OFFICIAL REPORT
AITHISG OIFIGEIL

Environment, Climate Change and Land Reform Committee

Tuesday 14 March 2017

Session 5

The Scottish Parliament
Pàrlamaid na h-Alba

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ENVIRONMENT, CLIMATE CHANGE AND LAND REFORM COMMITTEE
9th Meeting 2017, Session 5

CONVENER

*Graeme Dey (Angus South) (SNP)

DEPUTY CONVENER

*Maurice Golden (West Scotland) (Con)

COMMITTEE MEMBERS

*Claudia Beamish (South Scotland) (Lab)
*Alexander Burnett (Aberdeenshire West) (Con)
Finlay Carson (Galloway and West Dumfries) (Con)
*Kate Forbes (Skye, Lochaber and Badenoch) (SNP)
*Jenny Gilruth (Mid Fife and Glenrothes) (SNP)
*Emma Harper (South Scotland) (SNP)
*Angus MacDonald (Falkirk East) (SNP)
*Mark Ruskell (Mid Scotland and Fife) (Green)
*David Stewart (Highlands and Islands) (Lab)

*attended

THE FOLLOWING ALSO PARTICIPATED:

Professor Gavin Little (University of Stirling)
Professor Elisa Morgera (Strathclyde University Law School)
Professor Colin Reid (University of Dundee)
Dr Annalisa Savaresi (University of Stirling)
Bob Ward (Grantham Research Institute on Climate Change and the Environment)

CLERK TO THE COMMITTEE

Lynn Tullis

LOCATION

The Robert Burns Room (CR1)

Scottish Parliament

Environment, Climate Change and Land Reform Committee

Tuesday 14 March 2017

[The Convener opened the meeting at 10:00]

Decision on Taking Business in Private

The Convener (Graeme Dey): Good morning, and welcome to the ninth meeting in 2017 of the Environment, Climate Change and Land Reform Committee. We have apologies from Finlay Carson.

Before we move to the first agenda item, I remind everyone to ensure that their mobile phones are on silent for the duration of the meeting.

Under agenda item 1, I ask the committee to agree to take agenda item 3 in private. Do we agree to do so?

Members *indicated agreement.*

Leaving the European Union (Environmental Implications)

10:00

The Convener: Under agenda item 2, we will hear from an expert panel on the environmental implications for Scotland of the United Kingdom leaving the European Union. We are joined by Professor Gavin Little, from the University of Stirling; Professor Elisa Morgera, from the University of Strathclyde; Professor Colin Reid, from the University of Dundee; and Dr Annalisa Savaresi, from the University of Stirling. We are also joined, via videoconference, by Bob Ward, who is the policy and communications director of the Grantham research institute on climate change and the environment. Good morning, Bob.

Bob Ward (Grantham Research Institute on Climate Change and the Environment): Good morning.

The Convener: If you wish to contribute in response to any of the lines of questioning, you should raise your hand to let me know.

Bob Ward: No problem.

The Convener: We will move to questions. I would like each of the witnesses to say how they think that a great repeal bill will work with regard to environmental legislation.

Professor Colin Reid (University of Dundee): The great repeal bill, which is intended simply to carry over all EU law into domestic UK law, will work very nicely for a big chunk of environmental law, because lots of the measures have already been implemented. A lot of EU environmental law is enacted through directives that have required implementation in UK legislation. That means that the EU layer is almost an extra layer on top of the detailed rules, which all exist in UK legislation already. The problem is that that that will not cover everything. At one extreme, there are areas where the law is wholly dependent on EU decision making, EU structures and EU processes, but there is a huge area in the middle that includes references to EU legislation. The boundaries of things in UK domestic law are defined and set by references to EU directives, and untangling all that will be a fairly major exercise.

The Convener: If I remember rightly, in the UK there are about 650 pieces of legislation on the environment. How many of those would easily fall within the remit of the great repeal bill?

Professor Reid: I have absolutely no idea, and there will be different consequences for individual bits within individual pieces of legislation.

The Convener: So, it is complicated.

Professor Reid: It is complicated.

Professor Elisa Morgera (Strathclyde University Law School): I will add to the complication. One interesting feature of EU environmental law is that there have been successive generations of pieces of legislation in various sectors, and increasingly those sectors speak to each other. A lot of effort has been put into ensuring that nature protection considerations are included in water law, and there are other examples in agriculture and fisheries. There are different levels of success with regard to how well EU environmental law is integrated, but the point is that even small amendments to the existing body of EU environmental law might have trickle-down effects that create complications that might be difficult to assess prima facie.

The other element of complexity to consider concerns the fact that, in addition to the central role of the European Commission in some areas—with regard to which it is clear that discussions will have to be had about how power will be exercised once we are out of the EU—there are also more subtle roles that the Commission and the EU structure has played, including the issuance of guidance in relation to the implementation of international obligations relating to the environment, to which the UK is bound. That sort of thing might fall through the cracks. It might not be immediately apparent how changes in legislation might be reflected, and there will be a lack of guidance. Often, it is in the little details of the guidance that decisions about environmental sustainability and sustainable development are made.

The Convener: Does anyone else want to come in?

Professor Gavin Little (University of Stirling): I will add to the point that Professor Reid made.

Obviously, the idea of the great repeal bill is that EU law that is in force in the UK at the time of Brexit, including environmental law, will become domestic law whenever practicable. However, there is also the potential in the period in which the bill is going through Parliament and coming into force for some areas not to be transposed, for domestic policy reasons.

The Convener: Such as, and why?

Professor Little: I suppose that the UK Government might take the view that it does not want some areas of EU environmental law to be transposed. I do not know what they might be, but it is possible that that might happen.

Dr Annalisa Savaresi (University of Stirling): I would make a very small addition to what Elisa Morgera said. There is a common assumption that international environmental law obligations will supplement the ones that are embedded in EU environmental law. That is not to be taken for granted, however, especially with regard to enforcement. More generally, there is the issue that, in many cases, EU environmental law is more ambitious than the corresponding international environmental law obligations. Therefore, a careful assessment will have to be made with regard to the level at which the UK—and Scotland—wants to commit.

The Convener: How much work outwith the scope of a great repeal bill might have to be done as a consequence of Brexit? I am just looking for an idea of the scale.

