

Written evidence from the Government of Jersey (SIT 18)

Public Administration and Constitutional Affairs Committee The Scrutiny of International Treaties and other international agreements in the 21st century inquiry

Introduction

1. This paper is submitted as the Government of Jersey's evidence to the Committee under its Inquiry into the scrutiny of International Treaties and other international agreements in the 21st Century. As a Crown Dependency (CD), our information is focused on the question "what role should devolved governments and legislatures, Crown Dependencies and Overseas Territories have in relation to international treaties and arrangements?"
2. In terms of the fundamental position, there is a settled, binding constitutional convention ("the convention") that where the UK ratifies a treaty, it does so on behalf of the UK and only such (if any) of the CDs as wish¹ the treaty to apply to them.
3. In case it may assist the Committee, we set out more detail here on the origins of this convention and the practicalities of its operation in Jersey. This paper also considers some recent examples of the approach to the scrutiny and extension of Free Trade Agreements (FTAs), including the UK-EU Trade and Cooperation Agreement (TCA). We suggest some ways in which the current arrangements could be improved.

The Bevin Despatch

4. In 1950 it was recognised in Foreign Office Circular No 0118 (the "Bevin Despatch") that, unless otherwise stated, treaties and international agreements entered into by His Majesty's Government after that date would not automatically apply to the Channel Islands or the Isle of Man.
5. Paragraphs 3 and 4 (reproduced below) of the Bevin Dispatch explain that the constitutional relationship between the CDs and the UK required that they should be treated differently from constituent parts of the UK:

"3. His Majesty's Government have come to the conclusion that it would be more consistent with the constitutional position of these Islands to regard them for international purposes as not forming part of the United Kingdom of Great Britain and Northern Ireland.

4. Accordingly, any treaty or international agreement to which His Majesty's Government in the United Kingdom may become a party after the date of the present despatch will not be considered as applying to the Channel Islands or the Isle of Man

¹ See Ministry of Justice Note – "[Annex B: How to Note on the Extension of International Instruments to the Crown Dependencies.](#)"

by reason only of the fact that it applies to the United Kingdom of Great Britain and Northern Ireland, and any signature, ratification, acceptance or accession on behalf of the United Kingdom will not extend to the Islands unless they are expressly included.”

6. This practice has since been accepted by other States² and is regarded by the Secretary General of the United Nations as setting out a “*different intention*” for the purposes of Article 29 of the Vienna Convention. That article establishes that “*unless a different intention appears from the treaty or is otherwise established, a treaty is binding upon each party in respect of its entire territory.*” There is then a clear presumption post-1950 that the UK will ratify a treaty solely for itself, leaving the CDs outside its ambit unless they are expressly included.

Consultation and consent

7. Accordingly, as a matter of binding constitutional convention, before extending an international obligation, the UK must always consult the CDs on whether they wish that obligation to be applied to them. Further, before an obligation is extended, convention requires that a response is received from each of the CD governments confirming that they wish the obligation to be extended, having considered the ramifications of treaty extension³. These conventions are reflected in the Guidance Notes produced by the Ministry of Justice on the extension of international agreements to the CDs⁴, which reflect that consultation should take place with the CDs when international agreements are negotiated, and that extension should only take place where each respectively has indicated that it wishes to have an international obligation extended to it and is in a position to implement the relevant obligation. In Jersey’s view, it is essential that the convention is followed. This both provides the UK with confidence that the relevant international obligation will be implemented and ensures that Jersey’s autonomy in domestic affairs is respected.
8. Proposals for the extension of new international obligations to Jersey are considered by the External Relations Department, whose officials work with others across Government to prepare advice on such proposals. This includes legal advice from the Law Officers’

² It is understood that the Bevin Declaration was issued to: the British Embassies around the world to be communicated to the country in which they reside and to those countries’ diplomatic representatives in London; all other foreign Governments with whom His Majesty’s Government were in diplomatic relationship; the United Nations; the International Labour Office; and other international organisations.

³ On the existence of this convention, see for example the outcome of the Royal Commission on the Constitution that took place from 1969 to 1973 and led to the publication of the Kilbrandon Report in 1973 (the “Report”). The Report analysed the meaning and significance of the Bevin Despatch as part of its conclusions on the constitution. At paragraph 1381, it notes: “*The Islands were told by the Home Office that the objects of this declaration were to secure that they would not be bound by treaties on which they had not been consulted or which, when they were consulted, they did not wish to have applied to the Islands; that adequate time for consultation would be available; and that the inability or reluctance of any of the Islands to adhere to a particular agreement would not prevent the participation of the United Kingdom Government.*”

⁴ See Ministry of Justice Note – “[Annex B: How to Note on the Extension of International Instruments to the Crown Dependencies.](#)”

Department on whether the obligation is one with which Jersey can comply, or whether further implementing action, or the entry of reservations in respect of the obligations, may be required. The matter is then referred to the relevant Minister(s) to decide whether to agree to extension of an obligation.

