



Constitution Committee

Corrected oral evidence: Parliamentary scrutiny of treaties

Wednesday 12 December 2018

10.30 am

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Members present: Lord Norton of Louth (The Chairman); Lord Beith; Baroness Corston; Baroness Drake; Lord Dunlop; Lord Hunt of Wirral; Lord Judge; Lord MacGregor of Pulham Market; Lord Morgan; Lord Pannick.

Evidence Session No. 6

Heard in Public

Questions 51 - 61

Witnesses

I: Dr Brigid Fowler, Senior Researcher, Hansard Society; Michael Clancy OBE, Director of Law Reform, Law Society of Scotland.

Examination of witnesses

Dr Brigid Fowler and Michael Clancy OBE.

Q51 **The Chairman:** Good morning and thank you very much for being with us. Before we start putting questions to you, could you identify yourselves for the record?

Dr Brigid Fowler: I am a senior researcher at the Hansard Society. For the record, it may also be relevant to say that for seven years I was a committee specialist for the Foreign Affairs Committee in the House of Commons.

Michael Clancy: Good morning. I am director of law reform at the Law Society of Scotland.

Q52 **The Chairman:** I will start with a general question, and then we will come to the more specific ones. How effective would you say Parliament is in scrutinising the Government's treaty actions?

Dr Brigid Fowler: I will give it a go. As an initial point, the Committee can count itself very lucky because it is currently able to witness in real time how not to go about making a treaty, which is always a helpful place to start. On the notion of effectiveness, I would say two general things. First, I am glad you are asking the question, because it is important to be sure that something is broken before we try to fix it. A degree of scepticism about the size of this problem is warranted.

The second thing is to ask, "Effective at what?" You can unpack the notion of parliamentary engagement on treaties to think about several different functions that you might want to be fulfilled. There is a function of shaping the content of a UK negotiating position and thereby, one would hope, the content of the eventual treaty. There are functions of transparency and accountability, which are to do with getting information: exchanges of correspondence, ministerial appearances before Select Committees as you are going through the process, those kinds of things. Then there is potentially a function of visible democratic sign-off at some point towards the latter stages of the process, which means having a visible parliamentary vote of some sort.

If you think about the different functions that you might want fulfilled, you will generate different conclusions about what is happening now and what you might want to happen in the future.

The Chairman: On that, then, what would you say Parliament's constitutional role is? If it is scrutinising, that is responding, or is it trying to substitute an alternative policy?

Dr Brigid Fowler: As the Committee well knows, the traditional UK constitutional position is that treaty making is a prerogative power, and Parliament has not had a significant role. But even the Constitutional Reform and Governance Act, whatever its shortcomings, was in a sense an impingement on the prerogative. It at least says that the prerogative

may not be used for 21 days to ratify a treaty. As it were, that dam has been breached.

Notions of official formal mandating and vetoing are not traditional UK constitutional practices. They would be quite big steps, but there is plenty of scope to do things short of that. I would not want to rule out a big step towards a mandating or vetoing type of system completely.

The Chairman: But you would see Parliament's role as one of scrutiny, of seeing what the Government are doing, reacting to it and, if necessary, disapproving or approving.

Dr Brigid Fowler: There is certainly more scope for Parliament to be involved upstream in shaping the content. If you want to go as far as the need for a formal parliamentary vote on a mandate, that is a bigger step. But there is absolutely scope for Parliament to be involved upstream.

Michael Clancy: I agree very much with what Brigid Fowler has said. Looking at the scrutiny of the Government's treaty actions, it is amazing what you find when you delve into these things. The FCO publishes a treaty bulletin every month that shows what those treaty actions are. There are issues where the UK is acting as a depositary or looking at various bilateral treaties, for example the recent one between the UK and Turkey on cultural relations, or the UK-US treaty on peaceful uses of nuclear energy. It would be fair to say that neither of these two treaties has been much in the public eye or the parliamentary eye. That perhaps gives us an insight into the extent to which scrutiny is there, front and centre.

