



OFFICIAL REPORT
AITHISG OIFIGEIL

Finance and Constitution Committee

Wednesday 21 February 2018

Session 5



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FINANCE AND CONSTITUTION COMMITTEE

6th Meeting 2018, Session 5

CONVENER

*Bruce Crawford (Stirling) (SNP)

DEPUTY CONVENER

*Adam Tomkins (Glasgow) (Con)

COMMITTEE MEMBERS

*Neil Bibby (West Scotland) (Lab)

*Alexander Burnett (Aberdeenshire West) (Con)

*Willie Coffey (Kilmarnock and Irvine Valley) (SNP)

*Ash Denham (Edinburgh Eastern) (SNP)

*Murdo Fraser (Mid Scotland and Fife) (Con)

*Emma Harper (South Scotland) (SNP)

*Patrick Harvie (Glasgow) (Green)

*James Kelly (Glasgow) (Lab)

*Ivan McKee (Glasgow Provan) (SNP)

*attended

THE FOLLOWING ALSO PARTICIPATED:

Graham Fisher (Scottish Government)

Professor Michael Keating (Centre on Constitutional Change)

Professor Sangeeta Khorana (Bournemouth University)

Professor Andrew Lang (University of Edinburgh)

Luke McBratney (Scottish Government)

Dr Billy Melo Araujo (Queen's University Belfast)

Stephen Sadler (Scottish Government)

CLERK TO THE COMMITTEE

James Johnston

LOCATION

The David Livingstone Room (CR6)

Scottish Parliament

Finance and Constitution Committee

Wednesday 21 February 2018

[The Convener opened the meeting at 10:30]

Decision on Taking Business in Private

The Convener (Bruce Crawford): Good morning, and welcome to the sixth meeting in 2018 of the Finance and Constitution Committee. I ask that colleagues and others present at least switch their phones to silent mode, so that they do not interfere with the proceedings.

Agenda item 1 is consideration of a decision on whether to take items 3 and 4 in private? Do members agree to take those items in private?

Members *indicated agreement.*

Trade Bill

10:30

The Convener: Item 2 is to take evidence on the United Kingdom Trade Bill and the associated Scottish Government legislative consent memorandum. We are joined for this session by Scottish Government officials Graham Fisher from the legal directorate, Luke McBratney from the constitution and UK relations division, and Stephen Sadler from the trade policy team. I warmly welcome our witnesses to the session this morning. I understand that Mr Sadler wants to make a short opening statement—please feel free to do so.

Stephen Sadler (Scottish Government): Yes, thank you, convener—I will be brief.

The UK Government has described the main purpose of the bill as being to provide the key measures required to build a future trade policy for the UK once it leaves the European Union. The bill is in three parts. Parts 2 and 3 fall within reserved areas; part 1 is relevant to devolved matters and, along with schedules 1 to 3, is covered in some detail in the Government's legislative consent memorandum.

Clause 1 provides powers for both Scottish and UK ministers to make regulations to implement the Government procurement agreement. Clause 2 provides powers for both Scottish and UK ministers, within devolved competence, to make regulations to implement qualifying international agreements. Schedules 1 to 3 establish and then constrain devolved competence for the purposes of the exercise of those powers, along similar lines to the approach taken to Scottish ministers' powers in the European Union (Withdrawal) Bill.

The powers in the Trade Bill are designed to operate alongside the powers in the European Union (Withdrawal) Bill. The UK Government has said that it expects that, in most cases, the implementation of any obligations within existing international trade agreements would be dealt with through the European Union (Withdrawal) Bill. There will be certain circumstances where that may not be possible, and the provisions that are set out in clause 2 of the Trade Bill are intended to bridge that gap.

The LCM makes clear that, if the UK is to leave the EU, the Scottish Government agrees to the need for provisions that seek to maintain continuity in trading relationships and to ensure continued access to UK Government procurement markets. Such provisions, including those in the Trade Bill, would provide some continuity for businesses, employees and consumers.

The LCM also makes clear that the Scottish Government welcomes the powers that Trade Bill confers on ministers. However, the Government cannot recommend to Parliament that, at this stage, it gives consent to the bill as drafted. The Welsh Government takes a similar position. The Government's position on the bill is set out in the LCM, and its reasoning is consistent with the approach that it has taken in response to how powers are conferred on devolved Administrations in the European Union (Withdrawal) Bill.

On 18 January, the Scottish and Welsh Governments published a number of draft amendments to the Trade Bill. The amendments were tabled at Westminster and debated at the committee stage of the Trade Bill, although none were passed. We have had discussions with the UK Government and officials in the Department for International Trade before and since the amendments were debated, and I expect those discussions to continue.

The Secretary of State for International Trade has subsequently written to Scottish and Welsh ministers acknowledging the links between discussions on possible amendments to the European Union (Withdrawal) Bill and the Trade Bill. Dr Fox confirmed that the UK Government would want to reflect the outcome of the discussions by bringing forward changes to the European Union (Withdrawal) Bill and that he would want to adopt that approach on the Trade Bill.

It might not be possible to identify which trade agreements may need to be implemented through the Trade Bill until nearer exit day, but it might help if I give some brief examples. For organic products, EU regulations set out a list of third countries whose standards are treated as being equivalent to those of the EU, making import arrangements simpler. Those equivalence arrangements will be incorporated into domestic law by the European Union (Withdrawal) Bill, but trade agreements might include requirements of their own for what is to be treated as equivalent. The EU's existing trade agreements with third countries are already reflected in the EU regulations, but if anything changes when the UK develops its own trade agreements with those third countries, there will be a need to bring legislation—on organic standards in this example—into alignment.

Similarly, some trade agreements, such as the Canadian deal, include provisions on mutual recognition of professional qualifications. Although EU law is currently in line with those agreements, if anything changes when the UK develops its own trade agreements, there will be a need to bring UK law into line.

The closer that any UK third-country agreements are to existing EU third-country agreements, the less likely it is that the power in this bill will need to be used. We understand that the UK Government has not yet identified any area where it—or we—will definitely have to use the power; it is there as a back-up to avoid a situation in which so-called grandfather trade agreements cannot be brought into force because domestic law cannot be updated.

The Convener: Thank you for a good explanation of some of the areas. I will try to bring the issues closer to home, such as to my own constituency. If a trade deal on agriculture was being negotiated, a sheep farmer in Killin would currently, in devolved responsibilities, have the Scottish Government to look after the devolved elements of that deal. In future, if the European Union (Withdrawal) Bill stays as it is and there is no change to the Trade Bill, the Scottish Government would have no locus in any trade deal that might adjust costs, introduce new regulations or bring in potential barriers, because the responsibility would all lie at Westminster. Would the Scottish Government find that acceptable?

Stephen Sadler: That assumption is correct, and I do not think that the Government would find that acceptable. That is why the Government has suggested amendments to the Trade Bill that reflect overall changes to the European Union (Withdrawal) Bill. If those amendments are not made, we will be in a position where trade agreements can be made and regulations made in devolved areas that put constraints on Scottish and Welsh ministers.

The Convener: I am trying to find examples to bring the issues alive to people in Scotland so that they can understand the challenges and why the Scottish Government finds the bill as it stands unacceptable. I ask Adam Tomkins to begin the discussion and set the bill in the context of where it fits in an international perspective.

Adam Tomkins (Glasgow) (Con): Good morning. Am I right in understanding that the bill relates only to international trade?

Stephen Sadler: Yes.

Adam Tomkins: Are we all agreed that international relations, including treaty making and the making of free-trade agreements, are reserved to Westminster in the United Kingdom constitution? I assume that that is a fairly easy question, but I ask it for the avoidance of doubt.

Stephen Sadler: International trade is reserved, but the implementation of some aspects is a devolved matter, which is why the UK Government has acknowledged that point in the trade white paper, in the explanatory notes to the Trade Bill

and in subsequent discussions at official and ministerial level.

