Ivan McKee:** You must remember that these trade deals are already in place; they are not new. They are trade deals that were negotiated by the EU and that we have had the benefit of—some for many years. We are, in effect, preserving where we are.

We have concerns about the bill, and we have articulated those concerns. There are, of course, lots of things that we would love to have in a broader trade bill. However, the bill that we are discussing has a narrow focus and is of a technical nature. It is about ensuring that we do not take a step back with regard to the benefits that we enjoyed as a member of the EU through the trade deals that the EU negotiated with other countries. That is its scope. Not consenting to the bill would open up a range of technical aspects that would have to be put in place through legislation to ensure that Scotland continued to benefit from those deals, and likewise with the WTO GPA.

It is important to understand the issue in context. We can have a discussion about trade and talk all day about all the great things that we would love to happen. We would love to do that, but the LCM on the UK Government's Trade Bill is very narrowly focused. It is about the technical aspects and ensuring that we do not take a step back from the benefits that we enjoyed as a member of the EU through those third-party trade deals. It is no more than that—that is what it is. We have concerns about it, but, as I said, on balance, not consenting runs the risk of our taking a step back.

**Patrick Harvie:** It seems to me that your interpretation of the bill and its potential consequences—your suggestion that there is nothing to see here, that nothing will change and that it is all just about continuity—depends entirely on trust and on the good will of a UK Government that has already committed to breaking international law in respect of its ideological agenda and that has already legislated in devolved areas without the consent of the Scottish Parliament. Indeed, it did so despite the explicit refusal of consent by the Scottish Parliament. Why on earth should we take the UK Government at its word?

**Ivan McKee:** The Trade Bill is clearly focused and it is explicitly about rollover deals. That is what it is—that is what it says, and that is what it is all about. It is about ensuring that the benefits that we have through membership of the EU from the deals that it has negotiated on our behalf with third countries continue, as well as the WTO part that we have spoken about. That is it. Therefore, I do not understand the question. Is the member saying that we should not believe anything that the UK Government tells us or that we should not believe that what it has written in legislation is what it is going to do? Clearly, we have to proceed on the basis of what is written in the bill—we might like it to be different but it is what is—and the bill says that it enables those deals, as they exist at the moment and as the EU negotiated them, to be rolled over so that we can continue to get the benefit of them.

We all agree that it is good to be a member of the EU, and we are comfortable with the EU negotiating deals on behalf of its 28 members. We might not agree with all the details, but, by and large, we are comfortable with that position, because that is the position that we would be in were we to stay in or seek reaccession to the EU. All that is happening is that those trade deals will continue to apply to the UK and Scotland post-Brexit.

**Patrick Harvie:** That is despite the fact that the bill does not give a devolved role, either parliamentary or governmental, that you say is necessary.

**Ivan McKee:** As I said, it is not ideal, but the question is whether we continue to benefit from those EU deals. As I said, the primary concern that we had, which was about restrictions on the power of the Scottish ministers, has been removed. We would have liked something in the bill about the devolved competences, but we have had a written agreement on that, as well as oral agreement on the floor of the House of Commons.

That is where we are. I see that Patrick Harvie is laughing but, at the end of the day, we have those deals in place, having been a member of the EU, and we are perfectly happy with them. After reaccession to the EU as an independent country,

we will again be perfectly happy with the deals as they are. In the intervening period, when we are not a member of the EU, we support the rolling over of the deals so that they continue in their present form and we continue to benefit from them. That is it. As I say, there are plenty of other things that I would like a trade bill to be about, but that is not what this bill is about.

**Alexander Burnett:** You must be relieved to hear that countries such as Japan still trust us, and you must be delighted that the trade agreements are progressing for the benefit of Scottish businesses, not least through the massive expansion of protected geographical indications. Leaving aside the rollover of the 40 EU-held agreements and a deal with the EU, which three countries would you like to prioritise agreements with first?

**Ivan McKee:** I will first talk about the Japan issue, because there are some points that are worth picking up. Greg Hands referred to the issue in answer to earlier questions. On the point about geographical indications, the reason why only a handful of GIs were in the EU-Japan deal was that, despite our exhortations to the UK Government to do differently, it did not put forward GIs to the EU to be included in the deal. That was a complete failure of the UK Government to deliver on behalf of Scotland.

Greg Hands mentioned financial services in relation to the Japan deal. I will read out the information that I have here on the UK-Japan deal. It says:

> "The deal creates an annual dialogue between Her Majesty's Treasury, UK financial regulators, and the Japanese FSA that will explore ways to further reduce regulatory friction".

That means that, once a year, they are going to sit down and have a chat about what they might be able to do to reduce friction. That is the extent of the tremendous benefits that allegedly are in the UK-Japan deal for Scotland's financial services.

To answer the question on trade deals, the answer is the EU, the EU and the EU. That is our biggest market by far. "A Trading Nation—a plan for growing Scotland's exports", which we published last year, showed that 12 of the top 15 countries for exports are in Europe, and we can add in the 40-odd countries with which the EU has existing trade deals that we are scrambling to replicate. From that, it is clear that our future is as a member of the EU, benefiting from the negotiating power, the approach and the deals that it can deliver on our behalf.

**Angela Constance:** How important are the touchstone issues of trust, reputation and always being prepared to uphold international law in establishing future economic and trading relationships, particularly with the EU? The minister may have heard some of the evidence that the committee heard last week about concerns being raised in the United States Congress about consequences for future trade with the UK if we trash the Good Friday agreement.

**Ivan McKee:** Many of those issues are much broader than the scope of the Trade Bill LCM, but thank you for raising them. I saw, from a number of sources, the comments that were made in the US on the situation in which the UK Government has found itself as a consequence of its cavalier approach to international agreements.

The comment that countries such as Japan still trust us has been made a couple of times during the meeting. That is a fairly low bar, and not because it is Japan. The fact that we have not yet trashed our relationship with everybody is a fairly low bar to aspire to.

The issue is a huge concern. Much of the process is based on trust and relationship building. That allows you to do deals and go through the complicated negotiating process over a long period, to put in place deals that will benefit business, consumers and wider society. It is of concern that the UK Government is knowingly putting itself in a position in which it is seriously putting at risk that good will and trust, and I raised that issue directly with Greg Hands in our most recent call.

**The Convener:** As no other member wants to contribute, I thank Mr McKee for his evidence. That concludes our business for today, so I now close this meeting. Have a good day, colleagues.

*Meeting closed at 12:29.*

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