



Select Committee on the Constitution

Corrected oral evidence: Parliamentary scrutiny of treaties

Wednesday 5 December 2018

10.15 am

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Members present: Baroness Taylor of Bolton (The Chairman); Lord Beith, Baroness Corston; Baroness Drake; Lord Dunlop; Lord Judge; Lord MacGregor of Pulham Market; Lord Norton of Louth; Lord Wallace of Tankerness.

Evidence Session No. 5

Heard in Public

Questions 42 - 50

Witness

I: Alexander Downer, Former Australian Minister for Foreign Affairs and High Commissioner to the UK.

Examination of witness

Alexander Downer.

Q42 **The Chairman:** Good morning, Mr Downer. We are very pleased that you are able to join us. We were talking earlier about transport problems. We can all have difficulties. You have quite a range of experience and you are well known to quite a few members of this Committee because you have been very much involved in Australian parliamentary affairs and government for quite some time.

We have heard a little about how the Australian system works—there is the Joint Standing Committee on Treaties—so I wondered whether, given the experience you have, you could perhaps give us an overview of how effective you think that committee is for treaties in Australia.

Alexander Downer: First, I apologise for being late. I am terribly sorry about that. I am most embarrassed. In the process of rushing in here, I have left my iPad in a security checking area, so I do not have the notes that I had laboriously made for this meeting, but I can probably remember what I was going to say.

First, perhaps I could put this into an historical context. Australia, of course, is different from the UK in many constitutional respects. It has a written constitution and it is a federation. It is really important to keep those two points in mind.

Secondly, treaty making in Australia is ultimately the prerogative of the Executive under a combination of Section 61 of the constitution, which defines the role of the Executive, and Section 51 of the constitution, which delineates the powers of the federal Parliament. The residual powers in our constitution rest with the states, if you understand my point about residual powers. The federal Government, and particularly the federal Parliament, have defined powers. One of those defined powers is the power over external relations.

Although we have a federation and, in a constitutional sense, the six states of Australia are all sovereign, nevertheless Australia is a single country, the Commonwealth of Australia. It was judged by the founding fathers of the Australian constitution in the 1880s and the 1890s that you could not have a nation or a single country if it did not have a single external affairs policy. You would sympathise with that.

This leads directly to treaties. Initially, all Australian treaties were essentially British treaties, and treaties were made by the Executive here on behalf of the dominions, which is what Australia was defined as, until the 1920s. After the Treaty of Versailles, the dominions started to take control of their own treaty making.

Until the 1950s, the Executive made, negotiated and signed treaties, which were ratified by the Governor-General in council. We do not have a Privy Council; we have what is called the Executive Council. They ratified the treaties and that was that.

During the 1950s, the Prime Minister at the time, Sir Robert Menzies, thought that it was appropriate for the Parliament at least to be made aware of the treaties that the Government were entering into, so there was a process like your Ponsonby process, in so far as I understand it, where treaties were tabled in the Parliament. On many occasions, a parliamentary vote was asked for, although it did not have any constitutional meaning.

The Chairman: Who asked for it?

Alexander Downer: It was asked for by the Government themselves. The Japan peace treaty, which was in around 1953, was put to the Parliament, and the Parliament voted for it. At a defining moment in Australian international trade policy, the Australia-Japan commerce treaty of 1957 was put to the Parliament for a vote. I am careful not to tread into all your terminology here of the current day, but this was a meaningful vote in the sense that presumably if the Parliament had voted against a treaty that the Government had entered into, there would have been political controversy, but it would not have detracted from the legal right of the Government, simply as the Executive, to ratify the treaty.

This practice just fell by the wayside over the years, so it became very controversial that the Parliament and, to a greater extent, the public were not really being consulted as the Executive were making treaties. This had very real meaning for the constitution. Remember what I said earlier about the federal Government and the federal institutions having responsibility for external affairs.

What do you do in a situation such as the environment where the states have residual powers but the federal Government, using their external affairs power, enter into a treaty and, having ratified that treaty, impose on the federal Government obligations to implement the terms of that treaty? This is a constitutional conundrum that went to the High Court in 1982 in an extremely interesting case called the Tasmanian dam case, where the Tasmanian Government wanted to build a dam to produce hydroelectricity. They were very committed to renewables in the early 1980s down there in Tasmania. This was very unpopular with many people in other parts of Australia.