Professor Reid: That is hard to determine. If all that the great repeal bill says is that EU law as it stands on a certain date is deemed to be part of UK law, that makes the legislative process very easy. However, working out what that means in is practice very hard, especially because we have to freeze the state of EU law and work out what state it was in on a particular day. That becomes particularly difficult where legislation makes reference to EU law. For example, there is no definition of waste in UK waste law; it simply uses the EU definition. A lot of projects that require environmental impact assessment are not defined, because the legislation simply says "by reference to EU law", and the scope of environmental liability is all phrased in terms of things that are covered by other bits of EU law. Even if a short-cut is taken in terms of the legislation itself, there will be a huge challenge involved in the process of thinking through exactly what the state of EU law was on a particular date, especially when you consider that that law might be changed by subsequent amendment and reinterpretation by the European Court.

Professor Morgera: It is not just the amount of time involved that is challenging but the range of expertise that will be needed to understand what we are facing. We are here as experts, but I am sure that we all feel that our expertise covers only so much. Within environmental law, we have specialised expertise in climate change and nature protection. Also, the challenges of Brexit involve thinking about new interactions between international law, the hole that will exist where EU law has been, and national and constitutional issues in Scots law. That means that the issue is not just for environmental lawyers but for all legal experts, who do not usually work together and have not really addressed these questions before.

The Convener: Some people suggest that it might take 10 years to complete the process of disentanglement from the EU. Is that the kind of process that we might be talking about in relation to clarifying the issues around environmental legislation?

Professor Reid: I certainly think that it would be a huge challenge to do it in two years, but I am not sure what time limit you could set. Recently, I was told that the Republic of Ireland has only just got rid of its last pre-separation pieces of legislation—that is, the legislation that it inherited from its time as part of the UK. There are some things that do not necessarily need to be changed, of course, but it can be a long process.

The Convener: We can leave that in our legacy paper for successor committees to deal with.

Bob Ward, do you want to come in on those issues?

Bob Ward: I am not a legal expert, but I think that climate change might be one of the easier areas, because there is UK domestic legislation that governs emissions reductions and action on climate change adaptation. I assume that the proposed great repeal bill will also cover matters such as the energy efficiency standards and fuel emissions standards to which we are currently subject within the EU. As to the details of that, I do not know.

The Convener: Thank you. Let us move on. Dave Thompson—sorry, Stewart. My apologies.

David Stewart (Highlands and Islands) (Lab): I want to move on to international obligations. Clearly, we are in uncharted territory here, in that no member state has ever left the EU. There are issues around whether we think that there will be a hard or soft Brexit, and those are very much hard political questions. What is often discussed is whether we could go under the umbrella of the European Economic Area, to which some climate change targets apply. What is your assessment of going down that route, in as far as there is some understandable background to the EEA? It includes countries such as Norway, Liechtenstein and Iceland—along with the EU member states, of course. Who would like to kick off?

Dr Savaresi: The EEA member states are not subject to the same rules that apply to all EU member states, as committee members will know if they have seen my submission. The issue with EEA membership is that it allows Scotland—or the UK—to maintain certain standards without being engaged in their development. Nevertheless, it is a sure advantage, in terms of continuity post-Brexit, at least in the sectors of products and services, because that is what the bulk of environmental regulations will address in the context of EEA membership. For example, it will not help in the context of protected areas, which is not a subject that is covered by EEA member states' obligations. In other words: EEA membership will help on some issues, but not on others.

In that respect, EEA membership could be desirable from a business perspective, because it would allow businesses to continue operating on the same basis as they do now: with applicability of EU standards on products and services, which are going to be applicable if we want to continue exporting those services and products to the EU post-Brexit.

The Convener: Thank you. Bob Ward, I think that you wanted to come in.

Bob Ward: I agree with that. Membership of the EEA might make the trade of low-carbon goods and services easier than it would be if the UK were outside the EEA, but it would not solve problems such as the future of the EU emissions trading scheme, where the objection appears to be that the rules governing the system are covered by the European Court of Justice. Ian Duncan, a Conservative member of the European Parliament, recently suggested that, because of that connection, it is likely that the UK will need to extract itself from the ETS.

On other relationships that concern Europe and climate change, it is not quite clear whether EEA membership would make a difference. If we think about the EU's joint commitment to the Paris agreement, we know that the UK has already individually ratified that agreement and could operate outside membership of the EU. Whether EEA membership would allow greater co-operation between the UK and the other member states in the international negotiations—for instance, around the future implementation of the Paris agreement—I do not know. I understand that that is one area that is being examined by the Department for Business, Energy and Industrial Strategy.

David Stewart: My colleague Mark Ruskell will ask more detailed questions on emissions trading, so I will maybe hold fire until those. Would other witnesses like to come in on the back of my question?

10:15

Professor Morgera: The fact that EEA membership would not include nature protection legislation or the common agricultural and fisheries policies should not be considered from an environmental perspective alone. The United Nations special rapporteur on human rights and the environment has clarified the importance of nature protection vis-à-vis key human rights such as the rights to life, health, food and water.

The evidence is that, so far, the EU's role in raising standards on the protection of nature in the UK has been positive. Of course, that has been controversial, because it is an area close to national sovereignty in which decisions have to be made about the type of development that we pursue. In that regard, there is a risk. Three weeks

ago, I read in the *Financial Times* cover story that the great repeal bill might diminish the protection of nature, with a view to speeding up development.

Those are questions. The areas that will not be covered by EEA membership are critically important not only from an environmental perspective but to the vision for the sustainable development that one pursues, and they have human rights implications.

Dr Savaresi: On the EU ETS and climate policy, it is important to note that EEA member states implement their commitments under climate treaties jointly with the EU, so that route would be available in principle to Scotland or the UK if they were EEA members.

David Stewart: I will move to the other side of the equation. I talked about a softer Brexit, but let us assume for argument's sake that there is a hard Brexit and that, in effect, we have no deal or revert to World Trade Organization rules. What effect would that have on the environment?

Dr Savaresi: In a hard Brexit scenario, a number of issues will have to be taken into account. First, Britain will remain under great pressure to continue to comply with some EU laws and regulations even when it is outside the EU. That is very much the case in relation to chemicals, for example. As you may know, there is a vast amount of literature about how the EU has shaped the world trade in chemicals by adopting regulations that have to be complied with in order to export to the union. They will apply to Britain like everyone else if it wants to trade with the EU.

