



Select Committee on the Constitution

Uncorrected oral evidence: Parliamentary Scrutiny of Treaties

Wednesday 30 January 2019

10.20 am

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Members present: Baroness Taylor of Bolton (The Chairman); Lord Beith; Baroness Corston; Lord Dunlop; Lord Hunt of Wirral; Lord Judge; Lord Morgan; Lord Norton of Louth; Lord Pannick.

Evidence Session No. 10

Heard in Public

Questions 88 - 97

Witnesses

I: Rt Hon Sir Alan Duncan MP, Minister of State for Europe and the Americas, Foreign and Commonwealth Office; Rt Hon David Lidington MP, Chancellor of the Duchy of Lancaster; Julia Crouch, Deputy Director for International Agreements, Foreign and Commonwealth Office.

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Examination of witnesses

Sir Alan Duncan MP, David Lidington MP and Julia Crouch.

Q88 The Chairman: We thank all three of you for coming. As you know, we have been looking at the role of Parliament in treaty-making. We have been taking evidence, and quite a few people have submitted evidence. We have been told that treaty-making is not just about trade deals or big treaties; there are a heck of a lot of treaties these days.

The Constitutional Reform and Governance Act was passed rather quickly at the end of a parliamentary Session. First, we would like your views on the workings of that Act and whether you think that all the provisions are appropriate.

Sir Alan Duncan MP: Yes, I think so. The fundamental point about all treaties that come towards us is that any impact on our domestic legislation has to be considered properly through the normal parliamentary processes before the treaty is ratified. Where there is any bearing on our law, the proper process of parliamentary scrutiny takes place. The word "treaty" is sometimes applied to association agreements that have no such impact and are basically a sort of bilateral love-in, although it is good that they happen. There is a spectrum of significance, if you like, of treaties, but anything that has an impact on our law is scrutinised in a satisfactory way.

The Chairman: Does that mean that you think the 21-day period is satisfactory?

Sir Alan Duncan MP: My personal view is yes. Ultimately, anything to do with parliamentary scrutiny is a matter for Parliament, and we in the Foreign Office respect the supremacy of Parliament. From our point of view, from what we see, the answer is yes.

The Chairman: The evidence that we had from the Foreign Office was that it was "ready to engage in discussions ... to strengthen parliamentary scrutiny". Does that stand?

Sir Alan Duncan MP: I think that would stand in perpetuity.

The Chairman: In perpetuity. Very good.

Q89 Lord Norton of Louth: Under the provisions of the 2010 Act, the position of the House of Commons relative to treaties is equivalent to the negative resolution procedure in triggering any objection. Is there a case for putting it the other way around and having provision for the treaties to come forward to receive parliamentary approval? At the moment, you have the problem that, even if there was an objection in the Commons, time would not necessarily be found to debate it or consider it. Should there be a mechanism by which we were able to do that?

Sir Alan Duncan MP: Could you make that point again? There is a bit of feedback that is distorting my hearing.

Lord Norton of Louth: I was asking whether we should move from the equivalent of a negative resolution procedure. Even if the Commons do not like it, you cannot necessarily trigger a debate so that they could register their objection. Should we move to something that is more equivalent to the affirmative resolution procedure, so that there is a parliamentary mechanism for triggering debate?

Sir Alan Duncan MP: Again, that is ultimately a matter for Parliament. As your Lordships have already suggested, parliamentary time is already very much at a premium, and will be all the more so, certainly in the short term, in the aftermath of our leaving the EU. Finding time for the Commons and the Lords to grant express approval for all treaties negotiated in any one year would be very challenging; I think there were 35 last year. Scrutiny through a Select Committee, perhaps, would relieve the pressure but, ultimately, it is a matter for Parliament.

Lord Norton of Louth: You would not object if a Select Committee was a triggering mechanism for recommending that particular treaties should be subject to approval?

Sir Alan Duncan MP: I really do not think that is for us to say. With a former Leader of the House as your Chair, for us to try to dictate to Parliament what its procedures should be is a bit impertinent.

The Chairman: The other side of it is whether you would try to stop it happening.

Sir Alan Duncan MP: I am not sure that we would succeed if we were to try.

Lord Norton of Louth: Of course, there would be the question of who would bring it forward, because the provisions are in CRaG, which is a government measure.

Sir Alan Duncan MP: As I say, there is a variety of treaties. Inevitably, some attract more attention and concern and are more detailed than others. We fully accept that the process of scrutiny itself might need to be flexible in order not to give the same amount of time to the tiny ones as to one of massive significance.

Lord Norton of Louth: Are the Government thinking of reviewing it anyway? The Foreign Office submission said that CRaG was, "the product of lengthy and relatively recent consultation and dialogue". I was on the Joint Committee that examined the Constitutional Renewal Bill, and I was involved with the Bill when it went through at wash-up. There was a lot of pressure. There was an amendment, which happened to be mine, that actually provided for a statutory provision for the Government to publish a memorandum explaining a treaty. In reviewing the provisions, do the Government have any view on those provisions?

