



OFFICIAL REPORT
AITHISG OIFIGEIL

European and External Relations Committee

Thursday 22 September 2016

Session 5



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Pàrlamaid na h-Alba

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EUROPEAN AND EXTERNAL RELATIONS COMMITTEE

6th Meeting 2016, Session 5

CONVENER

*Joan McAlpine (South Scotland) (SNP)

DEPUTY CONVENER

*Lewis Macdonald (North East Scotland) (Lab)

COMMITTEE MEMBERS

*Jackson Carlaw (Eastwood) (Con)

*Ross Greer (West Scotland) (Green)

*Rachael Hamilton (South Scotland) (Con)

*Emma Harper (South Scotland) (SNP)

*Richard Lochhead (Moray) (SNP)

*Stuart McMillan (Greenock and Inverclyde) (SNP)

*Tavish Scott (Shetland Islands) (LD)

*attended

THE FOLLOWING ALSO PARTICIPATED:

Professor Nicola McEwen (University of Edinburgh)

Akash Paun (Institute for Government)

Christos Sirros (Québec Government Office in London)

CLERK TO THE COMMITTEE

Katy Orr

LOCATION

The David Livingstone Room (CR6)

Scottish Parliament
European and External Relations
Committee

Thursday 22 September 2016

[The Convener opened the meeting at 09:04]

Decision on Taking Business in
Private

The Convener (Joan McAlpine): Good morning and welcome to the sixth meeting of the European and External Relations Committee in session 5. I remind members and the public to turn off mobile phones and any other electronic devices. Members who use electronic devices to access committee papers during the meeting should ensure that they are switched to silent. Tavish Scott has apologised and indicated that he will be a little late.

Agenda item 1 is a decision on whether to take items 4 and 5 in private. Item 4 is consideration of the evidence heard on intergovernmental relations and item 5 is consideration of the committee's work programme. Do members agree to take those items in private?

Members *indicated agreement.*

European Union Referendum
(Implications for Scotland)

09:05

The Convener: Our main item of business today is two evidence sessions on intergovernmental relations. I welcome our first panel: Professor Nicola McEwen, professor of territorial politics and associate director with the centre on constitutional change at the University of Edinburgh; and Akash Paun, a fellow of the Institute for Government.

I am sure that you both saw the First Minister's evidence to the committee last week. We asked her about intergovernmental relations and how she envisaged the Scottish Government being "fully involved"—as the Prime Minister has said that it will be—in reaching a negotiating position alongside the United Kingdom. The First Minister said that she felt that the process is taking too long, but she also said that a process is needed that is aside from the joint ministerial committee that normally handles such matters. Will you reflect on that and give us your views, from what you have seen so far, on how the process will work and how it could work more effectively?

Professor Nicola McEwen (University of Edinburgh): I put on record my thanks to the committee for its help with the event that we organised the other day. Messages from the participants will be coming your way shortly.

I do not want to comment on the length of the process, because it is important to get the detail right, and if that takes a little more time, that is probably worth while.

If the arrangement is to be effective, it will need to operate a little differently from the standard joint ministerial committee forums as they have operated recently. The remit of JMCs, which is set out in a memorandum of understanding, is about good will, good communication and consideration of overspills between reserved and devolved competence. That does not seem to fit the purpose that we are talking about, which is very specific, focused and task oriented. There are different stages of the process. The first is working out what the negotiating position ought to be and then there is seeing it through each stage towards implementation. That seems to me to require a different kind of remit from the standard joint ministerial committee process. Therefore, the terms of reference for whatever forum is adopted are important.

The JMC is a multilateral forum for the UK Government and the devolved Governments—the member Administrations of the UK, if you like.

Something like that will be necessary. However, over the past few years, we have seen the emergence of more bilateral forums between the UK and Scottish Governments, such as the joint exchequer committee and the joint ministerial working group on welfare, to work out very specific things. In the case of Brexit, if the Scottish Government is to be able to negotiate something specific for Scotland—whatever that might entail—it probably will not be appropriate to do that in the context of a JMC; it will need some sort of bilateral negotiation.

Akash Paun (Institute for Government): I thank the committee for the invitation to give evidence. I am very pleased to have the opportunity to contribute to this important debate.

The signals that we have heard from the Prime Minister, other members of the Government and, indeed, the previous Prime Minister immediately after the referendum, have been very positive. If taken at face value, it seems that the UK Government is committed to approaching the process of Brexit in a collaborative way with the devolved Administrations. The test is what that means in practice, and how those words are turned into an effective system and process for joint decision making.

There were some statements about the Prime Minister's visit to Edinburgh, with people trying to work out what lots of official contact might mean, but the First Minister has expressed some frustration that the formal engagement between Governments on the issue seemed to be getting off to a slow start. That is partly just because the UK Government is still working out exactly what Brexit means, beyond "Brexit means Brexit". There have also been a lot of machinery of government changes down in Whitehall—lots of churn of officials and so on, and lots of key posts still to be filled in the new Department for Exiting the European Union. The whole system for dealing with this hugely complex set of issues is still getting set up, so I think that we can understand why things might have moved slowly so far.

On the intergovernmental machinery that we have and what we might need, I agree with a lot of Professor McEwen's comments. It is clear that the memorandum of understanding that sets out the wider principles for intergovernmental relations and the terms of reference for the joint ministerial committee structures is not really set up for joint decision making or co-operation. I looked at the memorandum of understanding yesterday on the way up to Edinburgh to refresh my memory. There is a section under the heading "Co-operation", which is one of the principles of intergovernmental relations. It is an incredibly short and almost entirely contentless section with some vague statements about the four Administrations

recognising the importance of working together on matters of joint interest and things like that—motherhood and apple pie, basically.

The intergovernmental relations machinery has never really been about bringing the four Governments together to deal with a big joint challenge of anywhere near this size and complexity, or trying to facilitate the finding of a shared position on such a challenge. We need something new, which may or may not be called a JMC Brexit. A new label may be chosen for it but the way in which it works and the principles under which the devolved Governments are involved—which may, possibly, deal with the questions that you are interested in, such as the body's level of transparency and accountability—will need to work quite differently.

The Convener: Yes. After the referendum, Lord Smith of the Smith commission was very critical of intergovernmental relations. The memorandum of understanding was supposed to be revised as a result of the Smith commission. Is that proceeding fast enough? Perhaps this is an opportunity to get on with that revision and to improve matters.

Akash Paun: That review has clearly proceeded slower than expected, as it kicked off back in December 2014. At the time, it was probably stated, and it was certainly expected, that there would be another meeting of the JMC in its plenary form with the heads of Government a year later, at the end of 2015. At that point, it was expected that an announcement of the new memorandum of understanding—the new framework and principles for intergovernmental relations—would be made.

However, various things, one after the other, have contributed to pushing the end of that process back. For a while, the big IGR issue was the resolution of the fiscal framework negotiations between the UK and Scottish Governments. Then we were into election campaigning, which was not seen as the ideal time to try to bring the Governments together. That was followed by the EU referendum campaign and the unexpected result, and we are now in autumn 2016.

More than ever before, there is a very specific and important task on which the Governments must work together in quite a new way. I anticipate—I have heard that this is the expectation of people in Government—that, fairly shortly, an announcement will be made about the intergovernmental machinery to deal with Brexit. Alongside that, a revised form of the MOU, or at least some new terms of reference for the intergovernmental machinery to deal with Brexit, will be published. I think that it is very important that that comes out—

09:15

The Convener: Someone has told you that that will happen soon. We have been told that the announcement on the European relationship will be made very soon. You think that both those things will happen at the same time. Is that what you have been told?

