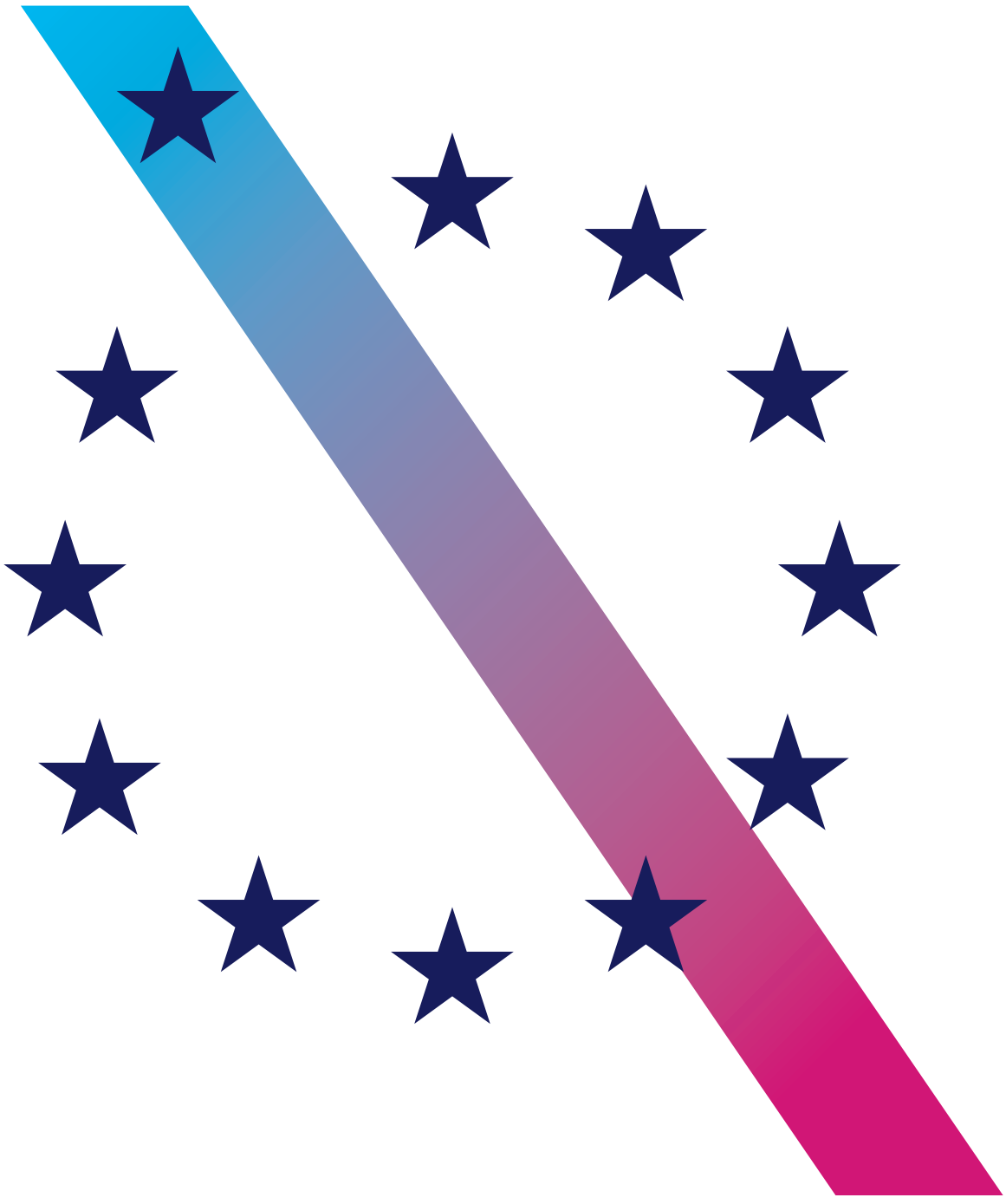
INSTITUTE FOR GOVERNMENT

Trade and regulation after Brexit



James Kane

About this report

For the first time in half a century, the UK is beginning to negotiate its own independent free trade agreements. Things have changed considerably during the UK's 47-year membership of the European Union. Though tariffs are still important, reducing regulatory barriers to trade has become central to modern trade deals. It is also intensely controversial. This report explores what pressures the UK will come under in future and what it should do about them.

@instituteforgov

Find out more
www.instituteforgovernment.org.uk

August 2020

Contents

Summary

For the first time in half a century, the UK is beginning to negotiate its own independent free trade agreements (FTAs). Things have changed considerably since the UK signed its last pre-European Union FTA in 1965. Though tariffs are still important, reducing regulatory barriers to trade has become central to modern trade deals. It is also intensely controversial. Public concern about the future of UK regulation is rife. This report explores what pressures the UK will come under in future and what it should do about them. We find:

- **Free trade agreements are unlikely to have a major impact on the substance of UK regulation.** FTAs focus on how countries regulate, not what results the regulations achieve. Public concern about an FTA with the US directly changing UK rules on, for example, chlorine-washed chicken is misplaced.

- **But 'side bargains' – negotiations in the margins of FTAs – are often used to get partner countries to remove individual barriers to trade.** Although FTA texts rarely deal with individual regulations, countries often use the leverage given by FTA negotiations to convince their partners to change their rules – in effect, threatening to collapse the talks if they do not get what they want. The UK could easily fall victim to this, given the importance of new and independently negotiated FTAs as a 'prize' of Brexit.

- **The World Trade Organization (WTO) imposes serious constraints on UK regulatory freedom.** The WTO dispute settlement system is not currently functioning, but this could change quickly if a new administration comes to power in the US. Over its 25-year existence, the dispute settlement mechanism has been able to force even leading trade powers such as the US, Japan and the European Union (EU) to change their rules. The UK is vulnerable to challenge because some of the regulations it has inherited from the EU – such as the ban on hormone-treated beef – have already been found not to comply with WTO rules.

- **The government's preparations for regulatory trade negotiations are less advanced than they should be.** Discussions are still taking place within government on the UK's position on a number of important regulatory issues. This creates a real risk that the government will be pushed into making concessions it shouldn't – or will fail to make concessions it should. The government should address this by making sure it knows what it is willing to accept and what would cause it to walk away from the table.

- **The government will find it easier to resist pressure from trading partners if it has a more coherent idea of its regulatory strategy.** While all regulations are different, there are often common principles underlying them (for example, the precautionary principle). Some governments have set out their strategy as regards these cross-cutting issues in public documents, such as the European Commission's 2000 Communication on the Precautionary Principle. The UK should do the same as a way of setting its independent regulatory policy on a solid footing.

- **Decision making structures for trade issues in government are top-heavy.** While the government feels its EU Exit Strategy Committee (XS – which oversees the UK's trading relationships with both the EU and the rest of the world) has been a success, it should not be overused. The large number of simultaneous trade negotiations that the UK is pursuing could overwhelm a committee comprising the government's most senior ministers. Its small size will also make it difficult for it to deal with technical regulatory questions. No.10 should set out a clearer decision making structure below the top level and give it parameters within which it can take decisions without having to go back to XS.

- **Giving parliament greater powers of scrutiny and the resources to use them will benefit UK regulatory trade negotiations.** Currently, parliament lacks both the formal powers and the resources to scrutinise UK trade policy. Strengthening parliament's role would make it easier for the government to resist pressure from its trading partners and increase public trust in the process.

- **The government needs to bring the devolved administrations along with it** – coercing them into complying with its regulatory decisions risks damaging the Union. While signing trade agreements is reserved to the UK government at Westminster, the devolved administrations have the powers to implement them. They could choose not to. The UK government could circumvent them, but a more co-operative model – such as that employed by the Canadian federal government and its provinces – would give the UK a stronger trade policy and place less strain on the Union.

Introduction

> **"We are moving from the administration of protection – quotas, tariffs and subsidies – to the administration of precaution – security, safety, health and environmental sustainability."** – Pascal Lamy, former director general of the World Trade Organization

When Pascal Lamy spoke those words at the Jan Tumlir Lecture, held in Brussels in March 2015, it was common to say that tariffs were no longer an important issue in trade. The approach of the Trump administration has since brought them back to the centre of trade policy. Regulation, however, is still important. All modern economies are regulated:[1] even in the most laissez-faire countries, such as the US, almost all goods for sale will still have to comply with a substantial number of regulatory requirements.*

Divergences between these regulations create costs to international trade.[2] For this reason, reducing regulatory divergence will continue to form a key part of free-trade agreement (FTA) negotiations in the future, including the UK's negotiations with the US, Australia and New Zealand.[3] These countries have already begun to point out the areas of UK regulation where they would like to see changes – including deeply controversial ones such as food standards.[4,5]

On the other hand, Boris Johnson's government has attached considerable importance to recovering the UK's 'regulatory sovereignty' from the EU.[6] The UK will, therefore, be seeking the freedom to increase the extent to which its regulations diverge from the EU's, while at the same time making commitments in FTAs to reduce the degree of regulatory divergence with its new partners. This presents a challenge: how can the UK government both maximise the regulatory autonomy which it evidently seeks and secure the new trade deals it wants?

Compounding this tension, the government will also have to deal with a public opinion that is increasingly concerned about the impacts of FTAs on the safety of goods in the UK. For example, in a poll commissioned by the Food Standards Agency, 68% of respondents said that they were concerned about whether food would continue to be safe and hygienic after Brexit.[7] In another poll, commissioned by the Institute for Public Policy Research, only 8% of the public were willing to see standards compromised for the sake of a trade deal with the US.[8] This report explores this tension as it affects one specific area of regulation: the regulation of goods.

* Some distinguish between 'regulations' (mandatory requirements imposed by governments) and 'standards' (documents adopted by standardising bodies such as the British Standards Institution, or BSI, which may be used as the basis for determining compliance with regulations but which businesses are not generally obliged to adopt). Others use the two terms interchangeably. In this paper, 'standards' by itself means the standards set by the BSI, the International Organization for Standardization (ISO) and so on. But 'food standards' and similar expressions include regulations.

Product regulations come under two major headings: technical barriers to trade (TBTs) and sanitary and phytosanitary (SPS) measures. Both define what criteria a good has to meet to be sold on a market.* They may also define the process by which a good has to be produced,** though such requirements tend to be more controversial.[9] To the extent that they do deal with the way a given product is produced, product regulations will overlap with so called 'level playing field' requirements, such as adherence to environmental and labour rules in the production process.*** Such requirements – alongside related issues including the regulation of subsidies – are beyond the scope of this report, and will be covered in future Institute for Government work.

Box 1: Sanitary and phytosanitary measures

Sanitary and phytosanitary (SPS) measures are all regulatory measures adopted:

a. to protect animal or plant life or health from risks arising from the entry, establishment or spread of pests, diseases, disease-carrying organisms or disease-causing organisms

b. to protect human or animal life or health from risks arising from additives, contaminants, toxins or disease-causing organisms in foods, beverages or feedstuffs

c. to protect human life or health from risks arising from diseases carried by animals, plants or products thereof, or from the entry, establishment or spread of pests

d. to prevent or limit other damage from the entry, establishment or spread of pests.

SPS measures therefore relate principally to food and agricultural products – for example, limits on the amount of pesticide residue that can be left on a fruit or vegetable. But a requirement for wooden crates used to transport other types of goods to be heat-treated or fumigated to prevent insects hitching a ride on them is also an SPS measure.

* For example, a toy might be subject to a requirement that it contain no more than a specified quantity of lead; a consignment of nuts might be required to contain no more than a specified amount of fungal toxins.

** The EU's ban on washing meat with chemical rinses to remove bacteria is one example of a 'process standard'.

*** Indeed, the EU has chosen to assimilate food safety requirements to environmental level playing field conditions in its proposed FTA with the UK.

Box 2 : Technical barriers to trade
Technical barriers to trade (TBTs) include technical regulations and procedures for assessment of conformity with technical regulations and standards. The definition of TBTs excludes SPS measures, so they apply mainly to manufactured goods – for example, safety standards for cars. But labelling requirements on foodstuffs (for example, to show whether they are organic or low in fat) can also be TBTs.

This report seeks to answer three basic questions regarding issues of product regulation in trade agreements:

1. What are the routes the UK's future trading partners will use to influence its regulations after Brexit?

2. How should the UK react to this influence?

3. Once decisions on regulation have been taken, how can the UK implement them effectively?

UK businesses will have their own interests in removing regulatory barriers to trade and the government's objectives for UK–US trade negotiations include 'reduc[ing] regulatory obstacles... for UK businesses and investors'.[10] The UK government's policy statement on UK–US talks, however, concentrates much more heavily on avoiding interference with UK regulation. For example, the government's 'policy explanation' on SPS measures makes almost no reference to changing US SPS rules, emphasising instead its commitment to defending the UK's right to regulate and refusing to compromise on UK standards.[11]

Similarly, domestic public debate on regulation and trade has focused on trade-related changes to UK regulations. For this reason, this report concentrates only on the UK's response to pressure from its partners – that is, its 'defensive interests'.