If that **proposition** holds, our scrutiny of these treaties is not very good at all. It may be because of the very structure that Brigid has shown and explained, in our approach to treaty making and treaty ratification, that it is essentially a done deal by the time it reaches Parliament. For some treaties, an assessment has to be made that all they get is the most marginal of scrutiny, and certainly not very strenuous scrutiny at that. When one then looks at the Foreign and Commonwealth Office update on all the treaties, it gives us an idea of exactly how much material is passing through Parliament in this substratum of scrutiny.

The Chairman: It raises a question. Even if you have the appropriate processes, you have to have the will to use those processes, and the interest, which is an issue as well.

Michael Clancy: Having the process and using the process are two distinct things, but of course having the process is first and foremost.

Q53 **Lord Morgan:** I was wondering how far you think Parliament should have a power to look back retrospectively at treaties concluded in the past but which take on a new significance in the light of circumstances. Dr Fowler rightly refers to the famous Ponsonby of the Ponsonby Rule. As you say, he moved from the Liberal Party to the Labour Party, and his reason for doing so was that he felt Parliament had been deceived during

the First World War, that the so-called entente cordiale with France of 1904 was not what it turned out to be at all, and that a new look would have perhaps given a more honest appraisal of it.

Dr Brigid Fowler: That is right. You have heard evidence from other witnesses about the massive change in the nature of treaties that has happened over the last 100 years or so. Trade agreements in particular can and arguably should be seen as a form of economic policy-making, which is very different from the traditional, high diplomatic politics of old.

I can imagine that there would be scope for reviewing treaties that are in force. Some treaties include review mechanisms. Some treaties are time limited and you have to make a positive decision about extending them. There is a UK-US defence treaty with an extension that comes around every 10 years, which draws some criticism in the Commons. It is one of the few treaties that has had an EDM tabled against it in the Commons. Some treaties have mechanisms built in. If you are thinking about a wholesale new system for looking at treaties, provision for Parliament to be engaged in those review and extension mechanisms should absolutely be part of the process.

A broader review of all treaties in force for the UK would be an extremely large exercise. I can well imagine that some are redundant or no longer fit for purpose. The key thing there is to be in touch with the Foreign Office, because treaties lapse anyway, or they might be sitting there and not being used, so I am not sure it is necessarily the top priority.

Lord Morgan: It would be a long exercise, but if you thought the country had gone to war on dishonest grounds it might be worth the effort.

Dr Brigid Fowler: Yes, clearly.

Michael Clancy: There are 14,000 treaties registered with the Foreign and Commonwealth Office. Where do we start? Which of them would we declare require scrutiny for retrospective reimagining, repurposing or rethinking? If I said to you that a treaty from the early 18th century was the sort of treaty we could disregard, that might be all right—unless we were talking about the Treaty of Union of 1707. Indeed, in the case of Gibraltar, there is the treaty of Utrecht. We would have to be cautious about the nature of the retrospective thinking, and the criteria for assessing the treaties to which we should apply that retrospectivity.

That is not an idle thought. During the course of the Scottish independence referendum campaign, serious thought was given to the extent of the application of the Treaty of Union of 1707. Indeed, during the course of the Scotland Bill in 1997-98, provisions of the Treaty of Union were embedded in it, among the constitutional provisions in Schedule 5. We have to be aware that some of these treaties may be some distance away in time, but they are very current and live with us to this day. With retrospectivity, can we rework that? I am not entirely sure.

Q54 **Lord Hunt of Wirral:** Mr Clancy, can we look to the future for the moment? You are guilty of having given many of us wise advice over

many years, for which many thanks. But, looking to the future, particularly post Brexit, what changes would you recommend for Parliament to scrutinise treaties more effectively? At what points in the process could and should Parliament exert the greatest influence?

Michael Clancy: Thank you, Lord Hunt. It is very kind of you to make those nice remarks about me. I hope I do not become one who is retrospectively reimagined in the future.

There is a consensus that the way in which Parliament deals with treaties is not satisfactory. That is an emerging theme, with which, as one reads the evidence that the Committee has heard before, I can safely say one would agree. What can we do to improve the provisions under the C RaG process? There is a lack of scrutiny and activity in the C RaG process. It is not a dynamic process in any real sense. It depends upon our perception of the role of the royal prerogative and parliamentary scrutiny in all this. When one looks at other jurisdictions, some produce better examples of scrutiny mechanisms than others. Our system is not particularly fitted for the US approach, but there might be more room to reflect on the experience of other common law jurisdictions, such as Australia or New Zealand, and whether it can be reengineered for our use, going forward.