Akash Paun: I think that that would make sense, because many of the issues that the Governments were grappling with as part of the review of intergovernmental relations were to do with the principles on which they should work together, how transparent intergovernmental relations should be, what the accountability processes could be and whether the four Governments should come together on the basis of parity of esteem rather than on the basis of the implicit hierarchy of the UK and the devolved Governments that comes through in the current MOU. I think that what the Governments set up to deal with Brexit will bring to the fore the issues that they have been thinking about since December 2014, so it would make sense to combine those processes.

Lewis Macdonald (North East Scotland) (Lab): I was very interested in what Nicola McEwen had to say about the potential that exists for both multilateral and bilateral arrangements to be put in place. I ask her to comment further on that.

I think that last week the First Minister said she hoped that what would be announced in October would be a multilateral arrangement involving at least the other devolved Administrations—Scotland, Wales and Northern Ireland—as well as the UK Government. However, Nicola McEwen was saying, I think, that some of the nitty-gritty of specific Scottish interests and input might best be dealt with on a bilateral basis. How do you envisage that working, given that we are talking about a situation in which, as both of you have said, the existing structures are not fit for that purpose?

Professor McEwen: I envisage it working in a mixture of ways. I think that it will work mainly informally with different Whitehall departments, as relevant. We will be able to get a better sense of that once we have a better idea of what particular type of relationship the Scottish Government wants Scotland to have with the EU, which is obviously contingent on what relationship the UK has with the EU. If the intention was to deal with specific issues to do with the single market or trade, for example, it is possible that the joint exchequer committee, which is an existing bilateral forum, might be an appropriate venue to discuss some of the arrangements and how the practicalities around them might work in practice. The joint exchequer committee involves mainly

Treasury ministers, but one assumes that some trade ministers would have to be involved, too.

I am not wholly confident that there would be a willingness to set up a completely new bilateral forum. If there are existing forums that can be utilised for that purpose, that might be a way forward. Using the interpersonal relationships that build up between officials and ministers is one way to go, and the Scotland Office could have a role to play in facilitating such connections.

A concern that I have is that the UK Government did quite a lot of work in implementing the Smith commission agreement and reaching the fiscal framework agreement, which was quite a difficult process. However, we now have a new Government and new ministers who, by and large, were not engaged in that process, so there is probably quite a bit of work to be done to nurture an understanding of how devolution has operated in practice in the past few years.

Lewis Macdonald: I guess that that answer makes me worry that we might simply repeat the weaknesses of the joint ministerial committee on Europe. If you are saying that there will be a formal multilateral process that involves at least the four Administrations but that a lot of the actual business will be done informally and bilaterally, the question of transparency becomes very difficult. How can this Parliament or other Parliaments have any oversight of the key negotiations if they are informal?

Professor McEwen: I am not convinced that the joint exchequer committee is less formal than the JMC. They are probably both on the side of informality. However, you will be aware of the agreement between this Parliament and the Scottish Government on transparency issues regarding the Scottish Government's relationships with the UK Government. That agreement covers not just the JMC but all forms of ministerial engagement with the UK Government.

I am not quite sure of the status of the agreement this side of the election. It is probably more about practice than about a formal legal underpinning—there is certainly no sign of such underpinning, although there are probably some signs of some practice changing. I encourage this committee and others to appreciate that there are opportunities to enhance transparency on the horizontal level—transparency over what the Scottish Government is doing within the intergovernmental arena and the Parliament's ability to hold it to account and to scrutinise those activities. When the discussions are multilateral, there is much less scope and it gets more difficult; obviously issues of confidentiality are involved around that.

Lewis Macdonald: It would be fair to say that the written agreement, although it is a good agreement on paper, has not begun to operate in any meaningful way.

Professor McEwen: I am not sure that that is the case. I have spoken to some members of the Social Security Committee who suggested that there were signs that the agreement was operating in practice in relation to that committee. You will have a better sense than I do of whether the agreement is operating in relation to this committee.

The Convener: On that point, can I just clarify something? My understanding is that both parties have to agree to share information, so if the UK Government said, "No, we don't want to share this information; it has to be completely confidential," the Government here could not share that information with Parliament. Is that correct?

Professor McEwen: Yes, I think that that is the case, but I emphasise that that is not so much about transparency around what the UK Government is saying as it is about what the Scottish Government is doing and advocating and how it is positioning itself in the intergovernmental arena.

When the agreement was being negotiated, it transpired that some of the most difficult and sensitive issues were not so much to do with the UK Government's perspective as they were to do with Northern Ireland's perspective. That adds to the difficulties with transparency around those multilateral discussions.

The Convener: Okay. Thank you very much.

Richard Lochhead (Moray) (SNP): I am not sure how anyone will be able to have any faith in Scotland being able to influence the UK's position in the Brexit negotiations if the intergovernmental machinery—if you can flatter it by calling it that—of the past 17 years continues to be the same. I totally agree with the comment that we need something different. I would suggest that we need something brand new.

Is it not the case that there is no official mechanism involving the devolved Administrations by which UK policy on any issue is decided UK-wide? Ultimately, what we have had so far—and I want to know whether the panel agrees with this—has been Scotland being treated as a consultee, in effect. When intergovernmental arrangements work, they very much depend on the mood, the diary space and the goodwill of any particular UK minister at any particular time.

For instance, as far as I can tell John Swinney's negotiations with the UK Government over the fiscal arrangements in relation to the Scotland Act 2016 relied on when the UK minister could take a

phone call or when he had space in his diary to meet John Swinney, and so on. Do you agree that that is simply not good enough when it comes to Brexit?

Akash Paun: Yes, and I know that you have a lot of personal experience of that. As was said earlier, we do not have systems to facilitate UK-wide decision making. That goes back to the design of the devolution settlement and the desire, dating back to 1999, to have as clean a split as possible between what is devolved and what is reserved. In federalist literature, it is called a dualist model. I believe that one of the papers that the committee has received for this meeting discusses that model in relation to Canada.

The starting presumption in Scotland's case is that matters are either devolved or reserved and that therefore machinery for joint decision making is not needed. That is the theory, but of course the practice is a lot messier than that and lots of issues cut across the constitutional division of powers. One school of thought states that business with the EU is a matter of foreign relations and a UK competence. The memorandum of understanding that states how the joint ministerial committee on Europe should work therefore states that the devolved Governments are present only as consultees, as you have said. Their involvement in decision making is largely determined by the UK Government minister who is leading on the issue that is being discussed.

The reality of EU membership, however, is that it cuts across the devolution settlements in such complex ways that we need to think about Brexit as a UK-wide decision. That is not the same as saying that there will be four equal partners around the table—I do not think that that is likely. However, I think that there is a way in between there being four equal partners and how things have too often worked in practice, which is that the issue is treated purely as a Westminster competence and that there is consultation only at the margins with the devolved Governments. It is difficult to find exactly the right point on the spectrum and think through how that can be put into operation, but that is the task.

Richard Lochhead: In the Brexit negotiations, many issues will be difficult to split as devolved or reserved. Scotland has to be involved in all the Brexit negotiations, because they will impact on Scotland in one way or another. What would a binding agreement to ensure that Scotland was involved at all levels of Brexit negotiations look like? Would it have to be underpinned by legislation to ensure that the UK Government had to agree a position with the rest of the UK?

Akash Paun: I cannot imagine the UK Government even entertaining the thought of

binding legislation that specified the ways in which the devolved Governments would have to be involved. Constitutionally, that would be quite a big step to take. A political agreement is more likely. If, as we have discussed, over the coming months a new multilateral forum is set up as part of the JMC structure or as something new, it is likely that there will be a publication that sets out the new system's terms of reference and the principles by which it will operate and take decisions. That of course would be scrutinised by the various legislatures and so on. It is very unlikely that we would see something legally binding, to be honest.

