

Public Administration and Constitutional Affairs Committee

Oral evidence: [The Scrutiny of International Treaties and other international agreements in the 21st century, HC 214](#)

Tuesday 21 June 2022

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Members present: Mr William Wragg (Chair); Ronnie Cowan; Jackie Doyle-Price; Mr David Jones; John McDonnell; David Mundell; Tom Randall; Lloyd Russell-Moyle; Karin Smyth; John Stevenson; Beth Winter.

Questions 113 - 158

Witnesses

I: Professor Lorand Bartels MBE, Professor of International Law, Trinity Hall, University of Cambridge; and Professor Malgosia Fitzmaurice, Professor of Public International Law, Queen Mary University of London.

Examination of witnesses

Witnesses: Professor Lorand Bartels MBE and Professor Malgosia Fitzmaurice.

Q113 **Chair:** Good morning and welcome to the Public Administration and Constitutional Affairs Committee. Today the Committee is continuing our inquiry into the scrutiny of international treaties in the 21st century. The focus of this morning's session will be the law of treaties and the Vienna Convention of the Law of Treaties. It is also an opportunity to explore how treaties have changed in form, nature and extent over time. We are joined by two experts in the field of international law, Professor Bartels and Professor Fitzmaurice. Good morning to you. Would you introduce yourself for the record, please?

Professor Bartels: Good morning and thank you very much for the invitation to be here. My name is Lorand Bartels. I am Professor of International Law at the University of Cambridge. Also, because I think we might talk about this later, I am the Chair of the UK's Trade and Agriculture Commission, which deals with scrutiny of a sort of free trade agreements.



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Professor Fitzmaurice: I am Professor Malgosia Fitzmaurice at Queen Mary University of London and also Doctorate Honoris Causa of the University of Neuchâtel in Switzerland. My main areas of expertise are law of treaties, environmental law and indigenous peoples.

Q114 **Chair:** Thank you very much indeed. I will pose a question to Professor Bartels first, a straightforward one perhaps but one you can expand on. What is international law and what relevance does it have to Parliament and parliamentarians?

Professor Bartels: International law, which does exist, by the way, is the law that governs relations between states primarily. By states I mean nation states. It goes a bit broader than that. It also governs relations between states and international organisations that are formed by states, so essentially they delegate some of their powers to international organisations, and between international organisations. In recent decades it has expanded a bit further to cover topics like human rights. Individuals have a certain standing under international law if states agree to this and the same with investment law, again individuals can have rights under international law, but it all comes back to states. They are the core element of international law. They are born into international law; they can't escape from international law; they can change international law in various ways.

There are two main types of international law. One is treaties, which are contracts between states but also between states and international organisations, and this is what we are here to talk about today. In addition to treaties there is also a form of international law called customary international law, which I think you can analogise a bit to common law. It is the law that is there by default and the way that customary international law is formed is by finding—you need to make a determination about this but states think that this is the law. They behave as though this is the law. There are two elements: they need to think that this is law and they need to behave in that same way via their practice and it needs to be a fairly uniform practice. You can't just pick out a selection of states and say, "They do this and that is, therefore, the law". It needs to be all states, which is the 193 or so that we have.

But treaties are, of course, a core part of international law because that is where states get to write down what they think their obligations are vis-à-vis any other state.

Q115 **Chair:** Thank you. Professor Fitzmaurice, an opening question from me. What makes something a treaty, what types of treaties are there and what do treaties cover?

Professor Fitzmaurice: Thank you very much. I will start with a general description of treaties. As Professor Bartels has said already, it is one of the sources of international law, included in the list of sources of Article 38 of the statute of the International Court of Justice, which reflects sources of international law. Treaties basically are the central means by



which states and international organisations conduct their business. In effect, to give you a figure, there are about 180,000 treaties registered with the United Nations Treaty Series.

There are some very important areas of international law that are mostly regulated by treaties, like international environmental law. It is less customary international law and more a treaty area. These treaties are global treaties like the convention on trade of endangered animals and plants, the very important CITES convention. It has 183 state parties, so we are talking about global conventions. There are different types of treaties in international law. There are framework treaties, for instance, the treaties that relate to the protection of the marine environment, like the MARPOL convention, which is also a global convention and 99.5% of states with commercial tonnage are parties to this convention. It is an umbrella convention that has annexes that can be amended in a simplified way. We have global treaties, regional treaties, bilateral treaties. I don't know if you want me to say something about the Vienna Convention now.

Chair: We will probably come on to the Vienna Convention but feel free briefly if you wish.

Professor Fitzmaurice: Okay. Treaties are the most important source of international law and we should not forget that the United Nations Charter is a treaty too. This is the most universal treaty you can imagine. The structure of the treaty is usually done in a way that is common to all the treaties. However, the question what is a treaty is a very complex question. There is a definition in the Vienna Convention of what is a treaty. The Vienna Convention on the Law of Treaties includes the definition of a treaty as an instrument between states in a written form, but what does it mean? It only means that the Vienna Convention's scope relates to treaties in a written form. There is a whole area outside of the life of the Vienna Convention relating to treaties that are tacit agreements or oral agreements, which do exist.

The Vienna Convention on the Law of Treaties from 1969 also excludes treaties between states and international organisations and that is another convention from 1986. This convention never entered into force, so it never gathered the required number of ratifications, probably because the Vienna Convention from 1986 follows more or less the Vienna Convention from 1969, taking into consideration the peculiarities of international organisations. There is still a quite unsolved question of the legal international personality of international organisations. Probably that question also prevented states from ratifying this convention.

Lastly, I will add that there is also an orphan Vienna Convention. I call it "orphan" because it is about succession of states in respect of treaties, which is in force but being in force only requires 15 ratifications. This convention does not really reflect customary international law on succession so it is not really used.



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The most important is the 1969 Vienna Convention, which is the result of almost 20 years of work by the International Law Commission, its biggest success. It is a body of the General Assembly consisting of 34 lawyers. We can say that these days the Vienna Convention on the Law of Treaties from 1969 reflects customary law.

Q116 **Chair:** Thank you. Following from that, Professor Bartels, do you agree that the nature of treaties has changed in the last 100 years or so? Can you provide examples of how treaties have changed in their nature and scope?

Professor Bartels: I would not say that they have changed in their nature. Contracts are contracts and treaties are treaties. The Vienna Convention set out certain of the formalities of how you make a treaty and so on but in essence these have been around for millennia really, just agreements between states. But what they cover has definitely changed over the last 100 years or so. Probably the easiest way to understand this is to think why you would have a treaty. You have a treaty because you need to, essentially, and what states used to do 100 years or more than 100 years ago with each other was much more limited than what they do now. We have alliance treaties, peace treaties, treaties to demarcate territories, where states rub against each other. That is the traditional scope or coverage of a treaty but in particularly the post Second World War era treaties have come to cover much of the same ground as domestic law making, which is why parliaments are increasingly interested in treaties. You have treaties now that cover virtually everything that you would find in domestic law.

Q117 **Chair:** That is very helpful and interesting. I am sorry to interject but it moves on to the next point about the implications for domestic policies and indeed the laws of the state.

Professor Bartels: There needs to be a match between what treaties do at the international level and what parliaments enact at the domestic levels, otherwise there is a problem. The treaty is binding on the state and then if domestically the state wants to do something different or does not bring into force the legislation that the treaty requires, the state is in violation of its international treaty obligations. It is very important to make sure that what happens at the international level in entering into international obligations is reflected domestically otherwise that mismatch constitutes a breach and that is bad news under international law. Even if under domestic law you can say, "We are sovereign domestically, we don't much care", that does not help you at the international level.