I think the dam case was in 1983. There was a federal election in 1983 and the Government changed. The Labor Government decided that they would legislate, using their external affairs power and their obligations under world heritage treaties and conventions, to deem the area where the Tasmanian government wanted to build the dam a world heritage site and therefore to ban the building of the dam. This was taken to the High Court, where the federal Government won. The High Court said that the federal Government were indeed exercising their external affairs power appropriately.

There was another case, more recently in 1994, also related to Tasmania. You might recall that throughout the British Empire in all the colonies and dominions there was a law that made homosexuality a criminal offence.

Of course, through the years these laws had been repealed in Australia. They were state laws, not federal law, because criminal law is primarily a responsibility of state governments. As you would imagine, the states all abolished this law—I cannot tell you exactly when—throughout the 1960s, the 1970s and into the 1980s, except for the state of Tasmania. Although it never enforced the law, it nevertheless did not think it was appropriate to repeal it. The federal Government wanted it repealed, so they signed an international convention to give them the power to repeal it. It was a highly controversial moment. Again, the federal Government prevailed.

I have spent a lot of time telling you this background. It is not awfully relevant to you, because your constitutional situation here in this country is quite different. But it led to a fierce debate about the extent to which Parliament and the public could have a say in treaty making. Of course, I mean not just treaties but conventions, where the federal Government signed up to ratify international instruments. There was a parliamentary committee that made a whole series of recommendations.

When the Howard Government were elected in 1996, part of their platform had been to establish a parliamentary committee called the Joint Standing Committee on Treaties, known as JSCOT. When I talk about JSCOT, I am talking about the treaties committee. This was set up in around the middle of 1996 by resolution of the federal Parliament. Under the resolution, all treaties have to be referred to JSCOT; we can spend some time talking about how it works.

JSCOT will, in the main, give an opinion on those treaties and make recommendations to the federal Government of amendments they could make to the treaties, or recommendations to reject or accept the treaties. There is a time limit, which off the top of my head—it is in my notes somewhere—is 15 parliamentary sitting days. It does not sound very long, but the Australian Parliament would typically sit for four days a week and two weeks out of four, so that gives a fairly reasonable amount of time. That has not been a particular problem, by the way, and the committee can always ask for an extension of time.

The Foreign Minister refers the treaties to the treaties committee. Resolutions of either House of Parliament, the Senate or the House of Representatives, can refer treaties to the committee. That is extremely rare. The committee, as time has gone on—this is normal with parliamentary committees—has seen its power and influence gradually grow and its mandate expand. Frequently, it will look at broader issues such as environmental treaties or just have an examination of the WTO and how that is all working, because that operates under treaties, so it is appropriate. That is roughly how the system works and its history.

The Chairman: We will come on to some of those details and pick up some of the points you have made, because while we do not have a similar written constitution, some of the problems and issues are very similar.

You talked about Ministers referring treaties to the committee and said that other people could as well. There is nothing automatic about a treaty going to the committee. At what stage can it be sent? How early?

Alexander Downer: A lot of these things, as time goes on, become convention, and if you breach convention it creates fierce controversy, as we just saw yesterday here. That is a way of generating political controversy and different opinions. The convention is that the Foreign Minister would refer all treaties, conventions and international instruments to the treaties committee.

They are divided into three categories. Some of them are just very minor amendments, such as to the Japan long-line tuna agreement in which something goes from 20 metres to 25 metres. It is probably not going to require an inquiry by the committee. Those things are just noted by the committee, but they are still referred to the committee.

In normal circumstances, if it is a significant treaty, that submission from the Foreign Minister attaches to it a national-interest analysis of the treaty, so that not just the Parliament and the committee but the public have an opportunity to see what the federal Government are doing and the federal Government's argument for entering into that treaty.

Lord Wallace of Tankerness: We have very helpfully been sent a report on the 20-year history of the Joint Standing Committee on Treaties. It was the categories that I was interested in. Who determines which category it goes into? Is it the Minister referring or is there a sifting arrangement within the Parliament to determine the category?

