

Trade and Devolution

Lisa Claire Whitten

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Key points

- The negotiation and conclusion of trade agreements is a power of the UK Government; however, contemporary trade agreements often make provisions in policy areas that are ordinarily devolved in the UK.
- Based on a comprehensive mapping exercise we find that 91% of trade agreements concluded by the UK since 2017 intersect with devolved matters and interests to some degree.
- The nature and extent of the intersection between UK trade agreements and UK devolution varies significantly and, even when intersections are direct, most do not seem to require legislative changes to be made in devolved law.
- Improving the inclusion of representatives from Scotland, Wales, and Northern Ireland in the formation of UK trade policy is beneficial from the perspective of democratic accountability and will also maximise the legitimacy of relevant provisions or policies when it comes to implementation.

Introduction

Throughout the period of its EU membership, the UK did not conduct its own independent trade policy. It participated in the Common Commercial Policy which grants the EU exclusive competence to regulate all aspects of external trade on behalf of its Member States. The return of these powers to negotiate and conclude trade agreements was a much-anticipated effect of the UK's withdrawal from the EU on the part of Brexit proponents. However, it also raised questions about the capacity and sufficiency of the existing UK system to operate and succeed in an area of policy for which it had not been responsible for 47 years.

One of the 'known unknowns' of the repatriation of trade policy competence from Brussels to London concerned UK devolution. Contemporary arrangements for devolution originated and evolved in the context of EU membership.¹ While the shared obligation on all UK territories to follow and implement EU laws had acted as a constraint on intra-UK regulatory divergence, so too, the outsourcing of external trade policy to the EU had removed the need to consider the extent of devolved administrations involvement in UK trade policy as this did not exist separate from

¹ For further discussion of the implications on internal UK trade see: Brown Swan, C., Horsley, T., McEwen, N., Whitten, L. C. (2024) 'Westminster Rules? The Internal Market Act and Devolution' *Centre for Public Policy*: https://www.gla.ac.uk/media/Media_1114828_smx.pdf

EU trade policy. The matter of devolved involvement in UK trade policy is particularly pertinent because of parallel developments in the nature of devolution and the nature of trade deals in recent decades. Since 1998, the scope of powers devolved to Scotland, Wales, and Northern Ireland has expanded such that respective administrations now have competence in a wide range of policy areas. Simultaneously, the scope of modern trade agreements tends to expand far beyond the traditional ideal of tariffs, quotas, and subsidies; most deals now also cover areas such as agriculture, fisheries, environment, and climate change that are within devolved competence in the UK. To demonstrate, based on this analysis, 88 of the 97 trade agreements laid before the UK Parliament between October 2017 and July 2024 made provisions in areas of policy that are ordinarily devolved (in whole or in part) in one or more of the devolved UK territories.

Constitutionally, the negotiation and conclusion of international agreements – including trade agreements – is in the royal prerogative of the central government and is therefore a ‘reserved’ (or ‘excepted’)² power in all three devolved territories.³ This means that the UK Government can sign up to provisions in an international agreement regardless of whether or not it concerns a policy area or specific piece of legislation that is otherwise devolved in either Scotland, Wales, or Northern Ireland. On a simplistic reading, therefore, any international agreement and any provisions they contain are, by definition, not a devolved matter. At the same time, however, because international agreements can make provisions in areas that are ordinarily devolved, in practice, international agreements often intersect with devolved competence insofar as they create new obligations and restrictions on policymakers at the devolved level. Including representatives from Scotland, Wales, and Northern Ireland in the formation of UK trade policy can therefore be beneficial from the perspective of democratic accountability and also maximise the legitimacy of relevant provisions or policies when it comes to implementation.