Chair: Thank you. That is extremely useful. We will explore further on the Vienna Convention, I believe, with my colleague John Stevenson.

Q118 **John Stevenson:** I will start with Professor Fitzmaurice. You have already touched upon aspects of the Vienna Convention but so that we can get some clarity in our own minds, what is the law of treaties exactly



in simplistic terms?

Professor Fitzmaurice: As I think I have already hinted at, basically the law of treaties in modern times is the Vienna Convention on the Law of Treaties. However, there are some areas of the law of treaties that are broader than the Vienna Convention. I mentioned that the Vienna Convention has a very strict approach to a treaty under the Vienna Convention. However, the Vienna Convention, in I believe Article 3, already says what is outside the scope of the Vienna Convention. That is international agreements concluded between states and other subjects of international law, so in that sense the drafters of the Vienna Convention had in mind international organisations. Also the Vienna Convention is not applicable to treaties that are not in a written form. The law of treaties is slightly more than the Vienna Convention.

However, the Vienna Convention entered into force in 1980 and since then we have had great development in the customary law of treaties that found its source in the Vienna Convention. Even if states that are not parties to the Vienna Convention appear before, let's say, the International Court of Justice, they agree to follow the Vienna Convention rule on the law of treaties as the general law of treaties provisions. The law of treaties is basically the Vienna Convention from 1969.

Q119 **John Stevenson:** The Vienna Convention covers treaties between states and you have touched upon this, but to what extent does it apply to international organisations?

Professor Fitzmaurice: It applies to international law but, as Professor Bartels said, it has to be in agreement with national law because the Vienna Convention is based on the principle enshrined in Article 26 "pacta sunt servanda", which means that treaties have to be followed once a state takes on the obligation. Although the Vienna Convention relates to international dimensions, it also has provisions that reflect on domestic law. For instance, how treaties are negotiated, who binds the state, is also part of the constitutional law of a state. There is a very close link between those two areas and I think that it is not correct to try to divide the law of treaties in a municipal area and the law of treaties in international law. They are very much connected.

In fact, once a good state—and this is also a principle of international law—decides to become a party to a treaty it should have already domestically corresponding legislation to fulfil the treaty. It is very unwise for a state—and there are cases like this, I have to say, because I follow the practice of many environmental treaties—if it agrees to become a party to take on an international obligation without corresponding municipal legislation. That goes against the pacta sunt servanda principles because they are not in a position to follow international obligations.

This brings me to the fact that the breach of international obligation results in a wrongful act from the point of view of international law. We



have then the rules of state responsibility for a breach of an international obligation. Article 73 of the Vienna Convention makes a clear division between the rules of state responsibility and the rules of law of treaties. However, it all again comes together because breach of an obligation deriving from a treaty incurs state responsibility. We have a set of Articles on State Responsibility, which is customary international law that was adopted in 2001 by the International Law Commission.

Q120 John Stevenson: I will go to Professor Bartels now. Who precisely can negotiate, sign and ratify a treaty?

Professor Bartels: These are different things. Negotiation can be done by government departments. You have officials who negotiate. The UK has, for instance, a whole cadre of international trade negotiators, which is a chief negotiator, chapter leads and then support. That is how the negotiations take place but once they are complete the text has to go through a legal scrub to make sure that all the bits fit together nicely, the right terms have been used consistently and so on.

Once you have the final text and both sides agree on the final text, you get signature, which is a formal act, and there are rules on how this can be done, who can sign a treaty under international law in the Vienna Convention. We are talking at this point about acts that bind the state, whose signature can bind the state. The Vienna Convention specifies that there are three officers, persons for each state who are entitled by way of right, who are deemed to be able to bind the state. This is the head of state, which of course in the case of the UK is the Queen, although she does not do this, the head of government, which is the Prime Minister, and then the foreign minister, which is the Secretary of State for Foreign Affairs in this country, but that is not all.

It is possible for other Ministers to be able to sign treaties if they are given authorisation to do this but the other side will want to make sure that those powers have been given to these Ministers. A formal document is then produced, a full powers document. It depends on the area and the importance of the treaty. You might have a treaty in a particular area, for instance a trade agreement, which is my area, where you might have a trade Minister and maybe not even the Secretary of State for Trade but another trade Minister. As you know, the UK has been signing lots and lots of continuity agreements and most of those were signed and the ceremony was presided over by not the Secretary of State for Trade but a more junior trade Minister, but this can only be done when they have been given full powers to sign the treaty.

The signature is only one step. You also then need ratification, which is an act under international law that is necessary for the treaty to be brought into force and to be properly binding on the state. Again, there are formalities in the Vienna Convention on how this is done and it is the same process again, essentially, the same personages who have the power to ratify on behalf of the state. But all of that is done at the international level and that comes to a point that both of us have raised



already, which is that if you have—and this is more illustrative than a difficulty—the possibility of the Prime Minister or the Secretary of State, Foreign Secretary, being able to sign treaties that are binding on the state, there is no reference to Parliament in any of that.

From an international law point of view, parliaments are a domestic detail, they are of no importance. What is important is who represents the state and that is the executive. In this country and most countries, or probably all countries, mechanisms have been developed to make sure that domestically you don't have the Prime Minister or the head of state going off and signing treaties without clearing this at home, but from the international law point of view of course that is completely possible. International law just cares about who is able to represent the state.

Q121 **John Stevenson:** You are saying that consent for a state to enter into a treaty is separate from the Minister doing it on behalf of the country?

Professor Bartels: There are two stages. Consent to be bound is equivalent to ratification, essentially. There are other ways in which consent can be expressed but ratification is the most common. It is a formal act that follows signature. Usually there is a point between signature and ratification and that is a very important point domestically. That is why the practice has developed, particularly in this country, where you have signature of a treaty and it is at that point the treaty will go into Parliament, you get to have a look at it, the CRAG process commences and so on, prior to ratification.

All of this is simply a matter of practice from the international law point of view. It is possible for this to be done by the head of state. We can talk about the theory. The king goes off and signs a treaty and then tells the barons about it, which we still have today but the practice, of course, is that treaties are signed by democratic countries with parliaments and so on that have mechanisms built in that are then reflected in the treaty to give parliaments a look at them before they become binding on the state.

Q122 **John Stevenson:** Following on from that, we understand that treaties can have effect and be applied provisionally. What exactly does that mean and how long can that last?

Professor Bartels: This is a very interesting aspect of treaty law. Provisional application is a term of art, so the two words are "provisional application" and this is specified in the Vienna Convention. This means that when a treaty is signed it can be said by agreement between the parties, without ratification, to be provisionally applied by the parties. What is interesting about this is that it has the same effect as ratification but a treaty can be provisionally applied without this going to parliament, and in fact that is pretty much the point of it. The treaty is then treated as though it is in force with parliament not having a say. It is not fully binding in the same way.



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The main difference is that it is much easier for the state to get out of it. All the state has to do is say, "We are no longer provisionally applying" and then that is the end of it, whereas normally with a ratified treaty there is a process for getting out of the treaty and sometimes there is not even a way of getting out of it. With provisional application it is very easy to get out of it, but so long as it lasts, it lasts, and that can involve dispute settlements. If you have a court system established under a treaty, as long as you have not said that you no longer consider the treaty to be provisionally applied, if the court proceedings start you are stuck with it.

Russia got stuck with an investment case under the Energy Charter Treaty, a very famous case, investment in Yukos, involving many billions of dollars, because they had provisionally applied without ratifying the Energy Charter Treaty. The investor triggered the dispute settlement mechanism and that was it for Russia, basically. They said, "But we didn't ratify the treaty" and the answer was, "It doesn't matter. You provisionally applied it."