In a post-Brexit world when the UK is making treaties with other countries, in the perception of a global Britain currently projected by the Government, an understanding of how treaties are made, how treaties come about, the negotiation of those treaties and the thinking behind the negotiation will be key. That means we have to be looking at the structures we have in Parliament. As you know, the House of Lords Liaison Committee is looking at these kinds of issues. A few months ago I gave evidence to that committee during its inquiry into investigative committees. I said at that time that I thought there would have to be new **committees** dealing with international law, international trade law and public international law generally. I said that these committees should have broad remits to look at the mandate given for the negotiation of treaties, and have periodic reports of the progress being made during the negotiation.

If one looks at the way in which the EU deals with these things—I know you have heard evidence about that, so I will not dwell on it—there is a significant amount of openness in some jurisdictions, which we do not currently enjoy. That can sometimes create a mismatch. Quite frankly, during the course of the EU negotiations it was easier to look at the Taskforce on Article 50 website to find out what was happening than the UK Government's websites.

This is the kind of area we are looking at: new committees with broad remits and the ability to call for papers and take evidence from Ministers and other stakeholders. Particularly during the negotiation of trade agreements, there is a high degree of interest in these areas. Some years ago, even though the Scottish Parliament does not have jurisdiction to do anything about these treaties, it nevertheless held an inquiry into TTIP. I remember being in the audience there. No one would let me loose to give

evidence to the committee. It was quite obvious that the concerns of civil society groups were being heard and formed part of the report of the committee. That is a model.

Lord Hunt of Wirral: Dr Fowler, do you agree?

Dr Brigid Fowler: Very broadly, yes. If we are looking ahead, the key change that is happening is that the UK will recover competence to make its own trade agreements. That power comes back on 29 March, whether or not we have a withdrawal agreement in place. One early question is whether to put a structure in place simply to handle trade agreements and leave structures for handling existing treaties more or less unchanged, or whether to take the opportunity—this is probably where things are heading—to innovate across the board for all treaties. Then the question is whether to integrate trade agreements into that overall structure or whether to keep them separate.

Our thinking is that the nature of contemporary trade agreements is such that you can probably determine in advance that they will need some different kind of structure. That is not to say that you would not want to make some changes to the way in which other treaties are handled. The advent of trade agreement making in the UK will exacerbate one of the difficulties with putting structures in place to handle treaties, which is their sheer range. It is a single legal form; they are all treaties, but that might cover anything from six pages about cultural exchanges with some entirely uncontroversial country to thousands of pages of an FTA with the US. That is one of the difficulties.

The range of instruments that you might be dealing with is one thing that argues for a flexible system, which suggests that you might want to be looking at some sort of sift somewhere. We would not want to oblige parliamentarians and parliamentary staff to spend time on treaties that nobody has a problem with and do not warrant it. Some sort of sifting function is probably going to be needed somewhere.

In terms of a committee, one of the initial questions, again, is whether to have separate systems in the two Houses or whether to think about a form of joint working. Thinking, for the sake of argument, about a single House, we were wondering about having a hub committee or umbrella committee that would have a remit to be engaged, potentially, right the way through the process. For example, you would make arrangements with the Foreign Office that this committee would at least be told when the UK was proposing to start negotiations on any kind of treaty so at least the information is there from the beginning. One of the scenarios you want to avoid, in which the first anybody knows about a treaty is that it is signed, would be avoided.

If you think of that as a hub or umbrella committee, it might engage departmental Select Committees in the Commons or specialist Select Committees here in the scrutiny of specific agreements, or at least let them know the opportunity is there to be engaged in the scrutiny of specific agreements. That is the kind of thing we were thinking about.

Q55 Lord MacGregor of Pulham Market: The workload on parliamentarians, particularly in the other place, is very high. Inevitably, there is a tendency to go for the issues that they regard as the most important, particularly in the public arena, with publicity and all that sort of thing. How do you make this particular job more attractive to them, so they can see not only the worth of it but that they will get some credit for what they are doing?