Unsurprisingly, given the recent history of UK trade policy, the institutions for involving UK devolved governments and legislatures in the negotiation, conclusion and implementation of trade agreements are underdeveloped.⁴ While there are formal and informal mechanisms that allow devolved governments to be consulted, these are not as established or robust as those in other states with sub-state authorities that have long had an independent trade policy and a stable system of multileveled governance.⁵ Formally, the Interministerial Group on Trade (IMG on Trade) provides a forum for regular discussions between the four UK administrations on issues related to trade.⁶ Notably, the IMG on Trade has only been operational since 2022 at which point a comprehensive new system to manage intergovernmental relations (IGR) came into effect. Prior to the new IGR architecture, trade issues were among the many non-devolved matters that could be discussed in Joint Ministerial Committee(s) – the predecessor to the current IGR system. Alongside formal institutional contexts for consultation, the UK government also regularly engages in informal consultation of devolved administrations concerning trade policy. Often this takes place at the departmental level between officials in a central government department responsible for trade negotiations or an agreement, and officials in relevant devolved departments responsible for an area of policy that will or may be impacted by them.

Against the backdrop of the still-nascent operation of an independent UK trade policy, this Briefing Paper considers the interaction between trade agreements concluded by the UK government since Brexit, and the UK’s devolved

² In respect of Northern Ireland, powers that are indefinitely retained by the UK government are termed ‘excepted powers’ whereas in Scotland and Wales these are known as ‘reserved powers’.

³ Scotland Act 1998 c.46 Sch. 5 s7; Government of Wales Act 2006 c.32 Sch. 7A s10; Northern Ireland Act 1998 c.47 Sch. 2 s3.

⁴ The issue of devolved involvement (or lack thereof) has been highlighted by various parliamentary committees since and against the backdrop of the UK’s vote to leave the EU; see for example: House of Lords Constitution Committee (2019) ‘Parliamentary Scrutiny of Treaties’ HL Paper 345: <https://publications.parliament.uk/pa/ld201719/ldselect/ldconst/345/345.pdf> (Chapter 5).

⁵ Melo-Araujo, B. (2019) ‘UK post-Brexit trade agreements and devolution’ *Legal Studies* Volume 39 Issue 4.

⁶ Six meetings of the IMG on Trade have taken place since the first in July 2022, the most recent meeting was April 2024. See: <https://www.gov.uk/government/publications/communiqués-from-the-interministerial-group-for-trade-july-2022-april-2024>

territories, governments, and their policy development.⁷ To do this, it presents initial findings from a comprehensive mapping of UK trade agreements and devolved areas.

Substance: Legislative Inclusivity and Intersection

As noted above, while the negotiation and conclusion of international agreements is in the royal prerogative powers of the central UK government, the provisions of those agreements generally and trade agreements in particular frequently intersect with areas of law and policy that are ordinarily devolved. In this context, the concept of legislative inclusivity of any given trade agreement concerns the extent to which the provisions of the agreement intersect with areas of law or policy that are devolved in the UK. The premise here is that, where there is significant intersection between a trade agreement and devolved competence, the former risks failing to reflect the preferences and interests of devolved territories, absent any involvement of representatives for them in the process of its negotiation and implementation.

A comprehensive mapping exercise has been undertaken to determine the extent to which devolution is reflected in the legal texts of UK trade agreements, and any domestic legislation that implements them; and whether devolved competence is engaged or impacted by the provisions of UK trade agreements, and any domestic legislation that implements them. It has two strands: [1] high-level mapping of UK international agreements concluded between 2017 and 2024 with a focus on the extent of consultation of devolved administrations and the impact of the relevant agreement on devolved competence, as reported by the UK government; [2] more in-depth mapping of the interaction between the scope and provisions in 'new' trade agreements (i.e., not those that are 'rolled over' from the UK's EU membership) and the scope of devolved competence and provisions in devolved law.

New International Agreement Mapping (2017 – 2024)

Our initial mapping is wide in scope. This provides both necessary context and, as indicated below, yields important insights which we will explore in subsequent research.

We developed a comprehensive database⁸ based on UK international agreements laid before parliament under the requirements of Part 2 of the Constitutional Reform and Governance Act 2010⁹, which were therefore scrutinised by the International Agreements Select Committee that sits in the House of Lords.¹⁰ The time period covered in the database – from end-2017 to end-2024 – reflects that covered by the online public record of international agreements maintained by the HL International Agreements Committee. It is sufficiently long to just predate the point at which the UK began concluding new trade agreements (i.e., non-rollover trade agreements) separate from the EU in advance and anticipation of its departure from the bloc and therefore from the EU Common Commercial Policy.