Sir Alan Duncan MP: Nothing of that sort has come across my desk. It tends to be a much longer-term policy issue, and, as you can imagine, at

the moment we are involved in many more day-to-day issues. It tends to involve some very clever people in a room somewhere down the Corridor.

I should have introduced Julia properly at the beginning. My apologies. She is deputy director of our international agreements department at the Foreign Office. Perhaps she would explain the set-up in the Foreign Office for addressing this sort of issue.

Julia Crouch: Yes, thank you, Minister. No proposals are currently under way to review CRaG as such, but we are working closely with the clerks to the EU Committee in looking at how that committee will scrutinise the agreements that are starting to come through. We are working closely with Parliament on what the EM should contain, so that Parliament has all the information it needs. We are certainly open to discussing how we can support any further scrutiny that Parliament would want to put in place.

Lord Norton of Louth: Thank you.

Q90 **Baroness Corston:** Quite a lot of the evidence we have had in the course of this inquiry has called for much greater influence on and input by Parliament in the treaty-making process. If there were to be more such engagement, would you see it as helping or hindering the Government?

Sir Alan Duncan MP: We welcome any kind of scrutiny. There is a balance. We all fully appreciate that it is Parliament's role to hold Ministers to account, and Ministers negotiating treaties will always need to have in their mind an understanding of which issues in those treaties are relevant to Parliament and are seen to be significant for Parliament. Food standards or workers' rights, for example, are of very high parliamentary salience, and we would have to be idiots not to appreciate their significance in the context of Parliament.

As publicly visible negotiations take place, there will be a higher degree of public engagement. I was very closely involved, when I was a DfID Minister, in the negotiation of the Arms Trade Treaty. Because of the goings-on between countries in negotiations, a lot of the exact detail of the negotiations was released on an almost daily basis. It was fought out, or negotiated, almost as much in public as in the forums where we were doing the negotiation.

We are back to the spectrum of different sorts of treaties requiring different sorts of scrutiny. I would not go so far as to say that the engagement should dictate how we negotiate, that we should have to reveal our hand at all stages, or that we can be mandated to do only certain things; I think that would be wrong. Some treaties involve delicate negotiations; as soon as you throw them open to the public gaze, you destroy the strength of your negotiating hand. There is a degree of flexibility. It becomes self-defining, in many senses. The big NGO-energised treaties, be it chlorinated chicken or the banning of arms, will excite strong public engagement in a way that other bilateral negotiations

about, say, aviation might not. We have to be flexible, but the real answer to your question is that we have to be sensibly politically aware.

Baroness Corston: Do either you or Ms Crouch know anything about the workings of the Joint Standing Committee on Treaties in the Australian Parliament, and how that works?

Sir Alan Duncan MP: I am sure that Julia Crouch does.

Baroness Corston: I was assuming that.

Julia Crouch: I confess that I do not know the intimate workings of that committee. I know that the Australian Government have set up a committee to give fairly intense scrutiny to treaties in Australia. One always has to look at the constitutional arrangements in each country; they may be useful examples, but whether we can lift and transplant them directly into the UK system would need to be carefully considered. I am sure that they are useful examples to look at, but Parliament will want to design something that works in our own system.

Sir Alan Duncan MP: I gave an example of something that was subject to public attention all the way through—the Arms Trade Treaty—but let me give you another one at completely the other end of the spectrum: the Good Friday agreement. Had we been under a legal obligation, through the process of the negotiations, under the terms of Standing Orders of the House, or something, to reveal exactly what we were doing at every stage, we would never have got there. Please understand that some treaties are different from others and that, if we were trammelled in that way, it would destroy the opportunity we need to be able to bank a treaty.

The Chairman: We have had examples of that previously, too.

Q91 **Lord Judge:** Last week, the House of Lords decided that, as far as it was concerned, the Trade Bill would be conditional on the Government setting out proposals for the process of making international agreements in future. I am not asking this question in the context of Brexit at all; I am asking just for general observations. Would you like to comment on the view expressed by the House of Lords in relation to the progress of a Bill being conditional in that way?

Sir Alan Duncan MP: Conditionality of that sort, in my personal experience of 26 years—the same as that of the Chancellor of the Duchy here—is unusual. Normally, an amendment of that sort would be specific to the Bill itself. Obviously, in passing government legislation, we regret it when anything is delayed, but in no way do we want to attack the right of your House to do such a thing. If there is an issue about scrutiny, it is broadly a separate issue. If I am allowed to express mild but polite regret, I hope you can take it in that vein.

Lord Judge: Does that mean that you have considered it and, as far as you are concerned, you would reject it?

