



The Select Committee on the European Union

Energy and Environment Sub-Committee

Corrected oral evidence: Brexit: Environment and Climate Change

Wednesday 26 October 2016

10.30 am

Watch the meeting

Members present: Lord Teverson (The Chairman); Lord Cunningham of Felling; Lord Curry of Kirkharle; Viscount Hanworth; Lord Krebs; Duke of Montrose; Lord Rooker; Lord Selkirk of Douglas; Lord Trees; Viscount Ullswater; Baroness Wilcox.

Evidence Session No. 1

Heard in Public

Questions 1 - 22

Witnesses

[I](#): Professor Andrew Jordan, University of East Anglia, Professor Maria Lee, University College London, and Professor Richard Macrory, University College London.

[II](#): Abi Bunker, Head of Policy and Advocacy, RSPB, Trevor Hutchings, Director of UK and EU Advocacy, WWF, and Leah Davis, Acting Director, Green Alliance.

Examination of witnesses

Professor Andrew Jordan, Professor Maria Lee and Professor Richard Macrory.

Q1 The Chairman: I open this public session, which is our first witness session in our inquiry into Brexit and the environment and climate change. I remind everybody, and particularly our witnesses, that this is a formal evidence session of the Committee; a full shorthand note will be taken and this will be on the public record in printed form and on the parliamentary website. We will send you a transcript, and if there are any errors on the transcript you are very welcome to let us know and we will change it. Quite obviously, this session, therefore, is on the record. It is also webcast and will be broadcast in due course on the parliamentary website. I also remind my colleagues here to declare any interests that they have when they take part in the questioning.

We have three professors before us, so that is going to be quite easy in terms of referring to people and getting the titles right. Perhaps I could ask each of you, briefly, to introduce yourselves both to the Committee here and to those who are listening in. Professor Lee, perhaps I could ask you to start and we will work across that way.

Professor Maria Lee: Thank you. I am Maria Lee. I am a professor of law at UCL where I work especially on EU environmental law and governance.

Professor Andrew Jordan: I am Professor Andy Jordan. I work at the Tyndall Centre at the University of East Anglia.

Professor Richard Macrory: I am Richard Macrory, also a professor of environmental law at UCL and a barrister. I should also say that I am a patron of the UK Environmental Law Association and am appearing in part on its behalf here. As a charity, it has been consistently neutral on in or out, before and after the referendum, but it is clearly looking very closely at the implications of environmental law for Britain, whatever model is taken. As we get on to the specific questions, because this is a work in progress, it is going to be very much my personal views and not the Association's view.

The Chairman: Thank you very much. Indeed, the Committee is looking at both the opportunities as well as the challenges of Brexit. In fact, that leads on very well to the first question, which perhaps I could ask you. What do you see as the opportunities and challenges for the UK's approach to the environment and climate change arising from the UK leaving the European Union? What do you think are the UK's key interests and objectives? If you would like, you can roll in, maybe, the European—the other side's—interests as well into that. I leave it very much up to you as to which of you want to go first or how you want to take that. As I can see indecision, perhaps I could ask Professor Lee to start us off on this one.

Professor Maria Lee: The opportunities and the challenges are quite similar in that we need to develop and evolve a thorough governance

system for environmental protection in the United Kingdom. Currently, all our environmental standards and norms are profoundly embedded in EU accountability, governance and legal structures. It is vital that we create our own architecture for applying environmental standards and environmental norms. That is an enormous challenge. It is also an opportunity. We might do something rather wonderful with our environmental governance system.

As to key interests and objectives, from my perspective, it is to maintain very high standards of environmental protection.

Professor Andrew Jordan: To start with the second part of the question—the key interests and objectives—that is very much the great unknown at the moment. I know that the environmental groups and other organisations are very anxious about the environment, which was not an issue during the referendum and was not discussed very much in David Cameron’s New Settlement. It has not really been a feature for discussion since 23 June and there is a real risk of it being forgotten. Defra has also undergone some quite significant cuts in recent years.

To come to the first part of your question—the opportunities and the risks— given that context, the environmental groups feel very strongly that some of the big opportunities, and there will be opportunities, may not be seized. There are opportunities around, for example, the reform of the Common Agricultural Policy and the ability, perhaps, to alter VAT on energy-saving goods and services. These opportunities will not be grasped fully and, significantly, some of the risks will not be mitigated sufficiently because the environmental part of this complex puzzle is not being raised at a sufficiently high level and to a sufficiently satisfactory degree.

Professor Richard Macrory: Taking the UKELA principles of how it is approaching this as a neutral organisation but one concerned with environmental law, it is trying to look at this on three principles. The first is that on exit, in whatever form that takes, we need a period of regulatory stability; and that will come on to the questions about the Great Repeal Bill. The last thing you want is to find that there are gaps, lots of litigation and so on; that will not help business or anybody else. Secondly, the current level of environmental protection, and the ability of citizens to participate in decisions should not be diminished by future changes in legislation. Lastly, we must recognise, as we have heard, that there will be opportunities to improve things, if we want to. Not everything is right with EU law and the structure of EU law.

In very general terms, because it is very difficult to give specifics until one analyses this closely, from my time as an environmental lawyer, which I am afraid to say goes back a number of years, I saw the changes to the structure of UK law in regard to the EU as it came in. There are two big challenges, and it is a question of whether one wants to preserve that.

First, it is the introduction into law of quite precise emission standards and environmental quality objectives in a way that did not exist. When I first studied environmental law, there was lots of law, lots of procedure and so on, but the actual standards were left to policy guidance and a lot of discretion to government. That has changed. It might have changed anyway, but the EU did that.

Secondly, we see in various areas of EU environmental law legally binding targets and objectives, whether it is renewable energy or whatever. Again, there is going to be a challenge: do we want to carry on with that practice of putting objectives into law? Lord Krebs will know that the Climate Change Act is very unusual in that it has that in the national law. That is an unequivocal duty. One needs a debate about whether that is useful to do on the legal side or whether we are going to revert back to where it is more in policy guidance, can be changed and so on.

The Chairman: We will be exploring that a lot more later on.

Q2 **Lord Trees:** Can I just pick up on the opportunities, because most of our questions will, understandably, be about the problems and challenges? It might be appropriate, Chairman. Are there any good things that you can see on the horizon from Brexit with regard to the environment?

Professor Andrew Jordan: How one defines an opportunity and a risk, of course, is a matter of judgment and political view. I think the environmental groups see a big opportunity in the reform of the Common Agricultural Policy. It could be altered in a way that would mean decarbonisation activities—for example, the planting of trees to soak up carbon or the growth of BECCS-type crops, in the very high mitigation options—could be encouraged. There are other actors who are also thinking, “There is an opportunity in Brexit to push things that have, perhaps, until now, been held back or slowed down”. The exploitation of shale gas, for example, might not have to undergo stringent environmental impact assessment procedures. The commercialisation of GM has been slowed down by things that have gone on at EU level. I guess it depends on where you stand and which way you are looking.

The Chairman: Are there any other comments?

Professor Richard Macrory: Again, as I said, this is something certainly that UKELA, which has a committee, working groups, judges and lawyers and so on, is beginning to look at. It is going to take six months before its work comes out. I could come up with odd examples where the drafting is very strange in some of the European stuff. One could make that much better. In terms of bigger things, I would not be prepared yet to comment. I do not think the work has seriously been done on that.

The Chairman: Professor Jordan, you mentioned something quite fundamental in a way, which is whether the environment would be left out of priorities among discussions or whether it would be an afterthought. How do you think that that can be changed? How can we make sure that environment does appear, or is it just a matter of getting

a Defra Minister on the Cabinet committee? What are your thoughts on ensuring that environment does have profile?

Professor Andrew Jordan: It is obviously important, at all steps in this process, that the environment is involved, so that when the Great Repeal Bill goes through Parliament the environmental connection is flagged, and that when new trade deals are struck, either with the EU or with other organisations, there is a sustainability impact assessment undertaken. Professor Lee also pointed to the much more fundamental governance structures that will exist not simply in the period between now and when the Great Repeal Bill takes effect but beyond that. It is that governance system, as she quite rightly said, that will ensure that the law does not become fossilised or, as I said to you when I appeared in July, that it does not become rather zombie-like.

Q3 **Viscount Ullswater:** Perhaps we could get down to the specifics of the Great Repeal Bill, because the Prime Minister has announced her intention to introduce the Bill, which will turn all EU law that currently affects the UK into domestic law once the UK has withdrawn from the EU. As far as environmental regulations are concerned, do you see particular problems regarding the Great Repeal Bill? Also, are there implications in relying on secondary legislation in the UK in the absence of underpinning EU regulations?

Professor Maria Lee: Pretty much all areas of law are going to be really complicated. The fact that I say environmental law will not be so dramatically different from everything else is not a good thing. That just makes the whole process extraordinarily difficult.

You used the expression that all EU law will be grandfathered by the Great Repeal Bill. That has not been made clear. There is a question over whether it will be, literally, all EU law, treaties, regulations, decisions and directives, or whether it is just EU law that currently finds its home in the domestic system through secondary legislation. If we do not do all EU law, then there will be an enormous gap because we will miss everything that has not already been put into secondary legislation. So, the first thing is that we will want all EU law. There may well be some debate about how that applies to the treaty and how much of the treaty principles we want to continue.