⁷ This project falls under the CITP research theme 'Negotiating a Turbulent World' which considers the global and domestic challenges that the UK faces in the conduct of its post-EU Exit trade policy. See: CITP (2024) 'Negotiating a Turbulent World': <https://citp.ac.uk/negotiating-a-turbulent-world>

⁸ Information contained in this database is sourced from: the UK parliament website, and the HL International Agreements Committee pages in particular; the UK government 'Treaty Series' and 'Country Series' web pages on www.gov.uk including Explanatory Memorandums published alongside international agreement legal texts which are generally available to download. The National Archives maintained legislation.gov.uk website and the EU record on eur-lex.europa.eu of those laws that continue to apply to Northern Ireland under the Protocol/Windsor Framework have also been used to cross-check relevant developments in implementing legislation and/or intersection of scope.

⁹ CRAG 2010, UKGPA 2010 c.25: <https://www.legislation.gov.uk/ukpga/2010/25/part/2>

¹⁰ See: 'International Agreements Committee: Lords Select Committee' <https://committees.parliament.uk/committee/448/international-agreements-committee/>

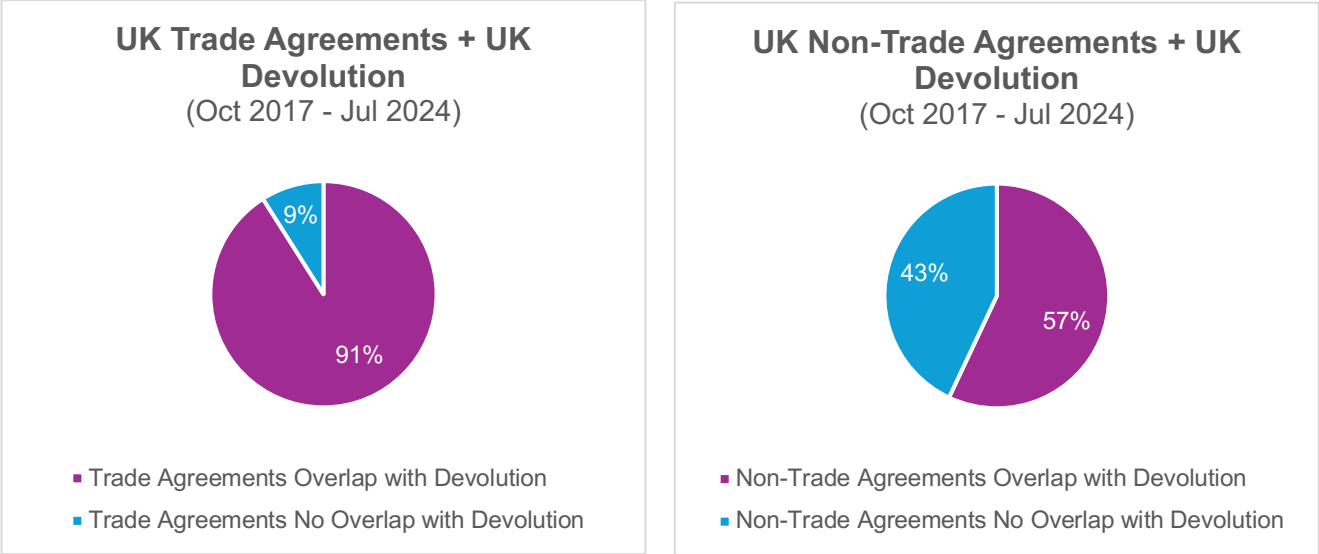
For this initial mapping stage, we distinguished between Trade Agreements and Non-Trade Agreements. Trade Agreements are understood broadly as encompassing any international treaty concluded by the UK that removes or seeks to remove barriers to trade between the parties. This broad definition includes ‘regional trade agreements’ (free trade areas and customs unions) as defined under Article XXIV of the General Agreement on Tariffs and Trade (GATT) as well as other international treaties governing commercial exchanges such as, for example, mutual recognition agreements and digital trade agreements; at this stage, the focus is on legally binding trade agreements, not soft law arrangements. Within this, the database distinguishes between new trade agreements and rollover trade agreements from the UK’s EU membership, as well as indicating when amendments have been made to rollover agreements subsequent to their initial application in the UK after it left the EU. While the focus is on trade agreements and trade policy specifically, the benefit of including non-trade agreements is that it becomes possible to identify any differences in approach to the involvement of devolved administrations in policy areas beyond trade policy, when compared to policy areas within trade policy.