Sir Alan Duncan MP: No. I am from the Foreign Office, not the trade department, nor am I the Leader of the House of Commons, so I am not going to say anything more robust or judgmental than I have already offered.

Lord Judge: Right. Does the Chancellor want to say anything about this particular issue?

David Lidington MP: No, not on this one. It is for Sir Alan.

Q92 **Lord Pannick:** One of the main themes we have been considering is transparency. Minister, you have already said that, plainly, there are circumstances where confidentiality is absolutely essential to the success of negotiations, either as to the detail—we heard some examples—or the very fact that you are negotiating at all with another country, on the Falklands, or with Spain or whoever. Would you accept, as Sir Malcolm Rifkind did in his evidence to us, that the political principle should be a presumption of openness?

That would be subject to two vital caveats. First, it would remain for the Government to decide whether there was a good reason for restricting openness, and, secondly, it would not be a legal principle, because the last thing you would want is lawyers taking you to court to argue about the application. Subject to those qualifications, would you accept that we should formally adopt a political principle of a presumption of openness?

Sir Alan Duncan MP: No, I think that would be an error. It would make negotiations very difficult. As we have seen already in public debate, it reduces the exchange of opinion, with the ramping up of opinion to that of simplistic slogans, which are very good for an NGO's profile but not very good for the quality of public debate. Parliament is the place to scrutinise, and the forum of social media exchange would not be fruitful for negotiating treaties. Of course, transparency is ultimately important, but at the right stage, in the right way and at the appropriate level.

Negotiation is an art. In my commercial life, I have negotiated lots of large commercial transactions, and I am thinking about what would have happened if they had been subject to public scrutiny while I was doing it. What matters is the public scrutiny of the consequences and the conclusion, not the process. If you have to be transparent about the process, it puts the process itself in a difficult and probably much weaker position.

In the end, particularly as we are probably approaching a world in which we will have to do many more things bilaterally, and fewer as an EU bloc, we would find that we were doing ourselves down. As we bring to ourselves, this Parliament and this country an autonomous, sovereign authority to do these things, we want to make sure that we can do them in the right way. Of course, we would be doing them only for our own interests and not as part of a bloc of 28, so the assumption should be that we are doing things that are good for the country.

Lord Pannick: I am sure you are right; if there were more openness,

there would be many simplistic slogans, to use your phrase. Do you not also accept that there is a real public interest in engaging people about these important subjects? Some outsiders may have valuable points to make, if there is more transparency, which may assist in arriving at a better result; not least because, by the time the treaty gets back to Parliament, the work has been done, and it is very difficult, at that stage, to influence it. I emphasise that I am not suggesting complete openness, but I cannot at the moment understand why you are so concerned about openness when there is no specific reason to restrict it.

Sir Alan Duncan MP: Because presumptions turn into obligations, which then turn into judicial reviews, and all sorts of things. Where perhaps we agree with each other is that there needs to be proper high-quality engagement with interested parties, particularly where there are serious legal consequences. I would like to think that that exists.

To go back to the Arms Trade Treaty, I was the DfID Minister responsible for it at the time, and the process culminated in the successful endorsement of the agreement by the UN. The level of engagement we had was absolutely massive, with NGOs, arms manufacturers and all interested parties. That did not need some kind of entrenched or embedded presumption of transparency. It was, quite simply, the proper and responsible process of government.

We adjusted the level of engagement to match the appropriateness of the treaty that was being negotiated, which is probably something we would always do. We have had the Canada treaty, with lots of NGOs firing off their views. If we were to negotiate with the United States on a free trade agreement, I am sure there would be massive public interest in what was happening and what was going to be included and discussed. But if it was some kind of nuclear de-proliferation or reduction treaty, we would be in a completely different world, where a presumption of transparency would be likely to ask us to reveal lots of things that it would not be appropriate to reveal. What then would the presumption of transparency have meant? It has to be calibrated.

I genuinely think that we are a proper, broadly open and democratic society, but where we need to keep confidences for the long-term deeper interests of the country, we should be able to do so. Where we need to engage parties that have a direct interest, because they might be affected, we should do so.

Lord Dunlop: I have a question about asymmetry of disclosure. We might have a view on how much transparency there should be on our side of the negotiation, but what happens if the procedures of the people we are negotiating with are more transparent? Obviously, part of the key to any negotiation is managing the external environment. Could we not potentially be on the back foot if the other side was putting stuff into the public domain that we were not prepared to disclose?

Sir Alan Duncan MP: No, not necessarily. It is all part of the art of negotiation. It might put us on the front foot. Asymmetry can work both

ways. Working out where the pros and cons lie is part of the art. That would be a state of affairs that would call into play the great wisdom of the Foreign Office in working out how best to work for British interests.