You asked how long this can go on for. In theory, the whole theory of provisional application is that maybe you are the king out there on the battlefield or the ambassador or whatever. You sign a treaty and you want it to kick off straightaway and then you take it home—sorry, presumably not the king because you take it home to the king who then ratifies. You are the general who agrees a peace treaty or something. You get on your horse, you trot off back home and the king then ratifies the treaty, but you wanted it to kick in straightaway, you wanted to stop a war. That is the theory. Of course we don't really do that any more, so the theory from those days is that when you have provisional application there is a question of timing because you wanted it to kick in immediately and then ratification was hot on the heels of provisional application.

What you see now increasingly is that treaties are provisionally applied to get them going earlier on but ratification can take a very long time indeed. For instance, with the European Union's trade agreements for over 20 years now—and there are many—I don't think there is a single one that has been properly ratified because there are parliaments that just sit on their hands and won't ratify them, so they are all provisionally applied. All of the EU's free trade agreements—apart from the one with the UK, I should say, because the member states did not get a vote there, a seat at that particular table—whenever the national parliaments are involved they don't ratify, so lots of these treaties are provisionally applied.

The most famous example and the longest one of a provisionally applied treaty is the GATT, General Agreement on Tariffs and Trade, which is still the core of the World Trade Organisation. It dates from 1948, signed in 1947, was provisionally applied as of 1 January 1948 and continued to be provisionally applied all the way through to the establishment of the World Trade Organisation in 1995. That is something like half a century



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of provisional application, and why? It is because Congress in the United States would never sign off on it.

Q123 **John Stevenson:** That is interesting. Professor Fitzmaurice, talking about that and following on in many respects, how can a treaty or a part of a treaty be terminated?

Professor Fitzmaurice: Thank you very much for this question. It is a very difficult question and I will say straightaway that the Vienna Convention has many residual rules, which mean that states can mould Vienna Convention rules as they please. However, the rules on termination of the treaty are basically set in stone now. The Vienna Convention has a whole section on the termination of a treaty and there are very strict rules on treaty termination.

First, the treaty can be only terminated basically if the treaty allows it. We have two types of treaties. One is where the treaty has provisions on termination of the treaty. The other type is where there are no provisions on treaty termination. The Vienna Convention says in the initial article on termination of a treaty that the treaty can be only terminated with the provisions of the treaty or the provisions of this convention. When there is a difficult situation when a treaty does not include the provisions for termination or withdrawal, we have the following guidance or rules from the Vienna Convention. The treaty can be terminated if "it is established that the parties intended to admit the possibility of denunciation or withdrawal".

It is obviously a very difficult position to establish the intention. We can go to travaux préparatoire of the convention but usually courts and tribunals are extremely reluctant to admit travaux préparatoire as being very sketchy, not giving all the views of the states. States very often change views after the negotiation of a treaty, which can take years for instance, and sometimes they are political not legal statements. It is very difficult to draw intention of state parties to a treaty that they intended the treaty to be terminated at some point.

The other rule that relates to the possibility of a treaty being terminated by the way of withdrawal without a specific provision is a right of denunciation or withdrawal can be drawn from the nature of the treaty. It is also an extremely vague provision and these provisions are not really quite followed by international courts and tribunals.

I will give an example of a very famous case before the International Court of Justice, which was a treaty concluded between Hungary and then Czechoslovakia on the extensive building of dams on the River Danube to provide electricity. It is called the Gabčíkovo-Nagymaros case, a very famous case from 1997. When the communist regime collapsed, there was a civil movement in Hungary to terminate the treaty that did not have a clause on termination. Then there was the so-called velvet revolution and Czechoslovakia divided into two states. The succession to the state came to the Slovak Republic, so in the end the states could not



agree during negotiations and they went to the International Court of Justice, which took a very firm stand on the *pacta sunt servanda* rule. Although Hungary pleaded a state of ecological necessity, Hungary pleaded change of circumstances—and I will come to it—the collapse of the communist regime, claiming that the treaty was concluded to develop communist co-operation, the court rejected all the arguments and basically said that there is no condition upon which the treaty should not be followed, although there were quite compelling conditions put forward by Hungary why they terminated a treaty without a termination clause.

In international law, it is a very difficult area of walking away from a treaty that does not include a termination clause. The Vienna Convention gives certain gates, openings for a state to do it, how to get out of a treaty on the basis of certain circumstances. I will say straightaway that there is no success in bringing forward to international courts and tribunals the possibilities that are provided in the Vienna Convention. The most famous and important is fundamental change of circumstances. On the basis of Article 62 of the Vienna Convention, a state can plead withdrawal from a treaty. However, the formulation of the article by the International Law Commission in a negative way already gives the sense of great reluctance to follow any provision outside a treaty that would lead to withdrawal from a treaty and also not following international obligations that the state assumed on the basis of the treaty.

Let me quickly cite, "A fundamental change of circumstances which has occurred with regard to those existing at the time of the conclusion of a treaty, and which was not foreseen by the parties, may not be invoked as a ground for terminating or withdrawing from the treaty unless—" and they are very high standard "unless" clauses, which in the view of the International Court of Justice were never meant by the case. Also in the *Gabčíkovo-Nagymaros* case Hungary tried to rely on a fundamental change of circumstances and did not succeed.

Basically from the practice of law of treaties—and I usually know the practice of the law of treaties—there was only one case where the Court of the European Union in the *Racke* case—which was about terminating a treaty on the export of wine between a German company and former Yugoslavia, which then was in a state of civil war—agreed that it was a fundamental change of circumstances. However, close reading of the case shows that the court has not followed all the strict conditions imposed by Article 62. Basically there is no way a state can just walk away from an international obligation in the law of treaties.

- Q124 **Tom Randall:** You have given those two examples of how to terminate a treaty by the provisions in the treaty and, failing that, under the Vienna Convention. How prevalent is it to have a treaty that does not have a termination clause in it? Is it the case that more modern treaties do have termination clauses? Is that a standard thing to have now rather than relying on the Vienna Convention?



Professor Fitzmaurice: Yes. The modern treaties usually have termination clauses. However, the United Nations Charter, which is a treaty, does not have such a clause and the reason is that from the beginning in 1945 when it was negotiated and drafted in San Francisco, global universal participation was very much needed. To discourage states from withdrawing from such an important treaty, the draftsmen of the treaty decided not to include a withdrawal clause. As far as I know, there was only one example when at some point Indonesia made a statement that it was withdrawing from the United Nations Charter. This was not even commented on. It was just left and in the end Indonesia withdrew this statement.

But in normal circumstances in the modern law of treaties they give the opportunity to withdraw, however under conditions not to disturb the relations. There is a certain period of time from notification of treaty withdrawal to the actual act of withdrawal.

Q125 **Lloyd Russell-Moyle:** Thank you. It has been very interesting. You are effectively saying that unless a treaty has withdrawals in it, it is impossible to withdraw from it. There is a principle domestically that no Parliament should be able to bind another Parliament and our Parliament is sovereign beyond all else, not that it can do whatever it wants, it has to repeal laws sometimes, but if it follows the process it can. Are these two things incompatible in principle and the application of international law or how do you reconcile the two?

Professor Bartels: I would say yes.

Lloyd Russell-Moyle: Just incompatible?