Alexander Downer: It would initially be a matter that the Minister would draw to the attention of the committee, and the committee would make a final decision on that. The committee can make an issue of whether it thinks a particular amendment to a treaty—it would be that, rather than a substantial treaty—needs more analysis to be done, needs to have hearings, needs to have a national interest analysis provided by the Department of Foreign Affairs and Trade. There are borders there that are not clearly defined, but it has never, in my recollection, been a controversy.

Q43 **Lord MacGregor of Pulham Market:** You have given us a fairly comprehensive introduction, but could I probe some aspects a little further? What aspects of the committee's work are particularly effective? To what extent are the committee's recommendations accepted by the Government, and to what extent do they influence the Government's behaviour? You have probably answered that already. What happens to recommendations that ratification be delayed or not take place?

Alexander Downer: I can think of only one example—there might be more than one, so this has to be qualified—where the Government of the day were surprised or not overly pleased by the recommendation of the treaties committee. From memory, I think it related to a commerce agreement that we negotiated with Kazakhstan. The issue for the treaties

committee was this: "What are we doing concluding this commerce agreement with Kazakhstan when it owes a major telecommunications provider"—Telstra, which is the equivalent of BT—"a lot of money?" It had closed down Telstra operations and there had been some controversy about that. The committee recommended that this be sorted out before we went ahead and ratified the treaty. I was the Foreign Minister at the time and I thought, "That's fair enough. Why do we not agree with the committee?"

This is normal politics. There are two things to say about that. Typically, if you are the Foreign Minister, the Minister responsible for treaties, you do not want to get into much of an argument with the treaties committee. You can win the argument on paper, but that is a pretty brutal way to behave.

Another thing to think about is the composition of the committee. The majority of its members are from the governing party. Since the Prime Minister has a significant say in who should be the chair of any individual committee, and being the chairperson of JSCOT is seen as a prestigious position in Parliament, that job usually goes to somebody with a bit of ambition and energy who is close to the Foreign Minister and the Prime Minister. I appointed Julie Bishop as the chair of JSCOT, and she subsequently became one of my successors as the Foreign Minister. She is a friend of mine. If there are problems in the committee, the chair will talk to the Foreign Minister and it becomes more of a partisan issue.

Dare I admit this? Towards the end of my time, in September 2007, I signed a nuclear safeguards agreement with the Russians, with President Putin, on the export of uranium to Russia. The Labor Party—the then opposition—was really against this. By the time JSCOT produced its report, the Government had changed. JSCOT's report recommended that we not go ahead and ratify this agreement, which did not happen until the Government changed their position on this, after which JSCOT remarkably recommended that we do. What am I telling you here? It is no different here, but party politics plays a huge role in how JSCOT works in practice.

Lord MacGregor of Pulham Market: What priority and seniority does the Parliament give to this work?

Alexander Downer: I am guessing here, but I would say that JSCOT is one of the few joint standing committees of Parliament. It is one of the newest, but it would be one of substantial prestige. Why is that? One of you, I think Lord Beith, asked the previous witness about the breadth of treaty making today compared to the issues that treaties covered in times before.

Treaties cover everything now, because of globalisation. I have explained how the Executive can bypass the Parliament in some respects through their treaty-making powers. Of course, you might need implementation legislation, and you often do. Treaties have become a much more important issue than ever before. Particularly bearing in mind the

examples I gave of the federal Government changing the balance of the constitution, using the external affairs power, away from the states towards the federal institutions and the federal Government, this committee has taken on quite a significant role.

- Q44 **Lord Beith:** You gave us the example of the Executive using that ability to lock in a policy where the state was not willing to do so. Is there not more widely a tendency for non-government organisations to use treaty negotiations and their influence in them to try to lock in policies that will then bind future Governments? They may be very worthy policies that I would support, such as on climate change, but what is going on is an attempt not just to achieve something internationally but to lock in a policy domestically.

Alexander Downer: Yes, there is no doubt about that. They can do that and they do that. There are two things about the NGOs' interests. First, their interest is much more in environmental treaties and conventions, for example, because they are international. Secondly, they have an interest in trade agreements. There are aspects of trade agreements, particularly the investor-state dispute resolution mechanisms, which energise NGOs.

At the moment, I am sure JSCOT is about to consider a free trade agreement between Australia and Peru. Built into that agreement is one of these investor-state dispute resolution mechanisms whereby the resolution of a dispute between an investor and the relevant state, in this case Peru, is resolved through arbitration.