Part 1: Routes to influence

The UK's trading partners have made no secret of their desire to influence UK regulation so as to make it more friendly to their businesses. Similarly, the UK will have its own objectives in trade negotiations, which will include reducing regulatory barriers to its exports. The two sides will be able to use four distinct routes to do so:

- free trade agreements (FTAs)
- 'side bargains' – talks in the margins of FTA negotiations
- bespoke regulatory agreements
- the World Trade Organization (WTO).

Although FTAs have attracted the most attention, they do much less than is sometimes thought to reduce countries' regulatory autonomy: little in practice is 'signed away' in such deals. Most regulatory bargaining in trade agreements happens in 'side bargains', rather than in the text – and these deserve much closer attention than they have hitherto received. Similarly, the effect of the UK's WTO commitments on its regulatory autonomy has sometimes been downplayed but is likely to be significant if the WTO's dispute settlement mechanism returns to full function.*

Route 1: Free trade agreements

Most public concern about the future of regulation and trade has focused on this route of influence. There is a fear that clauses will be inserted into the text of such agreements that compel the UK to change its regulations – or, more subtly, that prevent the UK from changing its regulations in future.[12,13] This concern is largely misplaced.

FTAs do discuss regulation

In the past, FTAs were often restricted to tariff concessions alone.** With the general decline in tariff rates worldwide following successive rounds of multilateral trade negotiations (that is, those covering all members of the WTO and its predecessor, the GATT), however, non-tariff barriers came to be more significant obstacles to the development of trade.[14,15] For this reason, bilateral FTAs (those between just two parties) have gradually come to focus more and more on non-tariff barriers such as regulations.[16,17] The great majority of FTAs now contain provisions on sanitary and phytosanitary (SPS) measures as well as technical barriers to trade (TBTs).

In the most recent and wide-ranging trade agreements, such as the EU–Canada Comprehensive Economic and Trade Agreement (CETA), the 11-party Comprehensive and Progressive Agreement for Trans-Pacific Partnership (CPTPP) or the abortive EU–US Transatlantic Trade and Investment Partnership (TTIP), regulatory issues have often taken centre stage. This focus on regulatory issues has been intensely controversial

* As we explain on page 17, the dispute settlement mechanism is not currently functioning because of a US veto on the appointment of new judges.

** For example, the US–Israel FTA, signed in 1985, contains a single brief article on health rules applied to agricultural products. Otherwise, it deals only with tariff and tariff-related measures applied at the border.

– as was seen most strikingly in the debate on TTIP in the mid-2010s. Thousands of people turned out on the streets of Berlin and other capitals to protest against it, while an anti-TTIP petition was signed by more than three million European citizens.[18,19] TTIP's regulatory provisions were among the most stridently criticised, being described as "the ultimate tool to prevent or weaken future public interest standards for citizens, workers, consumers, and the environment".[20]

But regulatory commitments in FTAs are generally limited, focusing instead on good practice over specific regulations

In practice, these fears were exaggerated. Proposals for regulatory convergence under TTIP were always more limited than its opponents feared (or, indeed, its supporters hoped). Under the EU's actual proposals, co-operation on both 'horizontal issues' (those covering all areas of regulation) and sector-specific regulations was to remain entirely voluntary, respecting each side's regulatory autonomy, notably in respect of the levels of protection chosen, without obliging the parties to achieve a particular regulatory outcome. The EU and the US were to engage bilaterally and co-operate in international forums, to identify opportunities for co-operation and, where appropriate, aim at achieving common or compatible regulatory measures. They would also need to provide each other early information and co-operation opportunities when developing new or reviewing regulations and by taking each other's regulatory approaches into account before regulating.[21]

What was true of TTIP is even more true of less ambitious agreements, such as the 2019 EU–Japan Economic Partnership Agreement (EPA). The regulatory chapters of this agreement have a heavy focus on incorporating the provisions of the WTO agreements on TBTs and SPS measures. Beyond these, the text consists largely of commitments to notify, to discuss, to co-operate, and to use 'best endeavours'. In the TBT chapter, for example, four articles are largely procedural and a fifth simply incorporates the WTO TBT Agreement. Many of its substantive commitments are simply expositions of the requirements of the WTO TBT Agreement. The overwhelming majority of the commitments made are either restatements of existing WTO obligations or commitments to good regulatory practices such as conducting impact assessments for proposed regulations. The only major instance of Japan accepting a substantive change to its regulations was its acceptance of the international standards for car safety prescribed by the United Nations Economic Commission for Europe (UNECE).

This light-touch approach is not a peculiarity of EU FTAs. Similar content is found in the US's FTAs – for example, its new trade agreement with Mexico and Canada (USMCA), signed in 2018 and effective as of summer 2020.* The SPS chapter of USMCA has very few binding obligations and is focused on good regulatory procedures. There are no references to specific regulatory measures at all: the reader will search in vain for words such as 'chicken', 'hormones' and so on. The text is not a way to impose specific US regulations on its trading partners. It focuses on procedural disciplines, on how the independent regulators in the three countries covered are to regulate – not what conclusions they are to reach. Most of these disciplines are derived directly from the WTO SPS Agreement, in some cases with slight rewording or amplification.

* It is helpfully known by four different acronyms: in American English (USMCA), in Canadian English (CUSMA), in Canadian French (ACEUM) and in Spanish (T-MEC).

The US's focus in talks with the UK is likely to be on similar procedural issues. The US's stated objectives on both SPS and TBT issues, for example, include "strong provisions on transparency and public consultation that require the publication of drafts of standards... [to] allow stakeholders in other countries to provide comments on those drafts, and require authorities to address significant issues raised by stakeholders and explain how the final measure achieves the stated objectives".[22]

The US believes that binding its FTA partners to this system – essentially the US's own system of 'rulemaking' laid down in its Administrative Procedure Act of 1946 – will help both to resolve existing trade disputes and to prevent the emergence of new ones.[23] By requiring regulators in partner countries at least to take account of the interests and views of US stakeholders, the US hopes that trade disputes will become less likely to reach the political level. Of course, this also means that domestic stakeholders in each country will have improved access to government decision making.

Good regulatory practices are nothing to be afraid of

Some commentators have suggested that even if these commitments do not limit countries' ability to regulate, they might reduce their willingness. They argue that requirements to base regulatory decisions exclusively on scientific evidence, to conduct risk assessments and public consultations before acting and to explain regulatory decisions to the other parties to an agreement can have a "regulatory chilling effect".[24] Governments bound by such commitments, it is argued, avoid regulating in ways that are contentious so as to avoid disputes with their trading partners, even if those regulations would be in the public interest.[25]

There is evidence that signing up to commitments in trade agreements can lead to more aggressive scrutiny within government of new regulatory proposals that might be controversial with trading partners. In the Canadian province of Ontario, for example, the trade ministry was found to exercise greater influence over regulatory processes than it had before trade and investment agreements were concluded.[26] This evidence has mostly focused on investor/state dispute settlement provisions, which allow foreign investors to take legal action against governments that regulate in ways harmful to their interests.

It is less clear that it is similarly applicable to regulatory co-operation provisions – particularly in the case of the UK. Many of the good regulatory practices provisions in previous US FTAs have targeted the comparatively underdeveloped regulatory systems in emerging economies.[27] The UK, on the other hand, applies almost all of these provisions already. It would be extremely unusual for the UK to implement a new regulation without a full public consultation. There is no bar on non-UK individuals and businesses participating in such public consultations. The UK's commitment to good regulatory practices of the type prescribed in US FTAs looks set to continue after Brexit: the UK's Food Standards Agency (FSA) has already published the model of risk management it will adopt when it assumes the functions currently carried out by the European Commission and the European Food Safety Authority.[28] It would be entirely in line with the Good Regulatory Practices chapter of a typical US FTA.

For this reason, the UK's regulatory processes have been recognised as some of the most effective in the world. Ten years ago, the OECD described the UK's Better Regulation policies as "impressive [in their] vigour, breadth and ambition".[29] Similarly, the UK already performs well in rankings of competitiveness and cost of doing business conducted by organisations such as the World Economic Forum and the World Bank.[30,31] Carrying out comprehensive impact assessments and stakeholder consultation before regulating is nothing new to the UK. Some might argue that the UK's existing regulatory processes overweight economic factors at the expense of other considerations. This is a legitimate political view. But even if one were to accept it, it does not seem likely that provisions in FTAs would push the UK further in this direction.

The UK's regulatory model already looks thoroughly compatible with that encouraged by typical modern FTAs.

Route 2: Side bargains

Countries implement new regulations all the time. Many of these can become non-tariff barriers to trade and harm the export interests of other countries. These 'trade irritants' are frequently difficult to resolve. Countries often bring these issues up in committees at the WTO, but frequently without success.* While the WTO dispute settlement mechanism may sometimes provide a means for the offended party to oblige the offender to change its ways, it is a far from perfect mechanism (and is in any case not currently functioning, as we discuss below).

It may not be cost-effective to bring a challenge in the WTO for a relatively small dispute, either financially or in terms of diplomatic capital. The irritant may not even be a breach of the WTO agreements – for example, if a country simply takes a long time to assess an application for permission to import a regulated product. Instead, many such irritants can be resolved in 'side bargains' made alongside the negotiation of FTAs.

Bargaining over regulation happens in the margins of FTAs, not the texts

The negotiation of a new FTA can provide a locus to resolve trade irritants. First, in purely practical terms, negotiations bring together large numbers of government officials – not just the trade diplomats who normally congregate in Geneva, but civil servants from across government departments and independent regulatory agencies. Bringing in technical experts can help resolve misunderstandings and facilitate small-scale regulatory reform.

More controversially, negotiating FTAs gives both sides a bargaining chip to use in the resolution of long-standing disputes. Where normally a regulator can often simply ignore a complaint raised by another country, when FTA negotiations are ongoing the

* In 2018 alone, 18 new specific trade concerns were brought to the WTO SPS Committee, while 35 were brought to the TBT Committee. These concerns can be wide-ranging: in the SPS Committee, Vietnam complained about Saudi Arabia's temporary ban on the import of shellfish; the US complained about Vietnam's regulatory requirements for 'white offals'; the EU complained about US import restrictions on apples and pears; and China complained about the EU's revised definition of the fungicide folpet. On the TBT side, concerns ranged from an Indonesian complaint about Indian regulations on the water content of cinnamon to EU criticism of a Russian ban on the use of PET (recycled plastic) bottles for the packaging of alcoholic drinks. See World Trade Organization, 'Technical barriers to trade information management system', (no date) retrieved 22 July 2020, http://tbtims.wto.org; World Trade Organization, 'Sanitary and phytosanitary information management system', (no date) retrieved 22 July 2020, http://spsims.wto.org.

complainant can make progress in those negotiations conditional on the resolution of its issues. Countries are not on the whole forced to change their regulations by the FTAs they sign – rather, they change their regulations to sign FTAs.

A number of examples of this can be seen in the EU's negotiations. Before it agreed to launch FTA negotiations with Japan in 2012, for example, the EU insisted that it and Japan conduct a joint 'scoping exercise'. This consisted in large part of determining whether the Japanese government was willing and able to take action to eliminate many non-tariff measures that had impeded EU access to Japanese markets, in some cases for decades.* In an unprecedented move, the EU council inserted a 'review clause' in the negotiating mandate, requiring the EU commission to report after one year on Japan's progress in removing trade barriers and giving the council the option to halt negotiations at that point if progress was insufficient. Sufficient progress had been made and negotiations were allowed to continue.[32] By July 2017, about half of the issues the EU had raised with Japan had been resolved, including "an overwhelming majority of issues relating to cars, pharmaceuticals and medical devices".[33]

Regulatory bargaining is often difficult to spot from the outside

These bargains are seldom so explicit. While the EU was negotiating its CETA agreement with Canada and immediately before it began negotiating the TTIP agreement with the US, the EU commission decided to legalise the washing of meat with lactic acid, subject to certain conditions. On the face of it, this was an entirely autonomous decision, applicable to domestic production as well as imports, and with no connection to trade whatsoever.[34]

In reality, however, it was widely reported that this was done as a show of good faith to its negotiating partners, to whom this barrier had been an annoyance for some time.[35] Similarly, the US's decision to expedite its approvals process for the import of Belgian apples and pears was not required by an EU–US agreement – but it did form part of a wider package of concessions being exchanged by the two sides in order to smooth the path to an agreement.[36]

While TTIP negotiations were ongoing, the EU commission and the US Trade Representative (USTR) regularly met outside the formal negotiations to discuss progress in resolving the lists of trade irritants that the two sides had exchanged privately – presumably including apples. The subsequent slowdown in the authorisation process for apple imports tracks the declining fortunes of TTIP.[37,38]

It is, of course, even easier to abstain from making new regulations to facilitate the conclusion of trade agreements. During the CETA and TTIP negotiations, the EU commission's decision to delay work towards new regulation on endocrine disrupting chemicals** was thought by some NGOs to be an attempt to avoid a confrontation with

* For example, duplicative testing requirements for pharmaceuticals, which appeared to European pharmaceutical companies to be deliberate attempts at delaying the entry of their products to the market so as to give their Japanese competitors time to catch up. More of these irritants are described in Sunesen ER, Francois JF and Thelle MH, *Assessment of Barriers to Trade and Investment between the EU and Japan*, Copenhagen Economics for DG Trade, 2009.