Lord Beith: In the situation you describe, where you have constructive discussions with NGOs as treaty negotiations go along, what tends to happen is that Parliament is out of the loop. The NGOs come to the MPs and Peers and say, "Do you know that the Government are trying to negotiate X or Y?", which suggests that there is a missing element in the procedure.

It was interesting that the Prime Minister, in the different context of the transition period for Brexit, actually talked about confidential committee hearings. She said that they may deliver, "confidential Committee sessions that can ensure Parliament has the most up-to-date information, while not undermining the negotiations". If that is acceptable in principle—we are not talking about the Brexit aspect now—it presumably has some potential in treaty negotiations generally.

Sir Alan Duncan MP: I do not think there is a missing element. What you have described is the process of our constitutional structure, which is that we have an Executive and a legislature. The legislature, in its 24/7 scrutiny of the Executive, is perfectly entitled within that scrutiny to say, "Oi, you're doing this treaty. Are you going to include X, Y and Z, or have you thought about A, B or C?" For the loop to connect in that way is perfectly acceptable; it is then up to the Executive to decide whether they show their hand in great detail, or whether they say, "We are in the midst of negotiations and we're just going to hold tight until it is the right time to tell you that".

Lord Beith: I think that in our questioning we have accepted, and Lord Pannick was indicating, that it is the Executive's decision in the end as to how transparent they can afford to be. What I am pointing to is the unsatisfactory situation in which NGOs are told what the Government are thinking of doing but Parliament is not. That may be because Parliament does not have a structure in place that exactly fits the Government's need to maintain a degree of confidentiality.

David Lidington MP: That is interesting. Certainly, the discussions on Brexit are not by any means at a conclusive stage. Today will be the first opportunity, for example, to understand the views of the Leader of the Opposition on this. The Prime Minister is very concerned to try to find a mechanism for phase 2, if I can describe it that way, whether or not it applies elsewhere.

Lord Beith: My question is whether the mechanism has a wider use.

David Lidington MP: I would not want to give a pledge on that. First, we have to see how discussions with parliamentarians about a structure for the future partnership with the EU work out. If that reflects the ambitions set out in the Government's White Paper, it will be much more wide-ranging than a normal bilateral treaty with an individual country,

because it will cover economic matters, political co-operation, security co-operation, police and criminal justice co-operation, and so on. We are at an early stage of testing the views with Select Committee Chairs, party leaders and spokesmen and so on.

The models at the back of our mind include the different range of models in EU member states at the moment for considering their Government's approach to a negotiation. In some cases—and obviously this is the UK's approach generally—there is a distinction between the Executive and the legislature. The Executive report back and the legislature expresses its view and decides whether or not to endorse what the Government have done. At the other end of the spectrum, the Danish Minister has to pop out of the Council of Ministers meeting to phone the equivalent of Sir William Cash to ask for permission to alter the mandate. I do not want to prejudice what may happen, but I do not think that will be the likely outcome of current discussions. When you look at what Finland and Sweden do, you can see that they have a softer mandate.

Lord Beith's point raises questions about how Parliament deals with these things. Under our current system, the normal expectation of a Select Committee in either House is that its proceedings are held in public, and that evidence, once given orally or in writing to a committee, becomes the property of that committee. Ultimately, the committee, not the evidence giver, decides whether it should be made public. It is not just a matter of the Government saying how they would like to set it up. In these EU negotiations, and even beyond, if parliamentarians want to say that they should have more input, even to grant an outline mandate, it would require a big shift in culture on the part of cross-party parliamentary committees.

The Chairman: You agree that it should not be transparency; it should be engagement where appropriate and in certain circumstances.

David Lidington MP: I think that is right. I am not willing to be pinned down, and cannot be pinned down with precision at the moment, because the discussions are at an early stage.

The Chairman: I was thinking outwith Brexit.

David Lidington MP: Yes. I am thinking about engagement rather than automatic transparency. In a negotiation with another sovereign Government, you have to have flexibility over your own negotiating position and how you present your case to that Government. The last thing in the world that we should be doing, in any negotiation, is saying in public what we might bid for that we are prepared to sacrifice in order to get the things we are prepared to settle for.

Q93 **Lord Hunt of Wirral:** Perhaps not in the context of Brexit, for the moment, but in the context of the parliamentary scrutiny of treaties generally, if Parliament established a treaty scrutiny committee, would the Government be willing to grant it some form of scrutiny reserve such that it could complete its work of scrutinising treaties before they were

laid before Parliament and before the 21-day period started ticking? Chancellor?

David Lidington MP: I think this is for Sir Alan in the first place, but I might chip in.

Lord Hunt of Wirral: Sorry, I meant former Chancellor.