09:30

Professor McEwen: I agree, but there are in-betweens. You could have a forum that is in between how the JMC has operated in the past 17 years and something that is more legal and binding, as was suggested.

In his first question, Richard Lochhead mentioned the difficulties that timetabling has sometimes caused. Part of the problem with the JMC has been its ad hoc nature. Given the speed with which the process will—or might—unfold once it starts, I am not sure that it is good enough to wait in order to find space in ministerial diaries to have meetings. At the point that such a forum is set up, the devolved Governments might want to establish how frequently it meets and whether there is a schedule. Up until now, the Scottish Government has not been particularly keen to have such an arrangement, but, as Richard Lochhead pointed out, we are moving into completely different territory not just with the process of negotiating Brexit, but with how devolution is developing anyway. It is much more complex and interdependent now, so there need to be firmer and more routine arrangements for co-ordination, negotiation and good communication between the Governments.

Stuart McMillan (Greenock and Inverclyde) (SNP): Further to the panellists' answers to colleagues so far, what is the best way to proceed? I heard what Professor McEwen said to Richard Lochhead, but what should be the wider approach to IGR, particularly over the course of the next 12 months?

Professor McEwen: None of the devolved Governments—at least from the evidence that they have given to the various inquiries that have taken place so far—seems to have much confidence in the JMC process. That is partly because they do not feel that they are co-owners—there is no sense of co-ownership in the process. The perception is that the process is hierarchical. The meetings are in London and they are always chaired by a UK Government minister, and although there is a joint secretariat there is not

a feeling of equality—at least of status—among the people around the table.

Some relatively simple things could be done to change that, even symbolically. Does the meeting always have to be chaired by a UK Government minister? Must it always be based in London? Does it always have to take place within such a confined, tight timetable? Some of the more meaty discussions might be curtailed because of the timetabling issues. Those issues would be relatively straightforward to address.

Should the JMC's terms of reference be orientated towards particular tasks? Should they be about trying to find agreement? The JMC does not operate in that way at the moment. The joint exchequer committee was a little bit different, because that was specifically about trying to reach agreement on the fiscal framework, the block grant adjustment and matters in relation to the Scotland Act 2012. The JMC is limited because often the interests of the devolved Governments in the Brexit process are not going to be shared. The devolved Governments have very different interests and they come at the issue from different perspectives. Therefore, it will be important to identify a bilateral process that can take on board the particular perspectives and interests that are prioritised by the Scottish Government and the Scottish Parliament.

Akash Paun: Intergovernmental relations have worked when the forum in question has had a very clear purpose—that has often been bilateral rather multilateral. Such a forum might have had a specific task, such as the implementation of the Scotland Act 2012 or the resolution of the differences of opinion around the fiscal framework.

Secondly, agreed principles on which the body will operate are needed, such as principles on who is entitled to convene the meetings and how accountable the structure is to the different legislatures.

Thirdly, alongside the clear purpose, shared objectives between the Governments at the political level are needed. There needs to be a commitment to make it work in the first place.

Fourthly, there needs to be sufficient support at the official level. The support of the joint exchequer committee and the programme boards to implement the Scotland Act 2012 represented a serious commitment between the UK Government and the Scottish Government to work together to make the new fiscal powers work effectively.

We can start to see how intergovernmental relations operate effectively where those different elements exist.

With Brexit, there will have to be sufficient support. Nicola McEwen said that the JMC

structure has had a joint secretariat between the Governments, but that is not a standing body that is devoted to the task. Sufficient resourcing and support will be needed to provide the information and facilitate the talks. The Governments will need to have a shared commitment to reach agreement for the whole system to work.

Stuart McMillan: My reading of the situation thus far is that there are at least three stages in the process. There is the pre stage, which we are currently in; the two-year process after article 50 of the Treaty on European Union has been triggered; and the post stage. Should the same arrangements apply for all three phases, or should there be different arrangements for each phase?

Professor McEwen: That is a good question. We can envisage the bilateral arrangements becoming more important, particularly if we get to the stage of negotiating and then implementing something distinctive for Scotland. It is difficult for me to see how that would not entail a revision of the devolution settlement. That will have to be revised anyway, to accommodate withdrawal from the European Union. However, if there was to be a distinctive arrangement for Scotland as part of that process, further reforms to devolution may be required—for example, to enable Scotland to have distinctive external relations or to enable it to negotiate employment protection laws or regulations, which is not currently within devolved competence. The bilateral forums that have been set up so far have focused on implementation, and we can see that approach being more important at that stage in the process.

Akash Paun: It is clear that there will be different phases and parallel sets of negotiations in the way that Nicola McEwen has referred to. Until article 50 is triggered, there will be almost a negotiation about the negotiations, which will involve working out the rules and principles for how the devolved Governments will be involved and establishing the machinery for that to happen. Once the negotiations proper begin, the complexity will be the multilevel element of it. If we are talking about accountability to the Scottish Parliament and the other legislatures, some difficulties could emerge in relation to what information the Governments are willing to share with the Parliaments, because it is clear that the UK Government will have a desire not to reveal too much about its negotiating hand.

On that issue, more than on ordinary intergovernmental relations—if I can put it like that—where there are only two levels involved, I foresee particular difficulties in making a reality of the concordat between the Government and the Parliament.

Stuart McMillan: Finally, to add to the complexity of it all, is there a role for the Mayor of

London, the Crown dependencies and Gibraltar in the Brexit discussions? If so, what is the nature of that role? What do you think it should be?

Akash Paun: They will be involved. They are—at least, the Crown dependencies are—members, along with Ireland, of the British-Irish Council, which has already met since the referendum to talk about some of the issues. They will obviously have some specific concerns about the effects of Brexit on them, including their relationship with the single market and so on.

I imagine that some of those issues are likely to be discussed through that forum, and through bilateral discussions between the various Governments and the UK Government. I do not imagine that we would see all those Administrations brought into the new JMC or whatever it is.

Professor McEwen: The British-Irish Council operates in a much more formal way than the JMC. When it held its extraordinary summit in the summer, in the wake of the Brexit referendum, it was interesting to note that the UK Government was represented by the territorial secretaries of state and not the senior ministers involved in the Brexit process, or indeed the Prime Minister. That suggests to me that the British-Irish Council will not be the forum in which the more meaningful discussions will be held. If it was, having more senior ministers attend that particular summit would have been at least a symbolic gesture, but that did not happen.

Lewis Macdonald: I want to press a little further the point that Stuart McMillan made. Right at the outset, we heard from the Mayor of London and the premier of Gibraltar, who both expressed their very strong views on the impact of Brexit. Are you saying that there is likely to be no formal process by which their particular perspectives will be fed in to Government consideration in advance of Brexit?

Professor McEwen: If there is a process, it will be an informal bilateral one; I do not think that it will involve a joint ministerial committee. It might do, but I do not expect that to be part of whatever is set up with the devolved Governments.

The Convener: Although, in our discussions, we have been confined mainly to the early stages of Brexit, the witnesses have touched on the idea of Scotland being able, in the future, to have its own external relations distinct from the UK.

When we were in Brussels, we had a number of off-the-record meetings with ambassadors to the EU. One of them said that, if the Scottish Government approached the business of Brexit with the UK Government and worked with it in good faith to agree a negotiating position, and if we were seen to be acting positively and in good faith, other nations would speak to us as long as

the UK Government had given the go-ahead—so to speak—for that and had indicated that it would be a positive thing. The point has been raised by a number of Conservative colleagues in debates in the Parliament. What is the likelihood of the UK Government giving other European nations the go-ahead to talk to Scotland? Is that likely?

Professor McEwen: It depends on the stage of the process to which you are referring. When sub-state Governments—if we want to use that term—enter into external relations, it is usually with the consent of the member state Government, or the national Government if you like.