Adam Tomkins: Absolutely—however, as a matter of constitutional law, international relations, treaty making and international trade are reserved in full to the Westminster Parliament and are not devolved to this Parliament. Is that the Scottish Government's understanding as well as mine?

Graham Fisher (Scottish Government): The regulation of international trade as it appears in schedule 5 to the Scotland Act 1998 is, of course, subject to the exception on observing and implementing international obligations.

Adam Tomkins: Thank you—that is helpful. Are we in agreement that there is no legal requirement anywhere in UK law, including under the Constitutional Reform and Governance Act 2010 or any other provision of statute, for the UK Government to consult devolved Administrations or legislatures on treaty making?

Graham Fisher: Absolutely. It is the concordat arrangements, which are binding in honour only, that require the UK Government to consult the devolved Administrations where their interests are affected.

Adam Tomkins: To be crystal clear, are we in agreement that there is no legal requirement in United Kingdom law for the United Kingdom Government to consult the devolved Administrations about treaty making, including the making of free-trade agreements?

Graham Fisher: There is certainly no direct legal requirement, although there are such things as legitimate expectation.

Adam Tomkins: Therefore, this conversation is entirely about matters that, as far as UK constitutional law is concerned, are reserved to Westminster.

Graham Fisher: Certainly—subject to the point about observing and implementing international obligations.

Adam Tomkins: That is really helpful—thank you. That is the legal background, but against that legal background sit a whole lot of political agreements, concordats, memorandums of understanding—call them what you will. As I understand it, the United Kingdom Government has undertaken to co-operate with the Scottish Government and other devolved Administrations in the UK on negotiating and implementing treaties in general and international trade treaties in particular. Is that correct?

Stephen Sadler: We have had several commitments or undertakings, as you have described them. In relation to the Trade Bill, for example, the UK Government published a white

paper on trade in October that included commitments to consult devolved Administrations. There are further commitments in the UK Government's response to the consultation responses, which was published in the first week of January. That report had scattered through it a number of high-level commitments. It talked about the need to have a trade policy that reflects the needs of the whole of the United Kingdom and said that therefore the Government would be consulting devolved legislatures, devolved Administrations and a wider group.

Adam Tomkins: Does the Scottish Government share my view that we should welcome those commitments?

Stephen Sadler: We should certainly welcome the commitments, yes.

Adam Tomkins: Good—I certainly welcome them. However, we understand that they are political commitments and not legal requirements.

Stephen Sadler: Yes.

Adam Tomkins: Thank you very much; that is very helpful.

Ivan McKee (Glasgow Provan) (SNP): Thank you for coming to talk to us this morning. What do you see as the Scottish Government's specific role as the trade negotiations move forward and the UK negotiates with the EU and third countries? How much of a role do you envisage there being for the Scottish Government and how would it manifest itself?

Stephen Sadler: Given the commitments that we have just talked about, we certainly hope that there will be full and timely involvement of the Scottish Government and other devolved Administrations.

This bill is talking only about taking a particular set of agreements that are already in place and rolling them forward and making them appropriate for the UK as an independent party and not a member of the EU. The UK Government has made express commitments about involving the devolved Administrations in the negotiation of future trade deals, and we look forward to working with it to put those commitments into practice. At the moment, there is not a huge amount of consultation going on. The UK Government might say that it is not yet in a position to have many of those discussions, but we certainly look forward to having them, in light of the commitments that it has given in many places publicly, in writing and in face-to-face meetings.

Ivan McKee: To clarify, are we talking about agreements that replace the EU's agreements with third countries and specify how the UK will fit into that structure, rather than the UK creating brand new agreements, which will come later?

Stephen Sadler: Yes.

Ivan McKee: Obviously, the clock is ticking, and you are saying that, at this stage, all that you have is a commitment that the Scottish Government will be involved as and when the time is right.

Stephen Sadler: Yes. We have had what I could describe as high-level discussions at official level about what might happen and a very general timetable, but we have not yet had any detailed discussions.

Ivan McKee: Is the shape of that becoming clearer? Is the timescale of when we might start to have more substantive conversations becoming clearer?

Stephen Sadler: I hope that it will become clearer soon, to be honest. It is not particularly clear at the moment, to be fair. Discussions are continuing between officials in the Scottish Government and the UK Government.

Ivan McKee: But at some point we are going to run out of time.

Stephen Sadler: There is a deadline on all of this, yes.

The Convener: Ash Denham, did you want to raise issues to do with the framework?

Ash Denham (Edinburgh Eastern) (SNP): It is similar ground to what Ivan McKee has just covered. Effective mechanisms must be in place for consultation between the UK Government and the devolved Administrations in order to provide quality of negotiations and outcomes as well as more legitimacy to the outcomes. I am sure that the Scottish Government would agree with that.

We might say that at one end of a scale there are mechanisms, and at the other end there are obligations. I am not sure whether Mr Sadler can answer this question, but Canada organises these things in a particular way. For example, Canada has created a joint committee on trade. That approach could be replicated in the UK, by having something like a joint ministerial committee on trade, which would meet several times a year. That would be a form of active participation at one end, and at the other end we might have access to texts or information being shared in a timely fashion. Does the Scottish Government have any developed proposals on the types of mechanisms and the framework that it would like to see, or is it too early for that?

10:45

Stephen Sadler: It is at an early stage, although both officials and ministers have had discussions at which we have said that we welcome the commitments that the UK Government is making to involve us more in future

trade deals and we have made a number of suggestions about how that might work, ranging—as Ms Denham suggests—from a formal JMC for trade through to a greater commitment to keep us regularly informed of the text and potentially the negotiation briefs before that.

Ash Denham: How has that been received? Have you had any indication of where the UK Government might sit between those two ends of the scale?

Stephen Sadler: We have had nothing specific on that. The UK Government has said that it would welcome continuing dialogue about how we will take things forward. It is fair to say that it is having similar discussions with the Welsh Government, which published a paper last week in which it specifically recommended creating a JMC on trade.

Ash Denham: Another option might be for the Scottish Government to expend some effort providing analyses and impact assessments for areas that are specifically of interest to Scotland, which could be fed through to the UK Government for use during negotiations. Is the Scottish Government working on that?

Stephen Sadler: Yes. “Scotland’s Place in Europe”, which was published recently, contains some high-level stuff.

Ash Denham: Yes, that is the migration work.

Stephen Sadler: We are continuing to work on that. We are looking not just to Government information but to information that might be available through Scottish Enterprise, for example. A range of people are already undertaking such assessments of individual sectors and we are trying to pull that together to see the kinds of messages that they give about the possible impact of Brexit on specific sectors and the whole economy.

The Convener: Before we go on to the role of Parliament, I want to probe some of the more high-level content that Adam Tomkins raised at the beginning of the meeting. Currently, all trade deals for the United Kingdom are negotiated through the European Union. There are clear mechanisms for that process, including the eventual sign-off of any deal in the European Parliament. There are also ways in which the Scottish Government can feed into that process. Indeed, MEPs can be lobbied directly by their constituents to influence the outcomes of any negotiations. What is the Scottish Government’s view on what will be lost from the current process in the future?

Stephen Sadler: Perhaps I can answer in a slightly different way. We want to ensure that, when the UK leaves the European Union, the

arrangements are improved on and give the devolved Administrations a greater role. Currently there are mechanisms in the UK for the UK Government and devolved Administrations to discuss European matters. We would like to see those enhanced rather than simply be preserved. We would not want to see our current level of interest or involvement diminished in any way as a result of the UK Government saying that it now deals with trade. We would need to develop a new set of arrangements for having a wider involvement in trade deals. We are starting to consider how we might be best placed to do that and what proposals we might make.

The Convener: We will move on to wider issues and the role of Parliament.

Patrick Harvie (Glasgow) (Green): Most of the comment and discussion so far has been on the role of the Scottish Government and most of the memorandum talks about the role of Scottish ministers and the Scottish Government. Understandably, whoever happened to be in office at any one time would be concerned about the role of the Government.