The challenge in all areas, including environmental law, is that the legislation does not stand alone. The legislation is embedded in an EU governance structure, so the obvious example is things like chemicals regulation. How do we continue to participate in EU chemicals regulation when we are no longer a member of the European Union? Presumably, we will want chemicals that have already been authorised to continue to have access to the UK market. Presumably, we will want chemicals that have been restricted at the EU level to be restricted at the UK level. These are not simple questions and they are not technical questions. They are quite profoundly political questions about who will be governing us and on what basis. The basic answer to your question is that all this legislation is embedded in EU structures, and unpicking that will be very

complicated and political.

Professor Richard Macrory: Speaking as a lawyer, the ideal goal, which I think is the Government's goal, is to retain regulatory certainty until a conscious decision is taken to review and revise. That is a very sensible goal. If it was as simple as saying, "The European Communities Act is repealed but any orders or regulations made under it survive", we would be home and dry, but, as Maria said, it is much more complex than that. It is a matter of how law is integrated into the UK. We have to deal with European regulations, which do not require transposition. That can be done. We have examples in this country of legislation that refers to directives—that is called legislation by reference—such as environmental permitting regulations, which require the Environment Agency to have regard to or to follow certain directives. It seems to me, on the surface, that that should survive because they could refer to a WHO standard or whatever. Then there are various guidance notes that come in and so on, and we have to decide their status.

For me, the biggest challenge—I will be very interested in how the drafting deals with it—is what you do about decisions of the European Court that have interpreted directives. Do they survive? If they do not survive and everything is open, then we are in a great area of regulatory uncertainty. I have an example of a case I am reporting on this month about wind farms in Wales concerning the habitats directive. There has been a lot of case law on the habitats directive, such as how the precautionary approach applies and what sort of assessment is required, in fleshing out the details. The judge starts with saying, "I can summarise now in about seven or eight paragraphs what are the key principles that apply from this case law and then we will apply it to a very difficult set of facts".

My concern is, in a sense, that, if one wants regulatory stability, until we revise, we need to keep those interpretations in the law before one deals with it. That will be quite a challenge. Does one do it through the existing law or new cases and so on? I think it can be done, but if it is not done, if something is not done about that, then, potentially, we have a great big gap. I do worry. I did see a ministerial statement in the House of Commons on 10 October, which said that the Great Repeal Bill will convert existing EU law into domestic law wherever practicable. I always worry, as a lawyer, that when you see the words "wherever practicable" they are there for a good reason. That is the area we need to look at very closely.

Professor Andrew Jordan: To add a little more to what the other professors have said, first, the Great Repeal Bill will need in Section 2 to provide for the critical difference between EU laws that are directly effective—Decisions and Regulations—and those that require enabling legislation, namely, Directives. That will have to be made clear in the enabling legislation, because—and this is important—environmental policy is enacted through a whole range of these different types of policy. It is not just regulations, for example.

The other thing to remember, and this could add some complexity to the process, is that environment is a devolved matter. Therefore, there will be some matters of an environmental nature or matters that could have environmental implications, such as energy and transport, which are reserved matters, and other matters, such as agriculture, fisheries and the environment, which are devolved matters. The potential there for political friction is very high.

There are two areas where there might be friction. The first is in the passage of the Great Repeal Bill. I am sure environmental actors and interests will try to promote the environment at that point. The other is in this process of legislative unpicking, which will occur once the Article 50 process has run its course and the Bill becomes an Act. There, I am sure, the devolved bodies will want to ensure that their views are heard and taken account of.

Professor Richard Macrory: It seems to me that what is required at the moment is a very detailed mapping exercise looking at all our UK environmental law and that which is devolved, saying, "Where has it come from? How has it come from EU law and what is it doing?" Then, when the Great Repeal Bill comes out, we will look to see if that maps in. I am sure the Defra lawyers are doing that. UKELA has working parties that will take about six months to study this Bill in fine detail. I think one will have to do that.

Q4 Lord Krebs: I want to pick up on a point that Professor Lee alluded to. I am not sure whether this was what you were referring to when you talked about chemicals. In setting environmental standards, the EU relies on expert groups that are Europe-wide. For example, in relation to GM regulation, EFSA would play a key role on risk assessment. One assumes that after Brexit we will rely on our national committees, such as ACNFP, for GM or ACRE. What would you envisage happening if the risk assessments that our body produced differed from those that were produced internationally at EU level, or would we rely on broader international risk assessment, such as WHO?

Professor Maria Lee: We are talking about products, so EU law applies quite differently if you are talking about regulating a factory, for example, or you are regulating a product, because products enjoy free movement through the internal market. If we, for example, authorise something that has not been authorised in the EU, it will not be allowed entry into the EU. If we are more cautious, then it will depend on the sort of trade relationship we have with the European Union as to whether we are allowed to ban entry of their less well-regulated goods.

In law that is quite straightforward, but in practice that is quite complicated. The bigger problem is rebuilding that capacity at the national level so that we take back, essentially, all the current activities that are being carried out at EU level, with all that vast shared expertise and resource.

Q5 Viscount Hanworth: I think my question has been almost superseded,

but I will state it again. What are the existing processes by which EU directives and regulations are transposed into UK law? I understand that it is multifarious, complex and piecemeal. Do you have anything further to add to that? Is that an accurate summary?

Professor Andrew Jordan: I would refer the Committee to the comments that the Secretary of State made yesterday before the Environmental Audit Committee. I understand that she said that somewhere between 25% and 33% of EU law could not easily be transposed via the Great Repeal Bill into national law. I do not know the basis for that figure. It could, for example, equate to the total quantity of directly effective legislation—that is, regulations and decisions—versus that which has to be transposed, namely, directives; but I do not know.

Lord Rooker: This is a small point following something that Professor Lee said. In recent years, the impression has got around in this country that the EU, particularly the Parliament, has been a bit flaky on the use of science. Would it be the case that if we were stronger on the use of science for regulating a product, because we had used the science, and the EU, which was still being flaky, was not using the science—it has certainly happened in the pesticides area—but had used political pressure, judgments and lobbying, the chances are that our safer or better product, based on the science, would not get into the market? Is that the case?

Professor Maria Lee: There is so much in that question. It is really interesting, but I will not deal with all of it. It is quite legitimate that when we assess environmental quality, consumer safety and all those things, it is not just about the science. It is, indeed, about the world we want to live in and about politics as well as science. That happens at the EU level and it certainly happens at the UK level as well.

I will answer the real question in the same way as I answered Lord Krebs's question, which is that it depends, in part, on the sort of trading relationship we have. Basically, if they have banned it, we cannot export it to the European Union. If we have banned it, they cannot export it to us. There would be a disagreement; there would be a conflict. That is what the WTO is full of all the time.

Professor Richard Macrory: As Maria said, depending on the terms of the agreement, there may be various forms of reciprocal recognition of authorisations that could deal with that position, or there will be conflicts. That will have implications for trading.

Professor Maria Lee: It will usually be more subtle. It will not usually be a GMO case where everyone is very upset and there is a black and white disagreement. There will usually be little bits around the edges where we decide, mutually, to recognise our different safety standards. It will not usually be quite as political as that.

Viscount Ullswater: Like glyphosate.

Professor Maria Lee: Maybe not like glyphosate.

The Chairman: Let us move on. We have started to talk about regulatory gaps. Perhaps, Lord Curry, you could carry on, on this topic.

Q6 **Lord Curry of Kirkharle:** Thank you. I would like to follow the last conversation, but I want to declare an interest. I farm in Northumberland. I have had farming connections, but until last December I chaired the Better Regulation Executive, which is about trying to remove regulatory burdens and not introduce more, which is why my next question is rather odd.

In introducing this point, it seems to me that one of the reasons why some voted to leave was because of the intrusive nature of the European Union and its overlegislative approach. I would like you to comment on that. Professor Macrory, you mentioned that not everything is currently good. We do have an opportunity to review the landscape. Yes, the Great Repeal Bill will, hopefully, introduce it into domestic law, but after that we will need to review it. Do you think, in reviewing that, there are areas where we could improve or plug gaps?

Professor Richard Macrory: I am sure there are. I will call this the review period. We have a stability period and a review. If we lived in a rational policy world, one would be taking various sectors, such as waste and water, standing back and saying, "How can we improve the legal system?" Unfortunately, we live in a political world as well, so I do not think it will be as simple as that. There will be messy things that will get changed. My concern is that it is done as openly and transparently as can be done and is done with parliamentary involvement.

Let me give you one example, because it is very apposite. Air quality standards have been subject to litigation and there is litigation at the moment relating to EU laws. They are in very unequivocal terms. They simply state, "This standard must be met, and, if it is not, the Secretary of State must produce a plan to meet it". There are no ifs or buts in the EU legislation. Neither is there in the national legislation, because it is reflecting.

The Environment Parliamentary Under Secretary has said in the House of Commons that she wants to keep those air quality standards for health reasons. My concern as a lawyer is that it will be very tempting for somebody in government to try to slip in some words such as "as far as practicable" or "without undue cost". I would if I was the Government. That may be very sensible, but it needs to be done openly. The worry is that there will be such a mass of changes and stuff going on that it will be up to parliamentarians, NGOs and other interests to keep a real watch for the little thing in the back schedule that might change the legal nature of that standard. To me, that is the challenge. As I said, I think there are opportunities, certainly for clearer drafting and things like that, which could be done, as long as it is done in a rather rational way.

Viscount Hanworth: There will be a large schedule for achieving them.