In that respect, a hard Brexit will not make much of a difference if we want to continue to export to that market. The issue is that, at the moment, the UK has a voice in the making of those regulations but, in the future, it will not; it will just be on the receiving end. As far as everything else is concerned, one has to distinguish between areas. There might be a long conversation to be had but, in general, the fact that the UK will be on its own will enable it to make whatever decisions it decides to make on a host of issues from protected areas to climate change, regardless of EU law and politics.

David Stewart: For example—to answer my own question, which I am good at—state aid rules would no longer apply, which may give a bit more freedom in some negotiations.

Dr Savaresi: Absolutely. For the energy sector, it may be a welcome novelty. At the same time, think of the effect that renewable energy obligations have had for the development of the renewables sector in Scotland. Taking away that element may mean that, after Brexit, there is no longer such emphasis on that sector moving on.

Professor Little: Apart from anything else, another aspect of a hard Brexit would be the definite loss of the European Union system for enforcement of international obligations. That would be a pretty significant issue for us.

David Stewart: You have just predicted my next question. The issue that concerns me is the statement by the UK Government that there would be an opt-out of the European Court of Justice. My question, which you have partly covered, is this: who guards the guards? If we leave Europe, who will be responsible for infraction procedures if there are breaches of environmental law? Could Professor Little say more about that?

Professor Little: That would depend to a considerable extent on the UK's position on its trading relationships and trading agreements. Inevitably, it would mean a greater focus on domestic enforcement and ensuring that we had a more robust system of domestic enforcement.

David Stewart: In that scenario, do you think that there would be a role for a new Scottish regulatory body?

Professor Little: That is possible. There are a range of different ways in which enforcement could be approached. It might be possible to think in terms of an ombudsman of some description, or there could be an environmental court—those issues would have to be explored. Different regulatory and enforcement models could be adopted, but I think that enforcement is going to be a key issue for us to consider.

Professor Morgera: Lack of enforcement will probably be the biggest threat deriving from Brexit—particularly a hard Brexit. On the other hand, existing international obligations on the UK have a bearing and provide opportunities to address the threat. International obligations relating to public access to justice in environmental matters could play a role, and there has been a trend in EU law to ensure private enforcement of environment law. The EU and international oversight have already pushed forward access to justice in England, Wales and Scotland, but more along those lines could be done within the current legal system—those opportunities exist today.

There are more general questions about transparency around public input into permit procedures and other decision-making processes. That is generally seen by environmental scholarship as a way of ensuring checks and balances and providing additional layers of oversight as well as additional resources that may not be available to the Government.

David Stewart: Those are very useful points. You are saying that, irrespective of a hard Brexit occurring, we would not opt out of international

human rights regulations and that those would still apply in that state. I presume that the Aarhus convention would apply as well.

Professor Morgera: The Aarhus convention would apply, as would the European convention on human rights.

There have been issues about the adequacy of current law in the UK to ensure public access to justice, which may be to do with the cost of litigation and the possibility of bringing cases in the public interest. There has been progress, but I understand that, from the point of view of environmental non-governmental organisations, more could be done.

The areas where more progress might be made, to be even more in line with existing international obligations, should also be looked at from the perspective of the loss of additional international oversight.

Bob Ward: If a hard Brexit meant the introduction of tariffs, that could make a big difference to the development of low-carbon technologies in the UK. For instance, it would make it more difficult to export to the European Union, and it would also affect imports. We might be able to develop a large UK domestic industry to serve a domestic market, but it is hard to see how that would provide a better deal for the British consumer, because we would not have the competition from other EU member states that we currently have.

The trade figures show that more than half of our exports of low-carbon goods are to the EU and that more than three quarters of our imports, which include components for wind turbines, come from the EU. It would not be easy to replace those sources with other countries that we might trade with.

David Stewart: I will move on to my final point, as I am conscious of the time.

The Convener: Maurice Golden has a supplementary question.

Maurice Golden (West Scotland) (Con): The panel has mentioned the International Court of Justice as an enforcement mechanism. I am interested in that. Can you draw parallels between national legal provision for enforcement and the International Court of Justice as an enforcement mechanism? The Gabčíkovo–Nagymaros dams dispute between Hungary and Slovakia was at the ICJ for the best part of two decades, so it does not seem to represent a speedy enforcement mechanism. In a post-Brexit landscape, how would it work if we had a national enforcement mechanism versus a European mechanism?

Dr Savaresi: It is important to bear it in mind that the International Court of Justice and the European Court of Justice do very different things. The International Court of Justice is the main international tribunal and oversees litigation. It resolves disputes between states over the interpretation of international law. The European Court of Justice has a very different job in that it is the supreme court of the European Union. In that connection, it interprets European Union law, but it also resolves disputes that emerge in relation to European Union law.

The European Court of Justice acts on what the European Commission requires it to do in enforcement, and that will no longer happen in Britain post-Brexit. If a member state does not comply with its air pollution obligations under EU law, the European Commission can decide to bring it before the European Court of Justice on a matter of enforcement. However, the International Court of Justice could never do that, because that is simply beyond its remit. Therefore, it would never be a substitute for the European Court of Justice.

For decades, in co-operation with the European Commission, the European Court of Justice has performed the unusual role of watchdog on the implementation of EU law by all EU member states. The question is how its absence will be dealt with. The institutions in this country are used to that oversight and being held to account, as are the institutions in every other EU member state. What will replace the European Court of Justice, if anything? Some argue that it will not need to be replaced and that we can safely rely on existing institutions to do its job. That is possibly the case, but it really depends on how we go about substituting the enforcement aspect that is embedded in EU governance.

Professor Reid: Members could consider the example of the bathing water standards. The great repeal bill might say that we will simply transfer the bathing water standards into domestic law. However, if it was discovered that the bathing water standards were not being met, who would have the right to go to court or wherever to enforce them? What would be the process for doing that? What remedy would be provided? The Government and the Scottish Environment Protection Agency would be responsible for reaching the targets, but if it was claimed that they had failed, they would obviously not have done that, so we could not rely on them. Would every citizen have the right to go to court? If so, through what process and to what tribunal? There are big issues there.

