



European Union Committee

Uncorrected oral evidence: Brexit: Devolution Inquiry

Tuesday 21 February 2017

4.05 pm

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Members present: Lord Boswell of Aynho (Chairman); Baroness Armstrong of Hill Top; Baroness Brown of Cambridge; Baroness Browning; Lord Green of Hurstpierpoint; Lord Jay of Ewelme; Earl of Kinnoull; Baroness Prashar; Lord Selkirk of Douglas; Lord Teverson; Lord Trees; Baroness Wilcox.

Evidence Session No. 10

Heard in Public

Questions 92 - 101

Witnesses

I: Professor Sionaidh Douglas-Scott, Co-director of the Centre for Law and Society in a Global Context, Queen Mary University of London; Professor Roger Scully, Professor of Political Science, Cardiff University; Professor Jonathan Tonge, Professor of Politics, Liverpool University.

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Examination of witnesses

Professor Sionaidh Douglas-Scott, Professor Roger Scully and Professor Jonathan Tonge.

Q92 **The Chairman:** Good afternoon, lady and gentlemen. We are very grateful for your attendance at the Committee this afternoon. I think you are all familiar with the broad approach to these inquiries, so we can keep the preliminaries to a necessary minimum. This is a public evidence session of the EU Select Committee of the Lords, which, in light of the work being done on Brexit by all our constituent sub-committees, tends to concentrate on the constitutional issues affecting the British Isles and our near associates, the Crown Dependencies, and Gibraltar. They are not the subject of this inquiry, which is about the devolved nations, as I think you understand. We are very fortunate to have secured for our panel this afternoon Sionaidh Douglas-Scott, Roger Scully and Jonathan Tonge. It would be helpful for the record, unless you particularly want to make an opening statement, if you could at least identify yourselves. Then we will kick straight off with questions, if we may.

Professor Roger Scully: I am Professor Roger Scully. I am acting director of the Wales Governance Centre and professor of political science at Cardiff University.

Professor Sionaidh Douglas-Scott: I am Sionaidh Douglas-Scott. I am anniversary chair in law at Queen Mary University of London, and the special legal adviser to the Scottish Parliament European and External Affairs Committee's Brexit inquiry, although I am speaking today in a personal capacity.

Professor Jonathan Tonge: I am Jon Tonge. I am professor of politics at the University of Liverpool, and I was director of the Economic and Social Research Council's 2010 and 2015 Northern Ireland Westminster election surveys.

The Chairman: Thank you. If colleagues are happy we will start straight off with questions. Please make this as flexible as you feel is appropriate and omit certain questions and concentrate on other questions as you wish.

Could you each, in this case, give us a reaction to the Prime Minister's Lancaster House speech last month and the subsequent White Paper setting out the United Kingdom Government's approach to Brexit negotiations? In particular—this is really the subject of our study—what are the political, economic and legal implications for the devolved nations of the Brexit model that the Westminster Government are pursuing?

Professor Roger Scully: The speech and the White Paper itself struck me as very aspirational in nature. There is a lot of, "We aim to achieve things", without much clarity about how those things will be achieved—for instance on the issue of the Irish border, which Jon might wish to talk about in further detail. There is an awful lot of vagueness. When reading

through the White Paper, I noted down in all sorts of places, "That's very vague", or, "That's very unclear".

On the second part of your question—the political, economic and legal implications for the devolved nations—the Brexit model that we are looking at appears to be a relatively hard Brexit; there is certainly no full membership of the single market. Legally, there are numerous legal implications for Wales, which my colleagues Jo Hunt and Rachel Minto, whom you spoke to a couple of weeks ago, talked about. Economically, as is set out in the Welsh Government's and Plaid Cymru's White Paper, the economic implications of no single market membership and other aspects of withdrawal from the European Union look profoundly concerning for Wales. Politically, Wales is possibly the least problematic of the devolved nations in the sense that it has nothing that it can credibly threaten London with, but Brexit certainly poses considerable challenges for much of the political establishment in Wales, for reasons we might get on to later.

Professor Sionaidh Douglas-Scott: Starting with the Lancaster House speech and the White Paper, the timing was unfortunate as far as Scotland is concerned, because it came before any consideration or pronouncement by the UK Government on the Scottish paper, *Scotland's Place in Europe*. However, the content of the Prime Minister's speech suggests that she has of necessity rejected its first limb, which is single market membership for the whole of the UK. Whether consideration will be given to the second possibility of some bespoke, differentiated relationship for Scotland in the single market remains to be seen.

Other than timing, certain aspects of her speech were not completely accurate legally, such as the statement that if Britain were to remain in the single market as an EEA member it would not be leaving the EU at all. That is incorrect, because the EEA is distinct from the EU and does not include policies such as the common agricultural policy and the common fisheries policy. Nor does it have the jurisdiction of the European Court of Justice, and there is provision for a safeguard measure that could be used on immigration. There is a difference, so I felt that it glossed over the differences between single market membership and membership of the EU. I am concerned about the statement that no deal might be better than a bad deal. Who is to decide on that? Is Parliament to have a say? If so, what? And what about the role of the devolveds in that?

On the second point about the political, economic and legal implications of the Government's Brexit model, politically in the case of Scotland it raises the prospect of a clash over different perceptions of the impact of Brexit, and in so doing it exposes the fragility of the devolution settlement. The First Minister has said that the prospect of a second Scottish independence referendum is "highly likely". That is something to bear in mind and take seriously.

Economically, the Scottish Parliament obtained evidence from the Fraser of Allander Institute that was the first evidence to model the impact of

Brexit specifically on Scotland rather than on the whole of the UK. The figures that the Scottish Parliament was presented with seemed to lead to different determinations from those on which the Prime Minister was relying, because she suggested that Britain would be better off outside the EU single market, which seems to contradict the figures which the Scottish Parliament was presented with.

Legally, at this stage there are two points that I would flag up. First, the legal role of the devolveds in the Brexit process—the divorce deal, the Article 50 withdrawal agreement—is relatively slight in terms of their ability to participate and have a formal legal role in that. However, there are implications for Sewel legislative consent Motions in the context certainly of the great repeal Bill but possibly if there is legislation on the withdrawal agreement or a later free trade agreement. Whether one wants to look at that as purely political or something with legal implications I will set on the table and say nothing more about at this stage.

The Chairman: Thank you. Could I just come back on one point? I think we all appreciate—I am not holding a brief for the Prime Minister—that although she was making a considered speech, she was not speaking as a lawyer or primarily on the legal implications. Within the legal framework, which you are very well qualified to speak on, if we were to have a deal on the divorce settlement or the framework for a future agreement, whatever that should mean, and if, as we may find in evidence, there are differential effects on different parts of the United Kingdom and the devolved nations as a result, assuming it is negotiated by the Westminster Government with the European Council and European institutions, is there any legal redress for the devolved countries to be able to say, “It may be fair overall, but it isn’t fair to us severally because of a particular item”? Would they have a handle or argument on that, or would it be a purely political argument?

Professor Sionaidh Douglas-Scott: The main argument would relate to Sewel. The Supreme Court has pronounced that that is not legally enforceable, although politically enforceable is another matter. Issues were raised in the Miller case that have not been looked at with great consideration yet, such as Act of Union points. Without going into the detail of those, I would not rule them out completely as legal arguments that might be raised as relevant later on.

Professor Jonathan Tonge: I thought that the Lancaster House speech and the White Paper lacked nothing in ambition. On realising those ambitions, I will start on an optimistic note about what can be realised. Section 4 of the White Paper on protecting and maintaining the common travel area is a realisable goal—a mini-Schengen, if you like, between Britain and Ireland could be maintained. It appears in protocol 20 of the EU treaties. You can make a case legally that the European Union will have to approve any maintenance of the common travel area between Ireland and the UK. I do not see any reason why the EU would object to the maintenance of the common travel area. That is the optimistic bit:

section 4 on the common travel area is winnable, realisable and good news.