Mapping the Intersection of Competencies

Several key findings emerge from this mapping. Firstly, it is clear that the majority of international agreements (and trade agreements in particular) signed by the UK Government between 2017 and 2024 made provisions that intersected with devolved competence. Assessment of the intersections is based on a cross-reading of the international agreements, and official guidance regarding them, and the devolved statutes that set out those areas of policy that are devolved, reserved, or excepted. Importantly, the nature and extent of these intersects vary significantly as does, therefore, the degree of anticipated impact on devolved policymaking.

Of the 224 international agreements covered in the initial mapping exercise, 57% were trade agreements and 43% were non-trade agreements. Regarding intersection with devolved law and policy, there is a clear difference between trade and non-trade agreements with the former being much more likely to intersect with devolved competence than the latter.

Figure 1: Percentage of UK Trade Agreements and UK Non-Trade Agreements that Intersect with Devolved Competence (Oct 2017 – Jul 2024)

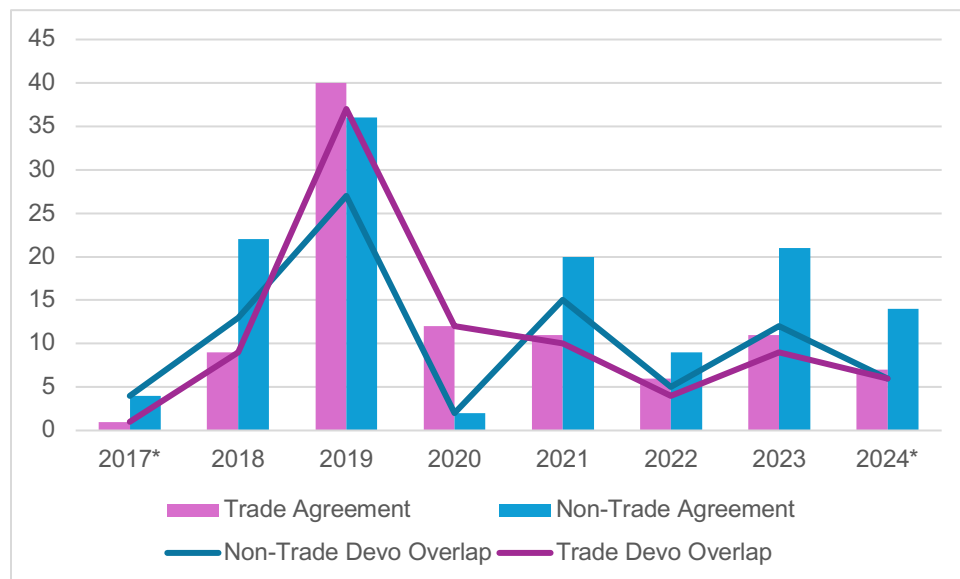


Source: Analysis of UK parliament records of international agreements laid before parliament, in accordance with the CRAG Act 2010, between October 2017 and July 2024. NB: Findings are subject to further analysis. No citation without permission.