The Convener: Mark Ruskell has another supplementary question.

10:30

Mark Ruskell (Mid Scotland and Fife) (Green): Professor Little touched on the potential impact of trade deals on regulation and enforcement. You will be aware that there are considerable concerns about the comprehensive economic and trade agreement, the investor-state dispute mechanisms in it and the requirements for corporations to be involved in the writing of regulations. I am interested in the direction in which you see trade deals going in the future and whether that will have an impact on the production of regulations and their enforcement.

Professor Little: That is a difficult question to answer, because it is difficult to see where things will go if the UK—and, I presume, Scotland as a part of it—becomes wholly reliant on WTO-style arrangements. That is completely uncharted water for an economy such as that of the UK, so I am not sure that I can answer your question in any definitive way.

Professor Morgera: It all depends on whom the trade deal will be arranged with. The EU has started a wave of bilateral trade and investment agreements that have provisions on environmental regulation co-operation, so there are opportunities to continue to work with the EU on raising environmental standards. There are also provisions to ensure that environmental standards are not lowered to attract foreign investment. Usually, there is no hard enforcement of those environmental provisions; instead of being a punitive system, it is a system of collaboration and support, and it stands in opposition to the practice of the US and other big players that use their trade agreements in different ways.

One can also use hard enforcement of trade agreements to raise environmental standards. The US has done so with some Latin American countries, for instance, to ensure better implementation of international law. However, there is a risk that other provisions in those complex agreements with regard to, for example, the creation of favourable conditions for investment and trade might pose more subtle threats to the environment.

It is a complex question. The agreements are usually voluminous, and the interactions among the provisions themselves and between the provisions and international law and the national law of the two countries involved are complicated and can vary a lot. There are some opportunities but there are also threats, and a really broad range of expertise will be needed to fully appreciate those opportunities and risks.

David Stewart: A theme in the helpful and thorough evidence that you have provided is that there might be a gap in the Parliament's own powers and that we might require some international powers in order to deal with Brexit. I am not suggesting having the power to set up embassies in Paris or Brussels—although some of my colleagues might wish to go down that route—but do we need some temporary powers that have an international component? What is your assessment of that argument? Is it valid? Is there a gap in the Parliament's powers to deal with a post-Brexit Scotland and UK?

Dr Savaresi: Again, one has to distinguish between different issues. In some areas of environmental law and policy, there is a clear international law/policy element that, after Brexit, might be better dealt with by the Administrations on their own. One example that I have given is that of fisheries. If, post-Brexit, the current constitutional arrangement on fisheries continues, Scotland might find itself at loggerheads with Westminster on fisheries policy. Look at what happened in Denmark on that specific issue. The Faroe Islands acquired full competence over fisheries—which is, of course, beyond what Scotland presently enjoys under the current constitutional arrangement—and, under the powers that the Faroe Islands were given, they were able to threaten to trigger their famous mackerel war with the EU. That is an example of a very small sub-national entity challenging even the EU on fisheries policy because it was in its clear interests to do so. Under the current constitutional arrangement, that would not be possible—it would be a matter for Westminster rather than Holyrood.

There are several assumptions in the hypothesis that I just made, but it serves as an example of how, post-Brexit, there may be scope to reconsider the current constitutional arrangements at least on some environmental issues so that they can be addressed in a way that is in the interests of the Scottish people.

Professor Reid: It depends on what the other parties are happy to put up with. The Faroes situation was agreed some time ago, when it might not have been seen as setting a precedent that might cause trouble in other parts of Europe. It is a good example and shows that, with creativity and willingness, you can achieve all sorts of patterns that differ from the standard binary arrangement of a nation state. However, nowadays, with such sensitivity on various issues, getting agreement on various things might not be altogether straightforward.

Professor Little: It would mean not just getting agreement on an international basis but getting agreement for a particular configuration within the UK, which might also be controversial.

David Stewart: Does Bob Ward want to add anything?

Bob Ward: Not really. The Climate Change Act 2008 provides a specific role for the devolved administrations in the main areas of climate change policy. Climate change might turn out to be easier to deal with under Brexit than many other areas of environmental policy.

The Convener: I have a final question before we wrap up this section. You touched on the possibility of enhancing the powers of the Scottish Parliament, but how big a concern is the possibility of reverse devolution in some areas, whereby powers could be taken away from the Scottish Parliament? Have you considered that?

Professor Reid: Yes. The EU framework has provided a dampener on fragmentation—it has meant that all the devolved Administrations have been able to go their own way but only so far. We have not had to think about anything else in terms of co-operation—willing or forced—but, post-Brexit, there will be questions about the extent to which we want to have collaboration, co-operation and harmonisation across the UK and how that will be achieved. Will that be achieved by agreement between the devolved Administrations or will London say that there needs to be a common UK agricultural policy and that the only way—or the best or simplest way—to guarantee that is through the power and the decisions residing in London?

The Convener: The question that arises is: how high or low is the bar to be set?

Professor Reid: Yes. The other consideration is how much you think you can achieve through informal collaboration and co-operation and how much you want to guarantee things.

Maurice Golden: I have a quick question on that. Professor Reid, there is a legal framework and you mentioned the definition of waste, but the application of that legal definition is interpreted somewhat differently in Scotland to the way in which it is interpreted in England. In your opinion, would such a difference in the practical implementation remain, irrespective of the legal framework?

Professor Reid: As long as we still have three legal systems in the United Kingdom—possibly three and a half or four, depending on your view of the situation in Wales—there will always be scope for interpretation. The question is: at what level do you set the common framework and measures and how much detail do those go into? In the EU legal system, we have seen things from directives that are widely expressed all the way down to regulations that nail things in absolute detail, because that is thought to be necessary if we are to achieve the appropriate level of conformity, collaboration and cohesion on particular subjects. The same questions will arise between the parts of the UK, but we have not previously had to think about them because the EU has provided that cohesion.

The Convener: Let us move on.

Emma Harper (South Scotland) (SNP): Good morning, everybody. Professor Reid, you say in your written submission that some important EU laws may not carry over post-Brexit. You mention

"the comparative stability of EU environmental law and policy",

and you go on to say that

"It takes a long time for initiatives to proceed through the EU law-making process, but once made, they tend to 'stick', without constant change."