That is the optimism over, I am afraid. Looking at some of the other sections of the White Paper, Section 3 is on strengthening the union. There is some interesting phraseology. First, it says, "We will secure a deal that works for the entire UK". Secondly, it says, "We remain fully committed to the Belfast Agreement and its successors". There is no successor to the Belfast agreement. There is a modification in terms of the St Andrews agreement, but there is no successor deal. Presumably this refers to the necessary rewriting of the Belfast agreement, which, by definition, does not represent a full commitment to it: if you are having to rewrite strand two, which makes several important references to the European Union, clearly it is not a full commitment to the deal as it stands.

On strengthening the union, I do not need to tell this audience, but when you look at the extent of the binary in Northern Ireland, which is problematic as we speak given the collapse of the Government there and the looming election, some of the data are revealing: 89% of nationalists voted to remain, against only 35% of unionists. Some 88% of those identifying as Irish identify as having voted to remain, against 38% of British identifiers. Some 85% of Catholics, against only 41% Protestants, voted to remain; 86% of Sinn Féin voters, against only 30% of DUP voters; and 92% of SDLP voters, against 46% of UUP voters. So the binary divide is being reinforced in Northern Ireland by Brexit.

It is worth noting that the Belfast agreement is an agreement of two parts. It is a multiparty agreement, but it is also an international agreement between two states, Britain and Ireland. Arguably, it can only be amended via the agreement of those two states. I suppose that this is the dog that has not barked yet. What would happen if there was a challenge to any attempted rewriting of the Belfast agreement? The Irish Government are covered, in some ways, because the one area where they cannot be taken to the International Court of Justice in terms of international treaties is over disputes relating to Northern Ireland with the UK Government. So to some extent the Irish Government are in the clear on this. If the UK Government try to rewrite strand two of the Belfast agreement—or, indeed, any strand—the position is trickier. Technically at least, the British Government could be taken to the International Court of Justice, but this is most improbable. The only exemptions for the UK relating to the ICJ relate to former Commonwealth countries. Technically, Ireland was never a member of the Commonwealth because the Republic of Ireland Act was passed before then. So I am surprised that more fuss has not been made about challenges to any rewriting of the Belfast agreement, because the UK Government could potentially be put under some pressure there, however unlikely the prospect given that citizens cannot access the ICJ.

That is the legal position. I have outlined the politics of the binary divide. I am sure this will come up, but I have not even got on to the

impossibility of a non-border if you have a world of tariffs. While the White Paper was admirable in section 8 about, "Ensuring free trade with European markets", that would be only be via the permission of the European Union. So we will see the return of some kind of border in Ireland, but the nature of it is a matter for technical and political resolution.

- Q93 **The Chairman:** You will know that this Committee has done a separate inquiry on Brexit and the island of Ireland. This is a more generic one on devolution, but we are always in the business of learning. Could you reflect and drop us a line on the Belfast agreement with the points you have begun to draw out? It would be interesting to us. Just for now, to clear the point, the evidence we tended to have and which we reproduced in our earlier report indicated that membership of the European Union is not a necessary condition, although it was reflected in the Belfast agreement. I would like to get from you a flavour of whether the amendments to the Belfast agreement that would be required would be largely technical, reflecting the fact that Britain would not be a member of the European Union, or whether there would have to be issues of substance as well, which you might like to write to us about at greater length in due course. Is this a quibble, or is there something substantive that needs addressing?

Professor Jonathan Tonge: The brief answer is that it is a combination of technical and political resolution. Most of the references to the European Union relate to strand two, which is the all-Ireland dimension of the Belfast agreement. The annexe makes it clear that the all-Ireland programmes, whether it be Interreg or Peace IV and the peace programmes, take place and are managed within an EU context. Another paragraph of strand two indicates that any EU policies will be taken into account in the proceedings of the North/South Ministerial Council. The easiest way is simply for the UK Government, in agreement with the Irish Government, to delete any references to the European Union. You could have son or daughter of the Belfast agreement on that basis. The agreement would still stand. The management of cross-border projects would simply no longer take place within any EU framework. Of course, the UK Government have offered to underwrite the very considerable financial input that has been provided by the European Union via those four peace programmes. So financially there are no particular implications, at least in the short term. It would be more a question of deleting references, assuming that that is permitted, given that this is also an international treaty. It would be self-defeating for the Irish Government to oppose any rewriting or deletions of the Belfast agreement.

The Chairman: I thank you all for that introduction. They are obviously matters that we will want to keep in mind through this inquiry and maybe subsequently. For now, let us come back to more immediate issues.

- Q94 **Baroness Brown of Cambridge:** The referendum seems an awfully long time ago now—it was eight months ago—and I would be interested to know if and how public opinion has changed in the devolved

Administrations and how people now feel about the local implications for them. Perhaps I might start with Professor Scully again.

Professor Roger Scully: There is only one regular opinion survey in Wales—the Welsh Political Barometer poll, which we at the Wales Governance Centre conduct along with ITV Wales and YouGov. In the months and years leading up to the referendum it suggested that things were likely to be very close in Wales—as, indeed, they were. Since the referendum, we have continued asking how people would vote in a hypothetical second EU referendum. Basically, we have seen no substantive change. Opinion on whether Britain should be in or out is pretty much where it was. What is much more interesting is when you look into the details of the survey evidence we have in Wales. In particular, a number of questions that have been asked in several recent polls about things such as people’s expectations of the consequences of Brexit for themselves and for Wales, and what sort of Brexit deal they would like to see.

We see two things. First, there is no overall consensus in public opinion, and secondly we see very stark and continuing differences between those who voted leave and those who voted remain. Essentially, there is no sign at all of these two camps coming together and coalescing around preferred options, or even having a similar view of how things are going to turn out. Remainers overwhelmingly still think that Brexit is a bad idea. If it is going to happen, they want to see the softest Brexit possible. They think the consequences are likely to be bad for themselves and for Wales. Leavers are much more optimistic and want to see a pretty hard Brexit. There is absolutely no sign of these two camps coming together at all. We have seen no movement in that direction in the polls in the period since the referendum.

The Chairman: Would others like to comment, maybe with reference to the Scottish or Northern Ireland scene?

Professor Sionaidh Douglas-Scott: I can be very brief here because I am a law professor, not a politics professor. I do not have anything much to add, except that I am not aware that public opinion in Scotland has changed or that the desire to remain has diminished at all. Every single local authority voted to remain. I have not seen any figures that would suggest that that has changed.

Professor Jonathan Tonge: Public opinion is not regularly monitored in Northern Ireland. What opinion polls we have had have focused on the election, but the figures I outlined earlier show the stark polarity of the division. When 89% of nationalists voted to remain and only 35% of unionists voted to remain, you see the extent of the division. It was slightly closer on the unionist side. The Democratic Unionist Party—the largest party in Northern Ireland—advocated leave. They are unrepentant leavers. They argue that it is a great opportunity for Northern Ireland, as part of the UK, to trade freely throughout the world. The Ulster Unionist Party argued for remain. They have been the only party to produce a document: *A Vision for Northern Ireland outside the EU*. They have come

to terms very quickly with the result and would not necessarily be classed as a remain party any more. They say that the remain/leave division has gone and we are coming out of the European Union. That is the only significant change in public opinion.

Baroness Brown of Cambridge: Do you think that there are implications for those very divided communities in Wales and Northern Ireland?