The memorandum does not contain a great deal about the role of parliamentary scrutiny. If the Trade Bill is passed in its current form, what is the Scottish Government's understanding of the level of parliamentary scrutiny that there would be here and at Westminster? Does the Scottish Government have a view on the changes that are required in relation to parliamentary scrutiny? What level of parliamentary scrutiny of trade negotiations and trade agreements does the Scottish Government seek to have set out in the bill?

Stephen Sadler: As the Trade Bill stands, the role of the Scottish Parliament would be formally limited to considering the regulations that come forward to implement the trade agreements in devolved areas. As for Westminster, there is an existing process under the 2010 act whereby the UK Parliament has a role in relation to trade agreements, and that would not be changed by the bill.

We are looking at the future arrangements and we have made a commitment to produce, in due course, a paper on suggestions for more trade powers, which will look at the role of the Scottish Government and the Scottish Parliament. In that paper, we will look to develop a consensus on ways to identify and protect any particular Scottish interest in trade agreements. There are international comparisons that we could usefully look at to see whether they would work in a Scottish and UK context.

Patrick Harvie: I raise as an example the debate over recent years on the transatlantic trade

and investment partnership. A great deal of civil society involvement and political debate was brought to bear, and in many ways it was European parliamentary scrutiny that made sure that some of those arguments carried the day. If we are to be outside the European Union, with the result that we will not have that layer of parliamentary scrutiny at European level, it is clear that we will need to replicate that in the structures of the UK as a multijurisdiction country with devolved competence.

It might be the case that the Scottish Government has not yet reached a view on the issue, in which case that is fine, but please say so. At what level does the Scottish Government feel that parliamentary scrutiny needs to be brought to bear—for example, in relation to the approval of negotiating mandates before trade agreements are reached, or through the signing off of trade agreements at a parliamentary level, rather than their merely being signed off by ministers of one or more Governments?

Stephen Sadler: It is probably easiest to start by saying that the Scottish Government has not yet reached a firm view on the matter. We are looking at a number of options. As you said, there is a range of potential levels of involvement for Parliaments and devolved Administrations. I noticed that the trade justice Scotland coalition's submission put forward a lot of suggestions about the way forward. Those issues, among others, are ones that we would want to consider in forming a view, which we would bring to Parliament for discussion—I would say "in due course", but that would be a terrible civil service thing to say. There are deadlines to all this. That consideration will have to take place sooner rather than later, but I am afraid that, as of today, we have not come to a firm view.

Patrick Harvie: Thank you. I look forward to having the chance to debate the matter in Parliament, if the Government plans to dedicate some time to that.

Willie Coffey (Kilmarnock and Irvine Valley) (SNP): I want to continue Patrick Harvie's theme of scrutiny. It does not appear that there will be any scrutiny or transparency in the process that is proposed, which must be a worry. We have already heard that the UK Government can basically force through any trade agreement that it likes, regardless of whether Scotland, Wales or Northern Ireland agrees. That is hardly a recipe for mutual co-operation, given the circumstances that we are in. What is the Scottish Government trying to do to get some agreement into the mix, so that we can work together more co-operatively to get the solutions that we seek?

Stephen Sadler: As we mentioned, we have had numerous commitments from the UK

Government, from last autumn onwards, if not earlier, to involve the Scottish Government and other devolved Administrations. We are taking that up and are having discussions at official level, and in due course there will be discussions at ministerial level. We will take the UK Government at its word. It says that it wants to involve all the devolved nations and wider society, so we want to push for discussions in the near future about what that will look like. Part of that is for the reason that you mentioned, because that level of scrutiny is important in wide-ranging trade agreements.

Willie Coffey: Will we propose a particular set of arrangements to the UK Government for agreement, or do we expect it to do that?

Stephen Sadler: I think that we will. As I said to Mr Harvie, somewhere between in due course and today we will come up with some proposals.

Willie Coffey: I love that. Thank you very much.

The Convener: Emma Harper has some technical questions.

Emma Harper (South Scotland) (SNP): Yes. I am interested in some of the technical issues, because I know that we do not want the UK Government to attempt to reserve powers that are currently devolved, such as in agriculture. We have had 40 years of the common agricultural policy and now that has to be disentangled. What are the technical challenges of coming up with a new agriculture trade bill?

Luke McBratney (Scottish Government): A range of legislation is proposed to deal with and prepare for the consequences of EU withdrawal. As the legislative consent memorandum makes clear, the principal tool that will be used is the European Union (Withdrawal) Bill. The committee is familiar with the Scottish Government's arguments about clause 11 of that bill and its position that EU competences in devolved areas should flow directly to the Scottish Parliament on withdrawal. As has been made clear, the Trade Bill is one of a range of other pieces of legislation, including the Sanctions (Human Rights Abuse and Corruption) Bill, which are directed at more specific and narrow aspects of withdrawal—in this case, the continuation of existing EU third-country trade agreements. The concern that you have raised about the continued ability of Scottish devolved institutions to have influence over devolved policy areas is one for the European Union (Withdrawal) Bill, rather than for the Trade Bill, which has a much narrower focus.

Adam Tomkins: I want to ask Mr Sadler to clarify something that he said in his opening remarks. He said, very carefully, that the Welsh Government position on the Trade Bill is similar to the Scottish Government position. Saying "similar to" implies that it is not identical. We know that the

Scottish Government and the Welsh Government have been working together closely on tabling amendments and so forth with regard to the withdrawal bill, and I think that Mr Sadler said that joint Welsh and Scottish Government amendments had been tabled for the Trade Bill at committee stage in the House of Commons. How is the Welsh Government position on the Trade Bill different from the Scottish Government position?

Stephen Sadler: I must have misread my notes. What I had written down was that the Welsh Government is taking the same position as the Scottish Government. I apologise if I said "similar".

Adam Tomkins: Thank you for clarifying that. It may be that I got that wrong.

The Convener: Before we move on to the final issue that we want to cover today with questions from Neil Bibby on the customs union, I want to ask a brief question. In "Scotland's Place in Europe", published in 2016, the Scottish Government made plain that it wanted to take part in any trade negotiations that impacted on devolved competences. I want to make sure that that is still the Scottish Government's position.

Stephen Sadler: Yes, it is. The Scottish Government's overarching view is that we should be involved in things that affect Scotland. It might sometimes be difficult to draw a clear line between devolved and reserved issues in trade deals, because there is a read-across on various things, and the more that modern trade agreements develop the more wide ranging they become and the more they edge into public policy issues, which are more devolved. That was a long way of saying yes.

The Convener: Yes, but some of the larger areas of those trade agreements often involve things such as agriculture, environment and fisheries. I assume that it is therefore the Government's expectation that you would be fully involved in any negotiations of that kind that impact on devolved competences.

Stephen Sadler: It would be our hope that we would be involved. We will certainly address that in our discussions with the UK Government about the way forward in developing future trade agreements.

The Convener: However, the Trade Bill does not deal with any of that—it does not deal with how any such mechanism can be deployed.

Stephen Sadler: No, it does not. The UK Government has said that that is for the future; we are saying that we need to have that discussion quite soon. It is not in the Trade Bill.

The Convener: We are basing a lot on faith, in that case. That is just a comment; I do not expect you to respond to it.

11:00

Neil Bibby (West Scotland) (Lab): Can you clarify the Scottish Government's position on the customs union? I understand that the Scottish Government wants to remain part of the European Union and, as such, a member of the customs union. However, is it the Scottish Government's position that, on leaving the European Union, it should be a member of the customs union as it currently exists, or does the Government accept that there needs to be a new customs union, with a new agreement?

Stephen Sadler: If and when the UK leaves the EU, we will not be part of the existing customs union. I think that the Government's view is that we should look to be part of a customs union, yes.