Professor Richard Macrory: We will come back to this later, I hope, on national courts and their remedies. In the ClientEarth case, which was an

air pollution case concerned with NOx and traffic, it was very clear that, first, we are in breach of the standards because they had not been met by a certain date. The next stage of the litigation is that you have to do it as quickly as possible. Does that mean three years or five years? That is now subject to a court case that was going on last week. It will be very interesting as to whether the courts feel that they have something to offer on this, because you are getting into policy areas, practical areas and so on.

Lord Cunningham of Felling: The question is not about having good regulatory control, is it? The question is about enforcing the regulatory control, making people match up to the regulatory control, and Britain is already manifestly failing in that regard in terms of air quality and particulate matter, causing ill-health and death. How would you suggest that that position be rectified when Britain has left the European Union?

The Chairman: Lord Cunningham, we are going to come on to that very specifically, so perhaps I could ask you to hold on that for a moment and come in on a supplementary if it is not answered.

Q7 **Lord Selkirk of Douglas:** Lord Chairman, I should mention that I have an interest in that I am a director of a small company with small land holdings. Also, I have been an advocate for quite a number of years before being a parliamentarian.

My question is a legal one. Maybe we will not know the answer until the legislation is published. Is there a presumption as to how much EU law will be applied or will not be?

Professor Andrew Jordan: A lot of this depends on the model of Brexit eventually selected. If it is a soft Brexit, then virtually all EU legislation will still apply, apart from some particular areas. The expectation is that the habitats and birds directives will not apply. There is also an expectation that the bathing water directive might not apply, and, perhaps, some other areas that, through common interests and issues that Her Majesty's Government feel particularly strongly about, might not apply. We are talking about a relatively small number of areas where the EU's policies would not apply.

They would, of course, also be subject to the current enforcement systems that apply to EEA states. There is an EEA court—the EFTA court—which pretty much tracks the jurisprudence of the ECJ, the European Court of Justice. There is an EFTA Surveillance Authority, like the Commission, which chases up on non-implementation.

If, on the other hand, it is a hard Brexit, and the UK completely pulls out of the single market and has something that is very different from the relationship that Norway or Switzerland has at the moment, then the issues around the governance system that will apply then will be particularly large.

The Chairman: Again, we are going to come to this later on.

Professor Richard Macrory: We are all now becoming EFTA and WTO specialists very rapidly. As I said, there is an EFTA court and an EFTA Surveillance Authority, which has very similar powers and roles to the Commission. It has a complaints procedure where citizens can complain, and it will look into that. I am told, for instance, that Norwegian environmental NGOs tend to use the Surveillance Authority rather than national litigation.

The main difference is that if the Surveillance Authority brings a case before the EFTA court, which is in Luxembourg, and the country does not comply with the court's judgment, the court has no power to impose financial penalties on the country concerned. In fact, there is currently a case with Iceland about dentists' qualifications, which has just come back to the court. All they can do is say, "You did not comply with the court judgment". So we are in that role.

There are some environmental cases before the EFTA court. In 2015, there was an air quality case about cities in Norway, and the EFTA court held that Norway had not complied.

When you get on to the trade agreements, if you take Switzerland, for instance, this is where it does get very bizarre. Switzerland is a member of EFTA but not the EEA. The EFTA court does not have jurisdiction over EFTA countries but only EEA countries. It is very bizarre.

The Chairman: I do not want to get too far down the enforcement side at the moment.

Professor Richard Macrory: No, you do not want to go down that route, but different arrangements could be negotiated.

The Chairman: We are going to come on to that.

Professor Maria Lee: Can I just add a quick point? We are all learning fast about EFTA. If we join EFTA, we utterly transform that organisation. The EEA is quite small—the EFTA part of the EEA. They seem to do a lot of things by consensus. They seem never to have had to use any provisions of their treaty that deal with big disagreements. If we joined, we would transform the organisations. What we know about the EEA now will change, if that is the case.

The Chairman: I suspect that as a founding member of EFTA they will not be keen to have us back too quickly, to be honest, but that may be for another sub-committee. We will not go into that just for the moment. Baroness Wilcox, would you like to continue?

Q8 **Baroness Wilcox:** Thank you very much. Some stakeholders have noted that EU law takes a long time to develop and then be implemented by Member States, making it difficult for legislative stances to be adapted in a timely manner. It may be possible for the UK to develop more responsive legislation after it leaves the EU. The question is this: could environmental law be developed more quickly after the UK leaves the EU? Are there areas in which increased flexibility could make UK

environmental law more effective?

Professor Andrew Jordan: They are two sides of the same coin. It takes time to develop EU law, although it does not often take as long as the EU is sometimes criticised for. Analysis that we have done in the past suggests that the EU has got quicker at agreeing upon and adopting legislation over time, which is quite interesting given how the EU has involved itself in more and more controversial areas. It does take time, but once it has been adopted it tends to stick. It is not, for the reasons that Professor Macrory gave, as likely to be unpicked by any particular Member State, the Parliament or the Commission: in short, it sticks. Investors like that, particularly those working in the so-called green economy. Water companies and energy generators like the certainty that EU legislation provides. It allows them to plan with confidence. Similarly, the environmental NGOs like the certainty. They can rely upon that for legal remedies when there are damages to the environment.

Where could there be flexibilities? Of course, flexibilities could be introduced after Brexit, but the critical question, first, is that it depends on what kind of model of Brexit is applied. There will be less room for manoeuvre and opportunity for change if we go down the route of a soft Brexit as opposed to a hard Brexit. But, if it is a hard Brexit, how quickly are the changes going to be made and how sure is it going to be that all the various different points of view are going to be brought together and used to inform the development of legislation? Many of the NGOs are worried that, after the Article 50 process has ended, it is going to be open season on environmental regulations and large swathes of policy are going to be quickly deregulated.

Baroness Wilcox: Would you think me very rude if I asked the question again? Could environmental law be developed more quickly after the UK leaves the EU?

Professor Andrew Jordan: It could be developed more quickly if the UK selects the hard Brexit option, yes. But there might be a price paid for doing things very quickly.

Baroness Wilcox: It is the first part of your answer that I am interested in because that was the question I asked you. Thank you very much.

Professor Richard Macrory: There are certainly some classic examples that I could give you about environmental assessment and environmental liability where it took, on environmental liability, 15 years or more before one got an agreement. I would hope that that would not have taken that long in the UK or in a devolved Administration. There are other cases. With carbon capture and storage, which I am very interested in, it took about two years to agree the basic framework directive. One should not generalise too much from one or two specific examples either way.

The Chairman: Following up Baroness Wilcox's question, there are areas where, because of environmental legislation being political, there is compromise. Presumably, there are some areas here in the UK where we

did not get the perfect solution that we would want, even from the environmentalists' point of view, that we could then fix which we could not have done otherwise. There must be one or two opportunities there, surely.

Professor Maria Lee: What sort of things would we want to change?

The Chairman: Things that we did not think were perfect as a total agreement that we are stuck with that we could actually improve.

Lord Curry of Kirkharle: I want to follow up on that. It may be better targeting of legislation in terms of flexibility. We mentioned that the Habitats Directive may not be part of the Great Repeal Bill. There are some elements of that directive that are quite controversial at the moment. If we had the opportunity to reintroduce the habitats directive, which was domestic, it could perhaps be better targeted.

Professor Maria Lee: This is a point that Professor Jordan made earlier. When we start pulling at the environmental legislation, we will all have different positions on what a good piece of legislation looks like. I like the hard edges to the habitats directive. They are very powerful. It is very hard to do harm to an EU protected site. It is not as hard to do harm to a UK protected site. Yes, we can change the legislation, and, yes, we can do it much more quickly than we can do it at the moment. There will be political battles to be had about whether that is a good or a bad thing.

Professor Andrew Jordan: Can I just contrast this with what is going on at the EU level? The EU level has now started a process called REFIT, where it goes through each area of legislation and checks them, scientific studies are undertaken and there is an opportunity for all the different groups, including the public, to come together to make their views known. Surely, that is the best way to do it, i.e. slowly over time. The obvious model here is a royal commission, is it not?

Lord Curry of Kirkharle: We were heavily influential in establishing the REFIT programme in Brussels. It was our influence that led to that.

Professor Andrew Jordan: Indeed. Surely, that is a better model for reforming legislation in a mature area of competence such as the environment, rather than summarising it very briefly in a Great Repeal Bill and pushing it through Parliament very quickly but not clarifying how the process will work in advance.

The Chairman: I want to move on but, on that point, whatever our personal views are, we are going to leave the European Union. That is the policy of the Government and the result of the referendum. Should we say that we should use that model of REFIT in this country? The Great Repeal Bill is a sticking plaster to get us through a transition, is it not? The problems that we have talked about are different. Thereafter, is REFIT a model that we should use?

Professor Richard Macrory: Yes. As I said earlier, if this was a rational world, I would like to see that one would take sectors, such as waste and

air, and have a serious look at the existing law as it is, which is reflecting the EU, and say, "Can we do it better?" The question you asked was: would increased flexibility make environmental law more effective? Being a lawyer, I would want to unpick what one means by "flexibility". I gave the example that if you give too much discretion to government "as far as practicable" in its duties, and so on, that form of flexibility may not necessarily be a good thing. There are other forms of flexibility that—I agree with you—are very useful. There will be a lot of opportunities that can be taken, but I would like to see it being done in a very serious way and in a pretty open way.

The Chairman: Okay. I think we need to move on.