What implications does leaving the EU have for, on the one hand, a stable and certain environmental policy and, on the other, a flexible and tailored environmental policy? Do you have any concerns—this is for the whole panel—about access to your environment counterparts across the EU as a result of being outwith a wider environmental framework?

Professor Reid: I will start on the general point. You have identified correctly the two sides of the coin. EU policy has been slow to develop and slow to change, which means that it is unresponsive and inflexible, and it does not necessarily cope well with local circumstances. On the other hand, it means that people know where they are going. Major enterprises such as cleaning up the seas, cleaning up rivers and cleaning up the air cannot be done overnight; they take long-term co-operation and collaboration between different initiatives and different perspectives. It is important that people know where they are going so that different areas of environmental law can tie together. Industry and investors need to know where they are going. We need to know that, if we do something today, it will be effective in 10 or 20 years' time.

That can be lost, because national Governments have a tendency to be swayed—for good reasons—by short-term political will. Let us consider the example of the long-term plan to raise the tax on petrol. It got knocked back about every second year because of sudden short crises, such as inflation going up. What had seemed like a 20-year plan to reduce our dependence on motorised traffic and thereby reduce air pollution from traffic was completely lost every couple of years. There is a danger that that will happen.

Given the scale of investment that is needed and that it must be provided up front for capital projects, knowing and being able to plan for what is going to happen in the future and having the certainty of knowing what the forthcoming standards will be is important for industry, as well

as for Government and the co-ordination of environmental policies.

Dr Savaresi: In addition, it is important to remind ourselves that, as with the situation in relation to the European Court of Justice, we are looking at a picture that has become familiar to us. We take for granted many of the things that the EU has been doing for its member states for a long time. I am talking about its technocratic governance. Many of the elements of environmental law are designed, crafted and thought of in Brussels by the highly specialised bureaucracy that the EU is endowed with. We might think that that is not a good idea from a democratic point of view, but the end result is that much of the environmental law in member states is the result of decisions that have been made in Brussels.

How do we go about replacing that? It is necessary to develop capacity. The EU ETS is a very good example of a construction that is EU made. The EU ETS is far from perfect, and it can be argued that it has not performed as it should have done but, once the UK is in charge, it will have to think about how to replace that. That is what Colin Reid was talking about—how do we give investors and businesses the regulatory certainty of knowing that they will be operating under certain conditions? The EU provided that certainty. The question is how to make up for its loss.

Professor Morgera: However cumbersome EU law might be, it has had benefits in allowing different member states to come together, to exchange views and to build on lessons learned from one another. Most EU environmental law has flexibilities built in. EU environmental regulation offers the advantage of providing a clear direction, and because the standards in place are mostly minimum standards, it is always possible for member states to be more ambitious on environmental protection in certain circumstances, but within a system that guarantees a lot of transparency.

That transparency is not normally there at the level of member states and national Parliaments, which is one loss that will come. The transparency also applies to bilateral trade and investment agreements. We do not have nearly as much information on negotiations with any other big partner as we have for EU negotiations on bilateral trade agreements.

10:45

The other aspect that must be considered—Annalisa Savaresi has hinted at this—is the pooling of resources that occurs in EU environmental lawmaking, the experiences that have been exchanged and the networks that have been created among not only regulators but enforcers and managers of waters, for instance. Some of those networks might remain available to non-member states and could possibly be joined informally so, again, there are some avenues where continued piggybacking on the pooling of resources at EU level might be explored.

Professor Little: Another factor to think about is that, currently, environmental policy making and lawmaking are, of course, done primarily at EU level. When that shifts down to domestic level, in addition to there being issues of resourcing, policy making and lawmaking, political pressures will be brought to bear on that process. There will be much more intense lobbying than is probably the case at the moment. There will be vested interests. It could also be that, at a more general level, the issue of the environment becomes far more politicised. That too is something that might well bear on environmental policy making and lawmaking.

The Convener: Perhaps that will particularly be the case in the agricultural sector, in which we have already heard phrases such as “level playing field” and “gold plated” being bandied about.

Professor Little: Very possibly. I suppose that there are also other issues that have been parked at EU level, such as that of genetically modified organisms.

The Convener: Absolutely.

Bob Ward: On climate change, there are a couple of things to point out on the policy making front. It should be recognised that the UK has been a leader in the EU on climate policy. It has been cutting its emissions faster than the average so, if the UK is no longer part of the EU’s commitment to its long-term collective goals, such as the one to reduce its emissions by 30 per cent by 2030, it will be more difficult for the EU to achieve that. In addition, the UK has been a proponent of stronger action in the EU and has to an extent counterbalanced the member states that wish to go more slowly, such as Poland. Without the UK as part of that process, the EU will find it more difficult to go faster.

Conversely, if the UK is now going to negotiate in the UN as a single country rather than collectively as part of the EU, it is likely to be a less influential player. That will certainly be true in relation to climate change, where it might have to look for other groupings. In the UN climate change negotiations, there is a new group of countries called the high ambition coalition, which is, for instance, pushing for a commitment to limit the rise in global mean surface temperature to only 1.5 degrees. That might be the future for the UK, but it is hard to see that, alone, it will be as

influential in those international fora as it is in its role within the EU.

The Convener: Thank you. That takes us nicely on to a question that Angus MacDonald wants to ask.

Angus MacDonald (Falkirk East) (SNP): Following on from the panel's comments—in particular Dr Savaresi's and Bob Ward's—I am keen to explore in a bit more detail the issue of nationally determined contributions, which detail the action that each state will take to meet the Paris agreement obligations. Given that EU officials undertake most of the work involved in drafting, compiling and completing NDCs on behalf of all the EU states, are there issues with regard to the UK's capacity to complete its own NDC, which I presume it will have to do immediately after Brexit? Is there capacity to deal with that over the next two years? Are there any safeguards to ensure that the UK does not backslide on its specific NDC and the existing EU NDC that was signed in 2015?

Bob Ward: The UK's domestic target, which is outlined in the fifth carbon budget, is more ambitious than the European Union's collective target for 2030. The Westminster Government is currently trying to work out what policies it needs to deliver on that 2030 target in the fifth carbon budget. We hope that those policies are due to be published at some point this year in the clean energy plan, which will lay out in detail what needs to be done.