Professor Bartels: Yes, but having said that, domestically and precisely because of this you are much less likely to enter into a treaty that would make this incompatibility of principle a problem in reality. One way is by making sure that the treaty has a termination clause, but you can have changes of government, they don't like treaties and they are stuck with a termination clause with a 12-month waiting period or whatever and the new government just has to twiddle their thumbs and wait for it to come to an end.

Q126 **Lloyd Russell-Moyle:** In some senses parliamentary sovereignty is not Executive sovereignty, so the Executive could be very happy with it and Parliament could enact laws that even require repealing it, and in the international scene there is no standing for Parliament?

Professor Bartels: Absolutely, that is right. You have to think of it as kings.

Q127 **Karin Smyth:** Professor Fitzmaurice, I will come back to you particularly on the Northern Ireland Protocol Bill in these circumstances, the Bill in general and the Government's legal advice. The question is about the Government's legal position. The Government have said that the UK's non-adherence of international law obligations is justified by the doctrine



of necessity. You have talked a little bit about that but so that we are all very clear, could you say where that legal position may have come from and give past examples—you have given a couple in your previous answers—of how that might relate to the situation we are in currently?

Professor Fitzmaurice: Again it is a very difficult question that, as I mentioned earlier, was raised in the Gabčíkovo-Nagymaros case when Hungary also relied on state necessity to walk from the international obligation. If I may ask for some time, because it is quite difficult, I want to say that the provision on state necessity is not a part of the law of treaties. It is part of the law of state responsibility. In fact, the International Court of Justice always took the stand of strict separation between the law of treaties and the law of state responsibility and took a view in the Gabčíkovo-Nagymaros case that the treaty can only be terminated on the basis of the Vienna Convention. However, the state can justify the termination on the basis of state responsibility. It is a very fine line but the court said that you cannot just terminate a treaty on the basis of a different legal order, which is the order of state responsibility, to start with that.

I think that probably government also relied a bit on pleadings before the court in Gabčíkovo-Nagymaros case and also in pleadings on state necessity that were very common after the economy of Argentina collapsed. There were international arbitrations where lawyers representing Argentina claimed the inability of Argentina to fulfil its international obligations due to economic collapse, state of necessity. But let's go to state necessity and I will come back to the reaction of other courts and tribunals on that.

The state of necessity is codified in Article 25 of the Articles on State Responsibility from 2001 and this requires clarification that state of necessity is under the chapeau of circumstances precluding wrongfulness. We can look at it like that, an act of a state would be considered a wrongful act in international law, a breach of international obligation unless there are certain circumstances that can serve as justification for not conforming with an international obligation. It is not only state of necessity but something that is well known in common law, contract law with force majeure for instance, which is also codified here.

However, out of all of the circumstances precluding wrongfulness, state of necessity is the most contentious and controversial. In fact, the International Law Commission, while codifying the Articles on State Responsibility, had a lot of doubt about whether to even include it because historically state of necessity is related to defence of a state and this is more general, exactly like the Article 62 circumstances precluding wrongfulness, state of necessity is formulated in a negative way. The main chapeau of the article on state of necessity says, "Necessity may not be invoked by a State as a ground for precluding the wrongfulness of an act not in conformity with an international law obligation of that State unless the act"—so again we have the subclauses that give a kind of



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opening and they are as follows—"Is the only way to safeguard an essential interest against a great and imminent peril; and does not seriously impair an essential interest of the State or States towards which the obligation exists, or the international community as a whole."

Obviously this has a communitarian dimension. The second paragraph of the state of necessity is very much embedded in obligations erga omnes, towards the whole community of states even. The court in again the Gabčíkovo-Nagymaros case—my students hate it, all the time Gabčíkovo-Nagymaros case—makes a very important pronouncement on the interpretation of what is imminent peril, very narrow, and also what is essential interests of a state. Without getting into detail, which is obviously written in the judgment on the Gabčíkovo-Nagymaros case, the court gave the strictest interpretation of the possible clauses that would preclude invocation of the state of necessity.

Q128 Karin Smyth: Were you surprised that the UK Government have invoked a state of necessity at this point with this particular proposed legislation?

Professor Bartels: I will add to that by saying that you resort to a defence of necessity when it is necessary, in other words you don't have anything else.

Professor Fitzmaurice: I will give an example. There were several cases when the state unsuccessfully has had recourse to state of necessity. One is probably quite well known. It was an advisory opinion by the ICJ on the Israeli wall, a very well known advisory opinion when Israel invoked state of necessity to basically breach its international obligation by building a wall. The court denied that it was a situation that would permit such a recourse to state necessity. As I already said, Argentina several times tried to invoke state of necessity in the cases before the Centre for Settlement of Investment Disputes when the whole economic system of Argentina collapsed. Even then it was only one time, but also not exactly strictly applied, when Argentina was excused from the liability on the basis of the doctrine of state of necessity due to restrictive measures in the bilateral investment agreement between the United States and Argentina.

Q129 Karin Smyth: We have the collapses of the Argentina economy, the Israeli wall and the collapse of communism. Professor Bartels said you go to the doctrine of necessity in those extreme examples when you have nothing else. What is your view about the Government invoking this at this particular stage and where do they go from here?

Professor Bartels: I think that this has been discussed quite a bit and the difficulties with the Government's defence are probably quite well known. One difference between necessity—

Karin Smyth: Just to interrupt, it is known because some of that legal advice has been leaked.



Professor Bartels: No, the position is pretty clear. I think that the Government's legal position is quite detailed. I can't imagine that there would be much more in the legal opinion that underlies it. Footnotes, but the legal position is pretty straightforward and sets it out as well as it can be set out. What I mean is that the difficulties with that legal position are that there is a clause in the treaty that deals with the same situation as are being cited for the necessity justification, which is Article 16.

Another difficulty—and this is the big difference between necessity and termination—is that with necessity you have to look to the obligation that you are breaching. It is a breach and then there is the justification for the breach. It may be that some of the obligations in the Northern Ireland protocol can be breached on the grounds of necessity but others cannot, so you need to look at exactly what is being justified. These are probably in addition to the question of what is a grave and imminent peril and whether the situation in Northern Ireland rises to that level. I think that these are the more technical aspects to look at in assessing the Government's response.

Professor Fitzmaurice: If I may add to that, they are taking account but still they are core elements of the state of necessity and if a state relies on state necessity it should rely on a definition and also the possibility of relying on this principle because it is very limited. I think that just saying state of necessity is probably not substantiated enough considering the codification of state of necessity in the Articles on State Responsibility reflect customary international law. It is not just a flight of imagination of the International Law Commission to restrict it. No, it is a very controversial way of escaping international obligations, so it is very narrow and very heavily guarded. Also, there is the possibility of negotiation, for instance with Article 16 safeguards, that the Northern Ireland protocol allows for. It is very well drafted: what are the safeguards? Also in Annex 7 to the protocol there is the possibility of finding a solution. I think that taking into consideration that there are ways and rules of probably negotiating again, state of necessity is something that probably should be very carefully considered. That is what I think, my personal view.

Q130 **Karin Smyth:** Thank you. If we can move on to ratification, which we have touched on, and then the role of Parliament. Professor Bartels, after ratification, what happens to the treaties and how are decisions usually taken and changes made to keep up to date with developments?

Professor Bartels: I think that the important point here is that treaties can be—are not necessarily all—living instruments. You can have a treaty that is just dumped and that is it, like a treaty that says, "The border is here", there is not much to be done, it is just there. But treaties that regulate activity and that overlap with what happens domestically are different because they set a framework for future acts between the parties. Particularly in my area, which is trade agreements, as I have said before, most of these treaties, the same with international organisations



that are established by treaties, are like constitutions in a limited area. They set up organs through which the parties can act. They meet, they make decisions, they implement, they create policies, they agree to do various things. If you look at treaties in that sense, it is not quite right to think of them as contracts that just say, "We will do this and you will do that" or "we both agree this is the border" or "we will sell you something". They are more like public law, they are more like legislation in that sense and the two parties can act together, two executives get together in these organs and agree on what to do.