At every stage, the internal process is absolutely fundamental to the external process. My sense is that, if there is to be a distinctive set of arrangements for Scotland vis-à-vis the European Union, it is most likely to be part of the UK's arrangement with the EU. A section of whatever agreement the UK reaches might be something specific pertaining to Scotland, which might subsequently open up opportunities for Scotland to engage in treaties or agreements with the EU.

09:45

I have looked at the database of treaties that the EU has entered into, and they are almost always treaties with other sovereign Governments. However, there are one or two exceptions—for example, a treaty with the Faroes on horizon 2020 is specifically with the home-rule Government of the Faroes. There are a number of other agreements between that Government, the Danish Government and the EU.

My general point is that the internal and external processes go together. The committee is probably familiar with the strong external relations authority that the Belgian regions and communities have. When Belgium has constitutional competence domestically, it also has competence externally in those areas. Even then, because international relations are usually conducted between national Governments there has been a formal and strict process of internal intergovernmental negotiations whereby the internal authority is linked to the external authority.

Akash Paun: That also speaks to how the Brexit process is likely to reopen far more elements of our internal territorial constitution than anyone has quite got their heads around yet. We may come out of this with a very different set of constitutional arrangements for governing the distribution of powers between different Governments. In areas where the UK takes back competence from Brussels, we may need new arrangements for co-ordinating policy between levels of government. Furthermore, as Nicola McEwen has just discussed, one more issue on

that list will be how the sub-state Governments represent themselves internationally. The UK Government has not quite realised the whole box of issues that this opens up.

The Convener: Do you agree with Nicola McEwen that that would require further legislation—changes to the Scotland Act 2016—or could it be done through process?

Akash Paun: Are you asking whether Brexit is likely to—

The Convener: I am talking about giving the Scottish Parliament additional powers—for example, over external relations in devolved areas.

Akash Paun: It is pretty inevitable that the design of the constitutional settlement and the Scotland Act 2016 will need to be revisited as part of the process. Some people wonder whether we could simply remove the reference to EU law or take a similarly minimal approach. However, because the nature of our membership of the EU is that it winds its way through almost every area of domestic policy, pulling out is going to fundamentally change the individual devolution settlements and the relationships between the nations of the UK. Therefore, the constitutional settlement will have to be looked at internally, as part of the process of Brexit.

The Convener: Do you agree, Professor McEwen?

Professor McEwen: I think so. I am not a constitutional lawyer but I think that it will require primary legislation.

Social protection is one of the areas that are emphasised in the criteria that the First Minister has set out. Most of the social protection regulations that are currently Europeanised but that would be repatriated concern employment law, which remains reserved. If that particular criterion were to be met, it would require that area of the Scotland Act 2016 to be revisited. There are other such examples.

The Convener: Thank you. That is interesting.

As members have no more questions, I will ask Akash Paun another one, since we have him here. Over the summer, I have been reading your blogs and I was interested in one that you wrote in July in which you looked at whether Scotland could block Brexit—to use the tabloid term that is often applied. Since you wrote that blog, the House of Lords Constitution Committee has said that the UK Parliament should be involved in any decision to trigger article 50, which obviously has implications for Scotland. What are your views now on that constitutional process and on whether Scotland can have a say even before article 50 is triggered?

Akash Paun: You are asking about the consent process.

The Convener: Yes.

Akash Paun: I understand that the British Government has not yet worked out at what points of the process legislation is likely to be required or how many different pieces of legislation it might need to introduce. It is in the early stages of working out those things. As I said, it is still appointing officials to lead elements of that work; therefore, it is hard to say how that is going to play out.

On the specific issue of legislation to trigger article 50, legal cases are being brought that argue that the UK Government cannot simply use the prerogative power to trigger article 50. The First Minister discussed that issue with you last week. The argument is that to do so would, in effect, be to repeal an act of Parliament—the European Communities Act 1972—by executive action. Therefore, the question is whether it is likely that the courts will step in and require legislation to be introduced. I am not enough of a lawyer to know how that is going to play, but I know that there are mixed views on the issue. We will see what happens.

I think that it is unlikely that we would see legislation at that point in the process and that, even if we did, it is unlikely that that would automatically trigger the legislative consent convention. It is not clear to me that putting before the Houses of Parliament a simple bill that would give the Prime Minister or UK Government the authority to trigger article 50 would, in itself, be legislating in a devolved area, so the Sewel convention would not necessarily be triggered at that point in the process.

When I wrote the piece to which you refer, I was thinking more about the end of the process, when some form of Brexit deal will be implemented. At that point, I expect legislative consent motions to be put before all three devolved legislatures, because Brexit will cut across devolved areas and will pretty inevitably change the competences of the devolved institutions. I expect the Sewel procedure to be triggered at that point. However, as we know, even though the convention is recognised in the Scotland Act 2016, that is done in such a way that it is probably not judicially enforceable. Therefore, I do not think that that gives the Scottish Parliament a veto over Brexit, although the UK Government would be in breach of established convention if it pushed ahead with something that changed the constitutional settlement of Scotland radically without reaching agreement on the terms of that with the Scottish Government and Parliament.

The Convener: Do you think that it would cause a constitutional crisis?

Akash Paun: Probably, yes.

Lewis Macdonald: I have one other question. With or without a constitutional crisis, in about a month's time, after the party conference season, the House of Commons will constitute new select committees on exiting the European Union and international trade. Clearly, this committee will have contact and, no doubt, informal discussions with those committees. However, what scope is there for formal parliamentary scrutiny of intergovernmental relations, involving working between parliamentary committees in the two Parliaments? Indeed, should we have multilateral as well as bilateral formats for that scrutiny?

Akash Paun: That issue always comes up in such discussions. Co-operation, the sharing of information and some kind of co-ordination of activity between the respective committees that are looking at the issue in the four legislatures of the UK would be sensible. Whenever people have looked at formal joint working, they have found that a set of logistical and procedural issues make it quite difficult to do in practice—I am sure that the committee's clerks are better able to advise you on that than I am.

It also depends on the purpose of the scrutiny. As I interpret it, the role of the committees of this Parliament is to hold your Government to account for its activities, including how it is engaging in negotiations with the UK. There is a bilateral accountability relationship there, and that is the primary function for committees in any individual Parliament or Assembly across the UK. I am not sure how one holds the system of IGR as a whole to account but, as I say, more informal collaboration and communication between the committees in some form would be sensible.

Professor McEwen: I agree. The committee might want to look at the role of national Parliaments in the EU process post Lisbon, because that brings in a multilevel element to parliamentary scrutiny and there might be insights for us. However, I would have to give that a little more thought. Once those committees are established, co-operation would be beneficial, particularly for sharing information and resources and just for mutual learning. However, for the most part, I agree with Akash Paun that the scrutiny element is most evident at the horizontal level.

The Convener: I now close this evidence session and thank both of our witnesses very much. We will have a two-minute suspension before we welcome our next panel of witnesses.

09:57

Meeting suspended.

10:04

On resuming—

The Convener: I resume our evidence session on the EU referendum and its implications for Scotland and welcome to the meeting our second panel: Christos Sirros, Agent-General of the Government of Québec in London, and Frédéric Tremblay, director of political and public affairs, Québec Government office in London.

Thank you for coming to speak to us today. Would you like to make a few short comments about the Québec Government's work in London?

Christos Sirros (Québec Government Office in London): With pleasure. I also have a small presentation to make.