** Endocrine disrupting chemicals (EDCs) are used in some pesticides but have been suspected to be associated with increased rates of cancer and other disorders.

its US counterparts. Others have claimed that the EU's decision not to define shale oil as a 'dirty fuel' was the result of representations made by the Canadian government on behalf of its tar sands industry during the CETA talks.[39]

The UK should expect similar pressure – and it has particular vulnerabilities

Applying pressure to UK negotiators to make domestic regulatory changes is the most likely way in which new trading partners can seek to influence the future of UK regulation. The text of any FTAs the UK is hoping to sign will concentrate more on procedural restrictions on UK regulators; discussions on specific regulatory issues are likely to happen behind the scenes.

The UK government is particularly vulnerable to such pressure being applied because of the weight it has placed on FTAs as a 'prize' from Brexit. All countries which start negotiating trade agreements want to conclude them, but there are few countries where successfully concluding FTAs is as politically significant as the UK. Threatening to collapse the negotiations unless the UK makes concessions on its regulations could be a good tactic for the UK's negotiating partners.

Making such concessions would not necessarily be the wrong thing to do. There is a respectable argument for reforming EU rules on questions such as gene editing or the use of pathogen reduction treatments in food processing where there is no clear scientific basis for maintaining them. And if the UK is going to make those reforms in any event, there is no reason not to extract some concession from a trading partner for them. But the government will need to take care to ensure that any concessions it does make are genuinely in the UK's interests, and not just used as bargaining chips. We suggest how the UK should structure its handling of regulatory trade issues to achieve this in Part 2.

Route 3: Regulatory agreements

Beyond FTAs, countries also often sign regulatory agreements with one another covering specific areas of policy. The UK has already 'rolled over' several such agreements in which it participated by virtue of its EU membership with countries, including those with Australia and the US, with whom it intends to strike fully fledged FTAs. (It has also suggested that it would consider similar arrangements with countries with which it is not yet ready to sign FTAs.)[40]

In theory, these regulatory agreements could be used to influence UK regulations. In practice, however, they are unlikely to do so.

The EU's TBT Agreements reduce testing requirements – but do not harmonise regulations

Regulatory agreements aim to reduce barriers to trade, sometimes through harmonisation of rules, but more often through mutual recognition of each other's regulators or regulatory systems.* In the TBT field, the EU has signed 'mutual

* Indeed, where they do require the parties to adopt harmonised rules, it is usually because the rules have already been harmonised at a multilateral level. For example, the EU and the US have signed a 'mutual recognition agreement' on marine equipment that requires harmonisation. In practice, however, the rules are already harmonised under a multilateral framework governed by the International Maritime Organization.

recognition agreements' (MRAs) with Australia, Canada, Japan, New Zealand and the US.* The agreements cover only specified sectors: for example, the EU–Australia MRA covers automotive products, electromagnetic compatibility, low-voltage equipment, machinery, medical devices, pressure equipment, telecommunications terminal equipment and good manufacturing practice for pharmaceuticals.

MRAs are valuable for businesses – which is why the UK has proposed to incorporate similar provisions in its FTA with the EU – but not to anything like the same degree as the mutual recognition principle practised within the EU.** This is because they do not provide for the mutual recognition of regulations, but only of conformity assessment.*** This allows, for example, a medical device manufactured in Australia to be tested in an Australian laboratory rather than in the EU (and vice versa) – but the Australian laboratory must test the product to EU standards, not Australian ones. The agreement allows businesses to save on the costs of duplicative testing in each country to which they export,**** but they still have to face the cost of producing to multiple different standards. The mutual recognition of conformity assessment embedded in these agreements is thus qualitatively different from the mutual recognition of regulation practised in the EU and European Economic Area (EEA), where any product lawfully marketed in any EEA member state must be allowed to be marketed in any other. They have no direct impact on domestic regulation at all.

SPS Agreements go further in theory – but their practical effect has been limited

The EU has also signed SPS agreements – often called 'veterinary equivalence agreements' (VEAs) – with the US, Canada and New Zealand. In some cases, these agreements have been folded into wider FTAs. For example, the EU's VEA with Canada, originally signed in 1999, has since been incorporated into the SPS chapter of CETA. The EU's VEAs go further than its TBT Agreements in that regulations – not just testing procedures – are recognised as equivalent. Annexes to the agreements list specific regulations of each party that are recognised as being equivalent. In theory, where equivalence is recognised, farmers and food manufacturers should be able to save money by rearing and handling animals and their products in the same way for both domestic and export markets.

Trade in animals and food products is made simpler by regulatory equivalence, but even where it has been agreed there is much more paperwork than there is for intra-EU trade. All consignments must still be accompanied by a health certificate signed by a government veterinarian. The effect of a recognition of equivalence is that the vet has to certify only that the product concerned has been produced in accordance with that country's requirements, rather than those of the importing country.

* It has also signed agreements with Israel and Switzerland, but these look somewhat different from the first five because their trading relationship with the EU is overall deeper.
** Or that proposed in the UK government's recent white paper on the UK internal market.
*** With the exception of the MRAs with Switzerland and the marine equipment MRA with the US (for the reasons given above).
**** Particularly if the testing concerned destroys the product. Consolidating testing in one location can also simplify audit processes.

What is more, the EU's VEAs have not done as much to facilitate trade as was hoped when they first began to be negotiated in the mid-1990s. In part, this was due to the rather restrictive notion of equivalence they incorporated. The WTO SPS Agreement concentrates on the level of protection that a regulation affords. In theory, it should be possible to recognise two completely different processes – for example, high hygiene standards for abattoirs and requirements to irradiate animal carcases after slaughter – as equivalent provided that the meat that comes out at the other end is no more likely to be contaminated with harmful micro-organisms in either case.[41]

When negotiating the VEAs, however, the EU and its partner countries did not examine whether different regulations in fact achieved the same result. Instead, full equivalence was recognised only where the two sets of regulations were identical. Where they differed, partial equivalence* was granted, requiring the exporter to comply with additional conditions set by the importing country. The practical effect of this is that, even with the VEA in place, an exporter still has to comply with the requirements of the importing country. The VEA just simplifies the paperwork slightly where those requirements happen to be the same as those of the exporting country.[42]

The EU–US VEA has been particularly ineffectual owing to the high degree of politicisation that came to characterise the EU–US relationship in the food safety field after it was signed in 1997. Approvals processes for completely unrelated products ground to a halt as the two sides retaliated against perceived unfairness by the other.[43] When the UK was assessing international agreements that it would need to roll over ahead of a no-deal Brexit in 2019, it came to the conclusion that the EU–US VEA was simply not worth replicating.

If the UK's regulatory agreements follow international precedent – which seems likely – they will do little to constrain the UK's regulatory freedom.

Route 4: The World Trade Organization

The WTO is today the greatest constraint on its members' regulatory autonomy. It did not start out like this: the WTO's precursor, the 1948 General Agreement on Tariffs and Trade (GATT), barely dealt with regulatory issues at all. This changed with the creation of the WTO in 1995. Two new agreements were signed to stop domestic regulations becoming non-tariff barriers to trade. The Agreement on the Application of Sanitary and Phytosanitary Measures covers measures adopted to protect animal and plant health, as well as food safety. The Agreement on Technical Barriers to Trade covers all other technical regulations, standards and conformity assessment procedures. A powerful dispute settlement mechanism was to make sure states lived up to these commitments.

* Referred to in the texts as "Yes (2) equivalence".

Box 3: WTO dispute settlement mechanism (DSM)

The GATT had a dispute settlement mechanism, but it was very weak. To make a judgment, it required the consent of all the GATT member states – including the state against which the complaint had been made. Powerful states such as the US therefore tended to use threats of unilateral retaliation as a tool for resolving non-tariff barriers in their trading partners.

The new DSM created in 1995 had real teeth. Dispute settlement panels could rule without the consent of the WTO member complained against. Losing parties faced the prospect of authorised retaliation in the form of increased tariffs. These retaliatory tariffs aim to inflict the same damage on the offending country's exports as it has inflicted on the complainant's. This strengthened DSM has over the last 25 years compelled even the world's most powerful trading partners to comply.

Since December 2019, however, the DSM's 'supreme court', the Appellate Body, has not been functional because of the US administration's unwillingness to nominate new judges. While this means that the UK can for the time being regulate with impunity, it also means that states can retaliate with impunity – just as in the bad old days of GATT. The UK has a strong interest in the DSM returning to health as soon as possible. A new administration in the US may allow this.

The SPS and TBT Agreements impose significant constraints on domestic regulation

These agreements impose serious constraints on WTO members. Under the SPS Agreement, for example, SPS measures must be "based on scientific principles and... not [be] maintained without sufficient scientific evidence";* in particular, they must be based on a risk assessment.** Countries can adopt measures provisionally where the scientific evidence is uncertain – applying the 'precautionary principle' (see Box 4 below) – but they must seek to obtain the evidence they will need to make a final determination within a reasonable period of time.*** They must not "arbitrarily or unjustifiably discriminate between Members where identical or similar conditions prevail": in other words, products that present the same risk to health should be treated in the same way.**** Finally, they must not impose any measures that are more trade-restrictive than necessary to protect human, animal or plant health.

* Article 2.2 SPS Agreement. For example, in the *Japan—Apples* case, Japan's restrictions on the import of American apples were found to violate this provision because there was no rational relationship between the stringency of the measure and the scientific evidence, which suggested the risk was low.

** Article 5.1 SPS Agreement. In the *EC—Hormones I* case, the EU's ban on beef treated with hormones was found to violate this provision because the risk assessment conducted was inadequate.

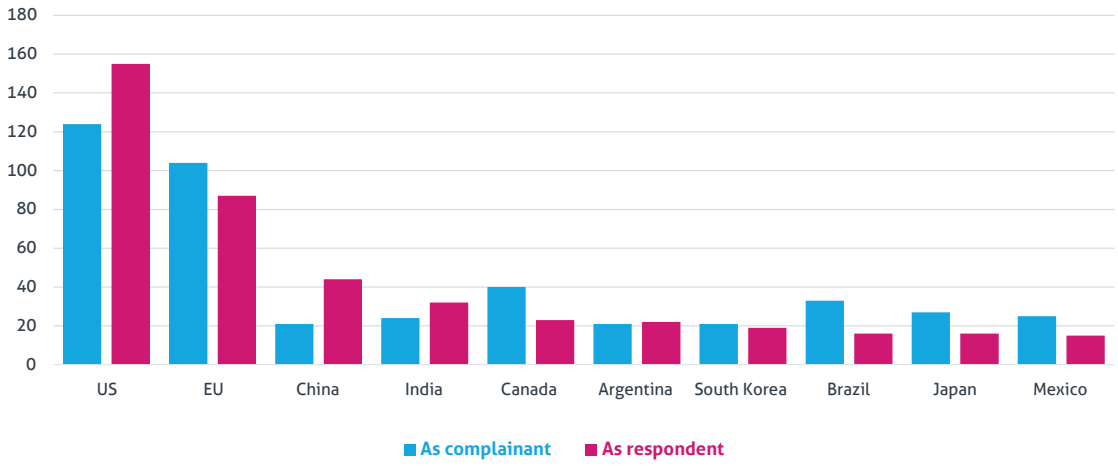
*** Article 5.7 SPS Agreement. In *Japan—Apples*, Japan's apple restrictions were also found to violate this provision because they were maintained even after extensive scientific evidence became available.

**** Article 2.3 SPS Agreement. In the *Australia—Salmon* case, Australia's restrictions on the import of Canadian salmon were found to violate this provision because they were unjustifiably stricter than those applied to imports of other fish such as herring.

Similarly, the TBT Agreement requires that technical regulations must be applied to imported goods in a way "no less favourable" to the way they are applied to like domestic products. In addition, such regulations must "not be more trade-restrictive than necessary to fulfil a legitimate objective".* If there is any way of achieving the same level of risk that allows trade to take place more freely, states are required to adopt it.