Although a high-level assessment has been made in this research, mapping the exact intersections of international agreements and devolved competence is not straightforward. Partly this is due to the lack of comprehensive reporting on the legislative implications of international agreements generally and trade agreements in particular. For much of the period in which the UK was preparing for its full trade independence – prior to the end of the UK Transition Period – the agreements concluded were rollover agreements from its period of EU membership. This pattern is indicated in the spike in the number of trade and non-trade agreements concluded in 2019 and, to a lesser extent, 2020. Official accounts of the legislative requirements for implementing these rollover agreements tend to point to the general effect of the *European Union Withdrawal Agreement Act 2018* and its creation of the category of ‘retained EU law’ (now assimilated law) which enabled a majority of the legal obligations of EU membership – including participation in EU treaties with third countries – to be ‘copied’ into the UK statute book.

While understandable, the practice of only very high-level reporting of the legislative implications of any new international agreement is potentially problematic from the perspective of devolved administrations as it undermines any pursuit of clarity on the precise impacts of UK international obligations at the devolved territory level.

Figure 2: Trade and Non-Trade Agreements (Oct 2017 to Jul 2024) and Frequency of Overlap with Devolved Competence



Source: Analysis of UK parliament records of international agreements laid before parliament, in accordance with the CRAG Act 2010, between October 2017 and July 2024. NB: Findings are subject to further analysis. No citation without permission.

* 2017 and 2024 do not represent data for the full year but for three and seven months respectively.

In view of the time investment and methodological challenges involved in comprehensively mapping the competence intersect of every international/trade agreement only an initial high-level assessment is made at this stage; as set out below, this is supplemented by a case study approach to analysing the intersection of provisions in ‘new’ trade agreements with devolution.

New Trade Agreement Mapping

Wholly new trade agreements concluded by the UK since or in preparation for leaving the EU are more potentially significant from the perspective of Scotland, Wales and Northern Ireland, because of the likelihood that these create new obligations or restrictions that intersect with, or impact upon, areas of devolved competence. It is also the case that implementation of these new agreements in domestic law can be expected to require new specific legislative provisions, rather than rely on 'retained EU law' (now 'assimilated EU law'). In assessing the legislative inclusivity of UK trade policy from a devolved perspective – and therefore the intersection of new trade agreements with devolved competence – it is therefore useful to carry out an in-depth analysis of the overlaps between the provisions of new UK trade agreements and of UK devolution.

Three types of intersect emerge: direct intersections with devolved law; direct intersections with devolved policy areas; and indirect intersections with devolved law and policy. The first type of intersect is the easiest to identify, the second and third types are harder to definitively and comprehensively assess because the nature of UK devolution makes exact delineation of (reserved vs devolved) competence challenging, and because relevant provisions in trade agreements do not always map neatly onto domestic legal and policy frameworks. Nonetheless, as Table 1 demonstrates, it is possible to distinguish between the different types of intersect that result from the different provisions in new (or non-rollover) UK trade agreements, in this case, the UK-Australia Free Trade Agreement (UK-AU FTA) and UK-New Zealand Free Trade Agreement (UK-NZ FTA).

Table 1: Categories of Intersection between UK Trade Agreements and UK Devolution

Type	Explanation	Examples*
direct intersection with devolved law	Implementation of the trade agreement requires specific acts of devolved primary or secondary legislation to be amended in one or more of Scotland, Wales, or Northern Ireland	UK-Australia FTA
		Government Procurement
		UK-New Zealand FTA
		Government Procurement
direct intersection with devolved policy areas	Implementation of the trade agreement creates new obligations or restrictions in areas of policy that are devolved competence in one or more of Scotland, Wales, or Northern Ireland	UK-Australia FTA
		Sanitary and Phytosanitary Measures; Technical Barriers to Trade; Cross-Border Trade in Services; Professional Services and the Recognition of Professional Qualifications; Investment; Digital Trade; Competition Policy and Consumer Protection; Small and Medium-Sized Enterprises; Labour; Environment; Trade and Gender Equality; Animal Welfare and Antimicrobial Resistance; Transparency and Anti-Corruption.
		UK-New Zealand FTA
		Sanitary and Phytosanitary Measures; Animal Welfare; Technical Barriers to Trade; Cross-Border Trade in Services; Domestic Regulation; Investment; Digital Trade; Consumer Protection; Environment; Trade and Labour; Small and Medium Sized Enterprises; Trade and Gender Equality; Anti-Corruption; Transparency.