Some people do not like that, so you will find NGOs using JSCOT as one of the mechanisms to try to highlight the dangers of that and persuade the federal Government to exclude these provisions from any trade agreement. You get a lot of that.

- Q45 **Baroness Drake:** The resolution of appointment suggests that the activities of JSCOT focus on the post-mandate stage of the treaty process. Should JSCOT have a greater opportunity to influence the Government's negotiating mandate?

Alexander Downer: I do not really think so. I am not sure that it would help with the Government's capacity to negotiate. The Government's basic view, and certainly my view, would be that the Executive, the relevant Minister and his or her department should be able to conduct the negotiations in an unfettered way, always knowing that at a certain point this agreement will go to JSCOT for its consideration.

Quite apart from everything else, let us take into account the resources that would be involved. I said that there has been a proliferation of treaties, agreements and conventions which countries enter into nowadays. I think I am right in saying that JSCOT has considered something like 800 treaties, conventions and international agreements, but it might be more than that. I think it is more than 800 over 20 years.

If it then had to start to give consideration to the Government's negotiating mandate, so a mandate was provided by the Cabinet and it

got into the negotiations themselves, it would create chaos, in the amount of time that was involved. You might take the view that a country such as Australia or the UK should enter into far fewer international agreements than we do, and that that would be a good way of stopping it. The Senate ratification process in the United States is one reason why the United States enters into far fewer treaties than countries such as Australia. Some of the Republicans probably think that is a pretty good thing. I am not so sure.

Baroness Drake: If JSCOT wanted to raise a question on the negotiating mandate, would its terms of reference allow for that?

Alexander Downer: No, it has to get a referral. There could be a resolution of the Senate or the House of Representatives, or the Minister could refer to it some issue that may be germane to a negotiation that is taking place, but I have no recollection of that happening. I have not been a Member of Parliament for 10 years, so it could have happened in the last 10 years. Certainly, in the first 10 years of the life of JSCOT, I was the Foreign Minister and it did not happen in that time.

Baroness Drake: To what extent is your view influenced by confidentiality trumping transparency when setting a mandate and commencing negotiations?

Alexander Downer: Only in a very minor way. There are not many treaties that need to be or should be negotiated in secret. This notion of a secret treaty has had currency in Australian politics. Under the Keating Government, Australia negotiated a security agreement with Indonesia, which Indonesia subsequently abrogated when it disapproved of our military intervention in East Timor.

In any case, they negotiated this security treaty with Indonesia in 1995. It was done in secret, in particular between Paul Keating, the then Prime Minister, and President Suharto of Indonesia. It was a very short treaty, but it included some obligations similar to the Article 5 NATO obligation. It happens, by coincidence, to be Article 5 of the ANZUS treaty—the Australia, New Zealand, United States security treaty.

That was an obligation to consult in the event of the territorial integrity of either country being breached. This was just presented to the Australian public as a fait accompli and there was a huge controversy about it. Actually, I was the shadow Minister for Foreign Affairs at the time and I can remember milking this for all it was worth. But I do not want to give you the impression I was playing politics; it is what I thought.

Yes, there have to be confidential conversations between Ministers and senior officials, as you well know from the huge Brexit negotiations that you have been having. You cannot have these negotiations in public. On the other hand, you have to draw the line somewhere. You do not want the whole treaty and its provisions to be some deathly secret that you spring on the public once it is all concluded as a fait accompli, because you will undermine confidence in what you are doing and people will think

that you are up to tricks and games. It would be a bit different here, but in the case of Australia the tricks and games you might be up to could be to nail the state governments. The federal Government could be using its treaty powers for all sorts of nefarious reasons, as perceived in political terms.

To come directly to your question, it is not why the joint standing committee is not involved in the negotiating process, the negotiating mandate, or the decision to negotiate a free trade agreement with Peru, to amend the Japan-Australia long-line tuna fishing agreement or whatever it happens to be. It would just clog up the system and make it unworkable. We would have hardly any treaties if we were to do that.

- Q46 **Lord Dunlop:** Perhaps I could probe a little further Parliament's influence on the conduct of negotiations in the light of what you said about the mandate. We have had a note from the Australian Department of Foreign Affairs and Trade suggesting that Parliament's role in examining treaties results in "efficiency and certainty of process", enabling the Government to negotiate with their overseas counterparts with "authority and credibility". I wonder whether you agree with that view and could say how that works. In the interests of time, are there any examples of where the work has been hindered?