That information should be more than sufficient to provide the details for a UK nationally determined contribution, which would need to be submitted at the point when the UK decides to be a separate entity with regard to the Paris agreement, rather than being part of the European Union.

On the capacity issue, the UK has provided many of the lead European Union negotiators in the UN negotiations—Pete Betts in particular has played a strong role—so there is expertise. The big problem at the moment, and one of the main reasons why the clean energy plan has been delayed, is the amount of time that is being spent on trying to work out what Brexit means. That is causing an enormous distraction in many Westminster Government departments and is limiting the ability to make progress on those other commitments.

The Convener: I suppose that the issue that comes into play is how high a priority climate policy is in the grand scheme of things.

Bob Ward: Yes. The discussions about climate policy in the Department for Business, Energy and Industrial Strategy are closely linked to broader discussions about the energy union, such as about interconnectors for the UK with other EU and non-EU states.

It is a complicated set of issues, but at least the UK has the domestic legislation in the Climate Change Act 2008, which should mean that there is not a big dislocation if we extract ourselves from the joint negotiating partnership with the other European Union member states.

Dr Savaresi: A number of things could be said about NDCs, but I will try to keep this as brief and as non-technical as possible.

NDCs are a very recent creation in the context of international climate law and policy, so experience of them is limited. The Brussels bureaucrats have taken care of the issue and have worked out a collective NDC for the European Union and its member states. In that context, the bureaucrats have also worked out what sort of targets will be assigned under EU law to each EU member state.

Moving out from that architecture will entail that the UK will have to submit its own NDC, as has been mentioned. It will not be possible to backslide on whatever was promised before that point, but that should not be a problem because, as has been observed, domestic UK policies are more ambitious than the targets that are envisioned in the new EU law, so I would not be concerned about that.

However, what could be an issue is how the UK NDC is prepared. There is no precedent for that—it has never been done before. What will be the role of the devolved Administrations in the preparation of the NDC? Most important for Scotland, what will be the role of renewable energy in that context? If any targets are embedded in the NDC, what will they be? There will be a conversation to be had on that issue as well as any other that is touched on in the NDC.

It is important to note that there are no rules on what NDCs should say. There is no NDC template, because the parties could not work it out in advance of the Paris agreement's adoption. They will come up with a template in the next few years and, when that is available, it will be a matter of sticking to it.

Alexander Burnett (Aberdeenshire West) (Con): I will move on from the bureaucratic challenges of integrating environmental policy to ask about funding. I ask the witnesses to comment on the funding implications of leaving the EU, particularly given that we are currently a net contributor.

Professor Reid: I am afraid that I do not know the details of the funding; I have concentrated on the legal side. The funding arrangements are complicated, because there are various

programmes that tie into EU measures and programmes. How far we replicate those will be a domestic policy decision, so funding could go up or down in particular areas. Agriculture has been identified as a huge area in which there are financial implications for the overall framework and details of the schemes that operate. Throughout EU environmental law, there are odd bits and pieces that have financial implications—for example, charging for water services is embedded in the water framework directive—but I am afraid that all those details are beyond my expertise.

Professor Morgera: I am not an expert, either, but there are two sets of considerations to bear in mind. The first is about what amounts of funding will be made available internally for continued integration of environmental issues into the agriculture and fisheries policy, for instance. It is a question not only of amount but of rules. At the moment, there are particular funding rules that bind or encourage farmers and fishermen to take a more ecosystem stewardship approach. Those rules could change and funding could be a huge factor in whether our productive sectors take an environmentally sustainable approach.

The other question is whether the UK outside the EU could still participate in funding schemes that the EU manages. There are some experiences on that and some lessons have been learned on, for instance, research funding. Negotiations can take some creative routes, so it may be a question of considering precedents and thinking about ways in which agreement can be found with the EU for some continued participation in funding schemes.

Dr Savaresi: It is interesting to note that EEA members all have different arrangements in relation to funding. Therefore, the specific elements that the UK and Scotland want to adhere to post-Brexit will be down to negotiations. Whether it is research only, development only or both will be up for grabs.

Professor Little: I do not wish to add much to that. Funding is predominantly a political or policy issue rather than a legal issue, which is what we would speak to.

Jenny Gilruth (Mid Fife and Glenrothes) (SNP): Professor Little, in your written submission you talk about how the event of a hard Brexit could impact on environmental policy and lawmaking through the loss of resources and expertise to Scotland. You state:

> "this may result over time in Scottish and UK environmental policy and law becoming more piecemeal, incremental, minimalist and reactive."

There is obviously a capacity issue. Do we have the necessary capacity in environmental resources and expertise in Scotland?

Professor Little: I am not sure that the UK has it. It will be a struggle for Scotland and the UK to try to replicate the level of expertise and the capacity that the institutions of the EU have.

11:00

I want to add something to the comments that I made in my submission. An allusion was made earlier to the fact that it is unlikely that environmental issues will be a priority in the context of everything that is happening. In the event of a hard Brexit it is likely that there will be a gradual process; I do not see things happening immediately. In the medium to long term, in Scotland we will see an uncoupling of some areas from the substantive provision that there is in the EU.

If we look at the history of environmental law in Scotland and the UK—what we might call a long 19th century of environmental law or public health law in Scotland—we see a pattern of lawmaking and policy making that has generally been ad hoc, pretty slow and incremental. Given the transnational nature of much modern environmental law, the pattern in a post-Brexit situation might not necessarily be similar, but it might reflect a national dynamic within Scotland and the UK on environmental issues.

Mark Ruskell: I wonder to what extent there are states outside the EU, including those within the EEA, that have built up the capacity to track EU directives and legislation and implement them. Are there successful models that we can look at?

Professor Reid: If you put it in terms of tracking EU directives, that is the easy way out. We could say, "Here is an important area—we recognise that something must be done on it," and we could look around for what to do or we could take the EU model off the shelf. However, taking the EU model off the shelf may or may not be what is wanted in a post-Brexit UK or a post-Brexit Scotland, where the whole idea would be that we design our own policy to fit our own particular needs and circumstances.