Sir Alan Duncan MP: I know you are looking beyond Europe, but let us start with Europe. At the moment, the way the scrutiny reserve works is that UK Ministers may not agree to a proposal for the European Council to authorise the EU to sign, provisionally apply or conclude an international agreement until the EU scrutiny committees of both Houses have finished their scrutiny. The European Scrutiny Committee has the power to recommend a proposal for debate in the European Committee on the Floor of the House. Ministers should not vote in the European Council on proposals that the committee has not cleared, or which are awaiting debate. That scrutiny reserve can be overridden in certain cases, as you know; we do that for reasons that I think we all understand.

We need to consider carefully the granting of a formal scrutiny reserve. We have to be a little careful about lifting and shifting practices that have been built up in the EU context, because things are going to be different. The EU scrutiny reserve stems from the fact that the EU Commission negotiates free trade agreements on behalf of all 28 states. Obviously, that is not going to be the case. It also ensures that international agreements do not bind the UK through EU law until they have been scrutinised by Parliament, which is very important. We will not need a scrutiny mechanism to fulfil the same purpose when we are no longer bound by EU law.

It needs quite a lot of thinking. We will have to adapt a lot of things once we have left the EU, and this is clearly one that will need to be looked at, because we are no longer looking at a collective political body making the law; we are looking at our own sovereign, autonomous right to do so. We need to work out how that might work, and how it might work in exceptional cases. There will be exceptional cases, and we do not yet know exactly what they will be, but we need to be open-minded about the fact that they will exist.

David Lidington MP: If you come up with that suggestion in your report, it is something the Government would look at seriously but, for the reasons Sir Alan gave, it is not straightforward. The ability to override is important. I probably hold something of a record for the number of overrides that I have made of both Lords and Commons scrutiny committees, usually because of fast-moving negotiations about sanctions, where I needed to take action swiftly to avoid the flight of assets or individuals. One needs the power to override, and it would need to be agreed in giving effect to the proposition that Lord Hunt put forward. Could one have a model of override that applied to each and every potential treaty?

The other thing that strikes me is that, in a post-EU future, we are probably looking at a significant increase in the number of treaties that the United Kingdom will seek to negotiate and implement, and they will be quite disparate in character. Would a single treaty scrutiny committee actually have within it the capacity and expertise to deal with things that might be as different as a fisheries treaty with Iceland, an FTA with Mexico, a political co-operation agreement with Kyrgyzstan or a military assistance treaty with Kuwait? It would surely be necessary, in each of those hypothetical examples, for whichever committee or committees were looking at them to take account of the views of experts on the areas of policy that were the subject matter of the treaty.

How long would the parliamentary process take? I am thinking perhaps more in Commons than in Lords terms, but the departmental Select Committees at our end of the Palace might say that subject-specific committees should have the lead, rather than new committees. A lot of detail would have to be explored, and questions teased out, before we said, "Okay, let's go ahead with this".

The Chairman: We have discussed among ourselves the variations, and how you could have a central committee and other committees involved. We have thought about that to a certain extent.

Q94 **Lord Dunlop:** Can we turn to devolved issues? Last week, the Prime Minister committed to an enhanced role for the devolved Administrations in the next phase of the EU negotiations. On that question more generally, how do you foresee involving the devolved Administrations in negotiating treaties that engage devolved competence?

David Lidington MP: There are two immediate strands: what is happening in what I described as phase 2 of the EU talks, and the question of third-country FTAs and, potentially, other treaties in the future. The existing memorandum of understanding that governs devolution recognises that it is the duty of the UK Government to involve the devolved Governments as fully as possible in discussions about the formulation of the UK Government's position on EU and international issues, wherever those touch on devolved competences. That is done in the European context primarily through the JMC set-up. For phase 1, we have had meetings of the JMC (EU Negotiations) and the newer Ministerial Forum (EU Negotiations), which involve devolved Governments and, at the moment, in the absence of an Executive, the Northern Ireland Civil Service.

Last week, the PM hosted a trilateral with the two First Ministers. One needs to be able to be sufficiently flexible to have short-notice bilateral and trilateral meetings in addition to formal JMC (EN) or JMC (P) structures. The PM asked the two First Ministers for their views on how to give an enhanced role to the devolveds in the second phase of the EU negotiations. I know that in her mind and the Government's mind is the model we have tried to follow on fisheries negotiations and the annual meeting on fixed-yield quotas, where we have had intensive discussions between Defra as the Whitehall departmental lead and the Fisheries

Ministers and their official teams from Scotland, Wales and Northern Ireland.

I remember going over to Brussels on ministerial business of my own and overlapping with the big annual fisheries meeting in December; about 30 people were crowded into the UK delegation room in the Justus Lipsius building, because all the devolveds were there in force. It depends on how many seats are available in the ministerial room, but at times devolved Ministers and officials have been in the room, if not formally at the table with the UK nameplate, and they have been able to talk to the Minister in the chair or to pass notes and see what is going on there.