Neil Bibby: Okay.

James Kelly (Glasgow) (Lab): Public procurement accounts for a major amount of expenditure. What are the implications of the Trade Bill for public procurement rules?

Stephen Sadler: I must start by saying that I am in no way an expert on public procurement rules.

My understanding is that the intention of the UK Government, supported by the Scottish Government, is that we would continue to be—or look to be—independent members of the agreement on Government procurement, as a starter. Because we will not be in exactly the same position as we are in now, there might well be scope for changes. Procurement is a devolved issue, at least in part, so in the context of future discussions about the UK being a member of the agreement, with Scotland as part of that, I think that we would be looking to see whether we could introduce changes or flexibility.

The Convener: I thank the witnesses for coming. We are bit ahead of schedule, so we will take the opportunity to go into private for items 3 and 4. We will resume in public at approximately 11.30, when we will hear from our second panel on the Trade Bill.

11:02

Meeting continued in private.

11:30

Meeting continued in public.

The Convener: We continue our evidence-taking session on the UK Trade Bill with a panel of

academic experts. I welcome to the meeting Dr Billy Melo Araujo—have I got the pronunciation right?

Dr Billy Melo Araujo (Queen's University Belfast): Just about. I will not hold it against you—even my daughter cannot pronounce my name properly, so it is fine. [*Laughter.*]

The Convener: I am glad that there is somebody who is not holding something against me—that is great to know.

Dr Billy Melo Araujo is a lecturer at the school of law at Queen's University Belfast. I also welcome Professor Andrew Lang—I think that I have pronounced that name correctly—who is the chair of international law and global governance at the University of Edinburgh; Professor Michael Keating, who is a director at the Economic and Social Research Council centre on constitutional change; and Professor Sangeeta Khorana, who is from the department of accounting, finance and economics at Bournemouth University. I thank all the witnesses for coming along—some of you have come a distance to help us out with our deliberations on the Trade Bill, for which I am very grateful.

I have two simple questions to start off with: first, what impact will the Trade Bill have on devolved powers; and, secondly, what are the implications for devolved competences, such as agriculture and the environment, of free-trade agreements into which the UK may enter? I do not mind who kicks off the responses. Who wants to have a go? We will start with Dr Billy, given that I almost pronounced his name correctly.

Dr Melo Araujo: I will raise three issues about the Trade Bill—perhaps I can go into greater detail about them later. The first is the vagueness of the bill's scope, which could have significant implications in terms of the powers that are given to the Executive to implement trade agreements. The second is the lack of adequate parliamentary scrutiny of trade agreements—and not just in relation to the Trade Bill, which covers trade agreements that are being rolled over, because questions are also being raised about trade agreements post-Brexit. The third issue is the lack of any role for the devolved authorities in shaping trade negotiations, which could be problematic because many of the issues that are covered in trade agreements relate specifically to devolved matters.

Professor Michael Keating (Centre on Constitutional Change): It is difficult to talk just about the Trade Bill, because it is narrow in scope. The coverage of international trade has been patchy: there are bits in the Trade Bill, bits in the withdrawal bill and bits in another bill, which makes it difficult to see the overall picture, so I will

talk about trade bills and trade agreements in general.

We have not negotiated free-trade agreements for about 45 years and in that time a lot of things have changed. Notably, trade deals are much wider in scope—they include measures on product, environmental and labour standards, social provisions and all kinds of things—and they are getting wider all the time. That means that trade is not just about trade but about domestic policy. Partly because of that, trade bills encroach on devolved competences to an extraordinary degree, although trade is still a reserved UK responsibility. That raises a question about how the devolved nations fit into international trade negotiations and agreements.

Professor Andrew Lang (University of Edinburgh): We can get into matters of detail, but I will make a few high-level points to distinguish the future free-trade agreements issue from the existing free-trade agreements issue. On future free-trade agreements, I agree with my colleagues: to some extent, every comprehensive FTA is a constitutional negotiation and potentially affects domestic constitutional arrangements.

The main point that I want to make is that it is reasonable to take a very ambitious view as to the role that the Scottish Government and the Scottish Parliament ought to play in future FTA negotiations. Best practice in a variety of federal systems globally is to have a significant degree of parliamentary involvement.

On existing FTAs, the situation is ever so slightly different. There will be some circumstances where the priorities of flexibility and speed, as long as there is no significant change, might require different arrangements.

Professor Sangeeta Khorana (Bournemouth University): Good morning, everyone. Thank you so much, convener.

I completely agree with my colleagues that the Trade Bill is narrow in scope and lacks clarity. We need to see a vision coming out as to where we are heading for. From the perspective of the Scottish Government, the first thing that merits attention is the consequences of the proposed change and how the devolved Administrations will interact on those issues. Secondly, what measures are being taken to prepare for a transition, if we are going to have one? The clock is ticking away. Thirdly, and most important, in future FTAs, which elements will the Scottish Parliament have a say on, and which will it not have a say on? We need more clarity here. That is my take on the Trade Bill.

The Convener: Will one of you have a go at giving us an obvious example of where the Trade Bill may impact on a devolved power, just so that

we bring the subject alive for the audience that is out there listening to this discussion? Would anyone like to have a go at that? Is there an obvious example where there might be implications for the devolved settlement?

Professor Khorana: Procurement is a matter for the devolved Administrations, and it is an area that the Trade Bill will have an impact on. Personally, I cannot comprehend how the UK is going to go about that once it Brexits. Once we have Brexited, what will that mean? Will we follow EU directives? The fact is that the UK has transposed EU directives into its procurement framework. How is it going to disentangle them, and what role is the Scottish Parliament going to play there? It is really important for the Scottish Parliament to start identifying the entities that it wants to be included and excluded. The Scottish Parliament has to start thinking about that aspect and whether it would like to give small and medium-sized enterprises a special role. We could discuss that as we proceed.

The Convener: Yes. I just want to get a general feel for things at the beginning.

Professor Keating: I would suggest agricultural support, agricultural regulation and, potentially, environmental policy.

Professor Lang: One could look at the extent to which future FTAs will involve investment chapters. There are lots of examples of sub-national authorities in a variety of countries being challenged over anything from construction permits to regulatory permits for land use of different kinds. Those things affect foreign investments in a variety of ways, and one is always open to a challenge of discrimination or lack of fair and equitable treatment and so on.

Dr Melo Araujo: If we look at classic trade policy, the comprehensive economic and trade agreement between the EU and Canada, for example, includes negotiated low tariffs and tariff-rate quotas for things such as pork, seafood, beef and veal. I do not know the extent to which those are relevant to Scotland in particular, but I expect that beef, for example, would be important. If we consider the EU and South Korea trade agreement, there were negotiations on tariff-rate quotas for dairy products. All of that is subject to renegotiation and, depending on the outcome, there could be more competition from Canada or South Korea. If more market access is provided, it will have an impact.

The Convener: The Trade Bill is a narrow bill. Should it be expanded to explain how the devolved Governments will be involved in future?

Professor Keating: That should be somewhere, although I do not know whether the Trade Bill is the right place to put it. There has

been a lot of talk about frameworks generally, and about the relationship of foreign trade to domestic policy and how that should be dealt with. So far, it has been dealt with in a very fragmented way. We do not have any clear principles or doctrine as to the roles that the devolved nations should play in making trade policy. A lot of European policy is going to become foreign trade policy. We have a mechanism for the involvement of the devolved nations in making European policy, but we do not have a similar mechanism for foreign trade deals.

Adam Tomkins: I want to pick up on the point that Prof Keating just shared with us. I think that what we are trying to understand is the extent to which the committee should recommend to Parliament that it should give consent to the bill, which is going through at Westminster. The legislative consent process does not apply to all Westminster legislation; it applies only to that which pertains to devolved, as opposed to reserved, matters. Can we just make sure that we have a clear understanding of that legal and constitutional landscape before we go any further?