There is the sheer scale of the number of things that the EU does on environmental issues in any given year to consider. Some of them are unnecessary, but a lot of them are worth doing, and there is no way in which Scotland, Northern Ireland, Wales and England by themselves can do all of them, so we come back to the idea of some form of co-operation and cohesion at the UK level and beyond the UK with some or all of the member states of the EU, the EEA and so on. Would we be allowed to have some sort of associate membership of the various professional and other collaborations that operate, so that we could continue to pool experience and so on?

I do not have details, but I am told that there is a de facto recognition that different EU member states take the lead on different areas, so although all member states are meant to engage equally with all the different areas, there is an assumption that we can leave one area to the Dutch and another to another EU state and so on. Therefore, there may be areas where we suddenly find that we have a lack of experience. Again, that is about the internal workings of the Government departments. You will have to ask them what they think about it.

Professor Little: Professor Reid mentioned the issue of tracking EU legislation. In the Scottish context, if there is post-Brexit UK strategic legislation that is contrary to EU law, that may prove problematic.

Mark Ruskell: Surely, to a certain extent, equivalence will be vital in terms of trade? Whatever trade deal is established, equivalence over a large number of environmental standards will be important.

Professor Little: One would think so, but, as was mentioned earlier, there could well be some areas where that would not be the case and where states would have a greater degree of national discretion.

The Convener: I guess that the scenario in which you are pulling EU legislation off the shelf and seeking to implement it is where the threat of lobbying and pressure comes in. Groups could say to Government, "You don't have to do this and it doesn't suit us for you to do it." That is where we could get into the territory that we touched on earlier.

Professor Morgera: There is also the question of interlinkages, which is where pooling of resources at the EU level has been helpful. All the implications across different ranges of international negotiations—the law of the sea, biodiversity and water, trade and investment—are linked at different levels, and pulling even one thread may unravel a lot of other areas.

It is a question of not just tracking EU environmental law but understanding why certain developments occur at EU level, in relation to developments in other areas.

Dr Savaresi: On a purely anecdotal basis, I know for a fact that Norway, for example, has developed capacity to do just that—to track and keep tabs on EU law—because that is what it has to do as an EEA member. That tracking is not on all issues, but it is an enormous bureaucratic undertaking in the sense that not being party to negotiations and deliberations means that many times Norway is in the dark about why some issues have been addressed the way that they have. It is definitely harder on the outside to keep tabs on EU law and regulations.

At the same time—this may sound overly optimistic—it is important to remind ourselves that the EU has forged the paths on so many environmental issues. For example, the committee may be aware that, post 2020, the EU is coming up with a comprehensive plan to reduce emissions from land users, which is unprecedented—nobody has done that before. Everybody is looking at what the EU is doing. That is very much like when the EU ETS was drawn up—nobody had done it before and everyone wanted to learn from the EU. The EU has learned by error, actually.

Those very ambitious designs that have been drawn up in the context of the EU will be out of reach. Realistically, the UK would have to build capacity just to cope with the present level of regulation and keep tabs on whatever EU laws it has to implement because of the trade issues that Mark Ruskell mentioned. It could move on to the next level once it has managed to build the capacity needed.

David Stewart: This is more an observation than a question. The witnesses will know that the EU relies on other bodies; an example is the codes of practice for food production, where it relies on the codex alimentarius, which in turn relates to the World Trade Organization. On one level, there is a life outwith the EU—much as I personally am enthusiastic about the work that it has done. The EU relies on world experts to give advice on food production.

Dr Savaresi: The EU does not do everything itself; that would be impossible in the global world in which we live. Everything is so interconnected.

What I meant to say with the example of land use was that in many areas, such as chemicals, the EU has come out with new tools to govern environmental issues that have attracted a lot of attention and have become the benchmark internationally for good governance—or at least for pioneering governance. Outside of that framework, things will not be impossible, but it will probably take time before the UK is up to speed on those issues.

Professor Morgera: What we see with the EU is that efforts to advance internal EU environmental law are linked to efforts to have influence on other international bodies that provide standards that complement its laws.

There is a link between what the EU has done in environmental law and what it does as a negotiator in other international organisations, as well as what it does bilaterally with its partners, be they Japan, Canada, the US or South Africa. Over

time, the use of all the different powers that the EU has as a whole has become much more strategic. Being out of the EU environmental lawmaking and negotiating teams means that it will be difficult to affect and make an impact on those strategic approaches to regulation that grow from being internal to international and transnational, or to propose something different.

Being a pioneer also means having the advantage of being a first mover, being seen as a model and having others collaborate with you or following your example.

Claudia Beamish (South Scotland) (Lab): I would like to explore in a bit more detail the opportunities that allow us to try to be positive—those for better integration of environmental policy and climate change policy with other policy areas such as agriculture, fisheries, rural issues, land use, wellbeing and sustainability. I highlight that the submission from the Strathclyde centre for environmental law and governance says that

"Scotland could develop a system of integrated regulation and financial support for ecosystem stewardship by farmers that is more ambitious, from an environmental perspective, than ... in the EU".

It goes on to refer to issues about EU ecosystem services. Perhaps Professor Morgera could start.

Professor Morgera: One of the advantages of EU and environmental lawmaking being so transparent is that one can clearly point a finger at shortcomings. For a long time, the EU common agricultural policy and the common fisheries policy have not necessarily performed to the levels of expectation of environmental NGOs and other stakeholders. There has been progress, but there are still clear areas in which the EU has not necessarily devised policies that fully integrate environmental concerns or integrate them sufficiently effectively. Particular new concepts that the EU supports internationally, such as ecosystem services and international obligations that relate to ecosystem restoration, have not yet quite found their place or systematic support in EU policy.

There are opportunities to do better while remaining in line with certain approaches. The question is whether there is political will, or whether there will be leeway for devolved Administrations that have more of an interest in going there, to pursue that direction. Then there is the question whether there will be funding, particularly for agriculture and fisheries, to support the farmers and fishermen who will take on the quite burdensome ecosystem stewardship role. They need to be supported and not put at a disadvantage compared with other approaches in the productive sector.

Professor Reid: I think that there is a great opportunity to start again. We could start completely afresh in thinking about what we want our countryside to provide. Do we want people to live there at all? If so, what will they do? Will they be productive? Will they be productive in a free market system or will we pay them for different things? If so, will that be for agricultural production, for landscape or for environment? How important will food security be in all those issues?