The office in London was established over 50 years ago. It is a small office with about 15 staff, and we deal with issues that we consider to be our responsibility or which are under our jurisdiction at home; we extend that as much as we can overseas. We deal with commercial matters, investment seeking and cultural affairs, for example, by supporting artists from Québec who are here and developing a marketplace for them. We also deal with political and public affairs, trying to create links between institutions, Governments, policies and best practice; we have some agreements with the British Council to create joint partnerships in a number of areas; and we generally follow what is going on with a lot of interest—especially these days.

The Convener: We now look forward to hearing your presentation.

Christos Sirros: Thank you again for the invitation. This is the second time that I have had the honour and the privilege of being here.

I know that you have all received and read paper 1, which is a background briefing paper that provides a summary of some of the intergovernmental relations arrangements in Canada. With the exception of one error of no consequence to the essence of the content, it provides a good overview of the arrangements from a Canadian perspective. In my short presentation, I will attempt to provide you with the Québec perspective of how that works and to answer any subsequent questions that might you have about arrangements in Canada or other areas of interest.

For the record, the factual error to which I referred can be found in the second paragraph of paragraph 17, which talks about the Council of the Federation. The council was not formalised by the

independence-seeking Parti Québécois, but by the federalist Québec Liberal Party Government under Jean Charest after regaining power in 2003. It was intended as an instrument to better assert Québec's place within the federation and to promote provincial initiatives.

Four key elements constitute the mechanism for Québec's intergovernmental relations. The first and most important is the secretariat for Canadian intergovernmental relations or, as we call it, SAIC—le secrétariat aux affaires intergouvernementales canadiennes. Secondly, there are the Canadian intergovernmental conferences, which are better known in Canada as federal-provincial conferences, although often only the provinces meet. The third element is the Council of the Federation, to which I have just referred, and the fourth is the ministry of international relations and la Francophonie, which deals with international intergovernmental relations. The ministry has offices such as the one in London in about 16 countries and 28 different locations around the world. I will not dwell much upon the latter, as it was the primary subject of my presentation here last year for the European and External Relations Committee, but I will provide some detail on the other elements that I have mentioned.

First of all, the SAIC plays a key advisory role to the Government of Québec on all matters affecting intergovernmental relations, both with the federal Government and with other provincial Governments, and it is led by Jean-Marc Fournier, the minister responsible for Canadian relations and the Canadian Francophonie. His role is supported by this secretariat of some 60 people, which has been known in its current guise since 1984, when it became part of the executive council of Québec. It was attached to the premier's office with a minister specifically responsible for it, and it gained the exclusive mandate of dealing with Canadian affairs. That crystallised the importance of Canadian intergovernmental relations that had been growing since the 1980 referendum as well as the priority accorded to their co-ordination at the highest level of Government. SAIC's role is to analyse the policies and laws adopted by other Canadian Governments and evaluate their implications for Québec. The SAIC is based in Québec City, but it is also represented by two further offices in Canada, one in Toronto and the other in Moncton in New Brunswick, the only officially bilingual province in Canada.

The SAIC is responsible for co-ordinating the actions of the Government of Québec in the context of its relations with the rest of Canada, which we usually call the ROC—sometimes we feel as though we are between a rock and a hard place. It plays a key role in promoting and defending Québec's interests within Canada; it

advises the Government of Québec on any issue concerning its relations with its partners in the federation; and it ensures its mandate by engaging with actors on the federal and provincial scene with a view to ensuring the respect and integrity of Québec's constitutional jurisdictions. It acts as the Government of Québec's memory, if you like, regarding intergovernmental issues and federalism, and as the defender of Québec's constitutional jurisdictions when it comes to the implementation of federal policies and programmes by the federal Government. In addition, the SAIC is responsible for the constitutional file and all negotiations in this area, although that aspect has been rather quiet since 1995, and it is mandated to promote the Canadian Francophonie and recognise the important contributions made to the defence and promotion of the French language by Francophone communities across Canada.

The second mechanism is Canadian intergovernmental conferences or what are known as the federal-provincial conferences. The Québec Government participates in about 80 Canadian intergovernmental conferences annually at both federal-provincial and interprovincial levels. The SAIC prepares positions to be promoted by the Government of Québec at those conferences, be they federal-provincial or just provincial, in collaboration with the specific sectoral ministries involved.

The federal-provincial conferences occur at First Ministerial, ministerial and official levels. As the name implies, the First Ministers' conferences involve Canada's most senior political leaders, usually focus on a single topic of discussion and are called at the behest of the federal Prime Minister. They are highly political; they seek to offer opportunities to chart general policy direction and to provide a high-level forum for the negotiation of issues of concern. They vary in frequency depending upon the federal Prime Minister. For example, the previous federal Government rarely convened them over its nine-year mandate—I think that there were one or two—while the present Government has convened two in the past two years, both on climate change.

Ministerial meetings provide federal and provincial ministers with the occasion to discuss sectoral issues including agriculture, environment, finance, health and so on, while officials' meetings involve deputy ministers—I think that you call them permanent secretaries—and/or other senior officials. Such meetings, which can be formal or informal, are an on-going channel of communication between officials of the various ministries.

The Council of the Federation, the newest addition to the available mechanisms, can be

interpreted as the provincial equivalent of the First Ministers' conferences. A high-level, multilateral Government forum that comprises Canada's 13 provincial and territorial premiers—there are 10 provinces and three territories—it usually meets twice a year. As I have said, the council is new; established in 2003, it was spearheaded by Québec as a framework for formalising interprovincial relations. There is no formal structure for such relations, just as there is no formal constitutional structure foreseen for federal-provincial relations. The council aims to strengthen interprovincial-territorial co-operation, exercise leadership on issues of importance to the provinces and promote relations between Governments that are based on respect for the constitution and recognition of the diversity of the federation.

The council's creation was championed by Québec in the context of its being felt that there was a need to better assert provincial authority and autonomy, and I guess that we could say that, in some ways, it is a work in progress. It has had some success in bringing to the forefront issues such as climate change and the reduction of interprovincial trade barriers, and it ensures that things that depend on the provinces can be discussed among the provinces. Sometimes common positions are developed vis-à-vis the federal Government and sometimes divergences between the provinces are identified.

The diverse range of mechanisms permits Québec to regularly engage in clear and comprehensive dialogue on internal intergovernmental relations with all key partners. In addition, Québec has a fairly strong infrastructure that we can use to exercise some kind of, if you like, international intergovernmental relations on the international stage. As a ministry of international relations, we do not seek to create or enact foreign policy but rather to ensure Québec's international intergovernmental relations in areas of our own jurisdiction.

Given the time constraints and the fact that it would be interesting to engage in a discussion, and given that I have already made a presentation on international relations, I will close with a brief remark on the subject. Québec's ministry of international relations co-ordinates our action on the international scene on the basis of the principle that whatever Québec's powers are at home, they are Québec's powers everywhere. Earlier, you heard a reference to the Flemish and Walloon Governments—the Belgian regional Governments. Our reality is not quite the same, as that principle is not constitutionally recognised, but Québec acts as if the principle allows us to seek a presence on the international scene on areas of our jurisdiction.

10:15

The principle was endorsed by the Privy Council in the 1930s when it was ruled that treaties negotiated on the international scene by Canada, which has exclusive jurisdiction for international commerce, require in areas of provincial jurisdiction provincial consent for their implementation in those areas. Therefore, in principle, for that decision to be made, the involvement of the provinces—and Québec actualises its place on the international scene—is required. As for our policies on the international scene, we have 28 international representations located in 16 countries around the world, and we represent ourselves in the various matters that I mentioned earlier.

I hope I have provided you with something informative that will, perhaps, be the basis of an interesting exchange of questions at what is a rather interesting time for you. After listening to the previous discussion, I am sure that you are curious about how things work.