As I understand it, the Trade Bill is uniquely concerned with international trade. Is that correct?

Dr Melo Araujo *indicated agreement.*

Adam Tomkins: The recording will not pick up that you are nodding, so it would be helpful if you could say yes.

Dr Melo Araujo: I would say yes, but with a caveat. The Trade Bill concerns international trade agreements, including

“an ... agreement that mainly relates to trade”.

There is no definition of “mainly relates to trade”. You will see in Professor Lang’s written evidence that it could deal with a variety of issues—it could deal with environmental protection agreements. It is quite wide in scope. It depends how you define an international trade agreement.

Adam Tomkins: The opening line of the long title says that the Trade Bill is

“A bill to make provision about the implementation of international trade agreements”.

That is correct, is it not?

Dr Melo Araujo: Yes.

Professor Lang: Yes.

Professor Keating: Yes.

Professor Khorana: Yes.

Adam Tomkins: Do all the members of the panel agree that international relations, including treaty making and the making of free-trade agreements, are reserved to the United Kingdom in the United Kingdom’s constitutional order?

Dr Melo Araujo: Yes.

Professor Lang: Yes.

Professor Keating: Yes.

Professor Khorana: Yes.

Adam Tomkins: Do all the members of the panel agree that there is no legal requirement in United Kingdom law, including under the Constitutional Reform and Governance Act 2010 or any other provision in statute, for the United Kingdom Government to consult devolved Administrations about treaties?

Professor Keating: Yes, that is absolutely true. On the other hand, we have an emerging set of conventions around legislative consent for matters that impinge upon devolved responsibilities. That is the tricky area—

Adam Tomkins: Yes, absolutely.

Professor Keating: —and it is being extended. It is that boundary that we have to think about.

Adam Tomkins: I fully accept that that is a tricky area, but I want to understand how it relates to the constitutional and legal underpinnings of the United Kingdom’s constitution. There has been a lot of talk that certain of the European Union (Withdrawal) Bill’s provisions do not respect the devolution settlement. I just want to make sure that we are respecting the devolution settlement, which says that international relations, including international trade, are reserved to the United Kingdom Parliament.

The question that I wanted to explore a bit more with Michael Keating, because he raised it in his evidence a few moments ago, concerns the fact that the United Kingdom will clearly want to negotiate a number of free-trade agreements with other countries around the world that are multi-Government jurisdictions, whether or not they are formally federal, including the United States, Canada, Australia, India and others. What can Michael Keating and other members of the panel tell us about how those multilayered jurisdictions—federal countries, if you want to use that term—navigate the relationship between what is done at the federal level, which in our case would be the UK level, and what is done at the sub-state level, which in our case would be here in Scotland?

Professor Keating: There are two obvious cases of that, one of which is Belgium, which is of course part of the EU. So-called mixed treaties require national ratification. The Canada deal required ratification by the regions as well as by the Belgian national Government, and it almost came unstuck. There is a potential time-bomb in Belgium, but they always manage to get around it.

The other case is Canada, where the issue has never been resolved in the constitution. It was

agreed that the provinces would be involved in the CETA arrangements, because when CETA came to be ratified in Canada there was a constitutional problem concerning the federal Government ratifying provisions that impinged on provincial jurisdictions. Such a situation can arise anywhere, but I do not have an example of a country where it has actually been resolved.

The Convener: During that questioning, a “but” came through on the legislative consent process, Professor Keating. Legislative consent is the committee’s primary purpose in scrutinising the bill, so will you expand on your concerns on that?

11:45

Professor Keating: The UK Government has already said that the bill will require legislative consent for certain of its provisions. That is consistent with our understanding of the Sewel convention.

We do not know what will happen with the withdrawal bill, which is the really big test of the process. The UK Government is suggesting that it might amend the withdrawal bill to take account of the reservations of the Scottish Government and the Welsh Government, which are not recommending consent to their respective legislatures. As the Supreme Court has told us, the Sewel convention is not enforceable as a matter of law, but the question is whether it is part of our understanding of the constitution. I would answer that it probably is but how the issues are resolved has never been tested.

The Convener: Does anybody else want to reflect on that?

Professor Lang: To repeat quickly what is already in the written evidence that is before the committee, there are three key issues on consent. The first is the level of scrutiny when significant changes are made to existing agreements. That is a serious issue. The second, which is perhaps less serious, depending a little on exactly how it is implemented, is the ambiguity as to scope. The third has to do with the limitations on devolved powers in schedule 1. That is well understood, so we do not need to go into it.

I will make a few points about other countries. Much depends on a country’s domestic constitutional arrangements. All the different comparator countries have slightly different domestic constitutional arrangements. However, it is fair to say that, in all the countries that we are examining, there is an increasing recognition that, even when there is no formal role for sub-national Parliaments or authorities and they have no veto powers, it is in the interest of the national Government to have full consultation and consent.

It is also in the interests of the FTA partner country, so one sees pressure for that.

One of the broad lessons to be learned from such examples is that it can be important for there to be at least one formal choke point. Whether formal acceptance by a sub-national Parliament is required or there is some formal requirement for a sub-national Parliament to be involved in the setting of the mandate, it can be important for there to be at least one point in the process when a sub-national Parliament has a formal power.

Adam Tomkins: That is helpful. Thank you.

The Convener: In its interim report, the committee said that it could not support legislative consent for the European Union (Withdrawal) Bill unless it was amended in some way to deal with the concerns that we had. If that bill, which has an impact on the Trade Bill, were not to be amended in the way that we expect it to be, what would the witnesses say to the committee about the position that it should take on legislative consent for the Trade Bill?

Professor Keating: The Trade Bill raises many of the same issues, so the position would be the same.

The Convener: Okay. I see other witnesses nodding but, as Adam Tomkins did, I ask them to say something so that it is on the record.

Professor Lang: I agree.

Professor Khorana: I agree.

The Convener: We are clear about where we are.

Ivan McKee: I thank the witnesses for coming to talk to us. I will follow on from the approach that Adam Tomkins took and come at the matter from a different direction. Do the witnesses all agree that, as it is structured, the devolution settlement states clearly that what is not reserved is devolved?

Professor Keating: Yes, but it also says that the competence of the UK Parliament is not affected, so the UK Parliament can ultimately have the last word, notwithstanding that.

Ivan McKee: Sure, but the devolution settlement states that what is not reserved is devolved. There is a clear list of things that are not reserved, including agriculture, fisheries, health, education and transport. They are devolved, by definition.

Will the panellists talk us through how free-trade agreements could impact on some of those devolved areas? Some of the papers refer to that; some mention international examples and Professor Lang mentioned situations in which requirements in free-trade agreements have

challenged devolved Parliaments or constrained their ability to operate in devolved areas.

Dr Melo Araujo: If the Trade Bill is read in conjunction with the European Union (Withdrawal) Bill, an advantage of leaving the EU would be that you would have an additional level of regulatory flexibility in setting up your procurement system; I presume that you would no longer be required to comply with the EU regulatory framework. In respect of the UK being successful in acceding to the GPA, the standards of the GPA's regulatory framework are much lower than those of the EU, which would give some wriggle room in terms of how to craft a procurement system for Scotland.

However, the current restrictions in the European Union (Withdrawal) Bill and the Trade Bill, as I have read them, would mean that no modifications will be possible under retained EU law unless they are done by Westminster. A devolved competence would be taken up by Westminster, in essence, which would mean that the benefit of regulatory flexibility that could be gained from leaving the EU would be lost.

Professor Lang: I will say two things quickly. Some chapters in FTAs have headings that are directly related to devolved powers—agriculture and so on. However, FTAs also have general principles—such as non-discrimination and the requirement to accord foreign investors fair and equitable treatment in investment chapters—that apply, in principle, to all forms of regulation at whatever level, and so do not exclude any particular area of regulation and therefore, by definition, include devolved powers. That is the point that I really want to make. Those general principles come in particular actions by subnational authorities in investment cases and, to a lesser extent, in trade cases.