Dr Brigid Fowler: That is one of the critical questions. It is absolutely correct to say that, in the other place, MPs are absolutely stretched at the moment. There are a number of things one could say. First, in terms of trade agreements at least, my sense is that, particularly as a result of the TTIP experience, there is a relatively wide awareness of the public interest in these things. Lots of MPs got hundreds of emails when the TTIP argument was at its height. That is a helpful background factor. There is obviously the withdrawal agreement experience. I hope, if and when the dust settles, Members, particularly of the other place, will reflect on the experience of making the withdrawal agreement and the fact that they are discovering, pretty brutally, how difficult it is to change the content of a treaty when we are at this stage. I would hope that would feed in.

But that speaks to the more general point about what can incentivise Members to get engaged. Public interest is one factor, but the idea that you have a meaningful say is another. Reading across from the Hansard Society's work on delegated legislation, one reason MPs do not get involved is that they do not think it makes any difference, and they would not be wrong. One way you might think about engaging Members of the other place in particular is through the knowledge that, if they get engaged, there will be some result. It might be to do with a Select Committee that becomes credible and whose reports have weight; it might be votes or scrutiny reserve type arrangements. You can incentivise people by giving them the powers, but they have to have both the will to use them and the resources in terms of specialist help.

Michael Clancy: I agree with that. The essential thing is that MPs and Peers have adequate resources to do this. There is a distinct lack of resources in this House. There is virtually no support, other than the hardworking clerks, the library service and the special advisers who attend committees. It is quite important that this is not seen simply as yet another bundle of paper or another 100 emails put on top of already hard-pressed representatives. It needs to be thought out and resource has to be put in to make it work.

Otherwise, the problems that Brigid has shown of disinterest—"Why bother?"—or lack of capability to make changes will simply deflate and depress people, and turn them off from doing this important work, and it will be important work. That message has to be emphasised. This jurisdiction that is being repatriated to the UK Parliament is of crucial importance to every man, woman and child in the country.

Q56 Baroness Corston: Seeing as there is unanimity of opinion about a

committee, and accepting what has been said about the pressure on Commons Members, I was a founding member of the Joint Committee on Human Rights 17 years ago and Commons Members took a lot of interest, but the heavy lifting was done by Members of the House of Lords. That worked perfectly well. Would you say that was a kind of model? Have you looked at the way in which the Joint Standing Committee on Treaties operates in the Australian Parliament?

Michael Clancy: I have looked only very briefly at that Australian committee. I would like to write to the Committee further and make a proper submission about it. Some of the comments I made about what kind of committee one could envisage for dealing with treaties in a post-Brexit Parliament were based on that. I was particularly attracted by the requirement for a **national** interest assessment in the Australian experience. That strikes me as a very worthwhile addition to the material one might give to Members who have to look at treaty provisions. It will have to be different from Explanatory Memoranda. An Explanatory Memorandum can sometimes be little more than the reworking of the words on the page. I say that as someone who has written an Explanatory Memorandum or two in my time. It is sometimes difficult to explain other than simply by reworking the words on the page. With the caveat that I will be submitting something to the Committee, I hope that suffices.

Dr Brigid Fowler: On the question of Joint Committees, I was thinking about the JCHR on my way in, because that is probably the Select Committee that has taken the most interest in treaties over time. There are good arguments for thinking about Joint Committees. With some exceptions, such as that one, the Hansard Society's experience has been that Members of both Houses, for different reasons, are not keen on Joint Committees. It is a bit hit-and-miss as to whether they can actually work. Our sense is that there are often quite different cultures in the two Houses. For example, when we look at the sifting committees for proposed negative instruments under the EU (Withdrawal) Act, we are struck by how the sifting committees in the two Houses are making different recommendations. We are a little sceptical about a Joint Committee as an overall body.

This is something we have been thinking about, though. If you were looking at detailed scrutiny of a specific treaty, probably a trade agreement, as it was going through, that might be a good thing to do jointly, primarily because of the resource issues. The number of people in the UK who genuinely have the expertise to help Members with the technical and legal aspects of a big trade agreement is quite limited. There might be a very practical issue about the two Houses trying to do that level of detailed scrutiny separately.