Professor Jonathan Tonge: It is damaging. It has contributed to the political problems more broadly between unionism and nationalism, which have precipitated the election. It certainly fed into the mix. I do not see any reconciliation of views on the matter. The polarity of opinion is stark. I do not see any healing. It has been used by people. Gerry Adams of Sinn Féin has said that the fact that the UK is heading out of the European Union is a disaster.

Professor Roger Scully: The differences in Wales are less obviously dangerous than they clearly potentially are in Northern Ireland. There are clearly political dangers, notably for Wales's long-dominant party. The Labour Party has been dominant in electoral politics in Wales for almost a century, yet it found itself on the wrong end of a great many of its voters last June. There is no sign that those voters are coming back to it on this issue.

The Chairman: To probe that more generally, is there a sense across the three nations of what you might call antagonism, or at least a difference of approach, between electorates that are, in the case of Wales, by majority pro leave, and in the case of Scotland and Northern Ireland for remain—although certainly in the case of Northern Ireland more narrowly—as against Assemblies that were probably on the whole more pro remain? Again, I suspect that Northern Ireland might be an exception. Is this a sort of “us and them” issue? Our job here is to think about these things; it is not the job of the general public to do it. Is it a stand-off between the electors and those who represent them?

Professor Roger Scully: There is little doubt that the result came as quite a shock to much of the Welsh political establishment. A fairly overwhelming majority of Members of the Welsh Assembly, even after UKIP's success in last May's Assembly elections, were pro remain, including a clear majority of the Welsh Conservative contingent in the Assembly. It has been a particular shock to the Labour Party, which found pretty much all of its historic bastions in Wales voting for leave, often by substantial margins. It has also caused something of an existential crisis for Plaid Cymru, the party that came second in the Welsh Assembly election. Its long-term vision of independence within Europe, where Europe was clearly understood to mean primarily membership of the European Union, appears also to be no longer on the table, even as a distant vision. For both those parties—much of the centre-left establishment in Welsh politics—the result was a clear shock. We have seen, particularly in the Labour Party, a certain amount of floundering in

trying to reconnect with these voters whom they found themselves very much on the wrong side of.

Professor Sionaidh Douglas-Scott: I do not think it is as simple as that in Scotland—I mean simple in reference to your question implying “us and them”. Although the political establishment came out in favour of remain before the referendum, in the Scottish Government the SNP is the party that has the most leave voters—but it probably also has the most remain voters because it has the most voters. It is not very straightforward. The other difference would be the stronger groundswell of feeling in Scotland for protecting EU citizens’ rights than is noticeable in England. Although that might just have been the message that the Government are giving out very strongly, it seems to be affirmed by a lot of Scottish people, too.

Professor Jonathan Tonge: The outgoing 108-member Northern Ireland Assembly was broadly in touch with public opinion. There were 67 remain and 41 leave MLAs, which slightly exaggerated the remain majority among the population as a whole. Picking up on Roger’s point, members of the political establishment in Northern Ireland—if you want to call the DUP that—were shocked themselves, to some extent, by the fact that the UK as a whole had voted to leave. I have to attend party conferences in Northern Ireland and I attend the DUP’s party conference. Brexit did not figure highly in conference proceedings. I do not think there was any great strategy ready in response to Brexit. I do not think that the DUP had expected this vote.

Since then, people have been waiting for documents to emerge from the Executive, but we have an Executive who at times resemble something of a pantomime horse with the head and the legs not always going in the same direction, with a DUP-Sinn Féin axis. Clearly they have diametrically opposed views on Brexit and it is very difficult to co-ordinate any response. Obviously at times there have been fairly belligerent responses. The outgoing First Minister dismissed Enda Kenny’s idea of an all-Ireland civic dialogue as a “grandstanding forum” for remoaners. The argument from the DUP was that we have enough existing forums to deal with this issue, but we still await a definitive document from the Executive—and now we have the hiatus of the election.

The Chairman: Lord Green and Baroness Armstrong are about to come in, but, for the record, can I have one final bite of the cherry on the current election campaign in Northern Ireland? Possibly most of us do not follow this in detail day to day, but how much are Brexit-related issues coming to the fore in that as the political parties put out their stall? Is it relatively silent?

Professor Jonathan Tonge: It has been more of an issue of mobilisation on the nationalist side. It has been part of what I would term Sinn Féin’s equality agenda: they claim that they have been treated badly by the DUP and are not achieving sufficient results in the Assembly and the political institutions. Brexit feeds into that mentality. In the battle within the nationalist community for votes, Sinn Féin has been subject to

left-wing challenges from the People Before Profit Alliance, which supported Brexit from a left-wing perspective, so Sinn Féin is trying to recover ground within its own community from left-wing Brexiteers. It has played into the election in that sense, but I would not say that it was by any means the defining issue in the Northern Ireland election.

Lord Green of Hurstpierpoint: I have a question on Northern Ireland and public opinion. Is there a prevalent presumption that the common travel area will remain intact, or is there a fear that it might not?

Professor Jonathan Tonge: There is a presumption that the common travel area will remain intact, for all sorts of pragmatic reasons and because it predated the European Union.

Lord Green of Hurstpierpoint: I mean in public opinion.

Professor Jonathan Tonge: That question has not been put, but the people to whom I have spoken, in political parties and beyond, seem to assume that the common travel area will survive because of the growth of cross-border workers, for example. People have never known anything else. Because it predates the European Union, the answer that I get back from people is, "This has always existed. It is not a European Union device and therefore it will carry on in perpetuity". The problems that everyone acknowledges are what happens with customs arrangements and tariffs, but there is a common supposition that the free movement of people across the border in Ireland will carry on—business as normal.

Baroness Armstrong of Hill Top: I could ask, "How are they going to stop migrants?" That was one of the big issues for the DUP.

Professor Jonathan Tonge: The simple truth is that they cannot. Various options have been mooted. I have read your previous report. One option mooted by the UUP was that immigration policy should be conducted by the Republic of Ireland's Government in the same way in which, if you wish to travel to America, you clear customs at Dublin airport. There would be huge political sensitivities about the Irish Government managing UK immigration policy. Frankly, why should they?

Baroness Armstrong of Hill Top: That was a sort of throwaway comment. I wanted to come back to this issue: I do not think that enough work has been done on what leavers in particular want to see. I wondered whether you had any more information about that. You said that the leavers wanted a hard Brexit, but was that view uniform across leavers? Were there different groups, where for some the issue was sovereignty and for some it was migration? What are you finding when you are polling and having focus groups?

Professor Roger Scully: Since the referendum, the research in Wales that has been conducted has involved a small number of polls that have asked a small number of questions. We are intending in Cardiff to do much more detailed research in the next few months and we will happily share the results with this Committee. When we have offered people a

small number of options, such as staying within the European Union, retaining full single market access but limited control over immigration, and two or three other rather harder Brexit options, a very large majority—three-quarters or more—of leavers favour completely leaving the European Union without any agreement or some other version of a hard Brexit. When you probe elsewhere, what you find is a strong concern about immigration and control over migration. That applies to a very large number of people who voted leave—it was the key priority. In another question, we asked people to prioritise single market access over control of borders, if those are two alternatives. You see that remainers generally favour single market access, but a very substantial majority of leavers think that the most important priority is control of borders. That has come out clearly in the evidence that we have thus far in Wales.

The Chairman: Could I ask you to unpack that a little? At the back of my mind in the Welsh context is the fact that there is substantial income from EU funds to Wales and the Welsh Government. To what extent has anyone done any work on how much people are prepared to say, “We insist on taking back control”, even if it were demonstrable that that was not in their own economic interests? If the argument was to carry—I am saying this only for the purpose of the argument—that a deal would damage the steel industry or some other aspect of international trade in Wales, would they change their tune, or is it too early to say?