To look beyond Europe for the moment, to FTAs, I talked to Trade Ministers yesterday, knowing that the subject was likely to come up. The DIT is having detailed discussions with the devolved Administrations at official level about their role in future trade agreements. The aim is to agree a framework for that before the exit date from the EU. Those talks are going well. The outcomes we expect, or the offer, certainly include a regular inter-ministerial forum on international trade. I hope very much that, subject to the final views of the Secretary of State for International Trade and, obviously, the devolved Governments themselves, we will be in a position to go into a lot more detail on that in the near future.

Lord Dunlop: You are open to the idea both in the next phase of EU negotiations and for free trade agreements that the devolveds could be part of the negotiating team. Is that what you are saying?

David Lidington MP: Yes. Exactly how they would fit into the negotiating team is a question to be determined. Ultimately, all three devolution Acts make it clear that the negotiation of international agreements is a reserved matter for the Government of the United Kingdom, and for the Parliament of the United Kingdom when it comes to ratification, so structures have to reflect the fact that, ultimately, it is a reserved matter. It is also true that those international agreements will touch on things whose implementation may be a devolved competence, fisheries being a classic example; the environment may be another.

It is right that the UK lead negotiator should be fully cognisant of the specific interests and concerns of the devolved Governments. To take the obvious example, there is the fact that to reflect an international agreement in Scots law will require something different from reflecting it in English law. It is right that the UK lead Minister should give devolved Ministers an opportunity to seek to influence the UK negotiating position. That is not the same thing as saying that there has to be a veto or that we should have some sort of qualified majority voting system to establish it. I do not think that would be right.

Members of the House of Commons from Scotland, Wales and Northern Ireland have the right to hold UK Ministers accountable for what happens in any such international agreements. It is about finding a practical method that works and genuinely tries to ensure that the devolved Administrations feel they are being seriously listened to, and that people

living in those areas of the UK feel that their interests are being properly taken into account.

Lord Dunlop: Obviously, one hopes that peace and harmony will reign on these issues, but, given experience, perhaps not. Do you have any thoughts on how disagreements can be resolved and what mechanisms and processes might be put in place to take the heat out of some of the issues?

David Lidington MP: We are looking at dispute resolution mechanisms as part of the intergovernmental review that is going on at the moment. There is, as Lord Dunlop knows, already a reference to dispute resolution in the memorandum of understanding on devolution. Through the IGR, we are discussing how we might adapt the memorandum to cover all dispute resolutions that touch on intergovernmental relations, but that needs to dovetail with the Government's agreements being worked up for particular issues, such as common UK frameworks post EU single market. That is work in progress.

The default position is that you have to go back to what the devolution Acts say about where competence and the right to decide ultimately lie, but you buttress that legal underpinning with conventions, memorandums of understanding and habits of good practice. It was controversial, but the agreement we were able to reach with the Welsh Government during the passage of the EU (Withdrawal) Bill on how we manage the potential application of Section 12 freezing powers was important. We basically agreed that the ultimate power lay with the UK Parliament, but the UK Government would abide by a clear code for formally taking account of the views of the devolved Governments and Parliaments, reporting those back and reporting quarterly on whether the powers were still needed, and so on. We came to an agreement with the Welsh Government that has so far worked pretty well.

Lord Dunlop: Can you comment generally on how the IGR review and the work on common frameworks is going, and what sort of timescale you are working to?

David Lidington MP: It is going constructively. Like a lot else in government, the sheer administrative as well as legislative workload involved in Brexit means that it is probably going more slowly than one might otherwise wish.

On the timescale, we had a JMC (Plenary) on 19 December, when the Prime Minister and the First Ministers reviewed progress since the IGR review was launched in March 2018 by the JMC (P). The officials have been told to continue work under five key headings. One is dispute resolution, to which I alluded. Then there is a set of principles that should provide a context for future relations: governance of common frameworks, future intergovernmental machinery, and how to have structures to ensure that we have effective co-operation and joint working on international matters in future. No firm date has been set for the next JMC (P) meeting, so I cannot give a clear deadline for that.

Those discussions are mostly being conducted at official level at the moment, but they are going constructively.

Q95 **Lord Dunlop:** Do you see any role for devolved legislators in approving treaties that engage devolved competence?

David Lidington MP: In actually approving treaties? I do not see how you can apply Sewel to treaties. The devolution Acts are clear that international relations are the responsibility of the UK Government and Parliament, and the Sewel convention applies to legislation but not to the negotiation of treaties. Obviously, when a treaty requires implementing legislation that touches on a devolved competence, Sewel kicks in and, in those circumstances, we would need to seek a legislative consent Motion in the usual way. Ultimately, it is a matter for the UK Parliament to decide what should happen. That is probably the best mechanism to rely on. At the moment, I am not tempted to try to invent some new system for treaties.

Lord Dunlop: Thank you. That is very helpful.