The Convener: Yes, we are. Thank you for that interesting presentation. The reason you are here is that we hope to explore what we could learn from your situation in Québec. I guess the most immediate topics include intergovernmental relations, and the question of how we can influence—in fact, help to shape—the UK's negotiating position vis-à-vis Brexit. We also want to explore whether it is possible for Scotland, as a sub-state, to have direct international relations with foreign governments.

I understand that the provinces in Canada were very involved in negotiating the North American free trade agreement and have been involved in the ongoing comprehensive economic and trade agreement with the European Union. Would you say a little more about how you have been able to influence those negotiations and what your role has been?

Christos Sirros: NAFTA was a while back, and the structure of the involvement of the provinces was quite different from the negotiations with the EU. On a general basis, even before the negotiations with the EU on CETA, there has been an ongoing permanent mechanism called C-commerce—Canada commerce—that brings together officials from the various provinces on the issues that are being negotiated by Canada.

Up until the CETA negotiations, Canada was the only Government represented at the table when it negotiated international treaties, but the Government's positions were fed by ongoing consultations with the provinces. Negotiations and compromises that had to be made at a level that went beyond the officials—as you probably know, a lot of these things come down to a political

decision where somebody has to make a decision on what you give and what you get—would be referred back to each of the provinces on a political level.

The CETA negotiations were quite a different kettle of fish and, for the first time, enacted something that Québec has been asking for for the past 30 years. I am certain that the process has not yet been recreated in other negotiations subsequent to CETA. I do not know which ones we have been involved with, although Canada is engaged in the trans-Pacific partnership agreement. CETA was an important milestone for us.

For the first time in history, all the provinces were present at the table and participated directly in the negotiations through one recognised chief negotiator—the Canadian chief negotiator—who interfaced with the EU's chief negotiator. Each of the provinces had representation in the room when the negotiations were taking place.

Before the negotiation rounds—I think that there were about 12 of them over a number of years, in Canada and in Brussels—the provinces and the federal Government would meet formally, not just in consultation, and the provinces would put forward the parameters of their various positions on the various issues. There would be opportunities for the provinces to work out some of their own differences. Canada being the country that it is—it has a width of 5,000 or 6,000km—there are regional differences. We have different issues. Alberta's reality is different from Québec's and Newfoundland's and so on. There was room and scope for interprovincial discussion that would allow the federal Government to formulate the parameters of the position that Canada would eventually put forward at the negotiating table. The people who had participated in those discussions were present at the negotiating table. It was kind of funny—I should not say “funny”—because there was a room with the chief negotiator in it, and the representatives of the various provinces were walking around and breaking out into the various negotiating rooms. Subsequently, everyone reconvened to put it all together. It was a very dynamic, inclusive and transparent process for those who were present, and I think that it worked fairly well.

I was quite involved in those discussions because, at the time, I was delegate general of Québec in Brussels, and I had followed the negotiations closely and been present at the lead-up sessions. As a formal member of Parliament and Government, I could see that the process worked. From the outside, it could have been seen as cumbersome, because there were a hundred and something members of the Canadian delegation, but given the reality of Canada's

existence as a federation and the disparity, in the end even the federal negotiators were able to say that it was a useful process.

I will explain why that happened, which is perhaps the issue that is of interest to the committee, and then I will stop. The Europeans did not want to engage with Canada unless they had the certainty of knowing that the provinces would follow through on whatever agreements would be arrived at in their areas of jurisdiction, because of the principle that I mentioned earlier. Their particular interest was access to Canada's public markets. Canada's public markets are not the federal Government's public markets; in essence, they are the provinces' public markets, with the exception of a couple of areas such as airports. All the areas that interested the Europeans—I am talking about roads, hospitals and so on—were provincial jurisdictions. They felt that they could not go forward with negotiations in Canada unless the Canadian Government could guarantee that it could implement in the provinces whatever was negotiated, and the federal Government cannot do that unless the provinces say yes. We said, "If we're there, we can say yes, because we'll agree to whatever it is that we want to agree to."

The Convener: That is very interesting.

Lewis Macdonald: Yes, it is interesting. Does that mean that the process that you described started with the constitutional position of Canadian provinces being specifically protected in relation to trade and international trade agreements and that being appreciated by the European Commission, which therefore sought that negotiating structure? Was it only at that point that the federal Government indicated its willingness to accommodate that in the way that you described?

Christos Sirros: Yes, that is fair. However, in the constitutional division of powers, the federal Government has exclusive jurisdiction for the negotiation of international commercial agreements. Theoretically, the federal Government's signature is the only one required on the document and the only signature that engages the country as a whole, but things were different in practice on CETA.

Prior to the CETA negotiations, there was a failed negotiation between Canada and the European Union on an accord to reinforce commerce and investment, which was not intended to be a global free-trade agreement but an attempt to deal with the Europeans' wish to tackle the question of investments in public markets. However, the federal Government said "No, that's not on the table." As a result, because of the devolved issues, the provinces were involved in CETA. The constitutional division of powers means that to implement international agreements in areas of jurisdiction that the

constitution recognises as belonging to the provinces, provincial consent is required—the result was what we saw.

Lewis Macdonald: You described it as a dynamic, inclusive and transparent process. I am particularly interested in the "transparent" aspect and want to tease it out. Do you mean that it was transparent to the 100 negotiators in that room, or was it transparent beyond the walls of that room?

Christos Sirros: I meant the 150 or so negotiators in the room, but there was also a growing public interest in what was being negotiated and a request for more transparency on a public level. We undertook a number of initiatives in response to that. For instance, within the framework of those negotiations, Québec appointed its own chief negotiator to co-ordinate all the efforts of the various ministries, and he was the interface with the Canadian chief negotiator. The Québec chief negotiator was brought before a committee like this one twice during the course of the negotiations, where he was asked questions and explained the purposes, objectives and so on. He instituted a number of consultations with various industrial sectors that were, I guess, behind closed doors, but the industrial sectors being talked about at the negotiating table were consulted with on an on-going basis during the negotiations.

It is difficult to be transparent in the traditional sense of the word when you are negotiating, because you do not want the other party to be aware of what you have up your sleeve, so to speak. So, in as much as it was possible, there was public transparency, but there were debriefs on an on-going basis after each round of the negotiations.

Lewis Macdonald: There would potentially be some relevance there, not so much for the exit of the United Kingdom from the European Union, but for the potential for negotiating replacement arrangements with the European Union or member states.

Can you tell us how long your negotiations took? Did the involvement of the provinces in the way that you have described make the negotiations longer or make little difference? Did that engagement of the provinces make a substantial difference to what was agreed?

Christos Sirros: The initial idea was that the process would be concluded within two years.

Lewis Macdonald: That sounds familiar.

Christos Sirros: You can draw your own conclusions about that. The process took six years and the agreement still has not been ratified, although all the negotiations have been concluded and the agreement is in the process of ratification,

especially on the European side. It did not take six years because the provinces were involved, but because it was the first major international free-trade agreement between two highly industrialised and developed entities that went beyond traditional free-trade agreements.

CETA is characterised by being a free-trade agreement that deals not just with tariffs and access to markets for goods, but with services and investment issues—it is more far reaching than the free-trade agreement between Canada and the US and Mexico—and that presented complications and meant that the process took longer than anticipated. Specific interests in each province were also affected. For instance, in Québec's case, our cheese producers saw it quite negatively because it opened up the market for European cheese and somehow the French have a reputation for cheese.

10:30

That issue was solved—our cheese producers took a hit but they were compensated by the federal Government. Such negotiations were going on between the federal and provincial Governments.

To answer your question whether the presence of the provinces made the process more cumbersome: possibly. However, that is the price of democracy and the price of inclusion and the price of making sure that you have a good agreement in the end.

You could probably come up with a quicker agreement but I am not sure that the results would be as widely accepted.