That is what makes it particularly important from your point of view when you are looking at treaties to pay attention to the organs that are in treaties, the powers that are given to those organs, because you will not see that again. A good example is the withdrawal agreement itself, which in the Northern Ireland protocol of particular relevance gives certain powers to the two sides, the UK and the EU, to make decisions. The Partnership Council is the organ through which this happens and that is on the UK side and then on the EU side. If you look at the list of powers that the Partnership Council has it even includes a provision—and I would not say this is completely unique but remarkable anyway—for a certain time to be able to make small amendments to the treaty, and that is the Executives doing that.

You can find these organs with relatively important powers. Usually the powers are much more limited but precisely for the reason that in theory a treaty can set itself up to do various things and that is again executives acting under the treaty, not parliaments.

Q131 Karin Smyth: Are there examples where parliaments do that and have that role?

Professor Bartels: I don't know that. I will hand over to Professor Fitzmaurice on treaty practice of parliaments in other countries. I do know that in the common law world, no, they don't.

Q132 Karin Smyth: I will come back to you, Professor Fitzmaurice. What would parliamentarians need if we were to want that role? How would we be informed?

Professor Bartels: You do it domestically. You would amend Crag essentially. You would say that if the Government proposed to make a decision of a particular kind under a particular treaty, before the Government could make that decision they would need to get parliamentary approval. Germany does this. The German parliament has far more control over the process of decision-making under treaties than the UK does. Parliament is quite powerful there. But it is a domestic question. You need to constrain the Executive in its acts under the treaty.

Q133 Karin Smyth: Are there any particular examples?

Professor Fitzmaurice: I come from a similar tradition in Poland originally, and in Poland parliament has an overall role in treaty-making.



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Every treaty and protocol, especially so important, would definitely go through a parliamentary approval procedure.

Q134 **Karin Smyth:** In one of your earlier responses you talked about the alignment of international law and domestic law. To make that happen is it your view that the domestic law should be lined up first before the executive?

Professor Fitzmaurice: Yes, in good countries, according to the principle of due diligence, this is the basic principle. But you cannot sign an agreement or accede to an international convention without the underlying domestic law. After the collapse of communism, when Poland was already an applicant country to European Union, as far as I know already from 1997 there were European laws being introduced to the Polish legal system before it became a member in 2004, I think. This shows the extent of taking on an international obligation.

Q135 **Karin Smyth:** With the Northern Ireland protocol, the Government that agreed that have also now agreed to unilaterally change it and are lining up domestic law after declaring that fact. Is that unusual?

Professor Bartels: Yes, although it has done it before.

Karin Smyth: Do you want to give that same example, for the record?

Professor Bartels: The Internal Market Act was similar.

Karin Smyth: On the same agreement?

Professor Bartels: On the same agreement. I do not know if we can say it is unusual, not for the UK at the moment. But, yes, it is not the normal practice even of the UK, which is quite the opposite. That is to bring in domestic legislation that would comply with the treaty before the treaty is ratified. That would be the usual thing you do with less exciting treaties.

Q136 **Karin Smyth:** Finally, if we can talk about where a treaty provision is not complied with. Can we talk about enforcement as to how they are enforced and by whom?

Professor Fitzmaurice: Again, this is a very complex question. There are different ways and means to deal with non-compliance by a state of a treaty. First, the Vienna Convention on the Law of Treaties already gives some guidance on it. There is Article 60—material breach of a treaty—which only relates to material breaches that are of grave character. It gives opportunities to states to either terminate a treaty or suspend the treaty. There are different scenarios. Suspension is one of them. This is the law of treaties in cases of material breach of non-compliance by a state with a treaty provisions; Article 60, material breach of a treaty.

However, the question arises what to do in cases of non-material breaches of the treaty. Then we move into the realm of state responsibility. We come to a facility that is also in the section on circumstances precluding wrongfulness, that is so-called



countermeasures. A countermeasure is this area of state responsibility, which is also delicate because the countermeasure would be a wrongful act if it was not a reply to a wrongful act. To give an example, if state A stopped fulfilling obligations stemming from a treaty on exchange of education students, state B can temporarily suspend obligations relating to exchange of medical assistance, for instance. But because this is a wrongful act, it is very limited again in the law of state responsibility.

The main condition is it has to be proportionate. If we go back to my example, and state B completely suspends all the treaty relations with state A, state B would commit a wrongful act itself because it would exceed the condition of proportionality. Another condition is the time condition. Once state A goes into compliance, state B immediately has to cease all the countermeasures because again it would be committing a wrongful act if it continued.

The third condition is that it also has some procedural requirements like the state that takes a countermeasure has to announce it. It has to go to negotiations. It is a very restrictive measure. Obviously when the dispute is before the settlement of this procedure then all the countermeasures have to stop.

Q137 Karin Smyth: Could you briefly add to that about the disputes? Ultimately how are disputes resolved? I know that is a big question but if you both could briefly answer.

Professor Bartels: Not in all treaties, but it is increasingly common for disputes to be resolved by a mechanism that is agreed in the treaty itself. They can set up their own tribunals or they can farm out the disputes to an existing tribunal like the International Court of Justice or others. Treaties that set up their own tribunals will then also set up enforcement mechanisms for breaches.

The World Trade Organisation trade agreements—to use that example—is all very codified. There is no need to go to the Vienna Convention or international law or anything like that usually when the dispute settlement systems work. The WTO is not working 100% at the moment but when they work. Then you have countermeasures essentially codified. If there is a violation of an obligation it is clear what the other side has to do. It brings a case, it wins, the other side does not comply and then there are countermeasures, which are again defined and more arbitrations to work out how retaliation takes place, and so on.

In addition to the general law of the Vienna Convention on the Law of Treaties and state responsibility, there is also codification. To come back to the Northern Ireland protocol, there is a lot of codification there, which of course then stretches over into the Trade and Co-operation Agreement and so on. All those processes would need to be followed in the event of a purported breach.

Q138 Beth Winter: We will move now to memoranda of understanding and



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other types of agreements. There has been concern raised with this Committee about the increasing use by the UK Government of MOUs. I will turn to Professor Fitzmaurice. One such recent example is the MOU between the UK Government and the Rwandan Government on the provision of an asylum partnership. What makes it an MOU and not a treaty and why do you think the UK Government have set this out as an MOU rather than a treaty?

Professor Fitzmaurice: MOUs and treaties is one of the grey areas of international law. Usually the approach of theory but also the practice of the law of treaties is that an MOU is not a treaty because it does not result in international law and obligation. It is not subject to international law.

MOUs are a very popular instrument by the Government to deal with matters that are of technical assistance, matters that change, because the amendment of an MOU is much simpler than an amendment of a treaty, which is as timely as ratification. It is another treaty, basically.

MOUs have a different language. It is very important that the Foreign Office, which is involved in the MOU, does not use the language of any other Department of a treaty. The international obligation should be in there, "shall" should be "will"; there is a whole dictionary of language that is different from the treaty.

The question may arise also: if it is not an international obligation why is it so popular? First, delicate methods can be decided by MOU because MOUs are not subject to the obligation of registration like international treaties according to Article 102 of the United Nations Charter, which says, "Every treaty and every international agreement entered into by any member of the United Nations after the present charter comes into force shall as soon as possible be registered with the secretariat and published by it". This avoids this kind of publicity. For instance, when a MOU is concluded for defence or amendments it is a preferable way of instrument because it does not have the obligation of publication. It can be kept secret simply.