Professor Roger Scully: I am not aware of any specific research that has examined that precise question in the Welsh context. A small amount of work was done before the referendum posing hypothetical scenarios, asking, for instance, “If you were so much worse off, where would you stand?” I am never too sure how much confidence to put in those questions, because you are asking people to make substantial leaps of the imagination. It showed some degree of change, in that if you tell people that they are definitely going to be worse off by leaving, they are less likely to support leave, unsurprisingly. As far as I am aware, there has been no detailed work on that specifically in the Welsh context.

The Chairman: Is that generally the pattern?

Professor Jonathan Tonge: We did not ask a trade-off question in the 2015 general election survey in Northern Ireland, but we put the proposition: “Immigration has been good for the economy and society”. Contradicting all that I said earlier about the bipolarity of Northern Ireland, we found majorities against that proposition both within the unionist community and within the nationalist community. There is no point pretending that it is just hard-line unionists who are—if you want to use this word—illiberal on this question. There were majorities against immigration being a good thing within both communities; immigration is a concern within both communities. It is stronger within the unionist community, but the data was clear.

Baroness Brown of Cambridge: As a quick follow up, is “immigration” immigration from other EU countries or from elsewhere? Do we know which bit of immigration, or is it all immigration?

Professor Jonathan Tonge: We just put “immigration” in our survey.

Professor Roger Scully: We have asked about that a bit in Wales. For example, in the Welsh election study last year, we asked people about issue priorities. Immigration came right at the top, ahead of all the economic issues combined. We also asked a question that I have not seen asked elsewhere. We gave a list of groups, asking, “Who among these do you consider to be an immigrant?” For refugees from places such as Syria, people said yes. For people coming to Wales from places such as Poland, there was an overwhelming yes. A lot of people did not regard those coming to Wales from Ireland as immigrants. Students, who count in the net migration statistics, were not regarded as immigrants, even if they were there for three-year or four-year degree programmes. There has been some research on who is counted as an immigrant. Quite a few people who show up in the net migration statistics are not what many people think they mean when they are talking about immigrants.

The Chairman: A quick question from Lord Green and then we must move on.

Lord Green of Hurstpierpoint: In Northern Ireland, if it is not clear what immigration meant, is there any reason to believe that immigration from the Republic was included in people’s understanding of immigration?

Professor Jonathan Tonge: It could have been. In the eyes of unionists, the question could have been construed to include immigrants from the Irish Republic. I doubt very much that that was in the thinking of nationalists, but it is possible on the unionist side, yes.

Q95 **Lord Jay of Ewelme:** I want to go back a little to the Prime Minister’s Lancaster House speech, to which you have all referred to a certain extent. As Professor Tonge said, she committed to “working with the administrations in Scotland, Wales and Northern Ireland to deliver a Brexit that works for the whole of the United Kingdom”. The question that arises is whether it is possible to respect the referendum result while at the same time taking into account the divergent views of the three countries other than England as expressed in the referendum results. Is there a contradiction in what the Prime Minister said?

Professor Sionaidh Douglas-Scott: I do not think there has to be, because there are two ways in which the referendum result could be respected while taking into account the views of voters in each of the four devolved nations. One would be for Britain to retain single-market membership. That seems to have been ruled out, but in my view—some might disagree with me—that would be compatible with the referendum result. The other would be for some sort of special arrangements to be made for Scotland, as the Scottish Government have requested, for some sort of differentiated relationship. Politically that might not seem very feasible, but legally and technically it is possible, and it would be another way of reconciling the two.

The Prime Minister has said that she desires a Brexit that works for all parts of the UK, and it is important to remember, certainly with regard to finance, that certain matters are not reserved competences, such as agriculture, fisheries, environment, justice and home affairs. Two of those are large things, and Scotland, Northern Ireland and Wales do disproportionately better than England. There might be seen to be a certain inequity if Brexit were to result in a different financial settlement. In those circumstances, it would be hard to say that it was a Brexit that worked for all parts of the United Kingdom.

The Chairman: Just to be clear, it is a needs-based expenditure at the moment, is it not?

Professor Sionaidh Douglas-Scott: That is right, but if the basis for the funding were to be switched to, say, a Barnett formula or population basis once the money comes back from Brussels, the division of finance could look quite different. That has to be considered.

Lord Jay of Ewelme: Does it follow from that that the answer might be not to have the Barnett formula but to change the Barnett formula to a needs formula?

Professor Sionaidh Douglas-Scott: Yes.

Lord Jay of Ewelme: And that would largely remove the problem that you mentioned.

Professor Sionaidh Douglas-Scott: If the funding were to remain on the same basis as it is currently, that aspect of Brexit would not be iniquitous.

Lord Jay of Ewelme: Going back to the point you made before, is it politically possible that the United Kingdom other than Scotland could stay out of the single market but Scotland could remain in the single market? Is that realistically a possible outcome?

Professor Sionaidh Douglas-Scott: There has to be the political will, which it seems to me might be lacking. There are certainly precedents of differentiated settlements currently within in the EU. If we look at federal systems such as Germany, the Länder there have all sorts of powers, such as treaty-making powers, which Scotland would need if it were a single-market member. There are precedents from elsewhere in the world, and if there is the political will, that could be taken forward.

Lord Jay of Ewelme: Political will on both sides, in Edinburgh and in Westminster?

Professor Sionaidh Douglas-Scott: And in EFTA.

Lord Jay of Ewelme: Sorry, I do not want Scotland to dominate the answer to the question. Does anyone else want to answer it?

Professor Roger Scully: Incorporating Wales is less difficult in a sense, because Wales voted for Brexit, so respecting the referendum result there is not so hard to do. The issues there are clearly about the sort of Brexit we will have. The Welsh Government's and Plaid Cymru's White Paper very much sets out a vision of an extremely soft Brexit—trying to maintain maximum single market access, and various other points. We may come on to discuss some aspects of the Welsh Government's White Paper later. There are some very compelling economic and other interests for Wales that are clearly threatened by the prospect of Brexit, so if the UK leaves the European Union, the exact model against which it is conducted and whether any special arrangements are made for Wales will be extremely important. That may not be about respecting the views in terms of the result but about respecting the very clear views of the Welsh Government that have been put forward in recent times.

Lord Jay of Ewelme: But what about Northern Ireland?

Professor Jonathan Tonge: Given Northern Ireland's troubled political history, and in terms of democratic legitimacy, given that it voted to remain, there is a strong case for special status. However, in a response to Sammy Wilson, a Member of Parliament in another place, the Secretary of State appeared to rule that out as an option. There will be a de facto special status, because if the common travel area is preserved there is, to all intents and purposes, a distinctive immigration policy for Northern Ireland. You can argue that that is a form of special status. The problem comes when you extend that notion to tariff-free trade, because the obvious comeback from the European Union and from critics would be that if you import goods without tariffs into Northern Ireland and they are passed on to the rest of the United Kingdom, in effect you are circumventing the common external tariff of the European Union. So, in practical terms, special status will be remarkably difficult to achieve. I simply cannot see the European Union, based on the Interlaken principle that its first priority is to fellow member states, approving such a deal, whatever its attractiveness given Northern Ireland's special circumstances.

Lord Jay of Ewelme: Perhaps the words "special status" put too much weight on. Whatever happens in Northern Ireland will surely be different from what happens elsewhere in the United Kingdom. One of the questions is whether that is a precedent for Scotland, in a way. If it is different for another part of the United Kingdom, does that make it easier for it to be different in another part?

Professor Sionaidh Douglas-Scott: The argument is certainly being made that if special arrangements can be made for the border going through Ireland, those should be applied in the case of Scotland, were it to retain single market membership. I find it quite hard to see why you should make a case for Northern Ireland and not for Scotland on that matter. Yes, there are problems with tariffs and regulatory barriers, but again we have the precedents of Liechtenstein and Switzerland, for example, which are in a similar situation: one is in the EEA and one is

not, and both are in the customs union together. It has been tried and has been found to work, so with the will it might possible.