9. Where the Government of Jersey wishes to agree to the extension of an obligation to Jersey, this has traditionally been, and still is often, communicated through the ‘official channel’⁵. The official channel is also used for communications where Jersey is seeking Royal Assent for its primary legislation, and its use reflects the underlying constitutional relationship between the CDs and the UK, which is through their respective relationships to the Crown. However, where the obligation is politically momentous, such as the decision to agree to extension of the TCA, or in respect of other FTAs in view of limitations on time, acceptance may be communicated directly by a letter from the Chief Minister or Minister for External Relations to the relevant UK Government Minister(s).

The UK – CDs Customs Arrangement

10. The principles within the convention were rehearsed at some length in the context of discussions between the Governments of Jersey and Guernsey, and the UK Government, concerning the UK – CDs Customs arrangements. As a consequence, express provision was included in the Customs Arrangement for each of the Bailiwicks which acknowledges that not only will Jersey and Guernsey be consulted by the UK Government on the extension of subsequent FTAs, but that the consent of each Bailiwick will be required before any such agreements are extended to them⁶.

The UK-EU Trade and Co-operation Agreement

11. The TCA provides an important example of how the requirement to obtain Jersey’s consent to the extension of an international obligation can be reflected in the terms of an international agreement, and how that agreement can be confirmed in practice, even where very significant time pressure resulted in a non-ideal overall process.
12. The TCA was prepared at high speed and to a tight deadline, with the final text only being settled and provided to the CDs on the morning of 24 December 2020, with the intention that it would provisionally apply from 1 January 2021. This was very late, and left little time – especially over the Christmas period – for detailed consideration by the Government of Jersey and the States Assembly.
13. Nonetheless, immediately following receipt of the text, Government of Jersey officials and the Law Officers’ Department rapidly reviewed it to check that the key provisions for Jersey accorded with those it had been consulted on during the text-based negotiations.

⁵ i.e. sent to the Bailiffs’ office, then to the Lieutenant Governor’s Office and onwards to the Ministry of Justice.

⁶ See Article 20(3) of the Arrangement with Jersey and the same provisions of the equivalent arrangement with Guernsey.

14. On the basis of this initial analysis, the Government presented a proposition to the States Assembly (P170/2020), recommending that it endorse the decision of the Council of Ministers that the Minister for External Relations should communicate Jersey's consent to its inclusion in the TCA from the outset, prior to the UK Parliament making a decision to ratify. The Assembly duly debated and endorsed that decision on 27 December 2020, which was communicated the same day by the Minister to the UK Government.
15. This initial consent to inclusion was provided to the UK subject to the caveat that the States Assembly and the Government of Jersey would continue to review the full text in detail, and take legal advice, to determine whether it did indeed reflect the terms negotiated. The Government of Jersey would then advise whether in its view a short-term termination option available during the 90-day 'cooling off period' should be exercised.
16. The provision for this 'cooling off period' was included in Article 502(3) of the TCA. This allowed one or more of the CDs to terminate their participation in the TCA within the first 90 days after provisional application (on 1 January 2021). This provision was added at a late stage of the negotiations following a request from the Governments of Jersey and Guernsey. The reasoning behind the request was to ensure that the CDs had the opportunity to fully examine the final terms of the TCA, particularly those elements in relation to fishing that were not settled until the final stages of the negotiations; and to allow the Bailiwick legislatures sufficient time to consider and verify the decision to participate.
17. The termination of a CD's participation using Article 502(3) could only be brought about by one or other of the Parties to the TCA (i.e. the UK or the EU) by giving notice to the Partnership Council established under the TCA. However, in practice, and as constitutionally appropriate, it was agreed that the UK would act on the instructions of any CD should it be considered necessary to terminate the obligations pursuant to this provision.
18. A decision to terminate Jersey's participation using the mechanism in Article 502(3) would have been a momentous one, terminating all of Jersey's rights and obligations arising under the treaty. Termination in respect of Jersey would have meant that Jersey would have ceased to benefit from the provisions that secure tariff and quota free access for any Jersey goods to the EU Market, and the associated provisions with respect to potential and current customs and goods trade facilitations, i.e. the provisions intended to reduce non-tariff barriers for goods at the border with the EU. In the event, the States Assembly and Government of Jersey presented Reports confirming that they were content that Jersey should remain part of the TCA after the cooling off period expired.