Also, as I said, amendments to such an instrument are easy. If circumstances change it is very easy to change a memorandum of understanding. The question may be asked: do states have to follow this kind of memorandum of understanding if they are not strictly binding under international law? They do. They take a political commitment, which is strictly followed. However, the breach of such a memorandum of understanding, which is not a treaty, cannot fall under the breaches that we relate to treaty, a material breach of a treaty countermeasure. I think that it would be very difficult to apply the rules of general international law to a breach of memorandum of understanding.

Q139 **Beth Winter:** If it is described by both parties as an MOU can it be considered as a treaty under international law? You seem to be saying not.



Professor Bartels: It should be in there. There is one key question. That is whether the parties intended to be bound. Do they intend this to create legal obligations? Clearly it does not matter what your document is called. It can happily be called a memorandum of understanding. If you read it and it gives the impression that the parties intended to create legal commitment it will be a treaty. That is why most memorandums of understanding concluded by this Government will say very clearly, "This memorandum of understanding is not legally obligatory" to avoid that.

I can refer you to the Foreign Office's own guidance notes, which describe all this fairly neatly but then finish and say confusingly, "Treaties are occasionally called memoranda of understanding".

Professor Fitzmaurice: It is exactly what I wanted to say. Intention is the watershed whether it is a treaty or memorandum of understanding. But exactly, treaties can come in any form and the International Court of Justice many times had to look at the instrument, which was not called a treaty, and decided in a very important case, Qatar v Bahrain in 1994, that the form of a treaty does not matter. It matters whether the instrument enumerates rights and obligation of states: in case of a dispute, does this instrument post a list of obligations on a state?

Q140 **Beth Winter:** This is subject to significant, and continues to be, legal challenges, a judicial review next month. The UN Refugee Agency, for instance, has said it is in breach of international law. Would you agree, if so, are there implications of that?

Professor Fitzmaurice: If it is a legal challenge, it is a case even now before the ICJ when Kenya and Somalia had a memorandum of understanding on the limitation. It was challenged by Kenya that it was not a treaty. The court looked at it and said it is a treaty.

Professor Bartels: I can add something on your example. I do not know about the judicial review action and so on, but it might not be important from that point of view whether it is a treaty. It might be sufficient that that is a statement of Government policy and the Government intend to act in a certain way. You can breach international law by acts that do not amount to treaties. It might not be material.

Professor Fitzmaurice: But as we said already, memoranda of understanding are usually followed even if they are not meant to be a treaty.

Q141 **Beth Winter:** The UK Government have also recently reached agreements with Sweden and Finland and that has resulted in the publication of statements.

Professor Fitzmaurice: I looked at it.

Beth Winter: What is your view on the status of these statements? Are they MOUs, treaties or something else?



Professor Fitzmaurice: It is neither a treaty nor a MOU. Both documents say at the end of them, "This document is a political declaration and it is not a legally binding commitment under international law". Both of them are political statements. They are very vague, very loose language, some very unspecified words of important commitment, but it is definitely nothing but a political statement.

I would even hesitate to call it a soft law document. It is another group of international law, unclear instruments, which can be a MOU but it does not have to be; environmental laws are full of them. Some declarations are far more precise than these two statements, which are just political statements that were meant like that, and no international obligation is meant to derive from any of this friendly statement by two Governments.

Q142 **Lloyd Russell-Moyle:** On the political declaration MOU is there a substantive difference? You said it is not a MOU, it is a political declaration. Is there a substantive wording issue difference there or is it just that MOUs can sometimes verge into treaties and MOUs can sometimes verge into lofty political declarations that do not mean anything? Is there an actual definition of a MOU that is international understanding?

Professor Fitzmaurice: We are now treading on grey areas of international law obviously, so I do not think we can give definite answers to that. But these two declarations with Sweden and Finland are definitely not couched in a language of MOUs. It is very loose language, recognition of challenges—

Q143 **Lloyd Russell-Moyle:** Is there is an expectation of certain kinds of language in an MOU that is different from certain kinds of languages that you get in more lofty political declarations?

Professor Fitzmaurice: Yes.

Professor Bartels: The key issue is: is it legally binding? As we have been saying, treaties are, MOUs are not, political statements are not. But you can have treaties that have very soft language recognising this, agree and considering, blah blah blah; so "binding" meaning what exactly? You are bound that you think something is a good idea. There are different ways of looking at it.

Then you can have MOUs that are in very precise terms but they say they are not legally binding. Then the question is: what happens if one of the parties does not do what it says it will? The answer is nothing. Nothing happens by definition but the expectation would be that they do as they say.

Lloyd Russell-Moyle: Do you mean both sides have the same expectation, which is then when these things can be—

Professor Bartels: Of course it can happen that there is an argument about whether an MOU rises to the level of a treaty, and there are cases



on that but that is quite rare. For this country, I think that would be with a fairly experienced treaty office and is not the sort of thing that you would expect would happen.

Professor Fitzmaurice: I want to add something to what Lorand said. In modern treaty practice there are treaties like the Paris Agreement on climate change, which have only one binding obligation and the rest of it is soft obligations. This is new treaty-making and are there breaches of international law if the state does not follow soft obligations? It is an unresolved question. I would like to say that in the practice of this country MOUs are treated very seriously. Usually when a MOU is—I do not want to say concluded—drafted, because I do not want to use the language from the law of treaties, the states are quite prepared to follow it.

Professor Bartels: Can I elaborate on that? The Foreign Office document is quite wonderful. It is worth a look. It has a table at the back. Memoranda of understanding and the table says, "Do not use" language and then there is a column for "Do use". So do not use "agree"; use "accept/approve/decide". Do not use "authoritative/authentic"; do use "equally valid". Do not use "parties"; use "participants". Do not use "shall"; use "will". Do not use "undertake"; use "carry out". There is a table that tells you how to avoid your MOU becoming a treaty.

Lloyd Russell-Moyle: Interesting. Of course, the presence of that table however could be an indication of subversion of words that you expect have almost equal standing.

Professor Bartels: International law operates as a language. This table is a very good glossary of what the words means.

Q144 **Lloyd Russell-Moyle:** I would love to go into some more of this but we will rattle through some of the questions that we want to ask. On your extent of the understanding of memoranda of understanding being used, have they increased in any way in particular? You mentioned they are a good way of dealing with more controversial or sensitive topics, I think was the word that you used. Has that increased in recent years?

Professor Bartels: I cannot answer that quantitatively. Malgosia is better on the encyclopaedic knowledge of treaty practice. But I can give you a good example in my area where there was an MOU, which is a little bit unusual, which is in trade law—sorry I should not say "law", I should say—it is not in the table—

Lloyd Russell-Moyle: Understanding.

Professor Bartels: Understanding, that is right. Although confusingly the World Trade Organisation agreements have plenty of agreements that are called "understanding" so they clearly did not read this table.

This is the MOU that the Government just signed—I have to be very careful with my language now—with Indiana, the US state. That has to be



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an MOU because Indiana is not the United States, which from the US point of view is the entity that concludes proper agreement. The MOU says, in a similar sort of course to the one you heard on this other MOU, "This does not constitute a legally binding document" or words to that effect, so very clear. But if you read it, it looks, to my eye, identical to a free trade agreement, in a limited way. It only deals with government procurement but the commitments are basically the same sort of thing as you would see in an FTA. It is just that this document has no formal legal status because it says that it does not. You rely upon good will for it to be carried out.