Q9 **Viscount Hanworth:** This is Lord Cunningham's question, which became Lord Selkirk's question, but here is the canonical version or at least the version that I have on the list. What oversight and enforcement mechanisms would apply if the UK remained within the EEA? Secondly, what about the circumstances in the event of a so-called hard Brexit? There is the question.

Can I add some spice to this by reading something submitted by Dr Charlotte Burns, who is writing for the Friends of the Earth? She said: "Without the external pressure and legal avenues afforded by EU membership it is unlikely that policy-makers would make the effort necessary to secure citizens' health, as the reluctance to address air quality in urban centres on grounds of cost testifies".

The question, I suppose, is: what has been the force of the European Union's mechanisms of enforcement and what might happen in their absence?

Professor Maria Lee: We have already outlined the structures that would apply if we were to remain members of the European Economic Area. You have the EFTA Surveillance Authority and the EFTA court. We can come back to that if you want to. If we have a hard Brexit, we would be dependent on domestic arrangements—some domestic mechanisms. It sounds so far-fetched to say that we might replace the Commission, but we have taken the Commission's role in supervising compliance completely for granted for 40 years, and that will go. We should think about whether it is feasible to replace that with a parliamentary body, a government body or some other sort of public body that will supervise government and agency compliance with the law. It sounds ambitious in the current climate, but we have had this for 40 years and we are about to lose it. It is important.

In addition to the Commission's role, we also need to pay close attention to the more subtle governance mechanisms that we are subject to in the European Union, which are, very routinely, obligations to report on how we intend to comply, then to report on how we did comply, and to explain how we will come into compliance if we fail to do so. We report to a well-resourced, well-informed, named body—the Commission.

There are two things. There is the enforcement and how we replace the Commission's role there. There are also these more subtle governance mechanisms that allow political and legal accountability. That is something that we are more than capable of dealing with.

The Chairman: That is very important. That is a good point.

Viscount Hanworth: Dr Charlotte Burns foresees complete dereliction. This may be regarded as a polemical discussion.

Professor Maria Lee: That is the risk, but we would hope that that is not going to happen.

Professor Richard Macrory: I think there is another question about how we could deal with national remedies, which is quite interesting. Yes, the Commission has been an important force, but not the only force. The national courts in certain areas, which have been picking up leads from the European Court of Justice and interpreting their judgments, have been quite powerful. As we have discussed, if it was an EFTA model, then there would be a surveillance model. If we are out, then the Commission will have no role.

To give one very practical example, which is interesting, I mentioned that the Court of Justice has the power to impose financial penalties, which is something that Britain proposed years ago. I advised the Committee sitting here that that was not a good thing, but I have changed my mind now on that.

One of the interesting things in the UK, tucked away in the Localism Act, is a provision that says if Britain is fined by the European Court and it turns out that it was the responsibility of a public authority that caused the breach—the Environment Agency or a local authority, say—the Government can recover the money from that authority. My European colleagues, whom I have talked to about this, think it is a really interesting model. I do not think that it has ever been invoked, but it concentrates the minds wonderfully to make sure that you comply.

Again, that will disappear, presumably, because the European Court will not have a power to impose penalties. The question, when we want to explore that, is: should we be thinking of replicating something like that? Is our current system by itself of judicial review and declarations going to be sufficient to ensure that whatever national environmental law we have is properly enforced? I have some ideas on that.

The Chairman: Lord Krebs, I think you want to say something.

Lord Krebs: I have a small follow-up question to Professor Lee's very clear explanation. Are there other countries outside the EU to which one could look for a well-operating and well-defined model of how the role of the Commission can be replaced at a national level?

Professor Maria Lee: The simple answer is not really, but I hope that Professor Macrory might be able to fill out a little bit on that. There are

two things going on here. One is the Commission as a holder to account but not necessarily a litigator. We can do that quite straightforwardly. If you think about the Climate Change Act, for example, that is a system within which we require reporting on how we are going to comply, reporting on how we complied and explanations of how we will come into compliance if we are not in compliance. We will report to Parliament. We have an expert climate change committee that is able to scrutinise. Those sorts of reporting models, which provide for serious political accountability and some level of legal accountability, because you do at least have to let us all know what you are doing, are not easy, because you need to find a public body with resources, but it is conceptually relatively straightforward and very important.

Holding government legally to account in the way that the Commission does feels like a terribly big ask, but one could imagine, in the future, things like a beefed-up environmental ombudsman; some sort of public defender role is not completely unheard of. As to things that we have elsewhere, you might think about places such as India or Pakistan where they have strong constitutional obligations for environmental protection, where the courts have been willing to hold Governments to account and send them away to do better. It is not completely unheard of.

The Commission is something that we have been taking for granted in that role and we are going to have to think really creatively and bravely about Governments who say they might not want to comply with the law.

The Chairman: I know that Lord Selkirk is going to follow this up, but perhaps we could pause there. Professor Macrory, were you going to add anything?

Professor Richard Macrory: This, again, comes to the opportunity to review our legislation and to think how we fill those gaps; and reporting requirements might well be one where we might say that, if one is dealing with waste or water, the legislation needs to be a bit tougher, perhaps equivalent to the climate change legislation, on regular reports to Parliament about what has happened. It is for the legislators to make sure that that is built in, because if it is not it just may not happen.

The Chairman: Perhaps I could bring Lord Trees in at this point, as I am not sure we have covered this area completely.

Q10 **Lord Trees:** I was going to ask about enforcement and oversight, and to some extent you have begun to answer the question. It is very important. We will lose the ECJ and the Commission looking over our shoulders. In my limited experience of a few years in Parliament, we are quite good at scrutinising legislation. What constantly worries me is the enforcement, compliance and active use of the legislation we have. You have mentioned a few possibilities, such as an ombudsman, but have we existing institutions that we can repurpose or use better, or will we need to create other new institutions and mechanisms to ensure that there is compliance and enforcement?

Professor Andrew Jordan: One danger that could be pleaded is judicial review. I do not know if you want to talk about judicial review, but the perception is that it has been going through the roof in recent years. There were several hundred judicial review cases in the 1970s, whereas now there are thousands and thousands of them. I know that a lot of them relate to immigration and issues like that, but, in principle, that is one way in which the Executive can be held to account. There are also weaknesses when it comes to environmental legislation. Correct me if I am wrong, but for a judicial review to be taken the applicant has to be substantially affected and incur substantial hardship. That might be difficult. No?

Professor Richard Macrory: No. We have moved on from that.

Professor Andrew Jordan: We have moved on from that; okay. The other key thing about judicial review, though, is that it relates to the process, does it not?

Professor Maria Lee: Yes.

Professor Andrew Jordan: As long as the right process has been followed, irrespective of what happens to the environment at the end, then that is okay. This is where the hard edges come in of EU legislation. If there is a strict requirement to protect a particular habitat, irrespective of what process you have gone through to decide whether that should not be developed, the habitat still remains or is replaced by an equally good habitat in a different location.

Professor Richard Macrory: If I could wind back for one moment, this whole question of enforcement and so on is going to apply to all areas of law if we leave the EU. One of the questions to ask is whether the environment is somehow a bit different and does require some special treatment. Ludwig Krämer, who is one of the great and most influential figures on EU law, has a phrase: "The environment dies in silence". What does that mean? From a legal perspective, he is saying that in most areas of law—be it competition law, social security law or welfare law—there will be clear economic interests who will protect themselves, go to court or whatever. With the environment, bits of it may be unowned; there is no clear interest. The response that we have taken, as we have done for the last hundred years, is to set up public authorities—local authorities, environment agencies and so on—to protect the environment.

The question here, and this is where the EU law has been powerful, is: what happens if they do not comply with their duties? That is what we are concerned with. With things like regulation and criminal law, the Environment Agency will continue to prosecute and enforce, sometimes against local authorities and sometimes against government. It is this area of public law duties that is particularly interesting. What we will rely upon, as we have heard, is judicial review and, basically, NGOs to bring their actions.

I think there are three problems with judicial review. Despite some efforts to limit exposure of costs, it is still a very expensive and time-consuming process. I am a great fan of the tribunal system, and I have been trying to argue that the tribunal system could still play a much greater role in this.

Secondly, the courts, even within judicial review, may have to be rather tougher in their remedies. It was very interesting in the ClientEarth case that they made a declaration and an order to the Government to produce a report within a certain time. That is quite unusual in national judicial review, and I think they felt empowered by the EU dimension.

Lastly, and we have touched upon this, we will have to consider creating some form of environmental ombudsman or somebody to be investigating some of these cases, if not, perhaps, to take the litigation. I was asking my European network of environmental lawyers if there are examples in Europe of this. The example that kept on coming up was the Hungarian Parliamentary Commissioner for Future Generations, which was set up and is now part of the Charter of Fundamental Rights. This is a post that provides opinions on legislation, initiates investigations, can take action before the constitutional court. It does not take litigation against public authorities as such, but I am told that its opinions are normally binding. I think we may have a gap in that area.

The Chairman: We are particularly interested in the soft law and guidance notes side. Without sounding too arcane, perhaps we could hear a very brief comment on that if we need to note that within our recommendations.

Professor Maria Lee: I have one very quick comment. Soft law is not binding on anyone. That is the point. It is already not binding because it is soft; its bindingness is down to its authority. Its authority is based on its quality—who contributed, what sort of expertise, what sort of participation, and the status of the individual who is promulgating it. How authoritative EU soft law will be when we are no longer members of the European Union is completely open to question. It is already not strictly binding. It becomes binding through practice, but in law it is not binding already.