Rest of World Free Trade Agreements

19. The TCA was a unique agreement for Jersey, with a particularly high degree of impact given the Island's close relations with the EU, and France, and corresponding direct interests (including the fishing industry). The text of the agreement was also publicly

available in various draft forms during the negotiations. In these important respects, it is quite different from the other FTA negotiations the UK has since launched. It is a clear example, however, showing that practical solutions can be found when negotiating new international agreements and considering their application, even where timelines curtail some aspects of normal process, in order to ensure that CD rights and international identities are respected.

20. The speed and pace of last-minute negotiations seen under the TCA have been replicated to a large extent under the FTA negotiations, subsequently being driven by the Department for International Trade (DIT). In its addition to its continuity agreements, the UK has now completed FTAs with Japan, and with Norway, Lichtenstein and Iceland (jointly as the EEA states) and has reached high-level agreement with Australia.

Jersey's current participation in FTAs: goods only with ability to extend services coverage

21. Jersey has taken the decision, through Ministers, to participate initially in these FTAs in respect of certain goods chapters only. In the case of Japan and the EEA, this maintains a continuity of arrangements as Jersey was also privy to goods aspects of trade with these countries under Protocol 3 (to the UK's Treaty of Accession 1972) and through it the previous relationship with the EU's FTAs. For Australia and New Zealand (and looking ahead to other future FTAs), it looks likely that Jersey can continue only to consent to Day 1 inclusion for goods chapters. The obligations within the services chapters and subsequent implications cannot be committed to without a change in approach by the UK, to allow Jersey sufficient time to consider the detailed legal and policy implications.
22. The Jersey-UK Customs Arrangement obliges Jersey to impose the same tariffs as the UK, and in respect of SPS alignment, Jersey has committed to achieving the same *outcomes* as the UK (even if sometimes through different means) in terms of border checks and connected requirements. Given the Island's small size and corresponding volume of trade, this approach is considered proportionate to meet Jersey's needs and lends itself to general participation in the goods chapters of FTAs – subject to reviewing the detail.
23. Jersey has clarified its priorities for goods participation with DIT and has agreed a process for ensuring access to the relevant text as necessary to ensure that we can consider all implications, and that appropriate references are made to our distinct jurisdiction and competent authorities.

Territorial application text in FTAs - termination provisions

24. It is disappointing that, thus far, not all of the helpful precedents established through the TCA by the UK have been adopted by way of subsequent practice by DIT. For example, the wording which gives effect to the geographical application of the TCA (Article 520) remains Jersey's preferred approach. That article not only clarifies the distinct nature of Jersey's customs authorities and their autonomy from the UK, but also confirms the ability (at paragraph 7) for Jersey, or any of the CDs, to choose to terminate participation in the

agreement. This is in addition to the time-limited termination Article 502(3) mentioned above, which afforded Jersey the necessary time to consider the full text of the agreement after signature, and Article 509 which allowed for Jersey's specific termination of those provisions pertaining to fisheries.

25. The ability for Jersey to disapply or terminate part or all of an FTA is a key tenet of the constitutional protections provided by the convention. This is particularly important when there has been no, or limited, opportunity for States Assembly scrutiny of the terms and indeed final text of an agreement.
26. To date, during negotiations of each of the UK's FTAs, DIT have kept Jersey officials apprised of the developments in the relevant goods chapter texts. However, this approach carries some risk in terms of the possibility of changes between near-final ('stable') negotiating text and the actual finalised legal text. The inclusion of termination articles would help to mitigate this risk.
27. Indeed, we consider that it could be helpful for DIT to adopt a standardised approach to territorial application and termination provisions in respect of the CDs, for use in all of the UK's FTAs, based on that in the TCA.