- Q145 **Lloyd Russell-Moyle:** Is it always the case that you can never make a treaty with a subordinate body of a state? Do some of the Belgium states have some ability of treaty agreements?

Professor Bartels: That is an interesting question. One question is constitutional law. Under constitutional law there is variety. Under international law I would say it would not fall under the Vienna Convention because it would not be a treaty with a state, but it could probably be a treaty anyway. That is one of the unusual ones that exist between a state and then a sub-federal entity.

- Q146 **Lloyd Russell-Moyle:** You could have a treaty, it would not be covered by the Vienna Convention, and it would depend on the domestic arrangements on whether that was legally binding or not?

Professor Bartels: I would say so.

Professor Fitzmaurice: For federal states very often the constitution gives the right to enter into international agreements and they have it.

Professor Bartels: I think Belgium is different.

- Q147 **Lloyd Russell-Moyle:** On governing MOUs, apart from this very useful table from the Foreign Office, is there anything equivalent of the Vienna Convention that could be brought down or are there any areas where the Vienna Convention starts to overlap, even if it is not a treaty MOU?

Professor Bartels: It is not legally binding so there is not any law that governs it.

Professor Fitzmaurice: One of the reasons we have MOUs is to avoid the Vienna Convention because the Vienna Convention puts this quite strict requirement on amendments, for instance, which calls for parliamentary procedure. If you have a MOU you can do it very quickly in a very informal way to amend the conditions. I think that one of the reasons that governments have an MOU is to avoid the restrictions of the Vienna Convention.

- Q148 **Lloyd Russell-Moyle:** Are there any occasions or can it happen where MOUs or even political declarations start to create customary international law? You talked about treaty law. We see a bit with political



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declarations sometimes on the environment where you think about the Rio declaration then being implemented, some of those clauses are in other international agreements, but are there any examples of more bilateral or state-to-state MOUs where it becomes customary international law?

Professor Bartels: In theory, yes, but you have to have a practice of a fairly large chunk of states for that to happen. You cannot just pick away and look at a few bilateral examples. For instance with trade law there is no customary international law whatsoever. It does not exist. There is even a paradox, which is the more treaties you have the less likely it is that you will find customary international law. Even on a principle as basic as the most favoured nation obligation is, it is not customary international law.

Q149 **Lloyd Russell-Moyle:** Professor Fitzmaurice, from your perspective have you come across political declarations and MOUs turning into customary international law in your area?

Professor Fitzmaurice: My area is environmental law. I think bilateral declarations from what I know, from the practice of state, tend to repeat global declarations. There are some very important declarations in environmental law that kicked off the development of international law, like the Stockholm declaration on human environment from 1972, which started the whole robust development of environmental law. The state did not know what the protection of the environment was.

I would say that it is more into bilateral practice of states and environment is more into treaty law. There are bilateral treaties on protection of species that are relevant to both states rather than some declarations. Even if there is a declaration they usually always rely on global declarations.

Q150 **Lloyd Russell-Moyle:** Do you think that MOUs should or could be scrutinised by Parliament or at least reported to Parliament?

Professor Bartels: I do not know.

Chair: Is that a political question?

Lloyd Russell-Moyle: Maybe the first part of it is. At the moment, there is no central registry for MOUs so the first part of the question is: is it possible to create that so that Parliament could scrutinise them? Secondly, should it happen?

Professor Bartels: If one were to be fussy about it and say Parliament in this scrutiny sense is looking at obligations that the Executive proposes to enter into the answer would be no, because there are not obligations.

Lloyd Russell-Moyle: Although you have said that the UK follows its MOUs usually to the letter.

Professor Bartels: Not as a matter of obligation, just because that is good policy. I would put it in the basket of Parliament looking at



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Government policy, and there must be other examples where there is a tradition that the Government will update Parliament on a particularly important type of policy. It may be that a register of these sorts of guidance notes, policy statements and so on is a good idea. I would treat it like that.

Professor Fitzmaurice: I agree with Lorand. We have to realise that there are hundreds, if not thousands, of MOUs done every year by governments everywhere and parliaments would have been flooded with trying to scrutinise each and every MOU. I agree with you that it should be more like a general governmental policy rather than looking at each and every MOU. It is the most common tool of interaction between governments, much more than treaties due to obvious advantages of MOUs. I think that it will have been impossible to scrutinise a lot of them by any parliament.

Q151 **Lloyd Russell-Moyle:** At the moment, very often the Government will make policy statements and lodge it with the library and there is not even a debate here in Parliament. It gets lodged as a matter of, "This is the latest policy update on X, Y and Z". But then there is a function often for Parliament, either through its Committees or through a Minister deciding, that if it is an important issue it will get a statement on the floor of the House. Is there a threshold that you could imagine or recommend that would require elevation from depository to discussion on things like MOUs?

Professor Bartels: With the examples that we have been talking about—and they are good examples—we have the Sweden, Finland statement, we have the Rwanda MOU, we have the Indiana MOU. We are talking about them because we know about them, they are important in very different ways. Legally they are all unimportant. Then there are god knows how many MOUs the Government have probably signed in the same time since these—thousands—we do not know. Some of them might also be important. It is very hard to know. It is not the sort of thing you could devise a rule for. You would have to develop some sort of practice that it is expected that an MOU that is particularly important finds its way into the newspapers. Maybe that should be the threshold. If people are reading about it maybe it should be reported.

Q152 **Lloyd Russell-Moyle:** The Rwanda case did come before Parliament and there was a debate here. We knew about the Sweden example but no one felt that it was so important to have a debate in Parliament. Maybe that is already a natural threshold.

Professor Bartels: One way of looking at this is maybe not so much via the legal form, because the legal form is not very important, but you might look at what it affects. The easiest thing to say is: does it have any implications for human rights? That may be a threshold question, or for legislation of some kind, like the Government procurement MOU with Indiana. I do not know if that would require Government legislation or



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even regulatory action of some kind. You could maybe work your way backwards and use those as thresholds.

Professor Fitzmaurice: I agree with him as well on that, but it should be more like subject-related—human rights for refugees, also some financial obligations of an unusual nature,

Lloyd Russell-Moyle: Financial obligations would be a trigger.

Professor Fitzmaurice: Yes, that should fall into the subject matter that should be scrutinised.

Professor Bartels: The European Parliament had a practice of doing that.

Q153 **Lloyd Russell-Moyle:** How did the European Parliament do that?

Professor Bartels: In the 1990s, when the European Parliament first had a formal right to approve certain treaties, and now it is basically all treaties with some exceptions, but before that only certain treaties had to be approved by Parliament and one of the criteria that they used was when there were significant financial implications.

Professor Fitzmaurice: This is very common, the significant financial implications.

Lloyd Russell-Moyle: You could set things that would set an alarm bell ringing that would need to go but not necessarily pure automatism. You would need some kind of human interaction into that to decide whether it still met that threshold. That is very useful, thank you.

Chair: There is a danger then we could have made it analogous to statutory instruments and how we choose which of those are debated, but we will leave that for a different time.

Q154 **Tom Randall:** Professor Bartels, you chair the Trade and Agriculture Commission. Could you explain the role that the commission carries out and, in particular, what your experience has been so far with scrutinising the Australia and New Zealand free trade agreements.

Professor Bartels: The Trade and Agriculture Commission was set up last year. There was a previous commission with an identical name and entirely different functions; I am only talking about the one that was set up last year.