The Chairman: Thank you for that point. We are now going to move on to the international side and conventions. We were going to have two questions here but I think we can put them into one. I ask Lord Rooker to start us off on that and ask Lord Cunningham to come in as a supplementary if we have not followed all of that.

Lord Rooker: In that case, I will cheat and take a point I was going to make. I would be astonished, by the way, if when the Great Repeal Bill is introduced, it does not have a little clause buried away somewhere, which says, "This is not subject to judicial review". The argument the Government will make is that, if it was, because it is complicated in the way that we discussed this morning, it will clog up the court system. There is going to be a get-out there. I speak as a non-lawyer, but I know

that what happens in Whitehall is that they will not want “subject to judicial review”. That is my experience of half a dozen departments.

Once we have left—and we have to work on the assumption that we are leaving, by the way—as to the significance of international legislation that is currently in place and will be in place in the future, will our relationship with that change or will it become more significant in the sense that some of it gets buried because we are in the EU? Once we are out of the EU, we are then subject to the law of the sea and all the other international legislation. Will its role or significance change, or do we just move out and say, “We are now following international law”?

Professor Richard Macrory: There are two questions. First, yes, we have ratified about 40 international conventions concerning the environment. One of the questions on exit is whether we are still bound by them, because most of those agreements are what are called mixed agreements. The EU and the Member States have signed them.

I am not a public international law expert. I wrote an article recently on this subject and consulted three different groups of international lawyers. One said that we would definitely still be bound, because we have just assumed all the competences—nothing more. The second said, “No, no, you will have to renegotiate”; and the third said that it was all very difficult. I have tended to come to the first view, which is that we will still be bound. That is all right.

Your second question is much more interesting, because the UK courts have operated up to now what is called a dualist system of law; that is to say, if we do not transpose the international convention into national law, you cannot invoke it directly. You can use it for interpretation, and they do that quite often. They are becoming a bit more adventurous.

Last year in the Supreme Court there was a case concerning children’s law where the claimants wanted to invoke a UN convention, and it had not been transposed. Four of the Supreme Court judges said there was nothing they could do, but the minority judgment of Lord Kerr is very interesting. He said that the reason for the dualist system is that government could then impose obligations on citizens without going through Parliament if it is binding. But here we are talking about a duty on the Government. He could not see why they should not be bound by a duty under international law. Lord Kerr was in the minority and he was quite bold. That may be the future. As you have said, international law will become more compelling in the UK courts than it has been up to now.

Professor Maria Lee: I do not really have anything to add to that. If we have signed and ratified, I agree with Richard that we are probably bound by the thing that we have signed and ratified. International law will become politically more significant as well because that will be the backstop beyond which we cannot fall in terms of environmental standards.

Professor Andrew Jordan: I have two other things to add to that. Generally, the EU has not simply taken an international convention and transposed it into EU law, and left it at that. It has often added in hard edges. It has added in deadlines, timetables and things like that. A classic example is how the Berne convention was gradually developed, evolved and transmogrified into the birds directive and the habitats directive.

To respond to Richard's point about the active interpretation of international law by national courts, would it not be ironic if that happened, because the Brexiteers criticise the European Court of Justice for overactive interpretation of EU law?

Professor Richard Macrory: I have a very short response. One will have to look at these international conventions, because up to now they have been transposed or extended by EU law, to see how that should be done. Some of them like the Ramsar convention are very vague and they will probably need fleshing out.

The Chairman: Professors, thank you very much indeed for taking us through this rather complex area. Clearly, the challenges will be at least as great as we thought they were before we started the session. Thank you very much. Also, it is very useful to have had some of the practical examples. I understand the Duke of Montrose has a question.

Q11 **Duke of Montrose:** As somebody who has spent a lifetime in livestock farming and looking after areas of the environment, added on to one of the questions here was: what about the principles set out in the treaty such as the precautionary principle? Can we see ourselves revising the precautionary principle to our own standards? What about this balance that was always between risk and hazard?

The Chairman: Can we take one sentence from each witness, because we are constrained by the time? If you want to give us additional evidence, please write in to us on it.

Professor Richard Macrory: The precautionary principle is in the treaty, but it is not a free-standing principle. It is a principle underpinning how you design and interpret the legislation. If we were completely out, it would, probably, still be a policy principle in government. Whether we put it into some form of legislation will be up to the Government to decide.

Professor Andrew Jordan: As Nigel Haigh pointed out some time ago, the UK had already signed up to the precautionary principle before it became a part of the Maastricht treaty. These things have evolved slowly over time.

Professor Maria Lee: The precautionary principle is not a single thing. It has been interpreted in a particular way by the European Court of Justice. It is simply a principle that takes uncertainty very seriously. I cannot imagine why we would want to be without a principle like that or why the courts would want to be without a principle that takes uncertainty seriously.

The Chairman: Quite a bit of our correspondence on scrutiny deals with some of this, and the Government tend to put evidence and hazard as almost an opposite to the precautionary principle occasionally.

We will end the public session here and I thank you very much indeed for your evidence before us.

Examination of witnesses

Abi Bunker Head of Policy and Advocacy, RSPB, Trevor Hutchings, Director of UK and EU Advocacy, and Leah Davis, Acting Director, Green Alliance.

Q12 **The Chairman:** Welcome to our second session on the UK leaving the European Union and its effect on environment and climate change. This is a formal evidence-taking session. A note will be taken and a transcript will be put on the public record in printed form. A copy will be sent to you. If there are any errors, please bring them to our attention. The session is on record; it will be webcast and will be available on the parliamentary website in due course. Once again, I ask members to declare any interests they might have when they put their questions. Before we start, not so much for our benefit but for the public who will be listening, could you introduce yourselves briefly, and then we will move on to the questions?

Trevor Hutchings: I am delighted to be here. My name is Trevor Hutchings. I work for WWF, the global conservation charity. I am the C there and am very interested in the impact of public policy on environmental objectives. Before WWF, I worked in various Government departments and with the European Commission. My last role was with the then DECC, heading its energy efficiency programme.

Abi Bunker: My name is Abi Bunker, head of policy and advocacy at the RSPB. I am delighted to be here, and thank you for the invitation. I head the RSPB's policy and advocacy teams. I have been at the RSPB for about 10 years. Prior to that I had various incarnations, including five or six years at the National Audit Office as a principal auditor.

Leah Davis: Likewise I am delighted to be here. Thank you for the invitation. I am Leah Davis, acting director at Green Alliance, which is an environmental think tank and charity that works for ambitious leadership on the environment, certainly at the political level. We are convening a coalition of some of the larger environmental NGOs on their response to the referendum.

The Chairman: To state the obvious, the Committee is looking at this item forwards, not backwards, in relation to the referendum result. We want to understand how we move forward, and how Parliament can call the Government to account and advise them, and suggest how we might move forward. The first question is based on that. What are the opportunities, as well as the challenges, for the UK and the global environment and climate change arising from the UK leaving the EU?

What are the UK's key interests and objectives? If you want, you can throw in the wider global interests.

Trevor Hutchings: As I am sure the Committee appreciates, in our view the EU has established over the past 40 years probably the most comprehensive suite of environmental legislation anywhere in the world. It is a world-class system. As the UK exits the EU, that system is potentially at risk of being degraded, and clearly that has consequences for the state of the natural world. In addition to that suite of legislation, the EU has established a system of accountability, if I can call it that, ensuring that Member States are able to implement their obligations under EU legislation, whether through access to justice or access to environmental information or through a system of audit and infraction proceedings. A whole range of accountability mechanisms are potentially at risk as we leave the EU.

We are very encouraged that the Government have announced that a body of legislation will be rolled across into domestic legislation, where practicable. Clearly, there are some questions around quite what that means in practice, but as a starting point it is exactly what we would like to see. It is clear that, even with that existing established body of legislation, we are still experiencing environmental decline both in the UK and globally. The RSPB's recent *State of Nature 2016* report set out the case, and tomorrow WWF will publish its *Living Planet Report*, which puts some stark reality into the state of global biodiversity.

We want to build on that established framework of legislation. We are encouraged that the Government have committed to a 25-year plan for nature, and we would like it to be an ambitious and robust plan that builds on the established framework but goes beyond it by implementing international commitments, such as those under the sustainable development goals agreed last year by more than 190 countries. Likewise, on the climate side, with the commitment to a low-carbon plan, how are the Government going to meet their obligations when we know there is a policy gap in meeting the fourth and fifth carbon budgets? There is a risk that that body of legislation is undermined, but there is an opportunity for the UK to become a world-class leader in environmental protection through the exemplar arrangements it could put through under its commitment to a 25-year plan for nature.

Abi Bunker: I heartily agree with everything Trevor has just said. The interests and objectives of the UK are pretty good at the moment in relation to the natural environment: the commitments we have made internationally through the Convention on Biological Diversity—the Aichi targets; the global conventions on climate change; and indeed the Government's commitments to leave the natural environment in a better condition for the next generation. All those commitments remain.

Theoretically, there is now an opportunity to regalanise and refresh, and invest in delivering those commitments through implementation. As Trevor, and we and others, have set out, we perceive the greatest risk—it is very real—in the loss of not only the environmental protection

legislation and other commitments and policies that have been built up over 40 years, but the governance, accountability and oversight to make that real. The Great Repeal Bill and the idea of bringing legislation over is a great first step, but it needs to be made substantial and real by robust implementation through accountability and oversight mechanisms.