Ivan McKee: In the example of the health service, Scotland's approach to the involvement of external investment is different to that of the rest of the UK. If a free-trade agreement was signed at UK level that enabled foreign investment to come into the health arena, that could be imposed on Scotland because it had been agreed at UK level.

Professor Keating: That could be the case for universities and other public services, too.

Ivan McKee: What sort of role should the Scottish Government have in negotiating trade deals, now and in the future?

Professor Lang: I imagine that that is a question for all of us.

The Convener: Feel free to answer.

Professor Lang: We should distinguish between different functions. First, I mentioned in my written evidence that analysis is important,

even though it is soft. There is an urgent role for building up capacity in Scotland.

Secondly, the negotiating mandates need careful thought about the respective roles of the UK and the devolved authorities. Oversight throughout the negotiations includes the third function, which is public consultation at Scotland level, with frameworks that are independent of UK frameworks being established.

The fourth function is to set up a framework for intergovernmental consultations. The fifth function covers ratification and implementation, which are processes at the back end, and what kind of formal role, if any, should be given to the Scottish Government and other devolved authorities.

Under each of those headings we could discuss specific proposals. Looking ahead, those are the five key issues that we need to think about in respect of a future framework.

As I said, there may be a good case for having a somewhat streamlined process in relation to a number of existing FTAs. There might be a set of different recommendations for that.

My final point is in response to an earlier question. There probably is a good reason to separate, in different bills or in different venues, treatment of existing FTAs from that of future FTAs. Combining them in a single bill may not be best, because they are quite different.

The Convener: Does anyone else want to pick up on that?

Professor Keating: The provisions for Westminster scrutiny and ratification of trade deals are really inadequate and problematic, so the Scottish Parliament will not be alone in criticising the provisions and asking for the process to be opened up to much greater scrutiny.

The Convener: We will come back to that area in a bit more detail; Patrick Harvie wants to go into it. First, Ash Denham has questions about the framework and how that will be dealt with.

Ash Denham: I am interested in intergovernmental relations and how they might be developed in order to underpin or facilitate trade negotiations on a sliding scale between consultation and full involvement of the devolved Administrations. It has come through in papers, and the committee has heard in evidence, that UK intergovernmental relations are currently considered to be quite inadequate. However, internationally, there are a number of useful templates that could be of interest to us and that we could develop. My question is open to all on the panel, but Dr Melo Araujo specifically mentioned the Canadian example. Can you give us an overview of the facets of that system that relate to trade negotiations?

Dr Melo Araujo: The Canadian system is usually held up as being the most effective and successful form of intergovernmental co-operation in terms of trade. At the very top, there is a joint committee that is known as the C-trade committee, which is composed of high-level trade representatives from the Canadian federal and provincial Governments. It meets quarterly and discusses issues that arise in relation to trade negotiations, from the decision to initiate such negotiations to problems that arise as they go on. The committee is supported by sub-committees that deal with the technical issues, as they relate to specific areas of provincial competence, including agriculture and procurement. The sub-committees deal with the boring technical aspects of trade policy; anything more controversial is flagged up to the C-trade committee.

In addition to that, there is a very high level of transparency in how trade agreements are carried out. The federal Government regularly informs the provinces and submits negotiating draft texts so that the provinces can review them, submit their observations and put forward their interests and suggested amendments.

As the committee has heard, in some cases, trade representatives from the provinces have been allowed to engage actively in trade negotiations. The most recent example was the EU-Canada CETA. However, that was done at the request of the EU, which had previously been burned in trade negotiations with Canada, in which it had said that it could not make liberalisation commitments in some areas—particularly procurement—because of the provinces. The EU wanted to get the middle man out of the way, and to deal directly with the provincial representatives. That worked very well: at any rate, the deal was done.

That system worked so well that Canada tried to replicate it in the trans-Pacific partnership, but the United States rejected it. Even if you have in place a system that allows for representation of some national entities, such as devolved authorities, you are still relying on the good will of your counterparts, which is something to bear in mind.

The system has allowed federal and provincial Governments to carry out and negotiate trade agreements in a relationship of mutual trust and co-operation. Perhaps most important is that it has forced the provincial Governments to take ownership of Canada's trade policy and trade agreements. Because they are actively involved in the process, they also have to sell the final outcome of that process to their constituents. Therefore, the whole process, rather than being an irritant and an obstacle to trade negotiations, ended up enhancing the democratic legitimacy of the agreements.

12:00

The other panel members have touched on the fact that we have to understand that the Canadian system works in Canada because of specific political and constitutional factors that are unique to Canada. That system would not be easily replicated here in the United Kingdom. Canada has a strong federal system, in which power is diffuse. A unique feature of the Canadian constitutional system is that provinces have exclusive competence to implement international obligations. If Canada negotiates a trade agreement that relates to procurement, which is a provincial competence, as it tends to do, the provinces have, in theory, the right to refuse to implement the provisions in their territorial jurisdictions. Therefore, in Canada the federal Government relies on provincial co-operation to get trade agreements over the line, and the provinces have greater leverage in trade negotiations. That is why there is a high level of co-operation between the two levels of government.

That is not the case in the UK, where power is not diffuse—indeed, legal sovereignty is concentrated in the hands of Westminster. To simply replicate in the UK the processes and institutional framework that Canada has would not necessarily lead to the same outcomes. One would probably need to go beyond that by making co-operation legally binding, which I think is not the case, as things stand.

Professor Keating: I agree with everything that Billy Melo Araujo has said. I will make a couple of points about Canada. First, there is currently a great deal of consensus in Canada about trade policy. That was not the case in the 1980s when I lived there: trade policy then was very controversial, but now there are provincial interests but not differences on the principle of free trade.

Secondly, Canada has a lot of experience in negotiating internal free-trade deals, because it does not have free trade between the provinces, so it has recognised the problem for a long time. The mechanism for that has been used to try to get agreement on international free-trade deals, taking account of provincial concerns.

Professor Lang: I have three ancillary points to make, which are not really about the substance of the question. First, having a proactive proposal in the near future would make a big difference and would set the stage for the discussions to come.

Secondly, in addition to considering the institutional issues, it is very important to build support for the—I think—generally true idea that it is better to do trade policy this way. One way of doing that is to begin to feed analysis into the

process, to show what constructive roles can be taken. That is why I keep coming back to analysis and capacity.

Thirdly, we can talk for ever about the particular institutional arrangements for consultation, but probably the single most important thing to provide the impetus for genuine consultation would be a formal role in approval or in setting the negotiating mandate, because if there is some kind of blocking power, consultation becomes very important.

Ash Denham: Professor Lang has set out a couple of things that should happen in the UK setting, given that, as Billy Melo Araujo said, the Canadian system would not necessarily work here. Will other panel members briefly outline the key points that should be part of the new IGR system for the UK?

Professor Khorana: The Scottish Parliament should propose to Westminster a clear mechanism for how they will interact. To go back to Andrew Lang's point, capacity has to be built and impact assessments have to be done in greater detail.

Let us take the example of procurement, on which I work, and which is devolved. As I said in my written submission, the Scottish Parliament will have to go into greater detail and find out the precise rules for Scottish firms that bid for contracts in the EU and third countries and for firms that bid in Scotland.

One important point for Scotland to think about is how it will replicate tenders electronic daily—TED—which is the EU tender database system, because if the UK wants to join the GPA, it will have to start thinking about a tender database. Most importantly, you have to start estimating the size of the procurement market, the barriers that Scottish firms face in third markets and what entities you want to open or discard, because those will be important not only in negotiating the GPA, but also when negotiating with the EU and with third countries with which the UK already has partnerships through the EU and those with which the UK is proposing new deals. Capacity is key and will lead to civil society interaction. That is how a system of interaction will be set up. It is a process of evolution.