It has a sort of treaty scrutiny role. What happens is that a free trade agreement that has been signed, so already negotiated and then signed—this has happened now with Australia and New Zealand—then comes to the commission and we have three months. We are asked by the Secretary of State for International Trade to advise by a particular date, which is three months, give or take. Then we look at questions that are given to us, and all this derives from the Agriculture Act. Those questions are to do with the effect of the agreement on domestic legislation in



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certain areas of environment, animal welfare and human and animal plant health as well.

We adopt, in doing this, a model based on parliamentary Committees. In those three months we have a public consultation, so we receive submissions on the questions, which are narrowly defined by statute and by us. We also speak to people who are Government officials for instance on both sides, high commissioners in both of these cases, other experts in the field who can help us out, and then we deliver our advice.

That advice has two lives. One is that it goes to the Secretary of State to make sure nothing has gone wrong essentially, but also it goes to Parliament. The idea is that Parliament is then advised, via this advice, which is a 70-odd page document—the last one that Parliament saw—which will inform its decision on whether to approve ratification of the agreement under CRAG procedures. It is not only our advice that comes to Parliament. There is also a Government report to which this advice is known as a section 42 report, which takes in information from other agencies as well. But our advice is also a standing document that comes before Parliament in its own right to the EFRA and ITC Committees.

Q155 Tom Randall: You said it takes three months to carry out that analysis; is that a sufficient amount of time to do that? Also, what is the period between the Government receiving the final report and the Government providing it to parliamentary Committees or publishing them?

Professor Bartels: On the first question, it has been sufficient with the Australia agreement and also with the New Zealand agreement. The next one, which is likely to come to us, is CPTPP, which is the big Pacific agreement with 11 countries, which includes Malaysia, Brunei, Peru, Chile and many countries.

I already made this point to the EFRA Committee, and this was included in its recommendations in its report on the Australia agreement. I made the point that I was a little bit concerned about having to do that job involving 11 countries—although two of them are Australia and New Zealand so that is easy at least—in a three-month period, at least without some additional resources. We need to look at not only the text of the agreement but also the practices in agricultural production in the other countries, and that involves looking at their regulatory systems in addition to what they do. The time is probably okay—just—provided that we can get a system through the high commissions and embassies but it may be we need additional resource.

It will be tight for CPTPP, but for a bilateral agreement, especially one where we understand the legal system and speak the language so we can figure things out on our own, three months seems to be enough.

Q156 Tom Randall: That leads to my next question. At the moment what resources are required to produce a report by your commission?



Professor Bartels: We have managed to work essentially on our own. We have a secretariat that supports us and is firewalled from the rest of the Government in so far as they are supporting us, which arranges meetings and the consultations and so on with other stakeholders and the officials I mentioned before. We have not required a great deal of resource.

But that is also largely because we know what questions to ask and it is partly a question of trying to know what you do not know. In the case of Australia that was quite difficult because Australia is a federal system. To work out what goes on in Western Australia versus Victoria, we have to find the right people to speak to. They also had to be willing to speak to us. Luckily we found people who were, but I am not sure that that would be the case for every country. They might find this is a bit of a peculiar operation and why would a Government official from a country that is far away and not conversant with our way of doing things enter into a discussion with us? They might worry that they say something that turns up later in court. Who knows?

That is what worries me a little bit as this system goes ahead. In a sense we have had a very easy ride so far because these are cousin-like countries with similar procedures. If we start to have to scrutinise agreements with other countries—chances are we will—that are not so familiar with our way of doing things it may become more difficult. I think it is important that if this process is to follow the same path, and it does not necessarily need to, we need to be able to do our job. The job will be more difficult and I would not want to be in a situation where we cannot do the job, not without instructions that we should not be doing that particular job.

Q157 **Tom Randall:** Without wanting to complicate it too much further, do you think that there is any scope for the commission to interact more directly with Parliament at all?

Professor Bartels: You remind me that I did not answer your other question. The way it works at the moment is quite good, which is that we do not speak to Parliament until we have written our advice, and I think that is fine because we would not know what to say. I am the front of the commission but I am only the front; there are 10 of us. I do not think it would be right to speak to Parliament before we have agreed on what we think. That is all right.

Your other question was: is there enough time between our advice and then the Government's section 42 report, which the Government last time round submitted at separate times? First, they published our advice generally, and I think also especially for Parliament and laid it before Parliament—I am not quite sure how but somehow. Then the section 42 report came later. I do not know whether that practice will be followed. I cannot say but I imagine so. There is no particular reason why not, but I don't know.



Then the question is what time does Parliament have to look at that, and I know that there has been a bit of a feisty exchange of letters between the International Trade Committee and the Secretary of State for International Trade on all these points: our advice, and then the section 42 report, and commencement of the 21-day period under CRAG. Of course it is 21 sitting days, so not really 21 days, it is more than that. I do not have views on all that. Obviously it is a good idea for Parliament to have a sufficient amount of time to be able to read our advice, read the Government's report, form its own views and so on. That is just normal.

I cannot tell you whether there is a sufficient amount of time. If the Chair of the ITC thinks that there is not, that is his expertise. I cannot second guess that. But I could say on the other side that you would not want this to drag on for ever because these agreements do need to be ratified. There has to be some reasonable amount of time. I cannot comment on what that reasonable amount of time is. I hope that that exchange of letters reaches a happy resolution soon, but it is well above my area of competence to say too much about it.

Q158 Tom Randall: This is my final question, which I will open up to both of you. If the House of Commons is to develop its capacity to effectively scrutinise international agreements what resources do you think it needs to do that effectively?

Professor Bartels: I will kick this one off because it follows on from what I have experienced with the TAC. What we have done is essentially two different jobs. One job is interpreting the treaty, to try to work out what it means. To do that you need to have an international lawyer to be able to understand the words, to be able to manage a table like this because treaties are a particular language and they need to be understood as being a language. The words live in a context, there are cases on some of these words and so on, and you need to know what the words mean. That means not just a generic international lawyer but also someone ideally who understands that area.

But that is only one side of the job. It is an important part of the job but it is not the only part because the other part is that if we are talking about treaties that then have an effect on what goes on domestically—and that is why Parliament is interested because it might have to bring legislation into force or be aware of regulatory acts and so on—you are talking about a domestic area of expertise.

For instance, the agreement and the bits of the agreements that we have been looking at in TAC involve discussion of agricultural production processes, chemical authorisations, all sorts of things, genetically modernised organisms laws in the UK, which I did not, until I started to learn about it, have the faintest idea about because that is not what I do. I do the international side; I do not have any idea about what goes on domestically. To do the job properly we needed to develop expertise in that area. Based on that experience, I would say that at least for some agreements you would probably need to cover both the international area



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and also the domestic area. For some treaties maybe the international area is enough.

Professor Fitzmaurice: If I may add something to it. What you are saying is very true. In my area of environmental protection also it is very well noted now that only the international part, that is co-operation between states, is not enough. For instance, biodiversity convention, which is also about additional knowledge and about big pharmaceutical companies trying to use traditional knowledge for development of new medicine, this convention is unification of governments, states, industry and indigenous or local communities. This is a new trend in international law where international conventions try to bring all the stakeholders together otherwise it would not work. Although it is a treaty between states, they made guidelines for industry.

I think what we have now are different levels of co-operation from traditional ones. It is all changing into more, including private parts.

Chair: I thank you both for attending our Committee this morning, Professor Bartels and Professor Fitzmaurice. We are very grateful for your time and for your expertise. If there is anything that you have neglected to mention to us in the course of our questioning please feel free to write following this meeting. It has been invaluable to have you and thank you particularly on a day of transport disruption, if I can describe it as that, for making it this morning.