Lord Morgan: One of the problems is that devolution and the competences of the devolved Assemblies have become more important over time. The Sewel convention has acquired more significance simply because the devolved Assemblies are doing more, and have a claim to do more. Is the way this has been approached helpful? We have jumped straight into key areas of competence for the Assemblies—agriculture and fisheries—which have become more important as the European connection has dissolved. Does that not give the impression that a lot of the disagreement about the role of the devolved Assemblies has not been necessary? It has injected an element of conflict that should not have been there.

David Lidington MP: Well, of course, the need to do that stems from the 2016 referendum result. What is true is that, when the Blair Government brought in the devolution settlements in 1998-99, the assumption in all parts of the UK, and pretty much across the Houses of Parliament, was that membership of the European Union would continue indefinitely and that therefore you did not need to think about matters that were subject to the EU acquis.

The decision to leave the European Union has forced on all political institutions a sudden need to focus on issues where previously the UK-wide regulatory framework was set at European level, and then to try to work out what it means in the different devolution Acts, which apply in slightly different ways, for the delineation of competences returning from EU level. We have to work out how to set that alongside a UK Government competence over international agreements and key things such as the provision of a UK-wide single market, which businesses in all parts of the UK tell us is absolutely essential for their continued prosperity.

Working those things out in short order has been a challenge. There is no hiding the fact that there have been some differences and disagreements. I am not here to make party-political points, but the difference has been sharpest with the Scottish Government. In part, that reflects a political difference between a unionist Government in London and a nationalist Government in Holyrood, with different strategic and constitutional objectives.

I can point to a good track record where sustained engagement with the devolved Administrations has yielded fruit. For example, we changed language and clauses in the Agriculture Bill to meet specific concerns expressed by the devolved Governments. In work on the European withdrawal implementation Bill, we talked to devolved Governments at official level. For some of the no-deal planning, the First Ministers, or their ministerial spokesmen, have been invited by the Prime Minister to attend the meetings of the Cabinet Committee dealing with EU exit preparations for both deal and no-deal scenarios.

The devolved Administrations are being brought in to an increasing degree. We are not going to avoid bumps, but there is a genuine wish on our part to minimise them and to respond, and the feedback I get from devolved Ministers is by no means only negative. There are complaints and disagreements from time to time, but credit is being given where departments have engaged seriously with them.

Lord Morgan: Would it not help if the Joint Ministerial Committee was a more effective and broadly credible body? It has been very unsatisfactory as regards personnel and when it meets, under Labour, coalition and Conservative Governments. We have labelled its inadequacies in previous discussions in this Committee. Is it not a serious problem?

David Lidington MP: I do not accept the way Lord Morgan has posed the question. I am perfectly happy to accept that this is work that needs to continue to progress, for the reasons Lord Morgan gives. The powers of devolved Administrations and the habit of devolution have developed over the years, and the machinery needs to respond to that.

To some extent, the tensions arise from the fact that different political parties run the Governments of different parts of the United Kingdom. If one goes back to when this was all set up, the United Kingdom, Wales and Scotland were all being run by Labour Governments; Northern Ireland is *sui generis*, obviously. To some extent—others around the table will know the ins and outs better than I do—it was dealt with in the family. In a position where there is a Conservative Government in one place, a nationalist Government somewhere else and a Labour Government in a third jurisdiction, it is all a bit more jagged. The intimacy of political relationships is not the same.

Looking at the track record, to date we have had 15 meetings of the Joint Ministerial Committee (EU Negotiations) and six meetings of the newer ministerial forum. I have upped the frequency of JMC (EN) meetings and we have initiated the forum meetings. We have not always succeeded,

but we try to meet monthly. I had to apologise for postponing a meeting of the JMC (EN) last week for other reasons, and I am trying to reschedule it as rapidly as possible. I have tried to stress to my Scottish and Welsh counterparts that it should not be a matter of waiting for a ministerial meeting or forum. If there is a problem, they should phone me or the relevant Secretary of State. The habit of informal working together to resolve difficulties, as much as anything formal, is the answer to the problems and tensions to which Lord Morgan refers.

- Q96 **The Chairman:** Can I go back to what was said earlier about Brexit, and the consequences of Brexit for treaty-making? Mention was made of an increasing volume of treaties and a change in the nature of some of the treaties that we will face. I would like your assessment of that. Given what has happened in Parliament, and the extent to which it wants almost to negotiate the Brexit treaty, which obviously it cannot do, is Parliament ever going to look at treaty-making in exactly the same way, and sit back as it has in the past? Have we seen a step change in Parliament wanting to be involved in a way that possibly cannot be turned back, even if it was desirable?