Baroness Corston: What would you say, then, to this proposition? You have just said, quite rightly, that committees in each House can come to different conclusions. Does that not speak to the preference for a Joint Committee? Then those issues are hammered out and a common conclusion is reached.

Dr Brigid Fowler: You could make the argument both ways. There is a value in a more diverse group of people coming together and reaching a common conclusion. Equally, inasmuch as Select Committees are reporting to their own House, you might want to say that it is better to do it separately. As you can tell, I am still a bit agnostic on that one.

Q57 **Lord Pannick:** Dr Fowler, you mentioned a few moments ago the need for MPs to have a meaningful say on these matters. The EU (Withdrawal) Act requires a so-called meaningful vote and sets up special procedures prior to ratification of the withdrawal agreement. My question to you both is whether those special procedures are simply an exceptional response to an exceptional political problem, or whether they provide any indication of a general way forward.

Michael Clancy: It is an extremely interesting question. The provisions of Section 13 of the European Union (Withdrawal) Act are not particularly auspicious for dealing with treaties in the future. I understand it was designed specifically to deal with the withdrawal agreement and the political declaration, rather than to be a model for the future. That is quite right, because it is a complex piece of work. It does not involve committee scrutiny in any deep way. It is about something that has already happened. Section 13(1)(a)(i) mentions "a statement that political agreement has been reached". There is an element of finality in there: it has been reached. It also mentions "a copy of the negotiated withdrawal agreement" and "a copy of the framework for the future relationship". All of this is to be before MPs for their resolution. Then the House of Lords gets the opportunity for a Motion to Take Note of the withdrawal agreement. There is then this tricky period of lapses of days, either calendar days or sitting days. You have to be quite careful about your counting capability in this, and I am afraid my lack of arithmetical skill makes it quite difficult for me at times.

It is almost a thumbnail sketch of what scrutiny and ratification is, rather than what it ought to be. In that sense, it was perhaps a clear example of political expediency taking a lead over good law making. It lacks significant clarity. Of course, it refers back to Section 9 of the Act on implementing the withdrawal agreement. It says that a Minister of the Crown may make regulations "subject to the prior enactment of a statute by Parliament approving the final terms of withdrawal". There is no tie-in between Section 9 and Section 13. Different language is used. An Act of Parliament has been passed, rather than a prior enactment of a statute by Parliament. It does not seem as coherent as we would like it to be.

Dr Brigid Fowler: In one respect, the EU withdrawal agreement perpetuates a tradition, in the sense that it is an EU treaty, and it is on EU treaties where particular procedures have been put in place historically throughout the UK's membership. The Committee will remember that the EU Act 2011 provided for us to have a referendum for the treaty approval process or pre-ratification process. There is a long tradition of coming up with specific special procedures for EU treaties. One of the questions is, once we are out of the EU, whether we should

transfer those kinds of procedures over to the new treaties that we may or may not be making with the EU after Brexit.

There are two points one can make about the specific form Section 13 came to take. First, it was not designed in an abstract sense—as people in this room well know, its final form was a result of a bit of a scramble during ping-pong in June. It is not necessarily drafted in the way in which one would have drafted it in the abstract. Secondly, the process of coming up with approval procedures for the withdrawal agreement was shaped very heavily by the particular possibility of a no-deal exit. This is a very unusual treaty negotiation in the sense that, if you do not achieve a ratified treaty, you do not revert to the status quo. That is very unusual. In most cases, if you do not achieve a ratified treaty, you just stay where you are and you do not have this very hard deadline at the end of the process.

On the specific procedure that Section 13 sets up, in one sense, making the passage of an Act of Parliament a requirement for ratification simply puts on a statutory footing something that happens anyway when a treaty needs legislation, because it is UK practice to pass the legislation first. The novel element in Section 13, in terms of how the UK normally makes treaties, is the statutory requirement for approval resolution. That is highly unusual. You can make the case that, for very important treaties, this is something you might want to be thinking about. I do not know whether it would need to be a statutory requirement, but you might want to at least think about being sure that you could have an approval vote if, for example, a Select Committee wanted one, or encouraging the Government to see it as being in their own interest to have an approval vote, in terms of generating consensus and political legitimacy. But this goes back to the point about flexibility, certainly regarding time on the Floor of the House in the other place. You do not want to require major debates and approval votes on absolutely every treaty that goes through.