Leah Davis: I echo Trevor and Abi's points. I completely agree. We have talked about the Great Repeal Bill, and another important point is that, certainly in the short term, huge amounts of legislation will be transferred, so accountability is significant. At the moment, our accountability and regulations lie largely at EU level, so trying to find a replacement that is at least as strong at UK level will be a challenge. In the short term, we may face more challenges, but in the longer term there may be opportunities, particularly in what we can do at domestic level while all this is happening—while we are focused on Brexit—to drive through some of the longer-term outcome-focused activity through the 25-year plan and carbon plan. That provides real opportunities.

The Chairman: I have read that one of the characteristics of the role of the UK in the European Union on the environmental side is that it has been very strong and leading on climate change but reluctant and resistant on environmental legislation. Is that characterisation reasonable or not, and what does it say for the future?

Trevor Hutchings: It depends on which point in time you are referring to. For example, the UK played a leading role in the design of the Habitats Directive when it was first derived in Brussels, and it has pushed very hard on reform of the Common Fisheries Policy more recently, but there are other examples where perhaps the UK has not been as progressive as other Member States. We have had a bit of a see-saw, with the UK in the lead and the UK being pulled along; the UK has a proud history of largely pushing a very progressive agenda, but with notable exceptions.

Abi Bunker: It depends on the area of policy and the point in time. Agri-environment is one of the main funding sources for delivering nature conservation in the UK; more than 50% of public funding of nature conservation is reliant on agri-environment funding. The UK has been an incredibly strong long-term leader in developing a good agri-environment, providing good evidence and science to improve it. On marine protected areas, it required a marine complaint and the intervention of the European Commission to remind the UK Government of their obligations to designate areas at sea to protect wildlife. We are now seeing a suite of marine protected area designations from across the four countries of the UK. It depends very much on the area.

Leah Davis: We see from our domestic legislation that the UK is a climate leader. The other example is pollution controls and air pollution, where there has been a greater challenge in recent years.

Q13 **Lord Rooker:** Because the UK has been a leader and a pusher in a lot of regulations, we have been accused internally of gold-plating because we

want to set an example to everybody, so irrespective of the Great Repeal Bill, there is an inevitability that the leavers will attempt to unstitch some of the environmental regulations. Off the top of your head, can you tell us the top three environmental and climate change regulations that, after Brexit, we should and must preserve against attack? What are they, and on what grounds should they be preserved? I do not want you to go too wide. What are the really important ones?

Abi Bunker: I would certainly propose that the most important from a nature conservation perspective have been the Birds and Habitats Directives, which are often referred to as the Nature Directives. There have been a number of reviews, one by the previous Government in 2012, to look at the nature directives and how well they have or have not delivered. That concluded, as did the recent fitness check in Brussels, which took evidence from across Europe on their effectiveness, that they are fit for purpose. The problem has been poor implementation, and arguably inadequate funding, to make them really work. I would argue that for the protection and restoration of the natural environment and biodiversity those are critical bits of legislation for us to bring across and make work in the UK context. The evidence shows that over the past 30 to 40 years they have done enormously beneficial things.

Trevor Hutchings: The whole suite of environmental legislation derived from the EU is very much interconnected and should be seen as a whole. As soon as we start to play around with bits of it, potentially we unravel it. The point has been made about gold-plating. The particular challenge is that we need to ensure better implementation. Gold-plating is more a perception than a reality. The Government's own balance of competences review was unable to find specific examples of gold-plating. It is very much about seeing it as a body of protections that, to go back to my earlier point, are not delivering the outcomes we want to see anyway, before we start picking and choosing which of them we think we should keep.

Lord Krebs: I want to pick up what Abi told us about the success of the Birds and Habitats directives. In his introduction, Trevor referred to the rather poor state of biodiversity in the UK. I know that many bird populations are in decline. I declare an interest in that I am one of the people who provided scientific evidence to the RSPB on those matters, and I am also on the Committee on Climate Change. If it is the case that things are in a bad state, how come these directives are doing such a good job? They cannot both be true at the same time.

Abi Bunker: I would argue that they can. I suspect you have heard this from more competent scientists than me. Trevor referred to the complexity and interrelatedness of different policies and legislation. The Birds and Habitats Directives set some responsibilities and ambitions for the outcomes we want. They set a clear framework for countries to deliver those through their own mechanisms and the ways that can happen, but the delivery of restoration and protection requires policy in other sectors—for example, agriculture and fisheries—to be aligned, and not to act in contradiction to the environmental protection legislation but

to help deliver it. We have not seen that over the last 30 to 40 years. Through the Common Agricultural Policy, we have seen a lot of perverse incentives and policy levers that were in contradiction to the stated aims of the Birds and Habitats Directives.

In the last year or two, there was a good, groundbreaking study by Donald et al that looked at the Birds and Habitats directives, with a lot of evidence from the UK and across Europe showing how they have helped to designate sites that would not otherwise have been designated and protected, and to recover species that otherwise would not have been saved, in some cases from extinction. They could do better, but they have been really important.

Lord Trees: Defra is working on two 25-year strategies. One is farming and one is environment, and they are not connected. Is that very sensible in view of what you said?

Abi Bunker: No, probably not. We have had a number of conversations with Defra to suggest that keeping those in separate silos is ecologically not very sensible, because it is in the interaction between agricultural production and the natural environment that the problems arise. Keeping them separate means that you continue to lose opportunities to tackle negative interactions and build on positive interactions, so I totally agree.

Q14 **Lord Selkirk of Douglas:** How important are policy stability and predictable review cycles to the effective management of the UK's environment and climate efforts? To what extent will Brexit affect that stability? I was an environment Minister for five years. I always found it very puzzling that soft green issues seemed to attract much more attention than hard green issues, because the latter were much more dangerous.

Leah Davis: The best example to use is predictability in policies where we already have them. The cycle is important. We have a Climate Change Act and we have climate change budgets. That gives us a clear policy direction, goal and focus over a predictable period. The best example I can give of where policy direction is really important is the Government's infrastructure pipeline. Towards the end of this decade, we see a drop-off when policy certainty ends, and therefore the infrastructure investment ends. We see a 96% drop in the investment from about £7.7 billion to £0.3 billion. That is an example of where those sorts of cycles are helpful, particularly in driving business investment and delivery on the ground.

I am not sure whether we have those sorts of cycles for some of the softer green measures. I would argue that it would be helpful to replicate them in other spheres.

Lord Cunningham of Felling: I declare an interest as a lifelong card-carrying member—rank and file—of the RSPB.

Lord Rooker: I should have done that as well.

The Chairman: It looks as though we have House of Lords membership

of the RSPB.

Q15 Lord Cunningham of Felling: My question is for each of you. Have you been able to identify any necessary urgent actions that the Government will need to take when the UK leaves the European Union to ensure continuity of adequate policy cover in the areas that concern you?

Abi Bunker: There are some clear steps from our perspective, and there have already been good signs from the Government. We have existing laws on environmental protection. Let us implement them and designate the places that need to be designated and take the actions we can. For the next two years, the UK is still part of Europe and there are important decisions on Common Fisheries Policy and yields for next year that still need to be made, so there should be implementation in the immediate term. We should retain the laws post-Brexit and, in the Great Repeal Bill, bring over the *acquis* of environmental protection legislation. We should address the governance gaps that will inevitably arise from our exit from the EU: the role the Commission has played in resolving transboundary problems, because nature does not respect political boundaries even if sometimes perhaps we would like it to; the role of the European Court of Justice and the statutory agencies across the UK countries; avoiding a race to the bottom so that, if there are further amendments to the legislation that the Government wish to undertake, there is full parliamentary scrutiny; and good collaboration and close working across the four countries of the UK, because a number of these areas are devolved responsibilities, so that is important.

These two are really important: a commitment to cross-border co-operation across the four countries of the UK and with our neighbours in Europe, who will share nature with us, and finally—a fundamental one—because so much of the money to pay for nature conservation comes from Europe, we have to fund and invest in nature conservation and environmental protection and restoration. They were perhaps not clearly set out, but those are six very important actions for the next months and years.

Leah Davis: There are some urgent ones: funding across the Common Agricultural Policy, funding that drives a lot of our energy efficiency and investments in some of our carbon reduction programmes, particularly at local level.

Another thing is the uncertainty at the moment about what our future product standards will be; for example, some of the energy performance and vehicle emission standards. Will we still be subject to those? Will we align with those? There could be new ones coming through, particularly on ecodesign. What will that mean for our products and their performance, and for the people—the businesses—who produce them in this country?

Trevor Hutchings: All of that could be clearly articulated in the Government's forthcoming plans on carbon, food and farming and the environment. Those should be the vehicles that offer certainty to those

who are regulated and those who need to be offered certainty. That is the place where the Government should be able to articulate it.

Lord Cunningham of Felling: They are what I would describe as urgent requirements. What about the longer-term implications of our leaving?

Trevor Hutchings: It comes back to what I said earlier about certainty on day one. We are pushing to go much further than that and to set out a long-term trajectory for halting the decline and restoring the natural environment in the UK, and indeed the UK's footprint internationally. It comes back to the long-term 25-year plan commitment. We very much want that articulated in such a way that it is about reversing the decline, and about restoration. On the point made earlier about the Climate Change Act providing us with carbon budgets and a pathway to an end point, we do not have that clarity in the wider natural environment, but a 25-year plan can articulate that outcome and the pathway to get there, with five-yearly milestones that offer clarity and an understanding that we are progressing towards an outcome that everyone has agreed.