The UK will have to decide what to do about the disputes it has inherited from the EU

Figure 1 **WTO disputes by country**



Source: Institute for Government analysis of WTO, 'Disputes by member', www.wto.org/english/tratop_e/dispu_e/dispu_by_country_e.htm

The EU has not always been strictly compliant with its WTO obligations. It has been challenged no fewer than 87 times – more than any country except the US. In many cases, the EU wins. When it does not win, it usually brings the measure which has been found in breach of its WTO obligations into compliance with them. In a few cases, however, the EU has opted to maintain measures that violate its WTO commitments. As well as the second most complained-against WTO member, the EU is also one of only four members which have ever been the subject of authorised retaliation. Two of the disputes in which the other party was authorised to retaliate concerned the EU's ban on treating beef cattle with growth hormones.**

The EU eventually settled this dispute by paying the complaining countries – the US and Canada – 'compensation' in the form of increased tariff-rate quotas for their non-hormone-treated beef exports.[44] However, this settlement will not apply to the UK in future. If the UK chooses to maintain the ban on hormone-treated beef, it is quite likely to face challenges from exporting countries in the WTO. Given that the ban has already been found to breach WTO rules, it would be difficult for the UK to defend such

* Article 2.1 and 2.2 TBT Agreement. For example, in the *US—Gasoline* case, US emissions standards for gasoline were found in breach of this provision because they applied more favourably to US-produced gasoline than to imported Venezuelan gasoline. Similarly, in *US—Clove Cigarettes*, a US ban on the import of Indonesian clove cigarettes was found to violate this provision because the US continued to allow the sale of domestically produced menthol cigarettes, which were considered sufficiently similar to the clove cigarettes as to require equal treatment.

** Disputes DS26 and DS48.

a challenge successfully. It would then have to decide whether to comply with its WTO obligation to legalise hormone-treated beef or to negotiate a similar compensation agreement to the EU's.

Other inherited EU regulations may also fall foul of WTO rules: for example, the EU's ban on 'chlorinated chicken' was challenged by the US at the WTO in 2009.* The dispute is currently on hold, but the US could seek to revive it against the EU – or the UK. As European food safety bodies have previously reported[45,46] that chlorine treatments do not pose a direct health risk and the UK itself voted in favour of lifting the EU ban in 2007,[47] the UK might again have trouble defending it in the WTO dispute settlement mechanism (assuming it returns to full function). The UK needs to decide what it proposes to do with these legacies of its time as a member state now that it can no longer hide behind the EU flag.

The UK's own regulations also risk challenge

The government has previously suggested that it would like not just to maintain UK standards but to raise them.** In many areas, this will not pose a problem. The UK already imposes numerous regulations that conflict with one or another of the WTO agreements. For example, the UK's ban on certain cosmetics containing plastic microbeads is a form of TBT.*** The UK is allowed to enact such measures because they are necessary to achieve one of the objectives listed in Article XX of the GATT. This article allows WTO members to do things that would otherwise be in breach of WTO rules if they are necessary, for example, for the "conservation of exhaustible natural resources".[48]

Some measures, however, might not be justifiable in those terms. MPs (including those on the Tory benches) recently attempted to amend the Agriculture and Trade bills so as to ban the import of agricultural products that were produced in ways that would not be legal in the UK.**** This would be unlikely to be compliant with the UK's obligations under the SPS and TBT Agreements. In particular, measures requiring imported food to comply with UK animal welfare law could well be successfully challenged in the WTO. This is because the WTO generally looks with disfavour on rules relating to production processes that have no discernible effect on the finished product.[49]

* Dispute DS389. The current status of the dispute is available at www.wto.org/english/tratop_e/dispu_e/cases_e/ds389_e.htm

** For example, the 2019 Conservative manifesto states that the future relationship with the EU will allow the UK to "raise standards in areas like workers' rights, animal welfare, agriculture and the environment" (p. 5).

*** The UK government notified the WTO of its proposed ban as a TBT in line with Article 10.6 of the TBT Agreement. See WTO document G/TBT/N/GBR/28 of 31 July 2017.

**** Some of the proposed amendments related only to food imported under a free trade agreement, which would not necessarily be in breach of WTO rules.

Such rules are extremely easy to misuse for protectionist purposes.* There is currently no exception from WTO rules for regulations aiming to protect animal welfare as there is for the environment, though the exception for "public morals" was recently used by the EU to ban the import of Canadian sealskins because of the cruelty involved.[50] The UK would have a difficult task in defending similar regulations should it choose to adopt them itself.

The UK can always choose not to comply

That said, it is clear that the WTO does not challenge the UK's regulatory sovereignty in the same way that the EU has been accused of doing. Unlike EU law, WTO law makes no claims to direct effect (that is, to provide rights to individual citizens that can be enforced in the courts of a member state).[51] Parliament can always legislate in contravention of WTO rules and the UK courts will not strike such legislation down, as they have done in cases where acts of parliament were found to contravene EU law.** There is no appeal from national courts to the WTO dispute settlement mechanism. Indeed, private individuals cannot bring cases to the WTO at all: only other WTO members can.[52]

What is more, a state that is found to have breached its WTO obligations is not formally required to bring its legislation into compliance with them. As in the beef hormones case, the losing party in a WTO dispute can always offer 'compensation' rather than comply with the rules. This compensation usually takes the form of additional tariff concessions or tariff-rate quotas (beyond those it has agreed as part of its WTO membership) that have a similar value to the winning country as the trade of which the losing country's illegal action has deprived it. It is up to the complaining country whether to accept this compensation or to retaliate against the loser by increasing its own tariffs on the loser's exports to the same value as the trade it has lost.*** If the UK finds that one of its own regulations is incompatible with WTO rules but it wants to retain it nonetheless, it could do as the EU did before.

This is clearly not without cost: the UK would have to accept its industries being less protected from foreign competition than they otherwise might be and it would be left with fewer tariffs to trade away in FTA negotiations. Whether it would be worth bearing those costs is a political question that the UK will have to answer in each individual case.

* As far back as 1904, Germany cut its tariffs on the import of "large dappled mountain cattle reared at a spot at least 300 metres above sea level and having at least one month's grazing each year at a spot at least 800 metres above sea level". The tariff reduction was theoretically open to everyone; in practice, only Switzerland could benefit. See for the original tariff U.S. Department of Commerce and Labor, *Customs Tariff of the German Customs Union (Law of December 25, 1902, revised to June, 1911)*, Government Printing Office, 1911; further discussion can be found in Hudec RE, '"Like Product": The differences in meaning in GATT Articles I and III', in Cottier T and Mavroidis PC eds, *Regulatory Barriers and the Principle of Non-Discrimination in World Trade Law*, University of Michigan Press, 2000, pp. 101–23.

** Perhaps most famously in the *Factortame* cases.

*** See Article 22 of the WTO Dispute Settlement Understanding.

Part 2: Deciding on the UK approach

Whichever of the routes described above its partners pursue, one thing is clear: the UK will come under pressure to amend its regulations in trade negotiations. Responding effectively to that pressure will be key if the UK is to conclude FTAs while making the most of the regulatory autonomy it seeks to gain from Brexit and maintaining public support for its trade policy. To do so, it will need to:

- develop a coherent regulatory approach
- decide in advance what concessions it is willing to make
- have a clear and inclusive process for resolving unanticipated questions
- include its regulators and the devolved administrations in its decision making.

Develop a coherent regulatory approach

Regulation is specific and detailed. It deals with individual policy domains or even individual products. But there are common issues that policy makers have to address when developing their regulatory framework – and regulation will be more coherent if it takes account of more general principles.

The EU treaties set out some of the principles underlying its approach to regulation. For example, Article 191 of the Treaty on the Functioning of the European Union (TFEU) declares that EU environmental regulation "shall be based on the precautionary principle and on the principles that preventive action should be taken, that environmental damage should as a priority be rectified at source and that the polluter should pay". These principles are then implemented in individual pieces of EU regulation covering specific areas of environment policy. Similarly, the EU's General Food Law requires EU food safety regulation to achieve a "high level of protection of human life and health" and provides that risk management decisions may take into account both scientific evidence and "other legitimate factors".[53]

These high-level positions are all policy choices the EU has made. Other countries choose to adopt different approaches to regulation: for example, many US regulators would claim that they do not apply the precautionary principle (see Box 4, below).[54] These EU policy choices were the product of negotiations between 28 member states in the EU council (and, in some cases, the EU parliament as well). The UK will need to decide whether it still agrees with them.

Ideally, it would have done so before starting new trade negotiations. Given that this is no longer possible, it should seek to decide its overall regulatory approach as soon as possible. Otherwise, it is liable to find that its risk regulation is influenced by the priorities of its trading partners and ends up being incoherent. While it is hardly unknown for governments to adopt different levels of risk tolerance in different fields, it can be undesirable. As well as impairing its effectiveness domestically, it is likely to make UK regulation easier to challenge at the WTO.*

* The *Australia—Salmon* case (described on page 17) demonstrates the difficulty of defending regulations that achieve demonstrably different levels of protection.

Box 4: The precautionary principle

The precautionary principle is an approach to regulatory decision making according to which "where there are threats of serious or irreversible damage, lack of full scientific certainty shall not be used as a reason for postponing cost-effective measures to prevent" it.[55] (In crude terms, 'better safe than sorry'.) Though often thought to be a peculiarity of the EU, the precautionary principle made an appearance in international law in the 1992 Rio Declaration on Environment and Development.

Different countries have, however, interpreted it differently. While the US has applied the precautionary principle in certain fields (for example, the regulation of gases that harm the ozone layer), it has tended to adopt an interpretation that focuses on the provisional nature of precautionary measures. While, in the US's view, it may sometimes be legitimate to apply precautionary regulation, it should be reviewed as soon as the additional information necessary for a more objective assessment of risk is obtained. Regulators should attempt to obtain this additional information as quickly as possible.[56]

The EU, on the other hand, favours a more cautious interpretation. In the EU's view, precautionary measures are not necessarily time-limited and can be applied unless and until the product in question is proven safe. This has been decried by the US as involving waiting "until the risk assessment process has convinced even the most irrational consumer of the absence of even the most hypothetical risk of the most remote theoretical uncertainty".[57]

Box 5: Acceptable level of protection

In most cases, reducing a risk (such as the risk of fire or of foodborne illness) to zero is impossible or could be achieved only at disproportionate cost. A state's 'appropriate level of protection' (ALOP) is a term derived from the WTO SPS Agreement describing the level of risk a state is prepared to tolerate.[58,*] This is fundamentally a political, not a scientific, decision. A state can then take scientific advice to determine what risk-management measures achieve the ALOP. In theory, WTO members should accept one another's measures as equivalent if they achieve the same ALOP, even if they do so by different means.

Box 6: Other legitimate factors

'Other legitimate factors' is a term used by the EU to describe those aspects of a risk-management decision that are not purely based on scientific evidence – for example, consumer concern or ethical and cultural values.[**,59] Their legitimacy as a basis for regulatory decision making is hotly contested by countries such as the US.[60]

* For a useful discussion of the ALOP in WTO law, see the Appellate Body report in the *Australia—Salmon* case at paras. 179–213; see also Du M, 'Autonomy in setting appropriate level of protection under the WTO law: rhetoric or reality?', *Journal of International Economic Law*, 2010; vol. 13 no. 4, pp. 1077–1102.

** For example, in Article 3(12) of Regulation (EC) No 178/2002.

A statement of regulatory intent could make the UK approach more coherent

One approach that some governments have adopted in trying to make their regulation more coherent is to set out their approach to these cross-cutting questions in a statement of regulatory intent. Twenty years ago, for example, the European Commission published its *Communication on the Precautionary Principle*, described above.[61] Although it has no binding legal force, it has guided EU regulation both internally and in relation to trade ever since.

It has historically proven more difficult for governments around the world to adequately set out their ALOP in general terms – Australia, for example, has claimed to take "a very conservative approach... with the intention of reducing risk to negligibly low levels".[62] A more precise statement of the UK's ALOP would both be valuable in itself and set the UK up as a global leader in risk regulation. This is particularly true in emerging fields such as autonomous vehicles and gene editing, where risk-management approaches are still underdeveloped and the UK has a strong interest in establishing itself as a regulatory leader.

The UK has already made such statements in some fields. The Office for Product Safety and Standards, part of the Department for Business, Energy and Industrial Strategy (BEIS), publishes general guidance for regulators.[63] In 2005, the Treasury published the Hampton report, which set out proposals for efficient and effective approaches to regulatory enforcement that were subsequently embedded in the Regulatory Enforcement and Sanctions Act 2008.[64] More recently, Dame Glenys Stacey's report on the future of farming regulation set out proposals for how the Department for Environment, Food and Rural Affairs (Defra) should use the new regulatory powers it will acquire as the UK leaves the EU.[65]

These are useful, but the government should also develop a statement with a broader character, setting out how it intends to use the new regulatory powers it will acquire in domains beyond agriculture. This would set out the UK's interpretation of core principles in risk regulation and give examples of how it proposed to apply them in individual regulatory domains. It should publish its approach and explain it in parliament and to the public. The document would then serve as guidance to regulators when proposing new regulations – and strengthen the government's nerve in standing up for the UK's regulatory system in future trade negotiations.

Given its cross-government character, it would make sense for this statement to be developed in the Cabinet Office, as was the *Regulatory Futures Review* published in 2017 (which focused on the 'how' of regulation rather than the 'what').[66] The Regulatory Policy Committee should also be involved. Ideally, the statement would be completed well before new trade agreements are concluded – though this may prove challenging given the pace at which the government wishes to proceed with these.