indirect intersection with devolved law or policy	Implementation of the trade agreement creates new obligations or restrictions in areas of policy that are not devolved competence in Scotland, Wales, or Northern Ireland but which impact on the economy or society in one or more devolved territory.	UK-Australia FTA
		Trade in Goods; Trade Remedies; Rules of Origin and Origin Procedures; Customs Procedures and Trade Facilitation; Financial Services; Temporary Entry for Business Persons; Telecommunications; Intellectual Property; State Owned Enterprises and Designated Monopolies; Innovation; Development; Good Regulatory Practice; Cooperation; Administrative and Institutional Provisions; Dispute Settlement.
		UK-New Zealand FTA
		National Treatment and Market Access for Goods; Rules of Origin and Origin Procedures; Customs Procedures and Trade Facilitation; Trade Remedies; Financial Services; Telecommunications; Temporary Entry of Business Persons; Intellectual Property; Competition; State Owned Enterprises and Designated Monopolies; Good Regulatory Practice and Regulatory Cooperation; Māori Trade and Economic Cooperation; Trade and Development; Institutional Provisions; Dispute Settlement.

*Areas listed reflect chapter titles in both the UK-NZ and UK-AU free trade agreements. Chapters on Initial Provisions and General Definitions, General Provisions and Exceptions, and Final Provisions are excluded on the basis that provisions therein relate primarily to procedural and definitional matters in the respective legal texts.

NB: Findings subject to further analysis. No citation without permission.

The analysis above is based on a cross-reading of provisions in the two Free Trade Agreements (FTAs) and relevant provisions of domestic law, including those sections of the three devolution Acts that outline the scope of devolved competence in Scotland, Wales, and Northern Ireland respectively.¹¹

As indicated, in both the UK-AU and UK-NZ FTA only one chapter – government procurement – falls into the first category where provisions directly intersect with devolved law and therefore required specific legislative changes to be made. To implement the Government Procurement Chapter¹² in the UK-AU FTA and the Government Procurement Chapter¹³ in the UK-NZ FTA, Scotland was required to make changes in its devolved law;¹⁴ powers to do so were granted under the Trade (Australia and New Zealand) Act 2023.¹⁵

For both the UK-AU and UK-NZ FTAs, provisions in 13 chapters fall into the second category where provisions directly intersect with devolved policy areas, but for which no legislative changes were necessary to ensure

¹¹ See FN 3.

¹² UK-Australia Free Trade Agreement (2021) 'Chapter 16 Government Procurement: <https://assets.publishing.service.gov.uk/media/61b861e3e90e070446653df0/uk-australia-free-trade-agreement-fta-chapter-16-government-procurement.pdf>

¹³ UK-New Zealand Free Trade Agreement (2022) 'Chapter 16 Government Procurement' https://assets.publishing.service.gov.uk/media/63595782e90e0777aa2cfec/CS_New_Zealand_1.2022_UK_New_Zealand_Free_Trade_vol4.pdf

¹⁴ Changes were made via The Public Procurement (Miscellaneous Amendments) (Scotland) Regulations 2023 (SSI 2023/124) <https://www.legislation.gov.uk/ssi/2023/124/contents/made>

¹⁵ Trade (Australia and New Zealand) Act 2023 c.9: s1, Sch. 1.: <https://www.legislation.gov.uk/ukpga/2023/9/schedule/1>