Q16 **Lord Trees:** The next section is about environmental opportunities. There are a number of environmental regulations that may not have transboundary implications but have more localised ones. Could you say a little about what we could do to implement more effective environmental legislation in a UK-specific context? In your answer, perhaps you might reference newts. I do not wish to be flippant, but newts is a subject that exercises the media greatly, and they might be relevant in this context.

Abi Bunker: I knew I should have put money on newts or bats being mentioned. I did not. I have been talking about the Birds and Habitats Directives. Forgive me for going back to them. There was a very good study undertaken by the Government in 2012 on the Birds and Habitats Directives and whether they were doing the job they needed to do, not least to look at the claims and accusations of gold-plating or problems. The study found that they were doing a pretty good job and were fit for purpose. You are absolutely right that there are problems with implementation, but that is not about what is in those bits of legislation, or indeed in the appendices; it is about the unsexy area of policy below that. How do you implement it and develop guidance that will tackle and provide clarity for businesses that need to operate in the environment but wish—most of them—not to damage it unnecessarily?

Until Brexit, which unfortunately stalled the process, RSPB and other NGOs were working very closely with the Government, Defra and other agencies and industry partners on a memorandum of agreement to look exactly at those problematic cases, some of which are real and some a matter of perception, and how to do the implementation. It is not the case that there is a need to remove things from appendices or change the legislation; it is about developing guidance and best practice for industry on how to implement them well. We would love to galvanise that work, which stalled after the Brexit result. It would be very good to try to move it forward and get good guidance to help address some of the problems.

Q17 Viscount Hanworth: In the Brexit circumstances, we shall need to develop policies to replace the CAP and the Common Fisheries Policy. What opportunities will arise for improving environmental protection?

Trevor Hutchings: The UK Government have played a leading role in reforming the CFP, which was not an effective instrument. Through that reform, we now have a framework that is providing a much greater approach to regionalised management to deal with discards and so on. Many of the fish stocks the UK fishing fleet depends on are shared with other nations, so it comes back to the point about managing fish stocks and the wider marine environment on a cross-boundary basis.

Having said that, I am sure there will be examples where with an even more specific regional approach tailored to UK needs, perhaps particularly in inshore waters, the UK Government can take the opportunity to tailor marine management to that situation. I suspect those opportunities will be less widespread than the need to manage the fisheries and marine environment on a collective basis, because fish stocks and the vessels fishing them are in other Member States' waters, so a common regime to manage their activities is paramount.

Viscount Hanworth: On the CFP, there is a strong, or at least vociferous, fishing lobby that looks forward to unrestrained opportunities under Brexit. Does that worry you?

Trevor Hutchings: Certainly, unrestrained opportunities do. The underlying premise is that fishing activity should be undertaken at a level that fish stocks can sustain. We need the best scientific evidence; we need a precautionary principle in setting fishing opportunities; and we need to manage fishing effort with fishing opportunity. A free-for-all would be very alarming.

Viscount Hanworth: That we all understand, but are you worried about the politics of the fishing lobby as currently manifested?

Trevor Hutchings: Only last week, I was with somebody from the Scottish Fishermen's Federation. They were not advocating a free-for-all or overfishing. Most fishermen understand that healthy fish stocks are absolutely crucial to their livelihood, so I am not hearing that. What I am hearing is that the fishing industry, or elements of it, would like to see a redistribution of quota between what UK fishermen are allowed to access and what other nationalities are able to catch within UK waters. That becomes a political rather than an environmental issue.

The Chairman: We will not go too far down that route, because we have dealt with that in another inquiry. I declare an interest as a board member of the Marine Management Organisation, which is effective in this area. We might talk about renewable energy, where I have a non-financial interest as a trustee of Regen South West. Ali Bunker, I think you want to comment on Viscount Hanworth's question.

Viscount Hanworth: And on the CAP.

Abi Bunker: I am happy to talk a bit about fisheries. I echo what Trevor said. I would like to thank you for the inquiry you undertook earlier in the year on fisheries. A number of the statements from the Minister about a commitment to sustainable fisheries have been welcomed. It is vital to have an ecosystem-based approach to fisheries and not one focused just on quota. We would be keen to work collaboratively with WWF and others who have lots of experience in this area and with Government to find a way forward.

Land use policy, and what comes next to support and drive how we manage our countryside and our agricultural land, has been identified as perhaps a once-in-a-lifetime opportunity to tackle some of the inconsistencies and perversities that, despite very good reforms over the last 50 years in the Common Agricultural Policy, still persist and in some ways have come about because 27 Member States are negotiating on probably the most important sector for their country. We and others are keen to provide evidence, and to work with government and others to secure some of those opportunities. Much money has gone into farming and much has been achieved, particularly through agri-environment schemes, but there is greater potential to use that public money to deliver public policy goals, public goods and public benefits for the greater good, be they environmental, social or otherwise. There is an opportunity to build on the progress of the past, learn the lessons and get rid of some of the perversities that we have been tackling over the last 20-odd years.

Viscount Ullswater: As was mentioned, environmental legislation is a devolved matter. Would you be worried if different parts of the UK evolved their environmental legislation in different ways, specific to the nature of the country in which they are operating?

Abi Bunker: I start from ecology and how the natural environment works. We need to operate in a way that accommodates and tackles the opportunities and challenges specific to the natural environment, and it is different throughout the UK. The fenlands of East Anglia are very different from the uplands of Wales, and the interactions between farming, forestry or other sectors and the natural environment are different.

Our experience at international level right through to regional level is that nature does not have political boundaries; it moves around, and that requires supranational action. There is real value within the UK, and the UK with other states, in operating and working collaboratively to deliver what the natural environment needs to be restored and to succeed. Working together on common principles and ambitions, but utilising the mechanisms that will work best in the different kinds of environment in the UK, has happened to some degree already. I think we can build on that success and make it work even better.

The Chairman: You say it has happened. I am sorry to put you on the spot, but it would be useful for us to have a practical example.

Abi Bunker: As an example, agricultural policy has been a devolved matter for some time. There has been an EU framework, but within that framework agri-environment schemes have been developed by each of the four countries slightly differently, arguably some more successfully than others. It is important to keep learning the lessons from across the four countries and to develop appropriate tools and mechanisms that really work to tackle the problems in those countries.

Trevor Hutchings: Another example would be marine protected areas, where the Scottish Government have probably moved further ahead in many respects in some of the designations they have made. In Wales, an example is the Well-being of Future Generations (Wales) Act, which is a ground-breaking piece of legislation, showcased at UN level as an exemplar of how to go about managing the environment in recognition of the social and economic benefits that come from looking at sustainable development in the round. There are examples where the devolved Administrations have perhaps gone ahead, but the point remains that, if we can have a more coherent management regime, it offers certainty for organisations working in the different countries.

Lord Rooker: Abi, when you were answering Viscount Hanworth you referred on three or four occasions to the opportunities from controlling the CAP. Can you give us any examples? What do you want to do? Do you want to re-wild the hills, put in more hedges and stop farming and food production in certain places? You did not give any examples. Do you have any, because I assume you are working up campaigns for the future?

Abi Bunker: There are a couple of things. I mentioned perversities. Currently, there are some perverse incentives to plough up permanent grassland, for example. Permanent grassland can be incredibly important as a carbon store, and some of it can be very valuable for biodiversity. There are opportunities to tackle perverse incentives. The main opportunity is to target any funding to agriculture to deliver greater value for money for the public purse through public policy to deliver social goals, environmental goals or nature conservation goals.

Currently, a significant proportion of funding distributed through the Common Agricultural Policy is through direct payments on the basis of land that is owned. There is scope to learn lessons from the past and clearly link funding much more directly to the delivery of public policy goals; to have objectives that are set for the money and deliver much more for the citizens and farmers of the UK; and to co-ordinate and integrate nature conservation and environmental delivery with more truly sustainable farming. Invest in farmers and give them the certainty and incentives to move to much more sustainable farming. Integrate it. To go back to a point your colleague made earlier, the interactions between farming and the natural environment are intrinsic to our success or failure in both of them, because being able to produce food in the long-term future relies on a resilient, healthy and thriving natural environment.

Viscount Hanworth: Could we do any better on nitrate pollution?

Abi Bunker: I think we could. There is the nitrates directive and a few other bits of legislation, but again the key is implementation and building that into any replacement for the CAP.

Viscount Hanworth: Many of our farmers will be pleased to get shot of regulations about nitrates.

Abi Bunker: There are varying perspectives about the interactions between farming and the natural environment. We have to look at and follow the evidence. We now have a lot more evidence than we did in the post-war period, and we need to build that into how we design our public policy and support farmers to tackle the problems.

Trevor Hutchings: Another specific example would be flood prevention. The market does not value farmers holding water upstream in catchment areas on their land; they cannot use that land for other purposes if they do so, but there is a public good in their doing that. That public good should be recognised through the payments scheme. Those are the kinds of examples we would cite.

Q18 **Baroness Wilcox:** Has there been a history of gold-plating environmental legislation? If so, are there opportunities now to help SMEs by reducing it?

Leah Davis: We have touched somewhat on the question. It depends on the definition of gold-plating. If it is that we have done more than was agreed with the EU, there are not that many examples. We have talked about them already. On climate, we have certainly gone further, but there are lots of examples where we have not. We mentioned some of the red tape reviews that have taken place to look at whether there is too much regulation with a negative impact. Those reviews have found that on the whole that is not the case. We have the standards we need.