Decide in advance what concessions the UK is willing to make

The UK has a big advantage over many countries entering regulatory trade negotiations in that it has a reasonably good idea of the priorities of its negotiating partners. The US has made no secret of its desire to change particular aspects of UK regulation, for instance: the US ambassador to the UK, Woody Johnson, told journalists in June that sensitive agricultural products such as chlorine-washed chicken "should absolutely be included in a US-UK free trade agreement".[67] The Australian government has already stated that it will seek to "assess and remove trade-restrictive measures" in the TBT and SPS fields.[68] And, as noted earlier, if the UK maintains an EU regulation that has already been successfully challenged in the WTO (such as the ban on hormone-treated beef), it is likely to face a challenge itself.

Beyond these hot-button issues, the US has published its negotiating objectives for UK trade talks.[69] It also publishes an annual list of regulatory trade barriers in countries around the world, which provides a good indication of those regulations that it will seek to target. For example, its 2020 trade barriers report highlights the following as barriers to US trade with the UK and the wider EU:

- excessive requirements for data submission when applications are being made for approval of a chemical
- energy-efficiency requirements for electronic displays (such as computer monitors)
- the use of common names, such as 'parmesan', as geographical indications
- the restriction of 'traditional terms', such as 'tawny' or 'château', to wines made in Europe
- requirements for export health certificates for animal products to make statements about compliance with animal welfare rules.[70]

Ideally, the UK would know how it proposed to respond to these issues well before negotiations started. Without a clear understanding of whether it is prepared to make concessions in these areas and of what concessions it will require from its negotiating partners in exchange for them, the UK faces an acute risk of being pushed around by its negotiating partners – or of failing to make concessions that would actually be advantageous. It also runs the risk of making commitments that contradict either one another or what it has already agreed with the EU in the Withdrawal Agreement. This understanding needs to be written down and agreed at ministerial level.

Ambiguity in the UK's negotiating objectives is a bad sign

Unfortunately, even after negotiations with the US have already started, there is little evidence as of summer 2020 that this has been done. Press reports suggest that there is still disagreement between the Department for International Trade (DIT) and Defra as to how sensitive issues of animal welfare should be handled.[71] No.10 has apparently not come down clearly on one side or the other.[72] There are even reports that a complex 'dual-tariff' scheme is being drawn up whereby tariff reductions would be made contingent on regulatory convergence.[73] The recent establishment of a Trade and Agriculture Commission suggests that the UK's policy on these issues is still very much up for grabs.[74]

Beyond animal welfare, the UK's negotiating objectives are ambiguous about sensitive issues such as geographical indications, saying that the UK's objective is to "maintain effective protection of food and drink names in a way that reflects their geographical origins, getting the balance right for consumers to ensure they are not confused or misled about the origins of goods, and have access to a competitive range of products".[75] The phrasing seems to have been carefully chosen not to commit the UK either to maintaining geographical indications (such as Caerphilly cheese or Arbroath smokies) or to getting rid of them.* This makes no sense in a negotiating mandate, which should set out a country's optimal end-point – not necessarily the one it expects to achieve. The clear implication is that, once again, tensions between the UK's trade and agriculture ministries have left it uncertain even as to what it would like to see in an ideal scenario.

This is a recipe for disaster. The UK has been preparing for these negotiations for almost four years. The US has made no secret of its priorities. If the UK has not been able to come up with an agreed position by now, it seems likely that it will not do so until it is forced to. This is likely to take the form of threats by the UK's negotiating partners to stage a walk-out if they do not get what they want: the gesture, while theatrical, is a common feature of trade negotiations.

UK ministers and senior officials will then have to make far-reaching and controversial decisions about the future of the UK's regulatory model at a time when they are tired, under intense media scrutiny, and afraid that their flagship trade policy (one they have promoted as among the chief benefits of Brexit) is on the verge of a humiliating collapse. No good decision is likely to be taken under such conditions.

Indecision bedevilled the May government in talks with the EU and should not do the same in FTAs

In fact, the situation is similar to that faced by Theresa May's government in its negotiations with the EU. As the Institute for Government has previously highlighted, the government's unwillingness to take tough decisions over Brexit forced civil servants to use "ambiguous wording and ingenious drafting" to build consensus among cabinet factions.[76] That government continually repeated slogans such as "no deal is better than a bad deal" without ever reaching firm decisions on what kind of deal would be so bad that no deal would be better.

* Notwithstanding the fact that Article 54(2) of the Withdrawal Agreement commits the UK to protecting EU geographical indications in perpetuity.

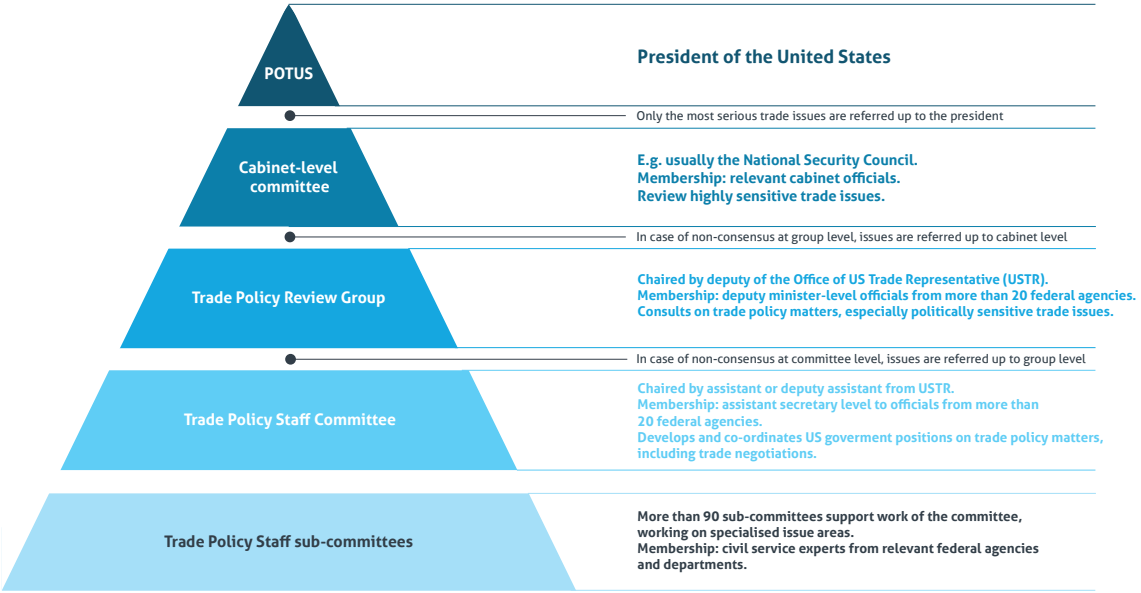
Without this clarity, the UK's red lines became progressively pinker and the EU was able to set the agenda. If the UK government is to avoid a repeat of this situation in its trade agreements beyond the EU, it needs to be certain of which concessions it is willing to make and which it will not – even if that means the FTA fails. That understanding needs to be collectively agreed by all members of cabinet. The UK has made an unforced error in entering talks with the US, Australia, New Zealand and Japan before reaching such an understanding at home. It should seek to correct it as soon as possible.

Have a clear and inclusive process for resolving unanticipated questions

Of course, some of the questions that will come up in regulatory trade negotiations will be new. The government will need a way of agreeing what the answers should be. As the Institute argued in its paper on trade three years ago, this cannot be left to DIT alone.[77] While tariff barriers have no purpose other than protection, non-tariff barriers to trade often serve a legitimate regulatory function that goes beyond their trade implications. The government needs to balance this function with the aims of its trade policy. This means that it will need a structure in which different departments can express their views before a final decision is taken.

Some countries, such as the US, opt for a highly formalised structure of decision making with clear escalation routes, leading ultimately to the president (see Figure 2). In this system, the majority of decisions are taken by lower-ranking officials, with only the most important and politically sensitive issues reaching cabinet level and the president. If there is full consensus on an issue, a decision can be adopted at any level.[78]

Figure 2 **US trade policy decision making**



Source: Huenemann J, 'On the trade policy-making process in the United States', in *The Trade Policymaking Process: level one in the two level game –county studies in the Western Hemisphere,* Inter-American Development Bank, 2002, p. 68; Office of the US Trade Representative, *Strategic Plan FY 2013–FY 2016*, retrieved 24 April 2017, https://ustr.gov/sites/default/files/USTR%20FY%202013%20FY%202016%20Strategic%20Plan.pdf; Environment Protection Agency, 'Steps in Development of U.S. Proposed Text for Trade Agreement Negotiations', 2014, retrieved 24 April 2017, www.epa.gov/sites/production/ les/2014-04/documents/ustrade.pdf

The UK's decision making process is clear at the top, but less so lower down

Figure 3 **UK trade policy decision making**

Source: Institute for Government analysis.

Since 2016, the UK has developed its own model for resolving interdepartmental disputes over trade policy. After a series of shifts under the May government, trade policy now sits with the EU Exit Strategy Committee (XS), whose terms of reference now refer not specifically to the EU but to "the UK's trade priorities, including Free Trade Agreements".[79] Senior officials from the departments represented on XS meet before each ministerial-level meeting to prepare the agenda and attempt to smooth out disagreements in advance. Unlike the US's Trade Policy Staff Committee, however, these EU Exit Strategy (officials) meetings do not have independent decision-making authority (which would not be normal constitutional practice in the UK).

Beneath XS sits a range of working groups convened at various levels. Some of these are standing – for example, the Trade Policy Steering Board, which brings together director-level representatives of involved departments – while others are convened ad hoc to draft a particular paper for decision by cabinet.

The government clearly believes XS functions well as a space for decision making at the most senior ministerial level – to the extent that it replicated its structure in developing its committee governing the response to the coronavirus crisis. The level at which it meets, however, is likely to make it increasingly difficult for it to take the detailed decisions that will be needed if, for instance, the UK is responding to a technical regulatory dispute in the WTO. Nor is it regularly attended by ministers from DIT, BEIS and Defra, who between them will be responsible for most regulatory trade questions.

A group chaired by the prime minister and attended by the foreign secretary, home secretary, chancellor and minister for the Cabinet Office necessarily has limited time and attention to spare. The lack of a clear and empowered structure underneath it has already meant that relatively minor trade policy decisions have gone to the most senior levels. For example, the decision on whether the UK Global Tariff – the tariff the UK will apply to countries with which it does not have an FTA – should retain the EU's complex tariff structure for cakes and biscuits (the Meursing Table) went all the way to the prime minister.

With the UK planning to conduct numerous, simultaneous FTA negotiations – as well as pursuing a leadership role in the WTO – this structure will prove unwieldy. Clearer governance at official level would both reduce the burden on senior ministers and give departments more confidence that DIT will act on their views. Once ministers have agreed on the principles of the UK's approach to trade and regulation, the government should establish more stable official-level committee structures with the ability to take decisions within the limits set. A more coherent official-level governance structure could also help fill in two gaps in XS: the UK's regulatory agencies and the devolved administrations.

Ensure governance structures and negotiating teams include regulators and the devolved administrations

The UK has a large number of regulatory bodies, covering fields from veterinary medicines to vehicles, with varying degrees of autonomy. While final decisions on regulatory measures must sit with democratically accountable ministers, they cannot be made without the input of arm's-length regulators. Their input will be valuable for two reasons: expertise and transparency.

First, when regulation is being discussed in the context of trade negotiations, it will clearly be vital for experts from the UK's independent regulators to be at the table. Even departments such as Defra and BEIS will not necessarily have the expertise to discuss detailed regulatory issues, let alone DIT's trade negotiators. In addition, independent regulators often have stronger relationships with industry and third-sector stakeholders. Agencies such as the Food Standards Agency and the Animal and Plant Health Agency should therefore be represented in talks on SPS issues, and so on. Where automotive regulation is being discussed, officials from the Vehicle Certification Agency should be in the room. If they are not, the UK risks inadvertently making commitments that it later finds difficult or undesirable to implement.

For this reason, countries such as the US invariably incorporate officials from independent agencies into their negotiating teams and governance structures.[80] For example, while a USTR official will chair negotiations on SPS issues, alongside them will be sitting representatives of the Food and Drug Administration, the Animal and Plant Health Inspection Service, the Food Safety and Inspection Service, the Environmental Protection Agency and the Department of Commerce. While this necessitates a very large table, it helps to make sure that the US's SPS negotiations reflect the interests of all parts of US industry.

Second, incorporating arm's-length regulators into the governance and conduct of trade negotiations helps provide assurance that regulatory changes are being made for sound reasons and after full consideration of the evidence, rather than in haste to secure an agreement. Given that some of the changes the UK makes to regulation over the coming years are likely to be controversial, this assurance will be important in bringing parliament and the public along.

The devolved administrations must be involved

As in many areas of the devolution settlement, the distribution of powers over product regulation to Scotland, Wales and Northern Ireland* is not entirely consistent. "International relations, including... regulation of international trade" is a reserved matter in all three devolution statutes, so the UK government can in theory negotiate trade agreements without reference to the devolved administrations.