Implications of fast-paced FTA negotiations

28. Without sight of the full terms of services chapters, or an allotted period after signature for the detail and implications to be further scrutinised, Jersey cannot generally consent to Day 1 inclusion in the non-goods parts of an agreement. As described above, the efficacy of the convention of consent is contingent upon genuine consultation, which must for these purposes include a full comprehension of the international obligations being undertaken. This is not possible without full sight of the text, with time for proper consideration and analysis.
29. The realities of modern-day negotiations – as borne out with the TCA and other FTAs to date – is that agreement on all of the detailed terms is not expected until the final phase, if not the 'last minute', of negotiations. Without greater access being provided to Jersey on the nature of those final discussions, absolute clarity on the exact terms is not possible, or certainly not guaranteed.
30. This means that Jersey cannot absolutely confirm whether it can – or wishes to – comply with such provisions, and that the UK also has no means of assurance. This is a very different scenario from other international agreements: generally speaking, Jersey has been asked to consent to extension or participation where the terms and obligations are already established, and often publicly available. In such cases, there is sufficient time to undertake legal assessment of Jersey's ability to adopt the new obligations, including any necessary consultation with the UK and consideration of Jersey's legislative frameworks as appropriate.

31. In Jersey's view, the 'cooling-off' mechanisms in the TCA provided an excellent way through this impasse. Nonetheless, the different approach adopted by DIT in the FTAs on which it is leading negotiations – an extension mechanism allowing inclusion in services chapters to be activated at a later date – is also helpful. It serves as a pragmatic compromise in the absence of the UK offering greater access for the CDs, or negotiating similar terms to the TCA that could allow for wider Day 1 coverage. It means that Jersey can consider the obligations and undertake any necessary compliance assessment in slower time.
32. In the longer term, particularly when Jersey has successfully utilised this extension mechanism, perhaps with the UK-Japan CEPA for example, we will have a greater understanding of the practical impact of services participation. Greater familiarity of process may also enable further solutions to be found.
33. The significant disadvantage of the extension mechanism approach, however, is that there is no fixed timeframe and Jersey (and the other CDs) are not immediately able to reap the benefits of services provisions, with no guarantee of when they will be able to do so. Equally, with the end of the formal negotiation rounds, there may be little momentum or negotiating advantage to be found in the activating the extension process. This means that any particular interests or key asks may not be easily accommodated.

States Assembly Scrutiny

34. The authority to consent to participate in international agreements sits with Government of Jersey Ministers. However, Ministers are keen to preserve the ability to refer FTAs to the States Assembly for consideration and debate where appropriate. For example, in the case of the TCA, the Government of Jersey had, like the UK Government, given commitments to the States Assembly that there would be a debate on the final issue of participation.
35. The UK process of Parliamentary consideration under the Constitutional Reform and Governance Act 2010, after an agreement has been signed, means that by default Jersey's own legislature must undertake a similar approach to any debate or consideration of the text.
36. In this respect, the extension mechanism under current FTAs is helpful as it enables the States Assembly to consider the text and obligations associated with services chapters, where it may wish to do so. The services sector, especially financial services, is the largest component of Jersey's economy, so potential new international obligations in this area may carry greater implications for the Island.

Entrustment

37. Extension of a UK-negotiated treaty is not the only means by which Jersey can participate in international agreements. In certain circumstances, it is also possible for Jersey to negotiate bilateral agreements with other countries through the granting of a Letter of

Entrustment from the UK Government. Through this process, Jersey currently has 16 full Double Taxation Agreements in place and is undertaking negotiations on Bilateral Investment Treaties (BITs).

38. These bespoke bilateral arrangements represent a significant development for Jersey as a democratically autonomous jurisdiction, distinct from the UK. They also offer a different means for Jersey to pursue its own interests on the international plane, whilst maintaining appropriate safeguards to reflect the UK's responsibility under international law.
39. Indeed, the granting of more Entrustments was a recommendation in a prior report by the Justice Select Committee to the Ministry of Justice, which it in turn accepted⁷.
40. It is important that the process for considering requests, granting Entrustments, and reviewing the negotiations delivered under them, is timely and practicable. Whilst the Government of Jersey is grateful for the UK's ongoing support in this area, there have been instances of lengthy processing times and delays, particularly in respect of some UK Government Departments. It is clear that further work is needed to expedite the process, perhaps through greater use of general Entrustment provision (rather than the current case-by-case approach for BITs).
41. Delays in the internal review process between the UK Government and Jersey counterparts inevitably have negative knock-on implications for the passage of negotiations with Jersey's selected partners, which reduces the impact and effectiveness of Jersey's ability to conclude such agreements under the Entrustment process. This in turn has real – and unnecessary – economic implications for the Island.

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⁷ See 'International Relations' section of the following: [Government Response to the Justice Select Committee's report: Crown Dependencies CM 7965 \(publishing.service.gov.uk\)](#)