The Chairman: I suppose it is worth commenting that special status need not solely be about access to a single market. It can be about other areas, such as European research space, or whatever. There are other elements.

I will bring in two colleagues to ask you specifically whether there is anything to add on the two devolved Governments' recent White Papers. The first is Lord Kinnoull, from Scotland.

Q96 **Earl of Kinnoull:** I should declare that I live just outside Perth.

I have two questions. First, this is a very small question and is aimed at Professor Douglas-Scott. Did you take issue with anything in *Scotland's Place in Europe*? It is quite a long document, with a whole series of statements.

Secondly, and rather more importantly, during this inquiry we have struggled to understand what different position Scotland is in. I will explain that a bit more. If the UK is to go to somebody else and say, "We'd like a deal with you, but for a bit of us, Scotland, we need a different deal", we have to be able, in my language, to make the broke. We have to be able to say simply why there should be a different deal for Scotland. As you tour through the various different deals around the EU, there is always a reason behind them. Could you encapsulate that difference and why it is not just another chunk of the UK?

Professor Sionaidh Douglas-Scott: Starting with your second point first, why make a case for Scotland? It has been said that the democratic argument is very important, and as the democratic argument is seen to be generally important in the context of the referendum—people voted for a certain thing and were told that it would happen—it should also be respected in the case of Scotland, where 62% of those who voted voted to remain.

Moreover, in Scotland you have greater evidence of a tradition of popular sovereignty than in England and Wales, where talk of popular sovereignty is now growing in the context of referendums. There is a democratic argument that carries a lot of weight. Scotland does have issues with immigration and a falling birth rate, and there may be an economic case to be made separately that Scotland has a greater need for immigration than England does. Certain sectors would make that argument in Scotland. I find the democratic argument quite persuasive.

Your first question was whether there is anything I would take issue with. There was nothing I specifically disagreed with. It is aspirational, as has been said about the UK Government's approach, and it depends on a lot of political will that might not be there to do a lot of things, including giving Scotland a separate legal personality and a great deal more devolution. That is quite a big ask. There could have been greater clarity on certain matters. Beyond the single market, as has been raised, what

other areas would it be desirable for there to be co-operation on? As Scotland has a separate legal system, justice and home affairs would be of particular interest in relation both to criminal matters, such as the European arrest warrant, and to civil and family law matters. I would like to see more on that generally, because these are incredibly important matters that are not being given the thought that they need.

Baroness Wilcox: This is mainly to Professor Scully as this is on Wales and the Welsh Government's paper, *Securing Wales' Future*. I ask the same questions, really. What in the paper do you agree with? What do you take issue with? How realistic are the proposals they are setting out?

Professor Roger Scully: We should note first that this White Paper was agreed not just by the Welsh Government but with Plaid Cymru.

Baroness Wilcox: Yes, indeed.

Professor Roger Scully: It represents a fairly substantial consensus with parties that between them account for two-thirds of the seats in the Welsh Assembly. A lot of the substance of the policy is very difficult to object to. I believe the late Lord Jenkins used to say that an interesting statement is one where a sane person can say the opposite. A lot of this is essentially about setting out the very compelling economic and other interests that Wales has at stake here. Wales has a relatively poor economy that depends to a great extent on a small number of export-oriented manufacturing businesses. Its rural economy depends much more heavily than the rural economy in England does on export-oriented livestock agriculture, which could be greatly hit by being removed from the common agricultural policy. It receives much greater levels of subsidy there. There are the structural funds and other EU money that have particularly supported valley communities. There are other issues in higher education—our field—where Erasmus, European research funds and so on are a very compelling interest. All that is set out in the White Paper. Frankly, it would have been bizarre if it had not been. All that is entirely reasonable. There are compelling interests in Wales that need to be defended.

What is more problematic in the White Paper and is highly unlikely to be achievable is what is set out on changes to intergovernmental machinery. The White Paper says on page 8, "The scale of change", following Brexit, "demands that the UK itself be remodelled". It says that, "current inter-governmental machinery will no longer be fit-for-purpose and new ways of working ... must be developed". The Welsh Government—and here they will find common ground with Plaid Cymru—have set out what we might call a radical devolutionist unionist position, arguing for a substantial change to the UK, in particular the establishment of mechanisms for intergovernmental working that depend much more on parity of esteem between the different Governments.

Certainly the problem for the Welsh Government is that they are unfortunately the only Government in the UK who fully believe in that. This sort of radical remodelling of the UK would be very difficult if all the

different participants fundamentally agreed with it. Even so, remodelling things that radically would be difficult. However, we have in Scotland and when the Government is functioning in Northern Ireland one and a half of the other Governments who do not even fundamentally believe in the UK.

We have even greater problems with the UK Government, where in Westminster and Whitehall there is a fundamental problem. There is a substantial understanding in London of the dimension of devolution that scholars would generally term self-rule. There are varying degrees of enthusiasm, but there is an understanding of the granting of powers to devolved Governments and Parliaments in Edinburgh, Cardiff, Northern Ireland and so on. There is very little understanding, let alone enthusiasm, for creating the dimension of what scholars call shared rule, where the individual constituent units would participate in their own right in the sharing of powers across the whole state. That can be in the form of the upper house in the German Parliament, where representatives of the Länder Governments participate directly in law and policy-making. It can be in the forms of mechanisms you see in Australia, for instance, where the different territory and state governments participate on a more or less equal basis with the Federal Government in the allocation of resources. There are various ways in which shared rule can be manifested, but for the sorts of stuff the Welsh Government are talking about in their White Paper to occur they would require such a radical change in the mindset of the core UK state that those ambitions are extremely unlikely to be realised. As I said, the Welsh Government have put a position here that would be difficult to achieve even if they had principle support elsewhere. Unfortunately for them, they do not.

The Chairman: Thank you. We will go on to a lot of the machinery issues about where we are now and where we might begin to develop in a moment. Before we do, we have Baroness Armstrong on the Northern Ireland perspective.

Q97 **Baroness Armstrong of Hill Top:** We clearly do not have a position from the Northern Ireland Executive—indeed, at the moment we do not have a Northern Ireland Executive. When we were in Dublin and Belfast we talked with people who felt this was a big disadvantage to Northern Ireland in terms of people's awareness of what their position might be and of their negotiating strength. Could you comment on that? What Professor Scully said about demanding more devolution for Wales and more of a federal UK raises the issue of how you think the UK Government should be in dealing with the devolved Administrations. Should we look for a different answer for each of them, or look at a UK solution? Will that be satisfactory, given the current position in Northern Ireland and the pulling on the Good Friday agreement?

Professor Jonathan Tonge: It is obviously unsatisfactory that we do not have an Executive in place offering input. If the Executive were in place, though, their two halves would offer very different views anyway. We have been reliant upon the very healthy co-operative bilateralism of the British and Irish Governments, which has been hugely welcome, very cordial and necessary. Northern nationalists are reliant on the Irish

Government acting as their voice at present, given the collapse of the Executive. I remain very pessimistic that an Executive could be formed very quickly after 2 March.

Until we get to that point, we have a problem with adequate representation for Northern Ireland, and that is before we can get on to talking about whether further powers should be devolved to Northern Ireland and what EU competences might be rolled out to Northern Ireland. That is not to denigrate the Executive; there have been significant achievements in the devolution of powers. The devolution of policing and justice in 2010 was a major achievement, given the problems that have been there in the past. At the moment it is simply about getting the show back on the road before we can even contemplate what powers can be rolled out.