implementation. This raises questions about the significance of commitments made in these FTAs because it suggests that relevant chapters do not create new obligations but rather reaffirm existing ones. A good example here are the Environment Chapters in both agreements. Focusing on the UK-AU FTA to demonstrate, its Environment Chapter¹⁶ makes a range of provisions and commitments intended to promote mutually supportive trade and environmental policies. Its scope directly intersects many areas of policy that are devolved in the UK including air quality, circular economy, marine management, forest management, biodiversity, and conservation. Largely, the Chapter reaffirms established environmental laws and policies in both the UK and AU, restates shared commitments to ensure these are effectively enforced and that targets for reducing environmentally damaging practices are met. No new UK legislation (devolved or UK-wide) was therefore required to implement this Chapter domestically. At the same time, provision is made in the Chapter for either the UK government or the Australian Government to challenge the other in the event that the “*second Party considers that an environmental law at the sub-central level of government of the first Party is not being effectively enforced by the relevant sub-central level of government through a sustained or recurring course of action or inaction in a manner affecting trade or investment between the Parties*”.¹⁷ What this means is that the Environment Chapter in the UK-AU FTA does create a new restriction on policymaking in respect to the environment at the devolved level, notwithstanding that no legislative changes were necessary to implement it and the relevant mechanisms for its enforcement may not ever actually be triggered.

For both the UK-AU and UK-NZ FTAs, 15 chapters fall into the third category where provisions concern areas that are reserved (or excepted) in the UK and which therefore only indirectly intersect with devolved law and policy. A good example in this category are provisions concerning trade in goods in both agreements. Focusing on the UK-NZ FTA to demonstrate, its National Treatment and Market Access for Goods Chapter liberalises arrangements for trade of New Zealand-originating goods to the UK and UK-originating goods to New Zealand. This includes agrifood products, such as beef and sheep-meat, that are significant outputs for the agrifood sectors in devolved territories. The FTA does include tariff-rate quotas that limit initial imports of New Zealand beef and sheep-meat – for 10 and 15 years respectively – and which are designed to protect UK farmers, additionally, a product-specific safeguard measure procedure for trade in beef is also included in the agreement. Yet, notwithstanding these protective provisions, the Chapter is expected to negatively impact the UK agricultural sector with disproportionate effects likely in devolved territories due to the comparative importance of agrifood in the three economies. Reflecting this, representatives of Scotland, Wales and Northern Ireland each expressed concern at the anticipated impacts of this Chapter of the UK-NZ FTA on their agri-food sectors. While the setting of tariffs and market access arrangements for third-country goods is a central UK Government competence, implementation of what has been agreed in such areas nonetheless has the potential to impact devolved policymaking albeit indirectly; in this example particularly in the area of agri-food production. It is worth noting here that, domestically, the provisions in this UK-NZ FTA Chapter work together with the ‘market access principles’ in the United Kingdom Internal Market Act 2020 which require UK (including devolved) authorities to recognise goods (or services) that are acceptable for sale in one part of the UK as acceptable for sale in the part for which they are responsible.¹⁸ In this way, the UKIM Act constrains the potential effectiveness of any measure that may be taken at devolved level to support local agrifood producers. While the UK-NZ FTA Chapter does not relate directly to the UKIM Act, its implementation is both made possible by and may exacerbate the effect of its market access principles in devolved territories.

¹⁶ UK-Australia Free Trade Agreement (2021) ‘Chapter 22 Environment’
<https://assets.publishing.service.gov.uk/media/61b86676e90e07043d677f3c/uk-australia-free-trade-agreement-fta-chapter-22-environment.pdf>

¹⁷ *Ibid.* Article 22.3 para. 7.

¹⁸ With notable exception being Northern Ireland where the UKIM Act market access principles only apply subject to the continued application of EU law in scope of the Protocol/Windsor Framework.

Conclusion

Based on this study, it is clear that overlaps between provisions in UK trade agreements and UK devolved competence is the norm, not the exception. Of the trade agreements analysed so far, 91% intersect with devolved law and policy on some level. What is also clear however is that the nature and extent of overlaps with devolved competence vary significantly and, even when there are direct intersections, most of these do not require specific legislative changes to be made in devolved law. These emerging trends beg questions about the regulatory effect of FTA provisions – is the autonomy of devolved authorities actually being constrained by FTA commitments or are these often too broad to result in substantive new obligations or restrictions? Alternatively, are commitments in FTAs in areas of devolved competence being made in view of and after new obligations or restrictions have already been introduced at the UK level?