The other point I would throw in is about legislation. As I say, most treaties require legislation anyway. It is UK practice to pass that before ratification. There is a concern about treaties that do not require any implementing legislation. My sense is that Members in the House of Commons often say, “We get to legislate on it so we do not need to worry about any of this other stuff”. But there is a body of treaties that do not require legislation, and they raise some concerns.

Lord Pannick: Given the likelihood that we are going to be going down this route again in the withdrawal agreement Bill, it would be very helpful if you could give some thought to what provisions should go into that Bill, given the deficiencies, as Michael Clancy points out, of Section 13. Someone will need to give some thought, assuming we have an agreement, to what the next Bill is going to contain.

Dr Brigid Fowler: Yes.

Q58 **Lord Judge:** Do you mind if we go back a bit further? I am not asking you to comment on the Miller judgment as such, although we can thrash

that out. But does the fact of those proceedings, culminating as they did in that judgment, have general implications for the Government's prerogative power on treaty making?

Dr Brigid Fowler: I defer to the lawyer.

Michael Clancy: I hope I can match your expectations. The court was quite specific about the use of the prerogative for major constitutional change. Therefore, the requirement for an Act to permit the Government to exercise the prerogative power for major constitutional change is quite a structured and narrow area of action by the Government. Does it have general implications? In the context where a Government were contemplating major constitutional change, yes, I think it would. As for the exercise of the power to intimate an intention to withdraw from the EU under Article 50—even though, as we now know, it is not in Article 50—the CJEU has agreed that there would be a power to withdraw that intention. That raises the question as to whether, then, an Act of Parliament would be necessary for the Government to exercise that aspect of its prerogative powers.

There is a maxim I was taught in my first year of studying contracts, not public international law, at Glasgow University. My old professor there, John Grant, would not want me to mention contracts in this context, but let us say that a treaty is like a contract. In Scotland—you will forgive the Latin—we say “*unumquodque eadem modu dissolvitur quo colligatur*”. That is, you dissolve something in the same way you create it. That idea has a certain coherence, and it is clearly the case that an Act of Parliament would be necessary in similar circumstances if the Government wished to resile from its intimation.

Lord Judge: As I understand it, somebody will have to decide whether a major constitutional change is envisaged by the treaty. Presumably the court would have to decide, if the litigant went to the court to ask for it.

Michael Clancy: That is true, if a litigant was able and willing to do that, yes.

Dr Brigid Fowler: As I say, I am not a lawyer. I would not want to comment on the Miller judgment specifically. The one thing I would say, if it is appropriate at this point, goes to the broader point about treaty termination. I know you have taken evidence on that from other witnesses. I could not comment on which treaties are constitutional, but I make the general point that the issue of how the UK terminates a treaty is a massive gap in the current arrangements. It is extremely rare that the UK might withdraw from a treaty, but, as the Committee will be aware, this issue could rise up the agenda. Some noises are being made about it in the context of the withdrawal agreement. There is the European Convention on Human Rights where, again, the issue has been floating around. It is a general point about the need for at least some kind of information when the UK is planning to withdraw from a treaty.

Lord Pannick: Mr Clancy, will an Act of Parliament be required if the

Government, together with our EU partners, decide to extend the two-year period under Article 50?

Michael Clancy: Extension of the two-year period under Article 50 has to be agreed unanimously. In a sense, Parliament, in having signed up to the treaties, the TEU and the TFEU, has already given its consent to an extension. No, I do not think a separate Act of Parliament would be needed. I may regret having said that.

Q59 **Lord Dunlop:** Can I to move on to ask you about the arrangements for engaging with the devolved Administrations in a world of increasing shared competence? What is the appropriate role for devolved Governments throughout the treaty process, particularly in relation to approving a negotiating mandate?

Dr Brigid Fowler: Looking in detail at how the devolveds might be engaged is not a bit of work we have done so far. I would add to the general evidence you have had suggesting that arrangements need to be changed, and better arrangements need to be in place to involve the devolveds in treaty making as the UK goes forward. As I understand it—and Michael will know better—there is very live discussion about new intergovernmental machinery to do this. Parliament will need to think about how it wants to scrutinise that intergovernmental machinery.