On input, at least there is a whole series of mechanisms, whether it be the British-Irish Parliamentary Assembly or bilateralism between the two Governments. There is also the joint ministerial EU committee. There are some mechanisms for Northern Ireland to have input, but no one can pretend the situation is satisfactory.

Q98 Lord Green of Hurstpierpoint: Turning to how the negotiations might pan out, the Prime Minister committed to working very carefully to ensure that as powers are repatriated from Brussels back to Britain, the right powers are returned to Westminster and the right powers are passed to the devolved Administrations. Two or three questions arise from that. Which EU competences should be transferred to the devolved Governments after Brexit? By the way, is there an issue with whether those go via Westminster and thence are re-delegated to the devolved Administrations, or is there some preference that the Governments of the devolved Administrations are likely to have to bypass Westminster, if only to ensure they really do get their hands on the powers? That is one question. How can the devolution powers be reconciled with the need to protect the integrity of the UK single market? That question is given more edge to the extent that the Scottish proposals get any traction. It is very hard to see how you can have Scotland part of the single market where England is not without installing a physical border between the two. Lastly, are there any powers that are currently reserved to the UK Government that you think should be devolved as a consequence of Brexit?

Professor Roger Scully: Thank you. Those are nice, simple questions. Frankly, I cannot completely answer all aspects of them. One general point is that with the passage of the recent Wales Act we now have versions of reserved powers models of devolution for Wales, Scotland and Northern Ireland in place. The basic implication of the reserved powers model, certainly according to all my lawyer friends, is that everything is devolved except that which is explicitly reserved. Any powers coming back, unless they are explicitly reserved, ought therefore to be going to the devolved level. That should be the default position. Speaking from the Welsh perspective, I have to say that the recent Wales Act is not widely seen as a triumph of constitution-making. To put it at its mildest, I

would suggested that the ham-fisted and ungenerous way in which the new devolution settlement was put in place has created a substantial amount of ill will and lack of faith in Whitehall and Westminster to deal generously and fairly with Wales in the context of devolution. That creates an extremely bad atmosphere for thinking about powers coming back from the European Union. The Prime Minister's statement—the White Paper said similar things—talked about the right powers returning to Westminster and the right powers passed to the devolved Administrations.

Who defines and decides what is right? That is a fundamental question. Under the concept of self-rule I spoke about, maybe Westminster and Whitehall can decide which powers to grant. If we have a more genuinely co-operative arrangement, maybe there could a broader attempt to discuss and agree the allocation of powers, but at the moment this Parliament essentially can pass legislation that can change those divisions. Doing that in an ungenerous way, as was recently seen with Wales, could cause some problems for Welsh devolution. It could cause far greater political problems for Northern Ireland and Scotland.

Professor Sionaidh Douglas-Scott: Certainly the Scottish Government would take the view that there are certain matters that are currently EU competences that, because they are not reserved to London, are devolved. Those are some quite important areas such as agriculture, fisheries, environment, justice and home affairs. There would be a lot of anger if those did not come back to Holyrood on Brexit. There is the question of how a common UK agriculture policy, and for fisheries and so on, would be worked out, but there are three pieces of legislation that deal with devolution. The Scotland Act 1998 does not include agriculture, fisheries, the environment and so on as reserved competences. If they were to come back from the EU to London, that legislation would have to be amended. I have no doubt that the Scottish Parliament would not give its consent for that. One would have to appreciate that even if Westminster decided to go ahead and legislate none the less, without legislative consent there would be some sort of constitutional problem, if not a crisis.

There is the separate issue of funding and where that goes; it does not necessarily follow the competences. That is a separate issue. Aside from that, there are other competences that would be needed for the Scottish differentiated option in *Scotland's Place in Europe* to be workable—other competences that relate to the whole nature of the EU single market, so the free movement of goods, persons, services and capital. Scotland would need to have greater powers there. There was talk up to the referendum of immigration, or bits of it, being devolved. That would definitely be one to think about, but, in addition, competition law springs to mind as something Scotland does not have control of now. Again, if Scotland is to be in the single market it is something that would be important.

There is also regulation of professions and things like that. Because Scotland has a separate legal system it could regulate its legal professions, but there are all the other professions as well. If you have a single market, there would be free movement of professional people from Scotland to elsewhere in the EEA, so there would need to be something for that. There would be a need for quite a bit of further devolution for that to be workable.

As I mentioned earlier, there would also be a need for Scotland to have some sort of legal personality. That is certainly what the Scottish Government are asking for, because if it is a member of the EEA or EFTA, it will be part of EFTA trade deals. Scotland being part of a trade deal would give rise to problems with the rest of the UK. I am not quite sure how you would reconcile that. From my perspective, that is perhaps the most difficult issue to reconcile. The free movement of goods and persons are less problematic than the trade deals problem. The free movement of persons is workable. The separate national insurance number that has been suggested for EEA immigrants to Scotland might be workable, but the trade deals and the external aspect of competence is a bit of a problem.

Professor Jonathan Tonge: I do not see the Northern Ireland Executive, assuming that we do not head for a period of direct rule, being in a position to acquire any new competences. I would simply expect rolling back to the Northern Ireland Assembly in areas such as agriculture and environment and allowing it to pick and choose which aspects of EU legislation it wishes to retain. Northern Ireland is probably at the height of its capacities in terms of the amount of power that ought to be devolved to the Administration, given their inherent instabilities. A radical option would be to give the Northern Ireland Administration control of immigration policy. I do not see that happening, but it would be a radical option. What obviously concerns me, although it is not directly EU-related, is the ECHR and the abolished role of the European Court of Justice. Obviously that could adversely affect Northern Ireland, because it was a very important confidence-building measure for nationalists. That is serious.

Lord Green of Hurstpierpoint: I have a follow-up question on the Scotland case. It is certainly possible to see how you can have a different regulatory environment in Scotland from the rest of the UK. It already exists to some extent because there is a different Scottish legal system. It is possible to see how the free movement of capital could be managed, because that is fairly borderless anyway. I can just about get my mind around managing to make immigration work with differential residence rights in Scotland from the rest of the UK. The really difficult one is goods: what do you do with goods shipped from England to Scotland and thence into the single market? There are very significant complexities in all this. That is more a statement than a question.

The Chairman: I sense that the panel is nodding, at least to the difficulties.

Professor Sionaidh Douglas-Scott: Again, the Scottish paper suggests ways of managing that. It keeps giving the Liechtenstein-Switzerland example of a product that can be marketed only in Liechtenstein and not elsewhere in the EEA if it is Swiss and conforms only to Swiss regulatory standards. It would be complicated, but Brexit is complicated. The whole idea of the customs tariff having to apply will be a problem in any case.

Lord Green of Hurstpierpoint: The difference between the Liechtenstein case and the Scotland-England case is that there is no border between Scotland and England at the moment.

Q99 **Lord Teverson:** I want to explore the great repeal Bill more. If we take the environment, as mentioned by Lord Green and which is already a devolved area, the Government's stated aim is to make environmental legislation look the same before we leave as the day after we leave. In all those areas, the UK is making law for the devolved nations in the areas in which they have devolved responsibility. It gets more complicated with agriculture and in particular for fisheries, where you have external international agreements. I find it difficult—maybe I am being thick—to work out how this passes from Europe to a great repeal Bill into devolution. Will it just stay there and then transfer to the Scottish Parliament or whatever to be reinterpreted?

The Chairman: Could I just add a question that is helpful to us, looking forward to the next stage? People talk about the great repeal Bill, although it may be a complex of Bills required to de-Europeanise and then re-enact the existing acquis. On devolved matters, assuming that agreement is reached on where they should rest with the devolved nations, do you envisage that there will be separate national legislation carried out by the Scottish Parliament, the National Assembly and the Northern Ireland Assembly to embrace those devolved powers, or will there be legislative consent to the centre to roll them up into the great repeal Bill and then farm them out as part of that? I do not think anyone has mapped this yet.