Professor Lang: We can take some key points from the existing model. One would be a legal requirement to provide information to relevant parliamentary committees and so on during negotiations. There will need to be some kind of formal structure for regular on-going meetings around trade policy issues, modelled on existing structures. I misspoke earlier when I talked about a blocking role, but there would need to be some kind of formal role in the process, whether that is hard or soft, from setting the negotiating mandate,

to negotiations, all the way through to ratification and implementation.

Dr Melo Araujo: I echo what has been said about trade capacity. To give you an example from Canada, provinces invest a lot of resources in building trade capacity, to the extent that it is not uncommon for the federal Government to seek advice from the provinces on areas that fall within their competence, because in some cases provinces are deemed to be more qualified. There is no point in having a co-operation system in place if you do not have the intelligence and capacity to engage in the process.

In the absence of a constitutional environment that would give devolved authorities the power to shape trade negotiations—either through ratification by the Scottish Parliament or an executive power to implement the obligations, which is specifically excluded from the withdrawal bill—I would echo Professor Lang's point that you would need formal and possibly legally binding structures of co-operation.

The Convener: We have covered a fair bit around the CETA arrangements, but it is probably the right time for Neil Bibby's question.

Neil Bibby: We have already touched on Wallonia and the trade agreement there. Does anyone have any further reflections on what happened and the consequences of having similar powers for Scotland, Wales or Northern Ireland?

Professor Keating: The difference in the UK is the asymmetrical constitution; we keep coming back to the point that there is only devolution in Scotland, Wales and Northern Ireland. It is difficult to imagine each of those areas having veto powers over trade agreements, because it is unlikely that that would be acceptable to Westminster. On the other hand, mere consultation may not be enough either.

The mechanism will probably be based on something like the joint ministerial committee on Europe. That is the only JMC that has had a continuous existence, because it has something to do. It is very important that committees have something to do; otherwise they just fade away. That is what happened to the domestic joint ministerial committee—people just did not turn up any more. However, a joint ministerial committee on trade would have a lot to do, certainly while we are negotiating free-trade agreements following Brexit.

The question is, what instruments would the devolved Administrations have available to them if they were ignored? How many levers would they have to ensure that their views were taken into account? We do not have a federal system like Canada does, but have asymmetrical devolution instead. Something must be done to ensure that

the views of the devolved Administrations are at least taken into consideration.

Professor Khorana: The clock is ticking and we do not have time to waste. The structures have to be put in place as soon as possible. We have to start thinking about the kind of transition measures that we need to address the problem that is staring us in the face.

Professor Lang: I have a couple of very quick points. Although the Wallonian Parliament performed a very important role in that process, the Wallonia case has given rise to probably quite reasonable concerns about the credibility of the EU as a negotiating partner and the ability of the EU to negotiate the kinds of agreements that it needs to.

I would not rule out a similar arrangement in relation to trade agreements, but the possible arrangements range from there being a full veto power to there being merely a requirement for consultation. One can imagine a requirement that a resolution be passed in devolved authorities expressing approval or disapproval. Such a resolution might not play a formal role, but at least it would be required. One can imagine a practice of consent—the agreement would be put before Parliament for debate or whatever. A range of different options are possible, which would at least provide serious political checks in the process and opportunities for debate and the expressions of views.

Neil Bibby: We have visitors from Wallonia tomorrow, so maybe I can ask them this question, but, in your view, what were the reasons for Wallonia's objection to the CETA deal and was the deal changed as a result of its veto?

Dr Melo Araujo: My recollection is that Wallonia had some concerns about commitments that were made in relation to tariffs on specific products—I cannot remember which ones—in agricultural areas where it had clear defensive interests. Also, it had a lot of concerns about the investment protection chapter in the CETA deal. International investment law is heavily criticised because of the perception that it constrains the regulatory autonomy of countries. Wallonia wanted to make substantial amendments, not just to the investment protection chapters, which included obligations on, for example, the fair and equitable treatment standard, but to the investor-state dispute settlement system—the investor arbitration clause that was included in the CETA deal.

Professor Lang: In respect of its concerns about investment, the Wallonian Parliament played an incredibly important and useful role in the process. If one were designing arrangements from scratch, one would hope that those concerns

would be raised earlier in the process rather than later, so that there was a front-loaded consultation.

Adam Tomkins: I have a quick supplementary on the really interesting things that have been said about Canada and Belgium. Are we to take it that Canada and Belgium are not representative examples of what federal countries generally do? I just want to make sure that we have understood this correctly. It seems that you are presenting those countries as outliers—as extreme examples. I think that Billy Melo Araujo said that Canada is the leading example of provincial Governments and legislatures being involved in the making of international trade agreements that a country is subject to. Certainly, nothing like that happens in the United States, where the commerce clause comes in to say that trade is an exclusive federal competence. Is that correct? You are not presenting Canada and Belgium as representative of what mature federations do, are you? There is a real spectrum.

Dr Melo Araujo: There are other systems where these types of processes exist. Germany, for example, has a federal system and the Länder have a huge role in shaping foreign policy.

It all depends on the federal system. You gave the example of the United States. One reason why states in the US do not have much of a say is that their interests are, formally at least, represented by the US Senate. The US has a bicameral system with a house that is there to represent the interests of the states—whether or not it does is another matter; it is there. You do not have that here in the United Kingdom. Every system is different and you have to accommodate those differences.

Patrick Harvie: I want to move on to look at the difference between the roles of Governments and Parliaments. Before that, one other question occurs to me about the governmental role in particular. It relates to some of what we have discussed already. Whether in relation to the simple copy-and-paste recreation of existing trade agreements—should that come to pass—or the creation of new ones, many agreements will include some form of investor-state dispute arrangements.

If, at some future point, the Scottish Government had taken some action within devolved competence for the protection of public health or the environment, for example, and that became the subject of a dispute under one of those arrangements, who would represent the state in that situation? Would it be the devolved Administration that had taken action for its devolved purposes, or would it be the UK Government, which has responsibility for trade and would therefore have signed off the trade agreement? Who would represent the state in

relation to the reasons for which it took the actions that it took?

12:15

Dr Melo Araujo: As I understand it—Professor Keating will correct me if I am wrong—in the UK, devolved authorities do not have an international legal personality, so if there was an issue concerning non-compliance with an international obligation that derived from a trade agreement, it would be the UK that would be held liable for the failure to comply with that agreement.

Andrew Lang: Typically, those who led the case would be at the national level, although there would be a variety of mechanisms for consultation and involvement on a case-by-case basis.

Patrick Harvie: So in a situation in which the Scottish Government had taken action on devolved competences to pursue a policy that was not shared by the UK Government in domestic terms, it would potentially be voiceless if it were to be challenged in relation to a trade agreement.

Professor Khorana: That is why we have suggested that it is important to have regular interaction between the Scottish Parliament and Westminster. That would avoid our finding ourselves in such situations in future.

Patrick Harvie: I will qualify that by saying that you are talking about a relationship between the Scottish Government, rather than the Scottish Parliament, and Westminster.

I want to move on to the role of Parliament. We have had a lot of useful discussion about examples of situations in which devolved or sub-state entities have a role at the beginning of a trade negotiation in approving the remit and mandate for the negotiation process or in approving the final agreement that emerges. To what extent is it the norm for those devolved or sub-state decisions to be governmental as opposed to parliamentary? Could you also reflect on the extent to which the functions of the European Parliament with regard to scrutiny of trade agreements—which, in the event that we leave the EU, we will be without—are replicated at UK level? Are there other European democracies that are not part of the EU where parliamentary authority can be exercised on such matters, or do the Governments of such countries exercise executive functions instead of allowing parliamentary scrutiny? I apologise for the length of the question.

Professor Keating: I take your point. The answer is that it is mostly Governments that exercise those powers. Parliaments have a very weak role. One reason that is given for that is that there is a lot of confidentiality in international trade

agreements. Generally, I am not convinced by that argument, because all this stuff leaks out anyway—we need only look at the Brexit negotiations, which are supposed to be terribly secret.