In the Hansard Society's evidence to the Liaison Committee, we suggested that this place might want to think about having a new Select Committee to engage exclusively and specifically on devolution issues with the devolved Assemblies. Again, I would defer to the view from Edinburgh.

Michael Clancy: It is a matter of constant concern, the toing and froing between the UK and the devolved Administrations, between this Parliament and the devolved legislatures, about their place in this area. Formally, under the Scotland Act, Schedule 5, paragraph 7, international relations, including with the EU, are reserved to the United Kingdom. But the Scottish Parliament is obliged to implement international agreements where they touch on devolved matters. That sets the scene. Yet there is an understanding that, when dealing with both EU matters and international matters, under the devolution memorandum of understanding between the UK Government and the devolved Administrations, there are provisions for exchange and consultation between the UK and devolved Governments.

The experience has been pretty good with organisations such as the JMC (EU), where Scottish Ministers and Scottish Government officials have had a significant interaction with UK Ministers and civil servants in setting agreed positions for negotiation in EU matters. That can be held up, at the moment, as being a working aspect of the JMC. There is a concordat to that effect, and there is a concordat on international relations, which I believe is concordat D. It says, "The parties to this Concordat recognise that the conduct of international relations is likely to have implications for the devolved responsibilities of Scottish Ministers and that the exercise of

these responsibilities is likely to have implications for international relations". Therefore, there is a mutual determination to ensure close co-operation in these areas between the UK Government and Scottish Ministers, with the objective of promoting the overseas interests of the United Kingdom and all its constituent parts.

This is not new. That concordat has been in place since 2013, with earlier versions of it. The difficulty we encounter under the EU WA and the negotiations leading up to that under the JMC (EN)—European negotiations—is a political one. I hear that officials on both sides are co-operating, but there is a political mismatch. That is something I have to leave to the politicians to resolve.

Lord Dunlop: The devolution MoU, you think, is a useful basis on which to build and perhaps a workable model that can be developed as we go forward. I suppose the political tension you have referred to is all about where you strike the balance between consulting and consenting. That comes into play particularly when you are talking about the extent to which the devolved legislatures should be consulted before a treaty is ratified. Do you have any comment on where to strike the right balance?

Michael Clancy: I have comments in the sense that I can tell you what the options are. We made a submission to the International Trade Committee latterly, in which we narrated those options. I will narrate them again in the paper I will send in, but they are: requiring the consent of the devolved Administrations to any UK negotiated trade position; normally requiring the consent; having a procedural structure for the devolved Administrations' involvement, similar to that in the EU WA for common frameworks; and at a minimum, without requiring the consent of the devolved legislatures, allowing those legislatures and Administrations to access documents, policies, et cetera, to comment upon.

Some of these create new avenues. Again, this is repurposing what we have in things such as the Sewel convention—but not the Sewel convention—and at the same time having a bare minimum of interaction between the UK and the devolved Administrations.

Lord Morgan: Are these concordats in the public domain? If they are not, should they be?

Michael Clancy: They are indeed in the public domain. If you type "memorandum of understanding" into the internet, you will get them, and I will send you a copy.

Lord Morgan: Thank you.

Q60 **Lord Beith:** Could I go back briefly to the committee structure that might exist in the Commons under anything you would recommend? It seemed to me that having a committee, whether purely Commons or joint, would not bring in the expertise among Members that might be present on an individual Select Committee in the area of the treaty, or

indeed among Members who were specialists in the area but did not want to commit themselves indefinitely to membership of a Joint Committee on treaties. For example, people in financial services or legal services might be the subject of complex treaties at some point but would not want to be tied up on that committee when they had other things to do.

Dr Brigid Fowler: My apologies if I was not clear. We would absolutely encourage the scrutiny of particular treaties being cross-departmental. We would want to make sure any system was flexible. We were wondering, for example, about having a hub or umbrella committee that would do the process bit, and then either referring a particular treaty to a particular departmental Select Committee, or perhaps forming a dedicated sub-committee of the Foreign Affairs Committee or the International Trade Committee, using the provisions that now allow members of other committees to participate in the work of those committees. You could even form an ad hoc Joint Committee, within the Commons on its own, like the Committees on Arms Export Controls. If it is a financial services treaty, you get two members of the Treasury Committee to sit together with two members of the Foreign Affairs Committee, or something like that.