I would question the sense that all the environmental protections and the body of legislation we have is entirely negative for SMEs. Huge opportunities have been created with some of the new markets across a range of environmental areas. That is the balance we need to strike.

Baroness Wilcox: That is a very good answer. Thank you very much indeed. Thank you too for the answer to my colleague's question about our inshore fisheries raping everything in sight. I must declare that I come from a fishing industry: the south-west English inshore fleet.

The Chairman: We turn to questions about alignment with the EU.

Q19 **Lord Curry of Kirkharle:** It was very difficult to sit on my hands during that debate about farming and the environment. First, let me pick up the last point. I chaired the Better Regulation Executive until last December. We spent a lot of time trying to bear down on and identify gold-plating, with great difficulty. I absolutely agree that there are very few examples. I declare an interest. I farm in Northumberland and I benefit from the basic payments scheme. I have been actively involved in environmental stewardship and conservation, probably for 30 years.

I am interested in any concerns you might have about whether as a consequence of Brexit we will find ourselves in a disadvantaged position relative to the rest of Europe. Currently, as part of it we have the financial influence of environmental stewardship schemes and the like, and the potential continuation of those incentives to try to improve biodiversity, natural environmental habitats, et cetera. As a supplementary point, you mentioned a free-for-all in fishing; there is a real risk if we pursue hard Brexit of a potential free-for-all in global trading. We could find ourselves in a world where our food production declines and we rely more and more on imported food produced under environmental conditions that are much worse than our own. I am interested in those two questions.

Trevor Hutchings: To pick up the latter one, greater understanding of the environmental impact that our consumption in the UK is having on the rest of the world is absolutely key; for example, the way we purchase and consume our fish. Is it coming from a sustainable source? Do products contain palm oil? Has the meat that we eat been fed on soy, which is leading to deforestation? Our awareness of our consumption habits in the UK is probably little understood. Businesses are becoming more aware of the resilience of their supply chains. If you sell garments, you need water in the areas where your cotton comes from. What is the resilience there as a result of the overextraction of water? There is a whole range of threats related to the UK's global footprint that this debate can often miss. Your point about potentially greater reliance on food imports brings into stark relief the need for better understanding of our UK footprint internationally.

Abi Bunker: I apologise, Lord Curry. Could you repeat your first question?

Lord Curry of Kirkharle: You may be aware that I have been involved in policy design in the past. I am concerned that we will be operating in a post-Brexit world where one must assume, even though the Common Agricultural Policy will continue to be reformed, that there will be financial incentives to encourage farmers in the European Union to adopt environmental standards and incentives through stewardship schemes, conservation measures, et cetera. How concerned are you that we may not be operating in the same environment with the same incentives here in Britain?

Abi Bunker: I would be very concerned if the UK were to develop a replacement for the CAP that did not have at its heart the use of public money to restore, maintain and protect the environment, which is at the heart of our agri-environment schemes. Over the last 30 years, the UK Government have been a European leader on the science, evidence and monitoring of agri-environment. We have probably moaned a bit that they are too slow at improving it and taking the opportunity to make it better and invest more, but that is there. The commitments on agri-environment we have had thus far from the Treasury, in the short term, have been very good. You are absolutely right that that needs to continue and be at the heart of the approach to our farming system. A sustainable

food and farming system of high environmental quality will be very important. As you say, a hard Brexit where we are not part of the single market and want to make trade deals with other parts of the world may indeed be likely to increase the risks.

There are some choices. To some degree in areas of its food, farming and fisheries, the UK already has a pretty good reputation internationally for quality, not just quantity and selling into global commodity markets. It is more along the lines of what, say, Switzerland does in investing in the environment, with the sustainability of its food and farming being part of its sales pitch to the rest of the world. If we had a hard Brexit scenario, the trade deals would have enormous implications. We would want to see environment as a core part of those trade deals, so that is an area of concern.

Q20 Viscount Ullswater: This question is an attempt to look into the future. In your view, will the environmental and climate change aspirations of the UK and the EU be similar after Brexit? How much influence will the UK have over the direction of EU environmental policy after Brexit? That is crystal ball gazing.

Trevor Hutchings: It is a bit. The climate change aspirations are set out largely in domestic legislation, the Climate Change Act and carbon budgets, so we very much anticipate that that will be the framework within which the UK continues to operate, and would advocate for that to be the case. To meet those aspirations, more policy needs to be forthcoming from government, particularly in meeting the fourth and fifth carbon budgets. There are international commitments as well. The Government have committed to ratify the Paris accord, and likewise the sustainable development goals. Those international commitments would help to drive action in the UK after we have left the EU.

Abi Bunker: It is important to remember that some of the European legislation we have been talking about, the Birds and Habitats Directives and others, takes its lead from international conventions—the Berne and Bonn conventions and the Convention on Biological Diversity. Those are all important international commitments where we hope the UK will continue to take a leadership role, on the UNFCCC in the case of climate. The EU has that role too. Those conventions set ambitions and targets, and hopefully we will get new targets under the CBD post 2020. If the UK Government take those commitments seriously, and if the EU does, there will need to be alignment to some extent.

Leah Davis: I agree about alignment. We have international obligations, particularly on the climate side, which we have both agreed to. The question is how we share some of that effort. At the moment we have effort-sharing in decisions on climate and emissions trading, and the question is about how that is split further on. That is where the unknown is. The positive point is that we have the same ambitions, certainly on climate.

Trevor Hutchings: The UK will have a real interest in how environmental legislation develops in the EU. We benefit from migratory birds, but they will be affected by regulations applied in other parts of Europe where they migrate to and from. Likewise, some of the air quality challenges we face in the UK are a consequence of what happens in continental Europe, and surely the UK will want to influence the regime in Europe.

- Q21 **The Chairman:** We share our environment with the rest of Europe, and we will not be floating off towards the Caribbean or anywhere—unfortunately, in some ways. We have talked about migratory species and the marine environment. We share all of that. What sort of aspiration should we have in a hard Brexit environment? I am not saying whether that will or will not happen, but let us assume that there is not the EEA liaison that goes on. What should we aspire to in our relationship with the European Union in future, and the shared resource that none of us can manage, because the natural environment does not respect borders? How do we get that to work post Britain leaving the EU? In the energy world there is a wider energy community, mainly for less developed countries, and for trade there is the EEA. Do we need something like that for the environment, or is that shooting too high?

Abi Bunker: To save the environment, which is shared and mobile, the UK needs to maintain and enhance relationships with regional and international nature conservation bodies and others, and to seek to cut through some of the politics to deliver what that shared nature and environment needs. That will be challenging. I do not have clear views on what shape it could take. The RSPB works in that way. Brexit creates challenges for each of our organisations. WWF is international in nature. We are part of the BirdLife International partnership, and we will continue to liaise and collaborate with partners across Europe and the world to try to understand the problems and the solutions for nature and then create mechanisms, collaborations and partnerships that will deliver what nature needs. I hope that the UK aspires to operate in a similar way for the natural environment, because, more than any other part of the world we live in, the natural environment transcends political and national boundaries. I am sorry that is a bit fluffy.

Trevor Hutchings: The EU has provided the framework. When the UK leaves the EU, there needs to be a mechanism to enable cross-border co-operation. That happens already with third countries—for example, Norway—in fisheries management and access agreements to each other's waters. There are examples, but they are largely under existing EEA agreements, or whatever it might be. Depending on the nature of the exit, there will need to be something in place, and a lot of effort will need to be put into ensuring that the UK is still influential in the rest of Europe in that regard.

Leah Davis: There are certain institutions and places where we have shared resources. The regulation of chemicals sits at European level. For certain things, we have institutions that are working; we have the effort-sharing we have already talked about, which we know has reduced the

cost of meeting some of our climate change obligations. You touched on the idea of having access to the energy union for some of our renewables, and balancing that and meeting our carbon targets. We think that will be a cheaper way of doing it. For me, it is about having an assessment both of where it is most sensible to share institutions, and of the opportunities and markets that we want to access.

Q22 Lord Trees: We do not know what our relationship with continental Europe might be. There is another big land mass contiguous with Europe with which there are not close political ties. I am thinking of Russia, with which there are a lot of shared environmental issues. Are there international conventions that embrace, for example, Russia and Europe talking about migratory birds, pollution and so on? Are there any models that exist already, or will we have to create a continental European convention on the environment?

Abi Bunker: I do not know the answer to that.

Trevor Hutchings: There are no obvious ones, but the UK already has bilateral arrangements with other countries outside the EU, and those are used to manage cross-border issues as well. There are mechanisms, but the challenge is that for the last 40 years or so we have had a very established mechanism for dealing with these issues. One needs to be assured that once we Brexit there will be a mechanism for doing that. I do not think there are many obvious ones that provide the comprehensive suite we have at the moment.

Abi Bunker: I suspect the political challenges of doing something with Russia might be even greater than the political challenges of continental Europe. You are right. The geese landing in Norfolk at the moment come from Siberia.

The Chairman: As a couple of the members of this Committee know, in the Arctic Council that co-operation tends to work, but we are not a member of that.

Trevor Hutchings: CCAMLR in the Antarctic has been meeting this very week. There has been evidence of progressive negotiations with Russia on marine protected areas in the southern ocean, so there are examples.

The Chairman: Thank you very much indeed for your evidence. If there is anything on which you wish to give us further evidence, we will be very pleased to take it in written form.