Alexander Downer: Do you mind reading the quote again, please?

Lord Dunlop: Parliament's role in examining treaties results in "efficiency and certainty of process", enabling the Government to negotiate with their overseas counterparts with "authority and credibility".

Alexander Downer: It is just bureaucratese, and that is being really polite. You had to read it to me twice. I am not a Member of Parliament or a government official any more. I can just tell you what I think. What I think is that it sounds nice, but I could not give you any examples of that meaning anything at all, in all honesty.

When you go into a negotiation with another country or another organisation, or you go to an international negotiation to negotiate an international convention, I doubt that your interlocutors have the slightest interest in whether you have a system of parliamentary scrutiny. I was the Foreign Minister for nearly 12 years. I could not possibly be expected to remember everything, and I could be wrong but I have no recollection of any interlocutor raising issues such as that with me in any circumstances.

Countries are interested in the ratification process. As you know, if it is a bilateral treaty it has to be ratified by both sides. If it is a multilateral treaty, typically there is a specified number of countries that have to ratify it before entry into force. They are interested in that. We were champions of the Comprehensive Nuclear Test-Ban Treaty. It has not formally come into force because it has not been ratified by all five of the

official nuclear weapons states. It has by this country but not by the United States and Russia.

We are interested in those sorts of issues, and they have a bearing on how you approach negotiations. In particular, when you are negotiating with the United States, you have to maintain contact with the Senators. We have a free trade agreement with the United States and we spent a huge amount of time during the negotiations engaging with the Senators there. There is no point in doing it if it is never going to be ratified.

But the fact that we have a system of parliamentary scrutiny has no particular bearing on the negotiations themselves. It does for the Australian Government in the sense that, as a negotiator, you know that this is a matter that the Parliament will have an interest in. That matters. Of course, many treaties and agreements need implementation legislation anyway. But for those that do not you are particularly worried about the MPs in your own party, because you do not want a revolt on your hands if you can help it. Are they going to be steadfast if this becomes controversial?

- Q47 **Lord Judge:** To what extent, if any, does the national interest analysis produced by the Australian Government increase transparency? Is it—my words, not yours—political propaganda?

Alexander Downer: No, it would not be political. It is produced by the public service. It is not produced in a political sense. It is done on the instructions of the Minister, but it is not political propaganda. Has it increased transparency? Ipso facto it has, because we did not have national-interest analyses before. I do not know whether you have been given examples of the national-interest analysis, but it explains the treaty, convention or international agreement that the Government are entering.

Lord Judge: It is like an Explanatory Memorandum.

Alexander Downer: Yes.

- Q48 **Lord Wallace of Tankerness:** You have mentioned on a number of occasions the tensions between the federal Government and state governments. We have been told that there is a Commonwealth-State-Territory Standing Committee on Treaties—SCOT. While our respective constitutions are different, with a written constitution and a proper federal system in Australia's case, nevertheless within our devolved set-up there are treaties, for example on agriculture, that can be negotiated at the UK level but that would have direct implications for the devolved Administrations. Can you tell us perhaps how SCOT operates in circumstances like that? Is it useful in helping to resolve disputes?

Alexander Downer: It does not meet very often. In my time, it would have met only about once a year. I never went to it. It was handled by officials. If there were to be a highly controversial treaty as far as the states were concerned, involving what are sometimes called states' rights, that matter would be taken up at a different forum, called COAG—

the Council of Australian Governments—which is chaired by the Prime Minister and includes all the state Premiers and the Chief Ministers of the territories. That would be debated in that forum, and it probably would be debated.

It is an institution whereby the states are informed of what the federal Government are thinking of doing, so there needs to be a process of consultation with the states through the negotiations if it has any bearing on state responsibilities. Agriculture is a very good example. It might be an issue relating to agricultural standards, food safety or whatever it may be. The states typically, not universally, have a responsibility for implementing those kinds of standards, so they will have an interest in that. It is typically not very controversial. The federal Government and the states are likely to agree on these sorts of things.