Sir Alan Duncan MP: In the short term, there will be quite a rush. One consequence of leaving the EU is that we will have to replicate bilaterally a lot of the treaties, particularly in the area of trade, which have been assigned as part of the EU bloc. If it is straightforward replication, I hope the process will be seen as more straightforward, but that means that the volume in the short term will increase. There will be trade agreements, and we will always have multilateral agreements, such as the Hague convention and things that deal with child support. In the Foreign Office, we lead on 16 association trade agreements, and we do a number of political agreements that will need to be replicated.

The long-term impact on the total volume of treaty-making remains to be seen. It may mean that, because we are doing things bilaterally, we will be able to do things more quickly on a sovereign basis than as part of a bloc; we will be representing just our own interests, not those of 28 countries which include our own. We may be able to take a slightly different approach. In some cases, we do not have a treaty as such; we just get on with it. There may be a greater degree of flexibility over how we structure these things. It is early to say but, certainly at the beginning, there will be a bit of a rush.

The Chairman: Do you think it is inevitable that Parliament will look for more involvement?

Sir Alan Duncan MP: Not necessarily. Parliament may just say, "Please make sure you replicate what you had, and get on with it". If Parliament sees that it is the same, it may be unexcited. On the other hand, if there is a completely new trade agreement or association agreement of some sort, for the sorts of reasons we were discussing earlier in this witness session, Parliament may get more excited. We have to be flexible, again, to appreciate when there is political sensitivity and engagement from

interested parties to make sure that we are alert and responsive to all those things.

Q97 Lord Beith: We are going to enter a period when Parliament will do what it has not really been doing in the last few months, which is arguing about the extent to which replication should take place. You used the word “replication” a moment ago. There will be political arguments about whether in many areas of policy we should continue to do what was done in Europe. The formal transfer is one of replication, but we then enter a period in which, even in discussing what the agreement should be, people will argue. They will argue about whether to carry on with an environmental provision or to change it, or whether to carry on with an aspect of judicial co-operation or to alter it in some way. From the Prime Minister’s statement, it appears that she envisages that Select Committees will be quite involved in that process in the coming months. Does Mr Lidington have any comment on that?

David Lidington MP: We always want Select Committees to take an active interest in things. One of my frustrations when I did Sir Alan’s job at the Foreign Office was that I found it so difficult to interest the Commons departmental Select Committees in the European aspects of their business. They tended to think that it was all a matter for the European Scrutiny Committee and they should not get involved. Actually, their terms of reference explicitly address their European responsibilities.

Some were better than others. The Treasury Select Committee, for example, because the financial services sector is so important in the UK economy, took a keen interest in EU financial services regulations. It was similar for the Defra Select Committee, but it is not true of every departmental Select Committee. On the Government’s part is perfect acceptance and willingness to see Select Committees take a more active interest in all this.

Lord Beith: The Prime Minister referred to the negotiating mandate for the discussions that are about to begin.

David Lidington MP: That takes us back to my response to an earlier question about the practice and culture of Select Committees, and the relationship between government and legislature. If we were to move to a world where we had a mandate system, and there are arguments for and against doing that, the two things essential for any mandate system to work—I am not committing the Government to such an approach—would be a clear and trustworthy culture of confidentiality, because I do not see how we could operate otherwise if we were in negotiation with another country or group of countries, and allowing a degree of freedom to the negotiator.

Lord Beith: I fully accept the confidentiality requirement for some things, but some of these issues will go right out into the open. There will be an open public argument about whether the Government’s mandate is to seek to maintain and replicate advantageous things that some people believe we have in Europe, or whether we should take advantage of the

new freedom to do things differently, as is the view of other people, and that the Government should, therefore, take a negotiating mandate that reflects one or other of those principles.

David Lidington MP: At the end of the day, the Government are elected to take decisions and to be accountable to Parliament for those decisions. If there is a majority in Parliament to block something that the Government want to do, there are plenty of occasions, when it comes to legislation or ratification, when Parliament can do that, if it really objects to something that the Government have done. There is a real dilemma, but I do not think you can have a system whereby parliamentary committees try to micromanage a Government's approach to a negotiation.

Sir Alan Duncan MP: A mandate can be permissive or instructive, or both. It might say, "Take the trade agreement we have with Ruritania now and add to it what you can", or it might say, "Take the trade agreement that exists and on no account include chlorinated chicken". A mandate can take many forms. I have not yet heard any principles or methodology suggested that would explain exactly what the criteria might be in a mandate or how they might be helpful to British interests.

The Chairman: Maybe any system that is advised would evolve over time, rather than trying to fix every eventuality or potential episode right at the beginning. That is very often the case.

Thank you all very much. Ms Crouch, Ministers, is there anything you would like to add? Is there anything we have not covered that you would like to tell the Committee before you leave?

Julia Crouch: No, I think everything has been covered.

Sir Alan Duncan MP: Officials tend to say that Ministers have said it.

The Chairman: I was giving the opportunity, just in case. It is worth a try. Thank you very much.