There are some examples in the Nordic countries—in Denmark, in particular—in relation to European policy, where an analogous situation arises. In Denmark, there is a very good system of parliamentary scrutiny and parliamentary mandates before negotiations are entered into but, generally speaking, the process tends to be Executive dominated.

Patrick Harvie: It might be possible to ask the Scottish Parliament information centre to give us more information about the Danish example, if that would be helpful in the future.

The Convener: A previous committee did a report on this area—I know, because I was a member of it. I am sure that we could get the evidence from that, too.

Patrick Harvie: That would be great.

Earlier, I gave the example of the transatlantic trade and investment partnership. European parliamentary scrutiny was an extremely important part of the movement that criticised and challenged aspects of TTIP as it was proposed. I asked Scottish Government officials this question and I got an official answer. To what extent would the same degree of challenge be possible under the terms of the Trade Bill if a trade agreement such as TTIP were to be proposed? Would we have any ability to use parliamentary scrutiny to do what was done successfully in relation to TTIP?

Billy Melo Araujo: On the basis of what I have seen so far, I think that the UK Parliament would struggle to exercise that level of scrutiny, because it seems from reading the explanatory note that you would be subject to the Constitutional Reform and Governance Act 2010, which does not go as far as a full-on ratification procedure, which is the basic standard when it comes to approving trade agreements. My first concern would be with Westminster, before we even got to the question of whether devolved Parliaments would have any say. I do not think that Westminster would have the sort of power that Wallonia had.

Patrick Harvie: Would the bill be capable of achieving that if changes were made to it? Is there scope to make changes to the bill to achieve an acceptable level of involvement, which would mean that Parliaments would not struggle?

Billy Melo Araujo: If it was significantly amended, yes. You could add provisions that would require full-on ratification. I agree with the rest of the panel that ratification on its own is no longer deemed adequate or fit for purpose for the

scrutiny of free-trade agreements that deal with regulatory issues, which can be politically toxic. You need a system in which Parliaments and other stakeholders are involved from the very beginning and are consulted and in which there is co-operation so that, by the end of the process, you get an outcome that reflects the interests of everyone. That would be difficult to achieve, but that is how you would maximise societal buy-in and the chances of the agreement being ratified. There are lots of different models that you could replicate here in the UK. The EU is at the forefront of this in terms of transparency and co-operation.

Professor Lang: One specific change to the Trade Bill that might be imagined to give the UK Parliament a role would be a requirement for primary rather than secondary legislation at the implementation stage. A second change would be to modify the CRAG act in respect of trade agreements requiring UK Parliament ratification. The bill is only about existing FTAs, so that could involve either all existing FTAs—although I am not so sure that there would be as strong a case for all of them—or a subset defined by reference to the degree of significant substantive change to the existing FTA.

Murdo Fraser (Mid Scotland and Fife) (Con): I have a brief follow-up question on some of what we have been discussing. You have all talked quite a lot about the need for improved intergovernmental relations. How could they be strengthened by improved interparliamentary relations within the UK? Could we look at models from other jurisdictions around the world where that happens well?

Billy Melo Araujo: The EU provides a good model. The EU faced a lot of criticism concerning a lack of transparency and a lack of involvement of national Parliaments, and it has reformed the system significantly so that national Parliaments are informed and have an opportunity to debate during the negotiation process, not just at the end of the process. Not all Parliaments take up the opportunity, but those that have done so have impacted on trade policy. There are models available.

Willie Coffey: I want to pick up on the issue of scrutiny. What we are hearing is quite concerning. Several of the submissions say that the process is not fit for purpose. Are you getting any sense from the UK Government that it is engaging positively and proactively to resolve the issues? Professor Khorana said that there is an urgency to get some of that work done at the moment. We are expressing quite a lot of concerns around the table—or some of us are—but are you getting any sense that there is a willingness to engage to resolve matters?

Professor Keating: There is urgency, because Brexit must be completed within a short period of time—although we still do not know quite what that period is. The danger is that precedents are set through the process that will become part of the constitutional arrangements for future trade deals—and other trade deals will come down the road. It is important to get it right at this stage, even though time is very short.

Willie Coffey: Are you getting any sense that two-way engagement is taking place that will enable us to meet in the middle and get a resolution?

Billy Melo Araujo: I would not know—I am just an academic. I think that, at one point, there was an acknowledgment from the Government that there would be something beyond the Trade Bill.

I suppose that the light-touch approach to parliamentary scrutiny in the Trade Bill is justified by the fact that it covers trade agreements that, on the whole, have gone through the parliamentary scrutiny process at the EU level. However, it also covers trade agreements that have not been ratified. For example, CETA, which is an agreement between the EU and Canada, has not been ratified and, under the Trade Bill, it would be rolled over. That agreement has not gone through the full scrutiny process at the EU level or at the national level because it is a mixed agreement, but it would be subject to a very light-touch ratification process under the Trade Bill. That would be problematic.

There is also the fact that we are talking not just about copying and pasting these agreements. By the Government's own admission, there are substantial changes to them, including, sometimes, new amendments. Issues such as investment protection and ISDS could be very problematic.

I am not even sure that the light-touch ratification process is justifiable in this trade agreement, given that we might be talking about a significantly amended trade agreement by the end of the process. Certainly for trade agreements that are negotiated by the United Kingdom after it leaves the EU—for example, agreements with the United States, China and India—I would hope that there would be a more intense level of parliamentary scrutiny. At the very least, another bill would be required to regulate those agreements.

Professor Lang: We talked earlier about the many reasons why there might be an inadequate level of consultation between different levels of Government. To the extent that that is driven by an overwhelming workload and too many issues, one can imagine that consultation could be best kick-started by commissioning studies, identifying

sensitive issues and then beginning a conversation with one's own set of issues.

The Convener: Emma Harper has a question about a specific area to ask of Professor Khorana.

Emma Harper: It is actually for Professor Lang. In your submission, you talk about the UK's position in the World Trade Organization and refer to

"EU-wide maximum permitted domestic support for agricultural producers".

I am interested in agriculture—I remind everyone that I am cabinet secretary Fergus Ewing's parliamentary liaison officer. When the Culture, Tourism, Europe and External Relations Committee took evidence, agricultural negotiations and trade were always addressed last because those areas are very difficult. I am interested to know what you mean by

"EU-wide maximum permitted domestic support".

Professor Lang: One of the European Union's obligations has been to cap at a certain level its maximum permitted domestic support—its subsidisation—for agricultural producers. That cap is defined as a quantity across all the current 28 EU countries, so, in principle, it will have to be divided. It will have to be modified for the EU 27, and the UK will have to have its own maximum cap.

It is important for the UK to define its own maximum cap. That will involve establishing a framework for domestic support for agricultural producers, which will involve serious negotiation among the devolved Administrations. However, I suspect that Westminster will take the view that there will have to be a pan-UK position. That is a very important question.

The WTO aspects of that are perhaps less significant than they might appear. That is partly because the WTO agreements permit certain kinds of subsidy, and a lot of the European subsidy programmes fall within the box of permitted subsidies. Because of how they have structured their subsidy programmes, the Europeans are not yet even close to their cap, so there may well be room to split the cap in a way that keeps everyone happy.

Emma Harper: With regard to the splitting of funding, Scotland has 85 per cent of the less favoured areas in the UK, with only 15 per cent lying south of the border. There will have to be some interesting negotiations to support our farmers.

Professor Lang: It is an extremely important issue and one that will be touched on in relation to the negotiation of WTO commitments. FTAs will also be extremely important.

The Convener: Thank you very much. It has been a fascinating evidence session. Many of us are learning about trade policy, trade negotiations and trade agreements to a degree to which we have not had to learn about them before. I have certainly found it educational.

Meeting closed at 12:30.

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