Professor Sionaidh Douglas-Scott: I think that is quite right, but it is clear that Westminster could not legislate a great repeal Bill including environment and agriculture without asking for consent. It would be possible for Westminster to do it in one piece of all-UK legislation, but it would have to ask for that consent. Beyond that, there will obviously have to be a lot of discussions about the best way to go about it and whether devolved Parliaments might pass their own legislation on devolved matters.

Professor Roger Scully: One general issue here is that many of the devolved responsibilities—most obviously things such as agriculture and the environment—have been exercised in such a heavily Europeanised framework. It is like a scaffolding that has been around those devolved responsibilities and that will suddenly be taken away. Obviously there are questions about whether we need a UK-wide framework to replace it. It may well be of importance for Welsh livestock and agriculture, and for animal safety and movement and so on. It is noticeable that the UK

Government's White Paper is extraordinarily vague, even by the standards of this rather vague White Paper. It says that, "no decisions currently taken by the devolved administrations will be removed from them". Where you are largely implementing policy decided at a European level, how much of a decision are you making? That is certainly not saying that all competences in these areas will remain with the devolved Administration at all. That was flagged up in the Prime Minister's Lancaster House speech: "The same rules and laws will apply on the day after Brexit as they did before. And it will be for the British Parliament to decide on any changes to that law". There is no mention of the devolveds at all.

The Chairman: I have a number of colleagues queuing on this and we have a couple of other technical issues to discuss. I am sorry: Jonathan.

Professor Jonathan Tonge: Briefly, there are two issues with the passing of a great repeal Bill for Northern Ireland. First, Section 6 of the Northern Ireland Act makes it perfectly clear that the Secretary of State can legislate however he wishes. He could simply pass a great repeal Bill and there would be no need for consent, desirable though it may be, from the Northern Ireland Assembly. It would be risky to say that you need the consent of the Northern Ireland Assembly for any generic, holistic repeal Bill, because I am not sure you would get cross-community consent for it. It would derail the whole thing. Section 6 of the Northern Ireland Act would pertain and the Bill would go through. I am fairly sure that the requirement for cross-community consent would not be fulfilled for such a Bill.

The Chairman: Thank you. I was going to abstain from any discussion of the budgetary issues and their consequences in the interests of time. On these issues, I have Baroness Brown then Baroness Browning.

Baroness Brown of Cambridge: I wondered whether you had any insight as to whether the devolved Administrations had the kind of resources and competence to cope with all the potential change coming along.

Professor Roger Scully: There is an interesting question about whether the UK state has. This is arguably the most complex thing the UK state has done since fighting World War II. It is a state the capacity of which has been significantly denuded by several years of austerity. Leaving that to one side, in the case of Wales there are significant problems both in the Executive and even more obviously in the legislative branch. The Executive of the Welsh Government is not particularly large by these standards. I am sure that is also the case for Scotland and Northern Ireland: Brexit has so many manifold potential implications that it is almost certain that there will be a substantial crowding out of policy initiatives and resources to devote to running the rest of the show, to put it crudely.

On the legislative side, the National Assembly for Wales remains as it did when it was just elected. It is a 60-member institution—extremely small

by most international standards. When it was first set up, it had only secondary legislative responsibilities. It has since acquired substantial primary legislative responsibilities. It is in the process of acquiring substantial taxation and borrowing powers. It will now have to implement for the next two years a change in the fundamental model of devolution from a conferred powers model to a particularly confusingly constructed reserved powers model. Then throw on top of that all the many challenges of Brexit. Frankly, the National Assembly for Wales was already failing to do its job properly in having proper degrees of specialism and scrutiny of Executive actions. The National Assembly for Wales is preposterously underresourced in its elected membership and its support staff. There simply will not be the capacity in terms of specialism, expertise and person hours to do a proper job of scrutinising all the many Welsh dimensions of Brexit. It simply will not be able to do that competently. We ought to be very explicit about that. Unless we have a substantial step change in the size of the National Assembly and the resources devolved to it, it will not be able to do its job properly.

The Chairman: I am going to alter our running order slightly, partly in the interests of time and partly because this is cognate. Lord Selkirk will ask his generic question on the points that you have just touched on in relation to Wales.

Q100 **Lord Selkirk of Douglas:** You have talked about this subject thoroughly, but may I put it to you like this? We put this question to the SNP Minister, who, as you can imagine, wanted everything as soon as possible and approached the subject from a premise different from that which most of us would. The question is about the capacity and resources to take on additional responsibilities. Do the devolved institutions, as they are now constituted, have sufficient capacity and resources? If the answer is no, what steps need to be taken to ensure that they do?

Professor Roger Scully: In the case of Wales, we have needed for some years, and Brexit has made the case substantially more pressing, a larger elected National Assembly. Frankly, we probably also need a significant injection of additional expertise into the executive branch. The need is most obvious—indeed, glaring—in the legislative branch, which was already falling well short of the capacity that it needed to do its job properly. Brexit makes the gap between capacity and responsibilities all the more glaring, if not embarrassing.

The Chairman: I think we now have the point on Wales. What about Scotland and Northern Ireland?

Professor Sionaidh Douglas-Scott: I take the point that Brexit is a challenge all round for capacity and abilities. Scotland is in a somewhat different position from Wales, because it had an independence referendum two and a half years ago and saw itself potentially able to be an independent country, with departments in all areas, so a bit of work was done then, with some research into the resources that would be needed. The other thing, of course, is that Scotland is the only one of the devolved Administrations to have a Brexit Minister. On this case, it is

taking seriously what it sees has to be done. However, I come back to that first point: Brexit is a challenge all round in terms of resources.

The Chairman: And Northern Ireland?

Professor Jonathan Tonge: The Northern Ireland Assembly is being cut in size from 108 to 90 Members. Given the fallout from Brexit, that is a mistake—I would probably not have said that a year ago. The Northern Ireland Assembly has also only just moved to a system of Government and Opposition. We have an embryonic Opposition, which was only formed last year; it is still at the fledgling stage and is still not fully developed, so there are issues with scrutiny. What this will do, and it will have to do it, is turn the Northern Ireland Assembly from essentially a part-time body into a full-time one. That will be the consequence, because it simply could not cope sitting for a couple of days a week with the workload that will arise from the things that have been highlighted this afternoon.

Lord Selkirk of Douglas: May I ask about timescale? What timescale do you envisage it will take to sort all this out?

Professor Sionaidh Douglas-Scott: One issue is sequencing. We know that there is this divorce agreement with Article 50 negotiations, which cover certain matters, but there is disagreement about whether some bespoke free-trade agreement with the EU can be concluded in that period. Most EU officials seem to say that it cannot and that it has to be separate and after the divorce agreement, whereas some members of the UK Government are saying otherwise. If you do not know what sort of trade deal you will have two years from now and what it will look like, that will slow down the process considerably. You will be thinking about not the implementation of the deal that the Prime Minister was talking about but some sort of transitional agreement and what that might look like. It is hard to predict right now, because we just do not know about the sequencing.

The Chairman: We have three more issues to raise and they are all, in a sense, cognate to one area: how the arrangements are taking into account the strain and the devolved nations' ability to make their input. Looking at the time, I will ask my colleagues to raise the questions collectively and perhaps you can give a suitably collective reply. Before I do that, I know that Baroness Browning, who was omitted earlier, wants to come in.

Baroness Browning: My question was on a very narrow matter to do with agriculture, so I am happy for you to press on.