Implementing them, however, will require engagement with the devolved administrations. While standards for manufactured goods are reserved, the regulation of food and agricultural products is devolved. For example, the Scotland Act 1998 specifically devolves control over the "prohibition and regulation of movement into and out of Scotland of... food, animals, animal products, plants and plant products for the purposes of protecting human, animal or plant health, animal welfare or the environment". This means that, while the UK government will be able to implement agreements it makes on TBT issues for the UK as a whole, it will be reliant on the devolved administrations to implement the results of its negotiations on SPS issues.**

We discuss in more detail how the UK government should seek to work with the devolved administrations to implement regulatory trade policy in the next section – as well as what it could do if the views of the administrations prove irreconcilable. But the best way to avoid outbreaks of hostility between the UK government and the devolved administrations, to the extent that the wider politics of the situation make this possible, would be to involve them fully in decision making, especially (but not exclusively) on issues where responsibility for implementing the decisions made sits with them. The Canadian government effectively included its provincial governments in its negotiations on CETA where they touched on areas falling under provincial jurisdiction, such as public procurement. This allowed the Canadians to make credible commitments to the EU in those areas. The final agreement was deeper, more comprehensive, and more accepted across Canada.[81]

* The Northern Ireland protocol will also limit what the UK can agree to.
** Unless it chooses to make changes to the devolution settlements.

Part 3: Implementing the agreement

Once decisions have been taken on how the UK should respond to pressure from its trading partners, the government will need to implement those decisions. The government can, of course, itself implement a decision to hold firm and keep UK regulations unchanged. If it does decide to make a concession and change the UK's regulations, however, it may need the agreement of parliament, the devolved administrations, or both. This section explains the cases in which it would need to engage these bodies and how both they and it should go about working together.

Parliament

The UK parliament exercises little control over treaties

Unlike many legislatures overseas, including the US congress and the EU parliament, the UK parliament will not have a guaranteed right to a yes/no vote on future trade agreements. Under the UK's constitutional set-up, the ratification of international treaties, including trade agreements, is an executive act carried out under the royal prerogative. The Constitutional Reform and Governance Act 2010 provides that an international treaty must normally be laid before both Houses of Parliament for 21 sitting days before it is ratified. If the Commons resolves that it should not be ratified, that period is extended for a further 21 sitting days. But the lower house cannot formally veto a treaty: it can only delay it through consecutive 21-day extensions.[82]

What is more, given the government's control of the parliamentary timetable, it is not certain that parliament could actually secure a vote and use its delaying powers.* If the government chose not to schedule a debate, opponents of a treaty would have to hope that one of the days on which Commons business is controlled by the opposition – opposition days, of which there are only 20 per parliamentary session – fell within the 21-day window and that the opposition was willing to use it for that purpose.[83] Backbench MPs have attempted to use early day motions to obtain a debate on proposed treaties, but without success.[84] Amendments giving parliament a greater role in the conclusion of trade agreements were made to the Trade Bill in the 2017–19 parliament and were proposed again in July 2020. With an 80-seat majority, however, the government had no need to concede and the amendments were rejected by the House of Commons.

Although the conclusion of treaties is a royal prerogative, this does not mean that the government can change the law by itself. The UK is a so-called 'dualist' state: treaties, even when ratified, do not automatically have the force of law in the UK (as they would in 'monist' states such as the Netherlands). They must be implemented by domestic legislation.[85] To avoid the uncomfortable situation of having bound itself in international law to provisions that it is unable to apply, the UK government does not ratify treaties for which the implementing legislation is not yet in place. This allows parliament the ability de facto to prevent the ratification of a treaty that requires primary legislation for its implementation.[86]

* The question of control over the parliamentary timetable became a key issue during the Brexit impasse in 2019.

The May government took the positive step of committing to introduce a bespoke bill for the implementation of FTAs "if changes to primary legislation are necessary".[87] This would have given parliament greater clarity about the aims of the legislation it was being asked to pass. The new government should continue this commitment, otherwise it risks creating suspicion that domestic legislation is actually being used to make concessions to the UK's negotiating partners – as the EU did when it legalised acid washes for meat.

The government can make extensive changes to UK regulation by secondary legislation

For some FTAs, however, changes to primary legislation may not be necessary. For example, the wide regulatory powers that the government enjoys under statutes such as the Environmental Protection Act 1990 and the Food Safety Act 1990 may provide it with all the powers it needs to implement commitments it has made to trading partners through secondary legislation alone. The government has made no commitments relating to implementing FTAs – or, for that matter, 'side bargains' – by secondary legislation. The May government's command paper on the subject said simply that "changes to secondary legislation would be made in the usual way".[88]

While secondary legislation does have to go through some form of parliamentary procedure – either affirmative or negative – parliament's scrutiny of most statutory instruments is extremely weak. No negative procedure statutory instrument has been rejected by the Commons since 1979.[89] Parliament, therefore, is unlikely to represent a serious barrier to implementing such changes.

The major obstacle to the government making radical changes to the UK's regulatory landscape is now Section 7(2) of the European Union (Withdrawal) Act 2018, which, with certain exceptions, prevents the amendment of retained EU law by UK secondary legislation. Parliament's ability to check the government's implementation of future international treaties will therefore depend to a large extent on its committees exercising vigilant scrutiny of proposed legislation (which may appear purely domestic) containing powers to amend retained EU law in relevant areas. This is linked closely with the need for parliamentary committees in all areas of policy to develop a better understanding of the links between their policy and trade, discussed below.

But parliament has not shown itself to be particularly vigilant. On 9 September 2019 the health secretary, Matt Hancock, made the Specific Food Hygiene (Regulation (EC) No. 853/2004) (Amendment) (EU Exit) Regulations 2019. These regulations make use of the "correcting power" granted by Section 8 of the Withdrawal Act to amend one article of the EU food hygiene regulation, Regulation 853/2004. The amendment transfers a function that the EU commission exercises in the EU to "an appropriate authority".*

* As regards England, the appropriate authority is the secretary of state. In Scotland, Wales and Northern Ireland, the powers have been conferred on the devolved administrations.

This function is that of approving substances that can legally be used to wash meat. The substantive effect of this small change is that the secretary of state can now legalise the washing of meat with chlorine or any other substance – as well as the import of meat that has been washed with such substances – by a simple negative procedure statutory instrument. While the instrument was debated in committees of both Houses of Parliament, the controversial nature of the powers being conferred seems to have passed largely unnoticed.

Parliament should have the resources to scrutinise UK trade policy effectively – not least because it is in the government's own interests

This does not augur well for parliament's ability to scrutinise technical regulatory changes pressed on the UK by its trading partners in future. If such changes are to enjoy popular support and democratic legitimacy, the government will need to be open and transparent with parliament.

What is more, this lack of parliamentary scrutiny does not even strengthen the government's hand in international negotiations. There is a great deal of evidence showing that governments that are tightly constrained by their legislatures tend to get better deals from their international negotiating partners.[90,91,92,93,94,*] It is a considerable advantage for a negotiator to be able to say something along the lines of "personally I'd love to give you this, but you know I'll never be able to make it wash back home" – the EU is especially adept at this.[95] In fact, it is so great an advantage that negotiators have been known to feign domestic constraints that they do not really face.[96] Paradoxically, therefore, a government with few constitutional constraints and a large majority in parliament is at an immediate disadvantage. Giving parliament greater powers and resources to scrutinise its actions could help address this.

The Institute for Government has previously highlighted the need for parliamentary committees to have privileged access to negotiators and negotiating texts.[97] The Commons International Trade Committee (ITC) should insist – and the government should accept – that this access extend to negotiations on regulatory issues that are related to the agreement but will not finally form part of it. The ITC should also look to scrutinise the government's handling of WTO disputes when they arise. Finally, it will be important for the ITC to maintain close ties with departmental select committees in relevant areas to ensure that the trade implications of new legislation are adequately scrutinised. The committee should have the resources necessary to do this.

* It could be argued that this was what the May government was attempting to do when it supported the 'Brady Amendment' rejecting the Northern Ireland backstop in January 2019. By showcasing how strong parliamentary opposition to the backstop was, it hoped to strengthen its hand in negotiations with the EU.

The devolved administrations

International trade is a reserved matter in all of the devolution settlements. This means that the UK government in theory has the power to negotiate trade agreements – including agreements on regulation – on behalf of the whole of the UK. This theoretical power is limited by two factors: the Northern Ireland protocol and the fact that the implementation of trade agreements as far as they affect agri-food regulation is devolved.

The UK government will not be negotiating on regulation in Northern Ireland

The Northern Ireland protocol is clear: EU regulation on goods (both manufactured and agricultural) will continue to apply in Northern Ireland for as long as the protocol is in force. Annex 2 of the protocol lists the specific pieces of legislation that are to remain in force. It includes essentially the whole of the EU acquis as it affects product standards. As and when the EU amends these rules, Northern Ireland will keep pace with them.[98]

This means that the UK will not be able to make commitments on regulation as regards Northern Ireland. It certainly cannot make commitments to change substantive rules and it would be imprudent for it even to make procedural commitments. The UK government simply cannot guarantee that, for example, food safety regulations in Northern Ireland will be based on a risk assessment. It seems overwhelmingly likely that they will, since the EU's risk management system for food is highly developed – but even if they are not, there will be nothing either the UK government or the Northern Ireland executive can do about it.

With no way of backing up any commitments it might make, the safest approach for the UK government would be to include a proviso in any trade deals it signs to the effect that the deal would have effect in Northern Ireland only to the extent possible under the protocol. It seems likely that this would come at a cost in negotiating capital, particularly if the UK government continues to insist that Northern Ireland exporters should be able to benefit from trade deals.[99]

The UK government's powers to implement agreements on agri-food issues in Scotland and Wales are limited

As stated above, while international trade is a reserved matter, SPS regulations are devolved – including in relation to imports of agri-food products. This makes negotiating on such regulations in the context of a UK-wide trade agreement difficult, especially with the Scottish government still determined to retain alignment with EU legislation.

UK ministers possess powers under all three devolution statutes to compel the devolved governments to take action if it is needed to enable the UK to comply with its international obligations. This could allow them to force the devolved administrations to comply with a WTO ruling against a devolved SPS regulation. They also have powers to stop the devolved administrations from acting in ways that would prevent the UK from complying with its international obligations. Finally, they have powers to revoke any secondary legislation made by devolved ministers that they have reason to believe is incompatible with the UK's international obligations.*

* These powers are contained in s.58 Scotland Act ('SA') 1998; s.82 Government of Wales Act ('GoWA') 2006; and s.26 Northern Ireland Act ('NIA') 1998.

However, it is not certain that these powers can be exercised in respect of an international agreement that has been signed but not yet ratified. Moreover, these powers would be of little use if devolved primary legislation was required to implement an FTA: the furthest UK ministers can go is to require their devolved counterparts to introduce a bill to the relevant legislature.* They would be entirely useless if the UK negotiates regulatory changes outside a formal agreement – which, as we said above, is the likeliest way in which pressure from the UK's trading partners will materialise.

Finally, there is always the possibility that devolved ministers would refuse to obey the UK government's orders. The UK government would have the law on its side, but the optics would be decidedly unattractive. The prospect of the UK government pursuing its Scottish counterpart through the courts to compel it to legalise chlorine-washed chicken is an unappealing one for any supporter of the Union.

The same can be said of Westminster exercising its right to legislate in a devolved area without the consent of the devolved administrations. Legally, it can: the devolution statutes are clear that the parliament of the UK retains the right to make laws in devolved areas.** But whether it is politically prudent to do so is again questionable, especially at a time when support for independence in Scotland is strong. Its decision to do so in the case of the European Union (Withdrawal Agreement) Act 2020 put severe strain on the fabric of the Union; making it a routine way of implementing controversial trade agreements would surely be untenable.

The UK government's workaround relies on mutual recognition – but co-operation is a better answer

The UK government recently published a white paper on the UK's internal market.[100] Under its proposals, the principle of 'mutual recognition' would be enshrined in UK law. This would mean that any product lawfully sold in any part of the UK could also be sold in any other part – regardless of whether or not it complied with the regulations of that part of the UK. So if, hypothetically, the UK government were to make chlorine-washed chicken legal in England, the Scottish government would have no powers to prevent its sale in Scotland.

Both governments recognise the close ties between the mutual recognition principle and international trade. The white paper explains that "the introduction and maintenance of collaborative relations to deal with regulatory barriers within a country helps its ability to develop and implement ambitious trade deals that can deliver UK-wide benefits and prosperity to businesses and citizens".[101] Conversely, the Scottish National Party leader in the House of Commons, Ian Blackford, has claimed that the proposals "will mean a reduction in standards in one part of the UK driving down standards elsewhere" and that they will allow the government "to sell out food standards in return for a US trade deal".[102]

* Under s.58(3) SA 1998; s.82(15) GoWA 2006; s.26(3) NIA 1998.
** In s.28(7) SA 1998; ss.93(5) and 107(5) GoWA 2006; s.5(6) NIA 1998.