Tavish Scott (Shetland Islands) (LD): I have a couple of supplementaries to Lewis Macdonald's questions. Mr Sirros, you mentioned the reaction of the cheese producers of Québec—very good cheese it is too, from my recollection. At the beginning of the trade process, did the provinces want a deal?

Christos Sirros: Québec started the whole process by saying, "We want a free trade agreement with Europe. We want Canada to negotiate a free trade agreement with the European Union." We then went out to the various provinces and said, "We're required to make this happen. It makes sense; the EU is the second largest, if not the largest, trading bloc in the world." It is our second trading partner as far as Québec is concerned because within Canada, I think that we have the most trade with the EU—probably more so than British Columbia, which is 5,000km away and is looking more at the east.

On the whole, the provinces came on board. They created a common front and said to the

federal Prime Minister, "This makes sense". He could therefore pick up on that and say, "This makes sense to me too".

Tavish Scott: So the "we want a deal" attitude was there across all the provinces and therefore the federal Government reflected that.

Christos Sirros: Yes.

Tavish Scott: You talked about the negotiations and you mentioned the Québec chief negotiator and the federal chief negotiator. Were they civil servants as we define them, or were they elected ministers?

Christos Sirros: The federal negotiator and the other provincial negotiators were civil servants. The Québec negotiator was a former Premier of Québec who was out of Parliament and not in the civil service. He was appointed as the chief negotiator.

Tavish Scott: How did the relationship work between the negotiators and the Governments? Lewis Macdonald made a point about transparency—how did the Governments in Québec, Ontario and British Columbia keep an eye on the on-going negotiations? What were the reporting mechanisms to politicians on the trade negotiations that were being done by civil servants?

Christos Sirros: There was on-going reporting. For example, our chief negotiator would report directly to the Premier and to the minister responsible for trade and commerce. A cabinet committee examined the results of the negotiations and our Ministry of International Relations was also involved.

I think that all the provinces had something similar whereby their negotiating team reported to the trade minister in their province and whatever else they wanted to do.

Appointing a former Premier as chief negotiator showed an element of political will to ensure that we asserted our willingness to be very actively involved in the negotiations.

Tavish Scott: And was there parliamentary oversight during that six-year process?

Christos Sirros: Not other than the ad hoc calling of the chief negotiator to explain and expose the issues that were taking place at the negotiating table.

Tavish Scott: But broadly, it went on and, at the end of the process, legislators could—

Christos Sirros: At the end of the process, once the treaty is ratified, it will come to the National Assembly of Québec for a vote on whether we will implement it.

Tavish Scott: Is that true of all the provinces?

Christos Sirros: Each has its own mechanism. About 20 years ago, we changed the mechanism. There used to be an order in council and the Cabinet would decide whether that was okay. Now issues are brought directly to the house and put before the members for a decision by Parliament.

Tavish Scott: To use what is a pejorative phrase in politics these days the National Assembly has a veto.

Christos Sirros: Yes.

Tavish Scott: Thank you. That is very interesting.

Richard Lochhead: Thank you for giving evidence today. Clearly, our political systems are different, but the intergovernmental machinery in Québec is a lot deeper than that which exists in the UK. Even though many of the agreements that emerge from the intergovernmental arrangements are non-binding, do the public and the politicians feel that those agreements are respected?

Christos Sirros: I have mentioned parliamentary conferences. The conferences do not have a formal constitutional standing, if you like. It is hard to answer your question, because I keep thinking about an example where the agreement was not respected.

On the whole, the agreements are respected. In other words, that happens if the premiers agree among themselves that that is how an issue will be dealt with. For example, there was a rather famous agreement between the premiers and the Prime Minister of Canada about how to distribute money for the healthcare system. An issue that has always been a bone of contention in Québec is the element of the Canadian constitution that allows the federal Government what is called a "spending power", which allows it to spend money even in areas of provincial jurisdiction. Every time that happens, Québec says, "This is our area of jurisdiction. You are welcome to spend your money, but we'll decide what the priorities are in Québec. Give us the money, and we will take it for that particular field."

At one parliamentary conference, there was an agreement among the provinces and the federal Government that resulted in a catchphrase that has entered the history books: "asymmetrical federalism". At the conference, nine provinces said, "Fine. Go ahead," but Québec said, "No." The federal Government then said, "Okay. Here's the money." We took the money for the healthcare system and we administered it. As I say, healthcare is an exclusive provincial jurisdiction. You can see the rub of the whole matter. The provinces have the exclusive right to administer hospitals, healthcare and social services and the

federal Government has no say whatsoever in how we organise our healthcare system, although it can still put money on the table for that system and possibly decide who gets it. That skews matters; that has always been the view.

To answer your question quickly, the agreements are respected, on the whole. However, they are political agreements and, as such, they can suffer the consequences of changes in political mood. I refer you to the famous example of the 1987 Meech Lake accord, which was destined to solve the constitutional question by recognising Québec's specificity within the Canadian federation. The accord was agreed to by all the premiers in all the provinces. It had a three-year window in which it had to be endorsed or approved by all the legislatures but, politics being politics, there were changes in a couple of the legislatures and some of the subsequent premiers who were not at the negotiating table refused to endorse it, so it fell dead after three years and resulted in the 1995 Québec referendum. However, that is another story; you can call me back another time to speak about it.

The Convener: Talking about CETA and how all the provinces were involved has been absolutely fascinating. We have had a very interesting briefing from one of our advisers, Professor Sonaidh Douglas-Scott, on sub-state treaty-making powers. She said that Québec has claimed that provinces can conclude treaties in their areas of jurisdiction through lieutenant-governors and that the Supreme Court of Canada has found that to be permissible. Will you give us examples of where Québec has concluded such agreements—I think that they are called ententes?

Christos Sirros: Yes. There is an issue with the wording. They are not treaties; they are agreements, or something or other. If my memory serves me, we have an agreement with various countries on international adoption, for instance. We concluded those agreements in discussions with foreign Governments. They have not been recognised as treaties by Canada and in Québec, they apply only as agreements between provinces.

We have agreements with 100 or so countries on social security recognition. Those agreements recognise that contributions that people have made in one country can be calculated in their pensions in Québec and vice versa. There are also driver's licence agreements.

The agreements deal with matters of that sort. We do not conduct foreign policy.

The Convener: It is interesting that you mentioned pensions. Your briefing paper says that the provincial and federal forms of authority both cover pensions. Is it right that Québec can still conclude an entente or agreement on pensions

even though some of the provision is at the federal level?

Christos Sirros: Yes. Québec has its own pension system. It is not so different from the Canadian system, but it is administered distinctly by Québec. That is for working pensions. We do not participate in the Canada pension plan, for instance; we have a Québec pension plan, which is fairly coherent and is run out of Québec.

One of the key elements that came out of the quiet revolution back in the 1960s was our constituting the Caisse de dépôt et placement du Québec, which is a holding that administers all the pension contributions of all Québec's public servants. Over time, it has become among the largest funds in the world, and it serves to guarantee the public service pensions by investments. All the other provinces are part of the federal pension scheme, but there is that difference in Canada. Nothing in the constitution precluded that. Giving itself an instrument of financial capability was considered to be a requisite gesture on the part of Québec in turning from an agrarian, agricultural society to a more modern and outward-looking society.

The Convener: I see. On examples of agreements that have been negotiated, I know that you cannot speak for other provinces, but I understand that there was, for example, a Canadian-American energy plan that was led largely by Alberta. Do you have other examples of distinctive policy areas that the provinces have led?

Christos Sirros: I am not sure what you are referring to in mentioning the Canadian-American energy plan, but I can give members an example of something that we did initiate, which was a carbon market with California, which Ontario subsequently joined.