We would absolutely encourage flexible structures like that, precisely for the reason you mentioned. Some people might want to make treaties, full stop, a particular concern of theirs, but then there might be people interested in Welsh lamb or whatever, who will only be interested in a particular treaty with New Zealand.

Lord Beith: Thank you for that clarification. Turning to transparency, Mr Clancy, you have some experience of trade negotiations and pre-negotiations. Is it your impression that, on the British side, we are a bit imprisoned by a culture of executive secrecy? We are dealing with people on the other side of the table who know they have to at least talk to or supply information to, for example, congressional committees, and may expect their position to be much more public. Therefore, in the end, it is noticeable to people on our side of the table.

Michael Clancy: There is a general lack of transparency about pre-negotiations and negotiations at the moment. It is fair to say that, if one looked at some aspects of current discussions between the UK and the US about trade negotiations, one would find that the United States Trade Representative website and the Foreign Office website have almost exactly the same text on them. This is not necessarily an amour propre of the UK, but there comes a point, in my understanding, when mechanisms in other jurisdictions may have more transparency than we are prepared to give. That might have been okay, in Lord Morgan's discussion of entente cordiale, when communications were much more restricted between countries, but nowadays it is very easy to sit and peruse the agendas of committees the world over. What appears to be hidden in one jurisdiction is quite open in another.

Lord Beith: Dr Fowler, do you want to add anything on the transparency point?

Dr Brigid Fowler: There are three things I would say. Our bias would be towards transparency, simply because of the political climate in which treaties and particularly trade agreements are made. If you are seen to be not publishing something or not being transparent, there is a risk that you are storing up problems for yourself. That being said, we absolutely would recognise that there is a role for a degree of non-disclosure or confidentiality to help the negotiations. One of the benefits for the UK is that it will go into making trade agreements with a lot of experience out there in the world, including among UK officials who have been working for the European Commission and in the European Parliament, as to what works, what does not and what documents are “safe”.

Lord Beith: On that point, if I may interrupt you, is there a role for restricted disclosure to committees or is that an undesirable development?

Dr Brigid Fowler: When one listens to the experiences of people who have participated in negotiations, particularly on trade agreements, they tend to say that there is a role for arrangements that give some parliamentarians privileged access. I would take advantage of that experience being available. I would certainly want to subject to scrutiny the claims of the UK Government that disclosing too much information undermines your own negotiating position. They ought to be subject to empirical testing.

There are two other points I would make. First, if we are reverting to talking about privileged arrangements and the sharing of information by Government, I have a concern that the political climate, particularly in the Commons, is not necessarily conducive to building up trust at the moment, coming out of the Brexit process. That could be one of the downsides. Lastly, I would encourage Members to try to get undertakings with Government about the sharing of information in writing. It does not need to be in statute. If you look at the arrangements regarding the CRaG Act, there are written undertakings, similarly, on European scrutiny. To make it clear and transparent and to save time, it would be good if who is sharing what information with whom and under what conditions was written down.

Q61 **Baroness Drake:** I have a narrower point on this boundary of transparency and confidentiality. What mechanism or authority should be used to determine when that boundary between transparency and the need for non-disclosure is reached? How would you do it?

Dr Brigid Fowler: We would suggest that it be done based on general principles. The onus should be on the person who does not want to disclose things to explain why—to subject that claim to scrutiny and testing, and, once everybody has agreed a procedure they are happy with, to publish that. You want to build in some flexibility because this will be a learning process. But the onus should be on the Government—as it presumably would be—to explain why they do not want to disclose things, although the committee or committees would also want to be very public about why they think, in order to do their job effectively, they

should have access to some information that they do not put into the public domain. That would be a change from committees' preferred way of working.

The Chairman: Thank you, Dr Fowler. Thank you, Mr Clancy. We are extremely grateful to you for being with us this morning and for your evidence, which has been extremely useful. Thank you both very much indeed.