The mutual recognition principle has been applied in many federal and quasi-federal systems elsewhere. It is perhaps best known in the EU, where it was enshrined in the European Court of Justice's famous *Cassis de Dijon* judgment of 1979.[103] But it does not always produce a stable equilibrium, especially in sensitive sectors such as food safety.[104] As we discussed in the previous section, countries such as Canada have developed structures for joint working between national and sub-national governments. The UK's regulatory trade policy will have a more secure foundation if the UK government accepts that the devolved administrations have a legitimate role to play in developing trade policy.

Conclusion

The UK government has embarked on a project that no nation has previously attempted. It has launched into a number of simultaneous trade negotiations with some of the world's largest trade players in which product regulation will be a central issue. At the same time, it is regaining a panoply of regulatory powers and responsibilities from the EU and has already begun to suggest areas in which it will want to put them to use. It faces a divided public at home, many of whom are intensely concerned about the future of UK regulation and are mistrustful of the government's motivations. Its framework for allocating regulatory powers between central and devolved governments is unsettled and relations between them are fractious. It is tempting to say simply that, if you wanted to reach a positive outcome on regulatory trade issues, "you wouldn't start from here".

Nonetheless, to get anywhere near a positive outcome it will need to develop a much clearer idea of what its objectives really are. So far, much of the government's discussion of regulatory issues in trade has been rhetorical. It has concentrated on emphasising the UK's commitment not to compromise its "world-leading standards". This is unhelpful. All trade negotiations involve some degree of compromise – particularly those with economic giants such as the US or the EU. Even Japan, the world's third-largest economy, had to make concessions in areas such as pharmaceutical and vehicle regulation to get a deal with the latter. The UK's trading partners, particularly the US, have not hidden the fact that they will expect similar concessions. This should not be expected to change, even under a potential new US administration in 2021.

The UK is not currently well prepared for this. The fact that discussions are still going on around 'dual tariff' regimes for agricultural goods that do not comply with UK standards, and that a Trade and Agriculture Commission has only just been set up to work through these issues, suggests that key decisions have not yet been made. While some areas of policy are well settled, there are still others where the UK is uncertain even of its objectives, let alone what trade-offs it would be prepared to make. It was unwise for the government to enter negotiations in this position and it should seek to rectify it as soon as possible. Otherwise, it is very likely to be bounced into making concessions that it would not make in the clear light of day, rather than after a marathon late-night negotiating session.

At the same time, it should create a much clearer structure for decision making on regulatory issues that have not yet emerged. With multiple negotiations taking place simultaneously, it is likely to become increasingly unworkable to take all decisions to the government's most senior ministers. A clearer framework needs to be established for collective decision making on issues that require cross-Whitehall agreement but are not important enough to be taken to the prime minister.

As it comes to implement its agreements, the government should look to improve its relationship with its key stakeholders: parliament and the devolved administrations. The government is currently holding firm on a very light-touch approach to parliamentary scrutiny based on the procedures laid down in the Constitutional Reform and Governance Act 2010. It should think again. An absence of domestic constraints makes the trade negotiators' task harder, not easier – unless their plan is to concede on all fronts. The government's aversion to scrutiny contributes to public suspicion that this is really the case. Similarly, the interaction between the government's new proposals on the UK internal market and its trading ambitions is creating friction between Westminster and the devolved administrations that the Union can ill afford.

None of this is to say that the situation is hopeless. The UK's basic regulatory system is robust and is internationally recognised as such – even if its remit has hitherto been limited by EU rules. Its Better Regulation programme is genuinely among the most effective in the world and much UK policy making is exemplary in its transparency, openness to public input, and foundation in evidence and clear assessments of risks and impacts. Some of the UK's regulators, such as the Food Standards Agency, have already begun to set out well-considered proposals for how they will exercise their new responsibilities after Brexit.

The government's task over the next few years will be to take this undoubted excellence and translate it onto the international scene. This task is not impossible – but it will take more than rhetoric.

References

1 Goldin C and Libecap GD eds, *The Regulated Economy: A historical approach to political economy*, University of Chicago Press, 1994.

2 OECD, *International Regulatory Co-operation and Trade: Understanding the trade costs of regulatory divergence and the remedies*, 2017.

3 Department for International Trade, *UK–US Free Trade Agreement*, 2020, retrieved 5 July 2020, https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/869592/UK_US_FTA_negotiations.pdf

4 Office of the United States Trade Representative, *United States–United Kingdom Negotiations: Summary of specific negotiating objectives*, 2019, retrieved 5 July 2020, www.ustr.gov/sites/default/files/Summary_of_U.S.-UK_Negotiating_Objectives.pdf

5 Department of Foreign Affairs and Trade, 'Australia–UK FTA negotiating aims and approach', (no date) retrieved 5 July 2020, www.dfat.gov.au/trade/agreements/negotiations/aukfta/negotiating-aims-and-approach

6 HM Government, *The Future Relationship with the EU: The UK's approach to negotiations*, CP 211, The Stationery Office, 2020.

7 Food Standards Agency, 'Citizens' views on the EU and food issues: Summary of findings – January 2019', (no date) retrieved 20 July 2020, www.food.gov.uk/sites/default/files/media/document/consumers-views-eu-jan-2019.pdf

8 Morris M, *Have Your Cake or Eat It? New findings on public attitudes to brexit (part two)*, IPPR, 2018.

9 Charnovitz S, 'The Law of Environmental "PPMs" in the WTO: Debunking the myth of illegality', *Yale Journal of International Law*, 2002, vol. 27, pp. 59–110.

10 Department for International Trade, *UK–US Free Trade Agreement*, 2020, retrieved 5 July 2020, https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/869592/UK_US_FTA_negotiations.pdf, p. 9.

11 *Ibid.*

12 Monbiot G, 'Boris Johnson's US trade deal will make Britain a paradise for disaster capitalists', *The Guardian*, 9 June 2020, www.theguardian.com/commentisfree/2020/jun/09/boris-johnson-trade-deal-us-chlorinated-chicken

13 Dearden N, 'It's not just chlorinated chicken: five foods a US trade deal could bring to the UK', *The Guardian*, 2 March 2020, www.theguardian.com/commentisfree/2020/mar/02/chlorinated-chicken-foods-us-trade-deal-uk-eu

14 Baldwin RE, *The New Protectionism: A response to shifts in national economic power*, National Bureau of Economic Research, NBER Working Paper No. 1823, 1986.

15 Ray E, 'Changing Patterns of Protectionism: The fall in tariffs and the rise in non-tariff barriers', *Northwest Journal of International Law and Business*, 1987, vol. 8, no. 2, pp. 285–327.

16 Ederington J and Ruta M, *Non-Tariff Measures and the World Trading System*, World Bank, 2016.

17 Leblond P and Viju-Miljusevic C, 'EU trade policy in the twenty-first century: change, continuity and challenges', *Journal of European Public Policy*, 2019, vol. 26, no. 12, pp. 1836–46.

18 Zalan E, '"STOP TTIP" activists hand EU 3mn signatures', *EUobserver*, 7 October 2015, www.euobserver.com/institutional/130587

19 Johnston C, 'Berlin anti-TTIP trade deal protest attracts hundreds of thousands', *The Guardian*, 10 October 2015, www.theguardian.com/world/2015/oct/10/berlin-anti-ttip-trade-deal-rally-hundreds-thousands-protesters

20 'Statement by 170 civil society organisations on regulatory co-operation in EU–US trade talks', 4 February 2015, https://corporateeurope.org/en/international-trade/2015/02/statement-170-civil-society-organisations-regulatory-cooperation-eu-us

21 European Commission, 'TTIP–EU proposal for Chapter: Regulatory Co-operation', 21 March 2016, retrieved 22 July 2020, http://trade.ec.europa.eu/doclib/docs/2016/march/tradoc_154377.pdf

22 Office of the United States Trade Representative, *United States–United Kingdom Negotiations: Summary of specific negotiating objectives*, 2019, retrieved 5 July 2020, www.ustr.gov/sites/default/files/Summary_of_U.S.-UK_Negotiating_Objectives.pdf, p. 2.

23 Hoekman B and Sabel CF, 'In a World of Value Chains: What space for regulatory coherence and co-operation in trade agreements?', in Kingsbury B, Malone DM, Mertenskötter P, Stewart RB, Streinz T and Sunami A eds, *Megaregulation Contested: Global economic ordering after TPP*, Oxford University Press, 2019, pp. 217–39.

24 Defined in Neumayer E, *Greening Trade and Investment – Environmental Protection Without Protectionism*, Earthscan, 2011, p. 68.

25 De Ville and Gabriel Siles-Brügge have made this argument in a number of publications. See De Ville F and Siles-Brügge G, *TTIP: The truth about the Transatlantic Trade and Investment Partnership*, Polity, 2016; De Ville F and Siles-Brügge G, 'Why TTIP is a game-changer and its critics have a point', *Journal of European Public Policy*, 2017, vol. 24, no. 10, pp. 1491–1505.

26 Van Harten G and Scott DN, 'Investment treaties and the internal vetting of regulatory proposals: A case study from Canada', *Journal of International Dispute Settlement*, 2016, vol. 7, no. 1, pp. 92–116.

27 Hoekman B and Sabel CF, 'In a World of Value Chains: What space for regulatory coherence and co-operation in trade agreements?', in Kingsbury B, Malone DM, Mertenskötter P, Stewart RB, Streinz T and Sunami A eds, *Megaregulation Contested: Global economic ordering after TPP*, Oxford University Press, 2019, pp. 217–39.

28 Food Standards Agency, 'Food and animal feed safety risk analysis from 1 January 2021', (no date) retrieved 22 July 2020, www.food.gov.uk/business-guidance/food-and-animal-feed-safety-risk-analysis-from-1-january-2021

29 OECD, *Better Regulation in Europe: United Kingdom*, 2010.

30 Schwab K, *The Global Competitiveness Report 2019*, World Economic Forum, 2019.

31 World Bank, *Doing Business 2020: Comparing business regulation in 190 economies*, 2020.

32 Ponjaert F, 'The political and institutional significance of an EU-Japan trade and partnership agreement', in Bacon P, Mayer H and Nakamura H eds, *The European Union and Japan: A new chapter in civilian power co-operation?*, Ashgate, 2015, pp. 85–115.

33 European Commission, 'An introduction to the EU–Japan Economic Partnership Agreement: Regulatory co-operation and non-tariff measures', July 2017, retrieved 12 July 2020, https://trade.ec.europa.eu/doclib/docs/2017/july/tradoc_155720.pdf

34 Commission Regulation (EU) No 101/2013 of 4 February 2013 concerning the use of lactic acid to reduce microbiological surface contamination on bovine carcases.

35 Geurts G, *TTIP and CETA: a threat to high-quality European agriculture, animal husbandry and food supply*, Transnational Institute, 2017, retrieved 22 June 2020, www.tni.org/files/publication-downloads/ttip_and_ceta_-_a_threat_to_high-quality_european_agriculture_animal_husbandry_and_food_supply_2.pdf

36 Gardner AL, *Stars with Stripes: The essential partnership between the European Union and the United States*, Palgrave Macmillan, 2020, pp. 116–125.

37 Market access was about to be achieved in 2016: European Commission, 'Draft rule paves the way for EU exports of apples and pears to the US', press release, 16 January 2016.

38 ...but is still not quite there yet: Vela JH, 'EU turns to alchemy to conjure up trade deal with Trump', Politico, 1 February 2020, www.politico.eu/article/eu-us-trade-deal-alchemy

39 De Ville F and Siles-Brügge G, *TTIP: The truth about the Transatlantic Trade and Investment Partnership*, Polity, 2016; De Ville F and Siles-Brügge G, 'Why TTIP is a game-changer and its critics have a point', *Journal of European Public Policy*, 2017, vol. 24, no. 10.

40 For example, with India: see Department for International Trade, 'Joint statement of the 14th meeting of the India–UK Joint Economic and Trade Committee', 24 July 2020, retrieved 2 August 2020, www.gov.uk/government/news/joint-statement-of-the-14th-meeting-of-the-india-uk-joint-economic-and-trade-committee

41 World Trade Organization, *Decision on the implementation of Article 4 of the Agreement on the Application of Sanitary and Phytosanitary Measures*, G/SPS/19, 23 July 2004.

42 Roberts D, Orden D and Josling T, 'Sanitary and phytosanitary barriers to agricultural trade: Progress, prospects and implications for developing countries', in Ingco MD and Winters LA eds, *Agriculture and the New Trade Agenda: Creating a Global Trading Environment for Development*, Cambridge University Press, 2004, pp. 329–58.

43 Hornsby DJ, *Risk Regulation, Science and interests in transatlantic trade conflicts*, Macmillan, 2014.

44 Johnson R, *The U.S.–EU Beef Hormone Dispute*, Congressional Research Service, CRS Report No. R40449, 2017.

45 European Commission, 'Opinion of the Scientific Committee on Veterinary Measures relating to public health on the evaluation of antimicrobial treatments for poultry carcases', 14–15 April 2003, https://ec.europa.eu/food/sites/food/files/safety/docs/sci-com_scv_out63_en.pdf

46 European Food Standards Authority, 'Opinion of the scientific panel on food additives, flavourings, processing aids and materials in contact with food (AFC) on a request from the Commission related to treatment of poultry carcasses with chlorine dioxide, acidified sodium chlorite, trisodium', *EFSA Journal*, no. 297, 2005.