The Chairman: I think that at this point we can roll the pitch. We are having such an interesting set of exchanges that we will want to continue with them as these matters become clearer. I will ask, in order, Lord Teverson, Baroness Prashar and Lord Trees to raise the issues, and then perhaps you can each give a response.

Q101 Lord Teverson: I am not a devolution expert, except perhaps when it comes to Cornwall, but I would like to know about the priorities given to the devolved institutions, particularly the Joint Ministerial Committee. Is that being taken into account enough? Does it have the right resources? Is it up for the job? Is it being used?

Baroness Prashar: My question is about the existing mechanisms for interparliamentary dialogue between Westminster and the devolved legislatures. Are they sufficient to deal with the challenges of Brexit? If not, what new structures are needed?

Lord Trees: My question is rather different. Up to now, all our questions have concerned the relationship of the devolved Administrations with Westminster and the issues around that. My question is about the extent to which the EU institutions and the member states understand, are cognisant with, have sympathy with and are likely to take into account the special circumstances of the devolved Administrations.

The Chairman: Are you happy with the scope of those questions? Who would like to go first? Professor Scully.

Professor Roger Scully: Perhaps I might respond first to Lord Teverson. Generally speaking, scholars who have looked at the work of the Joint Ministerial Committee and so on—not just on Brexit, but since the onset of devolution—have frankly not been terribly impressed by the robustness of the mechanisms that have been put in place for intergovernmental dialogue. It is arguably regrettable that stronger and more regular forums were not put in place in easier times in readiness for the rather difficult circumstances now.

It was interesting to read the evidence given to the House of Commons Brexit Committee a couple of weeks ago, in particular the responses of the Scottish Minister, Michael Russell, to Questions 888, 889 and 891. It is quite extraordinary. Asked how many meetings of the JMC there had been, he said, "Today's is the fourth. It meets this afternoon, though I am afraid I could not tell you where". He had not been told in what room. Asked what consultation there had been on the proposed Article 50 letter, he said: "We have not seen a draft letter. We do not know the date of submission of that letter. We have not seen a paper that proposes content for that letter". Everything that he said, as the relevant Minister in the Scottish Government, suggests that levels of consultation are a very long way below what some of the Prime Minister's earlier rhetoric might have suggested, which I think is extremely concerning. If we are serious about involving the devolved Governments properly in informing the UK Government's position and if we are serious about having a Brexit that works for all parts of the UK, I think that Mr Russell's evidence is extremely worrying.

On the final question, on the extent to which the EU institutions and other member states are aware of specific circumstances and concerns, that will vary a great deal. To some degree, it will vary between the different devolved nations, but also between the different member states. Many of

these states are internal federations or have substantial autonomy for particular regions, so some of these ideas are not particularly unusual to them. For instance, you do not have to explain to a Belgian or German politician the idea of devolution or federalism. It is probably also fair to say that different devolved nations have different levels of profile internationally. Speaking from the Welsh point of view, I think that Wales is almost certainly the least well developed in its international profile and its profile with the other states, although the Welsh Government and other Welsh institutions have been seeking to rectify that. However, I suspect that they still lag a long way behind Scotland, and for other reasons Northern Ireland, in the degree of attention to their concerns.

Professor Sionaidh Douglas-Scott: I completely support what my colleague said about the JMC. “Deeply frustrating” is a phrase I have heard expressed again and again about JMC meetings. As far as I understand it, it was moribund before Brexit, with the exception of its EU configuration. It is not moribund now, but the problem is that it is not an executive body. It is for an exchange of information. What the devolveds want is a much greater participation and, if possible, some sort of legal or political guarantee. The JMC is just not the forum for that to be achieved in. Other states such as Germany—my colleague mentioned the situation of the Länder and their particular role in the Bundesrat—have the ability to say, “This affects our devolved competencies. We want this done”. We do not have that. That is a real problem.

Lord Teverson: Very briefly, does it not work because this end does not want it to work but all the others do, or is it generally seen as something that is not fit for purpose and never will work?

The Chairman: That would be useful to know.

Professor Sionaidh Douglas-Scott: I suspect that the devolveds would like it to work better. In the past, I have heard it expressed with regard to the JMC that there were better ways of getting things done: direct ministerial or direct departmental contact, rather than the JMC. It was rather ignored in the past. Brexit is complicated enough. If we are then going to ask whether it is the Cabinet Office that will deal with these matters or whether it will be department to department, it will be complicated even further. There is a need for clarity over which particular body should deal with certain matters.

Secondly, I guess you are in a very good position to reflect on inter-parliamentary dialogue. In my experience from working with it, the Scottish Parliament committee has had meetings with committees here in Westminster. They have been quite hard to arrange and have sometimes fallen through at the last minute. That suggests that it is not the easiest thing in the world to organise. Parliamentarians are very busy people. I am not sure how successful trying to formalise that more would be, but on the other hand there is probably a lot of duplication going on in committees not just between Parliaments but within Westminster itself. How many Westminster committees are reporting on Brexit in some way

or another? How will they co-ordinate what they are doing? I am not so sure about mechanisms for dialogue.

The Chairman: Can I just interpose on that to cut a final question out? Is it not also important that the infrastructure, such as the ability to have clerks in committees across the devolved Administrations and from Westminster, should consult, and equally that civil servants should feel readily able to consult their colleagues? Is this the kind of wiring that needs to be put in place?

Professor Sionaidh Douglas-Scott: It probably is. Right now it is working a bit on personalities: conveners and chairs often try to establish links. It might depend on who the convener is and how proactive they are.

On the final point about the extent to which EU institutions will take account of the devolveds, there is a reluctance to admit to doing anything overtly, certainly on the part of the Commission and the Council, but as I understand it the European Parliament, in particular Guy Verhofstadt, has been friendlier to certain Scottish interests. Guy Verhofstadt will obviously play an important role in Article 50 negotiations because the Parliament's consent will be needed. There seems to be a more positive feeling in Scotland while there is a claim that nothing formal is going on.

Professor Jonathan Tonge: It is obviously very difficult for the UK Government to identify and reflect the position of the Northern Ireland Executive, because it currently does not exist and we do not have a First Minister and deputy First Minister in place. In so far as there is a common interest, it is in preserving the common travel area and minimising a border with no return to a hard border. That is fairly reflected in the White Paper the Government have produced. So there is a semi good news story there.

Inter-parliamentary dialogue is excellent. There is the British-Irish Parliamentary Assembly, the North South Ministerial Council and the British Irish Council. There is a very good set of arrangements and institutional apparatus in place.

There is EU recognition of the problem. I have been asked by the EU Parliament's Constitutional Affairs Committee to produce a report outlining the particular problems for Northern Ireland, so there is certainly recognition and a very acute awareness within the European Union of the problems with Northern Ireland. Given that the EU has financially underwritten the peace process, that is perhaps not surprising. The question is what the EU can now do. If the UK Government are not going to ask for special status for Northern Ireland, the EU will not give it. To some extent that particular ball is batted back into the UK Government's court. Then the EU's response will be properly tested.

The Chairman: Thank you. Unless there is any burning wish to ask further questions, I am conscious of the time, and the time you have given to us this afternoon. On behalf of the whole Committee, I am sure,

I would like to record our thanks for some fascinating exchanges that have gone into these extremely complicated matters and informed us hugely. We are very grateful for that. We will send you a transcript for the correction of any factual points. We are very much in the market for continuing dialogue. There was the specific issue, Professor Tonge, of the Belfast agreement and what in it might need to be modified, and indeed upcoming work relating to opinion or some of the legal aspects of this. To borrow a phrase from trade negotiations, we would very much like to see a living relationship with you as this process develops, from now, through our report and into the negotiations. We therefore record the thanks of the Committee, and I will now close the public session.