This comes up in particular in relation to New Zealand. The economic relationship between Australia and New Zealand is a very interesting one for you all to think about. We have what is called CER—closer economic relations—which is a clumsy name for an agreement with New Zealand. CER provides for completely free trade between Australia and New Zealand, but we do not have a customs union and we do not have a single market with New Zealand.

Not having a customs union means that we make our own trade agreements, which are sometimes different from each other's. Actually, they are often quite different from each other's. But we also try, in order to facilitate trade between Australia and New Zealand, to co-ordinate our standards for all sorts of things, including food safety. We have a committee that meets which includes the Australian states, not just the federal Government, and the New Zealand Government; they do not have states. These things are ironed out. Again, it is typically just common-sense stuff, and I cannot off the top of my head think of an occasion when this was particularly controversial.

I cited two examples to you of where one of the states, not all of them, was outraged by the behaviour of the federal Government in taking power from the states. But time has moved on. We have got to 2018. There is a realisation that ideas such as states' rights, subsidiarity and so on are pretty-sounding terms, but Australians are quintessentially practical people. You have to get the job done. You have to deliver for the public and not just play some philosophical game. It is not a classroom.

Typically, there is an increasing feeling that it makes more sense for the federal Government to take the lead on policy development and for the states to be more service delivery agencies. You very seldom get into arguments between the federal Government and the states any longer on treaty matters.

Q49 Lord Norton of Louth: From the point of view of our inquiry, our main interest is what lessons we can draw from Australian experience. If you were drawing on your wealth of experience of how the Australian Parliament scrutinises agreements, what would you say we should learn

from it? As you know, Parliament tends to come in very late in the process here. At what point should we be involved, and how?

Alexander Downer: Australia is always a good example of a well-run country. You cannot go wrong. I have lived here for four and a half years. I was at a function last night and I was asked what government action is taken here that is much better than the way it is done in Australia. I struggled with that.

The Chairman: They have been strange years.

Alexander Downer: Yes. The first two were fairly straightforward. There was the Scottish referendum. There was the general election. We are reasonably happy with how our system works. It is really beyond controversy. There are parliamentary committees that feel they should have more power and a bigger role, one of which is the intelligence services committee, which is modelled on the British one.

When I was the Foreign Minister—or, as they say in politics, “for which I am entirely responsible”, as if the officials had nothing to do it; I just dreamed it all up myself—essentially we just photocopied the British system, the British legislation, and in particular the British parliamentary oversight. But we obviously have not done that in this particular case.

There is no particular demand that I am aware of for an expansion of the mandate of JSCOT, or any great concern on the part of members of JSCOT that the federal Government do not take them seriously enough. This is one of the advantages, I suppose, in all honesty, of our common system of government where Ministers are also Members of Parliament. You might be the chairman of JSCOT this week, but last week you could have been in the Cabinet or next week you might be in the Cabinet. In the case of Australia, you could be the Prime Minister next week. Who is to know? It changes so often.

Overall, I get the impression, in so far as I have followed it, that they are reasonably satisfied with the way it has been working. In that sense, it is a guide to what you could do. You could set up a standing committee of both Houses that scrutinises the treaties and the international agreements before binding action, as they like to say, or ratification occurs.

In normal circumstances, outside moments of high natural contention, as you have at the moment, where people are playing their partisan games to the fullest extent possible, if the committee really felt strongly about something, the federal Government would definitely take that into account. They would not just disregard the committee. Of course they could, but they would not.

Q50 **Lord Norton of Louth:** We have copied the idea of a parallel chamber from you. That is why we have debates in Westminster Hall. The equivalent would be to take JSCOT and apply something similar when it came to international agreements, on the grounds that it works reasonably well without interfering with the power of government to

negotiate an agreement.

Alexander Downer: Yes, you are not raising huge constitutional questions. Of course, you can make constitutional changes here, in a sense, more easily than we can. It is incredibly complicated to change the Australian constitution and, in any case, why would you do that? People would become very suspicious. They would not vote for it.

In Australia, by the way, you need to have a referendum to change the constitution, and people invariably vote no because you never know what is going to happen if you vote yes.

The Chairman: That is an interesting note to end on. Thank you very much for giving us your practical experience, and we have certainly got a great deal of that. We have had two very good sessions this morning and it has been helpful to hear from both of our witnesses. We are off to debate Brexit again. Thank you very much for coming.