47 Johnson R, *U.S.–EU poultry dispute on the use of pathogen reduction treatments (PRTs)*, Congressional Research Service, CRS Report No. R40199, 2015.

48 Charnovitz S, 'The Law of Environmental "PPMs" in the WTO: Debunking the myth of illegality', *Yale Journal of International Law*, 2002, vol. 27

49 For more detail on this extensively discussed point, see e.g. Howse R and Regan D, 'The product/process distinction – An illusory basis for disciplining "unilateralism" in trade policy', *European Journal of International Law*, 2000, vol. 11, no. 2, pp. 249–89; Jackson JH, 'Comments on Shrimp/Turtle and the product/process distinction', *European Journal of International Law*, 2000, vol. 11, no. 2, pp. 303–7; Gaines SE, 'Processes and production methods: How to produce sound policy for environmental PPM-based trade measures?', *Columbia Journal of Environmental Law*, 2002, vol. 27, no. 2, pp. 383–432; Kysar DA, 'Preferences for processes: The process/product distinction and the regulation of consumer choice', *Harvard Law Review*, 2004, vol. 118, no. 2, pp. 525–642; Archibald CJ, 'Forbidden by the WTO? Discrimination against a product when its creation causes harm to the environment or animal welfare', *Natural Resources Journal*, 2008, vol. 48, no. 1, pp. 15–51.

50 Conconi P and Voon T, 'EC–seal products: The tension between public morals and international trade agreements', *World Trade Review*, 2016, vol. 15, no. 2, pp. 211–34.

51 Though some have argued that it should: Fabri HR, 'Is there a case – legally and politically – for direct effect of WTO obligations?', *European Journal of International Law*, 2014, vol. 25, no. 1, pp. 151–73.

52 Though, once again, arguments that they should have been made almost since the WTO's foundation: Schleyer GT, 'Power to the people: allowing private parties to raise claims before the WTO dispute resolution system', *Fordham Law Review*, 1997, vol. 65, no. 5, pp. 2275–310; Charnovitz S, 'Opening the WTO to Non-Governmental Interests', *Fordham International Law Journal*, 2000, vol. 24, pp. 173–208.

53 Regulation (EC) No 178/2002 of the European Parliament and of the Council of 28 January 2002 laying down the general principles and requirements of food law, establishing the European Food Safety Authority and laying down procedures in matters of food safety.

54 Not everyone would agree with them: for a contrasting view see Wiener JB, Rogers MD, Hammitt JK, Sand PH, eds, *The Reality of Precaution: Comparing risk regulation in the United States and Europe*, Abingdon: Earthscan, 2011.

55 United Nations Conference on Environment and Development, *Rio Declaration on Environment and Development*, A/CONF.151/26 (Vol. I), 1992.

56 Wiener JB, Rogers MD, Hammitt JK, Sand PH, eds, *The Reality of Precaution: Comparing risk regulation in the United States and Europe*, Abingdon: Earthscan, 2011.

57 US Under-Secretary of State Alan Larson, quoted in Vogel D, *The Politics of Precaution: Regulating health, safety, and environmental risks in Europe and the United States*, Princeton University Press, 2012, p. 9.

58 For a useful discussion of the ALOP in WTO law, see the Appellate Body report in the *Australia—Salmon* case at paras. 179–213; see also Du M, 'Autonomy in setting appropriate level of protection under the WTO law: rhetoric or reality?', *Journal of International Economic Law*, 2010, vol. 13, no. 4, pp. 1077–102.

59 Szajkowska A, 'Different actors, different factors – science and other legitimate factors in the EU and national food safety regulation', *European Journal of Risk Regulation*, 2011, vol. 2, no. 4, pp. 523–39.

60 Alemanno A, *Trade in Food: Regulatory and judicial approaches in the EC and the WTO*, Cameron May, 2007.

61 Commission of the European Communities, *Communication from the Commission on the Precautionary Principle*, COM(2000) 1 final, 2000.

62 Gascoigne D, 'Appropriate level of protection: an Australian perspective', in Anderson K, McRae C and Wilson D eds, *The Economics of Quarantine and the SPS Agreement*, University of Adelaide Press, 2001, p. 137.

63 Office for Product Safety and Standards, 'Regulators: professional guidance and tools', 17 April 2019, retrieved 2 July 2020, www.gov.uk/guidance/regulators-professional-guidance-and-tools

64 Hampton P, *Reducing Administrative Burdens: Effective inspection and enforcement*, HM Treasury, 2005.

65 Stacey G, *Farm Inspection and Regulation Review*, Department for Environment, Food and Rural Affairs, 2018.

66 Cabinet Office, *Regulatory Futures Review*, 2017.

67 Parker G and Evans J, 'UK leaves door open to imports of US chlorine-washed chicken', *Financial Times*, 4 June 2020, www.ft.com/content/a4b0ceb9-99e8-483e-8d42-048c8834530b

68 Department of Foreign Affairs and Trade, 'Australia–UK FTA negotiating aims and approach', (no date) retrieved 5 July 2020, www.dfat.gov.au/trade/agreements/negotiations/aukfta/negotiating-aims-and-approach

69 Office of the United States Trade Representative, *United States–United Kingdom Negotiations: Summary of specific negotiating objectives*, 2019, retrieved 5 July 2020, www.ustr.gov/sites/default/files/Summary_of_U.S.-UK_Negotiating_Objectives.pdf

70 Office of the United States Trade Representative, *2020 National Trade Estimate Report on Foreign Trade Barriers*, 2020.

71 Parker G and Evans J, 'UK leaves door open to imports of US chlorine-washed chicken', *Financial Times*, 4 June 2020, www.ft.com/content/a4b0ceb9-99e8-483e-8d42-048c8834530b

72 Shrimsley R, 'The UK's fight for free trade cannot be fudged', *Financial Times*, 15 June 2020, www.ft.com/content/a1bb84cf-be5d-486c-841f-fc6d84aa22b8

73 Parker G and Evans J, 'UK leaves door open to imports of US chlorine-washed chicken', *Financial Times*, 4 June 2020, www.ft.com/content/a4b0ceb9-99e8-483e-8d42-048c8834530b

74 Hughes L and Foster P, 'UK farmers win concession on post-Brexit agricultural trade policy', *Financial Times*, 29 June 2020, www.ft.com/content/fc4c270b-9d05-4913-aad2-8e0f8b845dda

75 Department for International Trade, *UK–US Free Trade Agreement*, 2020, retrieved 5 July 2020, https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/869592/UK_US_FTA_negotiations.pdf, p. 11.

76 Thimont Jack M, Etherington H and Owen J, *The civil service after Brexit: Lessons from the Article 50 period*, Institute for Government, 2020, p. 23.

77 Ilott O, Rutter J and Stelk I, *Taking Back Control of Trade Policy*, Institute for Government, 2017, www.instituteforgovernment.org.uk/publications/taking-back-control-trade-policy.

78 *Ibid.*

79 Cabinet Office, 'List of Cabinet Committees and their membership as at 29 June 2020', 29 June 2020, retrieved 28 July 2020, https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/896093/Cabinet_Committee_list_and_public_ToRs.pdf

80 Ilott O, Rutter J and Stelk I, *Taking Back Control of Trade Policy*, Institute for Government, 2017, www.instituteforgovernment.org.uk/publications/taking-back-control-trade-policy.

81 *Ibid.*

82 House of Lords Select Committee on the Constitution, *Parliamentary Scrutiny of Treaties: Twentieth report of session 2017–2019*, (HL 345), The Stationery Office, 2019.

83 Barrett J, 'The United Kingdom and parliamentary scrutiny of treaties: recent reforms', *International Comparative Law Quarterly*, 2011, vol. 60, no. 1, pp. 225–45.

84 Fowler B, 'Parliamentary consent to treaty ratifications: another procedure strained by Brexit?', Hansard Society, (no date) retrieved 26 July 2020, www.hansardsociety.org.uk/blog/parliamentary-consent-to-treaty-ratifications-another-procedure-strained-by

85 Crawford J, *Brownlie's Principles of Public International Law*, 9th edition, Oxford University Press, 2019.

86 Barrett J, 'The United Kingdom and parliamentary scrutiny of treaties: recent reforms', *International Comparative Law Quarterly*, 2011, vol. 60, no. 1, pp. 225–45.87 Department for International Trade, *Processes for making free trade agreements after the United Kingdom has left the European Union*, CP 63, The Stationery Office, 2019.

88 *Ibid.*

89 Marshall J, 'Secondary legislation: how is it scrutinised?', Institute for Government, 19 May 2020, retrieved 27 July 2020, www.instituteforgovernment.org.uk/explainers/secondary-legislation

90 Putnam RD, 'Diplomacy and domestic politics: the logic of two-level games', *International Organization, 1988, vol. 42, no. 3, pp. 427–60.*

91 Evans PB, 'Building an integrative approach to international and domestic politics: reflections and projections', in Evans PB, Jacobson HK and Putnam RD eds, *Double-edged Diplomacy: International bargaining and domestic politics*, University of California Press, 1993, pp. 397–430.

92 Hug S and König T, 'In View of Ratification: Governmental preferences and domestic constraints at the Amsterdam Intergovernmental Conference', *International Organization*, 2002, vol. 56, no. 2, pp. 447–76.

93 Finke D and König T, 'Why risk popular ratification failure? A comparative analysis of the choice of the ratification instrument in the 25 Member States of the EU', *Constitutional Political Economy*, 2009, vol. 20, no. 3, pp. 341–65.

94 da Conceiçao-Heldt E, 'Two-level games and trade co-operation: what do we now know?' *International Politics*, 2013, vol. 50, no. 4, pp. 579–99.

95 Ilott O, 'Why Parliament's vote on the final deal is more important than its vote on triggering Article 50', blog, Institute for Government, 14 November 2016, retrieved 5 August 2020, www.instituteforgovernment.org.uk/blog/why-parliament-vote-final-deal-more-important-its-vote-triggering-article-50

96 Hodson D and Maher I, 'British brinkmanship and Gaelic games: EU treaty ratification in the UK and Ireland from a two level game perspective', *British Journal of Politics and International Relations*, 2014, vol. 16, no. 4, pp. 645–61.

97 Ilott O, Rutter J and Stelk I, *Taking Back Control of Trade Policy*, Institute for Government, 2017, www.instituteforgovernment.org.uk/publications/taking-back-control-trade-policy.

98 Sargeant J, Stojanovic A, Etherington H and Kane J, *Implementing Brexit: The Northern Ireland protocol*, Institute for Government, 2020, www.instituteforgovernment.org.uk/publications/implementing-brexit-northern-ireland-protocol.

99 *Ibid.*

100 Department for Business, Energy and Industrial Strategy, *UK Internal Market*, CP 278, The Stationery Office, 2020.

101 *Ibid.*, para. 124.

102 House of Commons, *Hansard*, 16 July 2020, vol 678, col 1704.

103 Rewe-Zentral AG v Bundesmonopolverwaltung für Branntwein (Cassis de Dijon) (120/78) [1979] ECR 649, [1979] 3 CMLR 494.

104 Davies G, 'Is mutual recognition an alternative to harmonisation? Lessons on trade and tolerance of diversity from the EU', in Bartels L and Ortino F eds, *Regional Trade Agreements and the WTO Legal System*, Oxford University Press, 2006, pp. 265–80.

About the author

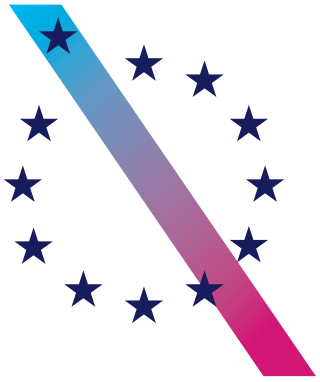
James Kane joined the Institute for Government in March 2020 as an associate working on trade policy. He was previously a civil servant in the Cabinet Office trade secretariat. He joined the civil service in 2013 and worked in a number of EU and trade-focused roles in the Department for Environment, Food and Rural Affairs, the Cabinet Office and on secondment to the European Commission. He was educated at Oxford and the College of Europe (Bruges).

INSTITUTE FOR GOVERNMENT

The Institute for Government is the leading think tank working to make government more effective.

We provide rigorous research and analysis, topical commentary and public events to explore the key challenges facing government.

We offer a space for discussion and fresh thinking, to help senior politicians and civil servants think differently and bring about change.



instituteforgovernment.org.uk

enquiries@instituteforgovernment.org.uk

+44 (0) 20 7747 0400 +44 (0) 20 7766 0700

@instituteforgov

Institute for Government, 2 Carlton Gardens
London SW1Y 5AA, United Kingdom