It is not clear who has the jurisdiction in the area of energy. We both do. The provinces have responsibility for natural resources. We have a lot of hydroelectric power and Alberta has a lot of oil. Members can therefore see divergences in our interests.

It is fair to say, without anybody holding me accountable for saying it, that other provinces are not as active on the international scene as Québec. We are the only province that has such a developed network of representation and goes beyond the strict scope of commerce and investment as the objective of being on the international scene, although that is also a key element of our presence there.

I do not know whether that answers your question, but it is the best that I can do.

10:45

The Convener: That is great. Thank you.

Ross Greer (West Scotland) (Green): Our briefing paper refers to the level of scrutiny available to the Québec National Assembly on intergovernmental accords and I noted with interest that it states that specific accords are not subject to scrutiny as such but are dealt with in annual reports. Is that procedure generally considered to be satisfactory or is it regarded as an issue in the National Assembly, particularly by Opposition parties? Is there a desire for a stronger level of legislative scrutiny in that regard?

Christos Sirros: I do not think that it is a major issue. When you referred to accords, did you mean intergovernmental accords?

Ross Greer: Yes.

Christos Sirros: I was in Parliament for 23 years and during that time I do not recall any issue with anyone saying that they wanted Parliament to have a say about agreements that had been reached between Québec and other provinces or between Québec and the federal Government. We have a daily 45-minute Parliament question period, which I think is different from the procedure in the Scottish Parliament.

Ross Greer: Yes.

Christos Sirros: Whenever there is an accord like the ones that I mentioned, it is the subject of the Opposition's first question to the Premier and the subject will last for as long as there is enough support for it to do so. There are many ways of undertaking scrutiny, including parliamentary procedures that allow members of particular committees to undertake specific initiatives. For instance, with bipartisan agreement, a parliamentary committee might decide to undertake an initiative to examine a particular agreement or any other issue. There are therefore mechanisms by which Parliament can undertake scrutiny, but the 45-minute daily question period is the one most often used by the Opposition to highlight issues of concern about specific agreements.

Stuart McMillan: Does the fact that Canada has a written constitution help or hinder intergovernmental relations?

Christos Sirros: That is quite a question. It is a hard one to answer because, as I said before, the Canadian constitution is clear on the division between the federal and the provincial in a number of jurisdictions, but it is silent on some others such as, for example, international relations, which allows Québec to declare that it has a say on international relations.

It is fair to say that the one element that has created the most controversy in the story of intergovernmental relations, particularly those between Québec and the federal Government, is the question of federal spending power, which I mentioned previously and which has the greatest effect in terms of muddying the waters a bit. I have already given a good example of that, but education is another one. It is interesting that there is no federal minister of education because education is an exclusively provincial jurisdiction. However, the federal Government is able to spend money in education by putting money on the table for research in universities and so on.

A written constitution can be an advantage but it depends very much on how the constitution is written, and that is a politician's answer.

Stuart McMillan: Thank you for that. On the answer that you gave to Tavish Scott earlier on the veto, how often has the veto been used or nearly been used in heated debates that have taken place in Québec?

Christos Sirros: In terms of the implementation of international agreements that Canada has negotiated, I do not think that the National Assembly has vetoed an agreement that has been brought to the Assembly for endorsement.

Stuart McMillan: But the power to do so is there.

Christos Sirros: The power is there.

Stuart McMillan: Thank you very much.

The Convener: To conclude on that point, our briefing from Professor Douglas-Scott made the point that the British constitution and law have historically been very influential in Canada and that concluding treaties is treated as a federal function in terms of the royal prerogative. Historically, there was a royal prerogative to conclude treaties, but, as you have illustrated today, you have evolved quite a lot of custom and practice. Is that because you are rooted in the British constitution and law? Do you recognise that relationship in the way in which Canada has evolved?

Christos Sirros: Do you mean in terms of jurisprudence and actions like that?

The Convener: Yes. When you were talking about CETA, you said that such a move had not been done before and there was no provision for it under the Canadian constitution, but that you found a way to accommodate it. There seems to be flexibility in the way in which you operate, despite having a written constitution. It has been suggested to us that that is because of your history.

Christos Sirros: I think that is true. Intergovernmental relations are not very mechanical in the sense that one plus one equals two all the time, or that something will always give the same outcome. However, there has been an evolution. The most important element of that, as I mentioned earlier, was the provinces' ability theoretically to block the implementation of federal treaties in their area of jurisdiction. That recognition is not written in the constitution; it came out of an interpretation of a difference between the federal and provincial Governments at the time.

Time, politics and dynamics have shaped and are still shaping the Canadian reality. Canadian federalism has evolved over time. The constitution remains an issue in the sense that Québec has not signed up to the 1982 constitution that was repatriated from Westminster to Canada—and we have our own political debate about that, which I will not get into—but the way in which we come to agreements has evolved and is evolving. It varies and it depends on the people and their perspective of what it is, or what it is not, to be in a federation. It depends on both sides.

When the pro-independence party in Québec formed a Government, it was obviously in a much more difficult situation when it came to making agreements with Canada. I am not even sure that it really wanted to do so at that point. The federal Government is often wary of concluding agreements with pro-federalist Governments because it feels that it will create a precedent for subsequent Governments. It becomes a question of politics and dynamics but, yes, the fact that things are not dealt with on a strictly rigid basis has allowed for some flexibility through mechanisms that are not recognised anywhere in the constitution.

There is no such thing as a federal provincial conference instigated in the constitution. It is something that came out of the need for people to talk to each other and because it was obvious—at least, in Canada, it was felt—that things would be better if people tried to solve some of the issues and so on. I am not sure whether I have answered your question entirely.

The Convener: No, that is an excellent answer. Thank you very much for taking the time to come here and speak to us today. It has been very interesting.

Christos Sirros: My pleasure.

The Convener: We will have a short suspension before getting on with the rest of today's business.

10:54

Meeting suspended.

10:59

On resuming—

Cultural Property (Armed Conflicts) Bill (UK Parliament Legislation)

The Convener: Agenda item 3 is consideration of the legislative consent memorandum on the Cultural Property (Armed Conflicts) Bill. I invite comments from members on the LCM.

Lewis Macdonald: I just want to say how important the bill is and that I welcome it. The Scottish Government has designated next year as the year of history, heritage and archaeology in Scotland, but it will not have escaped any of us how much cultural violence has occurred in the middle east in the past two years, with Palmyra the obvious case in point. It has taken some time to get here, but it is important that Governments take action to address what is happening in situ.

We also should not ignore the suggestion that a lot of the cultural violence by Daesh or so-called Islamic State has been directed in order to increase the value of artefacts on the black market in Europe. If, as intended, the bill criminalises black-market trading in cultural artefacts that are stolen from middle eastern countries that are affected by Daesh activities, that is very welcome. As the Parliament's culture committee as well as the international committee, we should endorse the measure.

Richard Lochhead: I, too, welcome the bill, given how horrific it has been to witness the destruction of ancient cultural heritage in Syria, Iraq and Libya in particular, as well as the theft of heritage, which has of course funded terrorist organisations. It is important that Scottish judicial authorities and the Scottish Government are alive to the prospect that any of that illegal trade may make its way into Scotland. From a UK and Scottish perspective, it is a good bill.

The Convener: Thank you for that. If no one else wants to comment, are members happy to delegate responsibility to me and the clerks to produce a factual report and arrange for its publication?

Members *indicated agreement.*

The Convener: Do we also agree to recommend that the Parliament give consent to the LCM?

Members *indicated agreement.*

11:01

Meeting continued in private until 11:26.

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Published in Edinburgh by the Scottish Parliamentary Corporate Body, the Scottish Parliament, Edinburgh, EH99 1SP

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