We have not had to think hard about all those issues for several decades. Now they are absolutely on the table and have to be thought of, but at the same time as we are coping with all the disruption from Brexit and all the carrying over of existing law simply to make sure that something operates in the first place. It is a problem that everything has come at once; the big opportunities have come at the same time as we are struggling to cope with just keeping things ticking over.

Dr Savaresi: Another area that comes to mind and in which Scotland has led the way is community energy, which is becoming an issue in the EU. Those who have seen the draft renewable energy directive for the period post 2020 will know that it mentions that issue, but Scotland is already there. Last week, I was at a meeting in Finland at which everybody was asking about the Scottish experience of community energy. There will be a lot more space for Scotland and the UK to pursue whatever policies they intend to pursue on that issue beyond the EU.

Claudia Beamish: I ask Bob Ward to address the integration of climate change policy, of which we are proud in Scotland and the UK. The Parliament will debate the draft climate change plan this week, and I would value comments on the continuation of integration post-Brexit.

11:15

Bob Ward: Some of the key areas have been highlighted. Since 2013, the common agricultural policy has tried to make a priority of increasing resilience to the impacts of climate change in EU farming practice. One hopes that, in whatever replaces the common agricultural policy, the UK will place a similarly high priority on that and on reducing emissions from agriculture. Until now, much of UK policy has focused on the power sector for reducing emissions. We have been successful, but the really difficult stuff that we now face—meeting our 2030 targets and the fifth carbon budget—will relate to heating and transport. We can do a lot in the UK to promote that, but achieving it will be very difficult.

I apologise that I am not an expert on the Scottish aspects of climate change policy, but it is of concern that the Department for Environment,

Food and Rural Affairs has not done a good job in England of raising the profile of climate change risks and the need to adapt to them. That activity has been muted partly because the department has been pared back and has not had the staff to implement such policies. However, it must be a priority for Westminster and all the devolved Administrations throughout the UK to improve the incorporation of climate change adaptation into much existing policy. I refer particularly to flooding policy—it needs to take account of the fact that sea levels are rising, which increases the risk of coastal flooding, and of the fact that we are experiencing heavier rainfall, which increases the risk of river flooding and surface water flooding. It is not always obvious that that is being properly taken into account in our planning.

Claudia Beamish: I ask the witnesses to comment on the integration of marine policy with policy on fisheries and other uses of our marine environment in relation to concerns about the future of the birds and habitats directives and our marine protected areas.

Professor Morgera: In some ways, the discussion about the common fisheries policy can be related to the common agricultural policy. The EU has made progress on integration—perhaps less in fisheries than in agriculture—but a lot could be done better. Significant layers of international law and structures are in place in the marine environment so, in some ways, we have less leeway than in the agricultural sector.

Internationally, we lag behind on integration. Ensuring protection of the marine environment, creating marine protected areas and engaging in sustainable fisheries are global challenges, and we have much less experience in and understanding of them than terrestrial protection. There are opportunities, but it is almost impossible to go it alone in that sector. A lot of co-operation is needed, because there are shared stocks and global impacts that affect different areas. One can be a leader, but action very much needs to be taken co-operatively in regional and sectoral organisations, as well as through international processes.

Professor Reid: I endorse the point that such work is not something that we can do by ourselves.

This is an area where, within the United Kingdom, the jurisdictional issues—what relates to the UK, to Scotland, to Northern Ireland and so on—become particularly important. It is also perhaps a good example of an area where the absence of EU enforcement measures might be an issue. While we are in the EU, if we do not designate enough marine special areas of conservation, the Commission will investigate, people will complain and action might be taken against the UK to make sure that it does enough. Once we are outwith the EU, what will the process be? Who will call the Government to account if we do not live up to the targets?

Claudia Beamish: Can the panel highlight any examples of other countries, from within or outside the EU, effectively integrating policies on the environment and climate change with policies on agriculture, land use or any of the topics that we have touched on?

Dr Savaresi: On land use, this is very much a new story, as the Paris agreement has changed the game a bit. States are moving more slowly in that sector than they are in other sectors. That is why the EU experience is so interesting and why everybody is so interested in seeing what the EU is doing. The way in which international obligations were crafted before meant that there was no incentive for states to take aggressive action in the sector. The story about mitigation in the land sector still needs to be told. A lot of attention has been given to reduced deforestation in the tropics, but that is not at issue here.

The example of Norway on sustainable fisheries management has been well showcased, but it seems to be the leader to look up to. It is a good example of an EEA member state that does not do what the EU does and has managed to achieve success in that tricky area. I have to say that it is one of very few good examples, because dealing with fisheries is difficult for all states. There is a lot of thinking to be done, but this is an area where the UK on its own could make a difference, given that there are international obligations that the UK would have to abide by even outside the EU.

Professor Morgera: On that note, there are international processes that are trying to identify good practice. In December 2016, 196 parties to the UN Convention on Biological Diversity discussed their obligations on mainstreaming biodiversity in fisheries, agriculture and tourism. That also has to do with ecosystem-based approaches to climate change adaptation and mitigation.

The jury is still out. The obligations have existed since the 1990s and we have not necessarily made a lot of progress. We need to bring together examples of where things have worked. Different international organisations will pull that information together over the next biennium. The Food and Agriculture Organization of the United Nations has been mandated to provide experiences and tools that relate to mainstreaming biodiversity in the fisheries sector.

There are on-going international processes that might provide food for thought on what the UK and Scotland might wish to do. At the same time, one has to be aware that things that work in one place

might not work elsewhere. There might also be practices here that could helpfully be shared, with a view to comparing experiences and finding the right approach.

The Convener: We will move on to the EU emissions trading scheme, which we touched on earlier but will now discuss in more detail.

Mark Ruskell: We have heard comments on policing the ETS, the role of the European Court of Justice and capacity issues. What does the panel see as the most likely outcome? Do you see us remaining in the ETS? If we do not remain in it, how will we link to it or create something that is as good as it, if not better than it?

Dr Savaresi: As I mentioned in my submission, should the UK decide to pull out of the ETS, it would be best to do so after the present cycle ends in 2020, so 2021 would be the ideal time to unplug from the ETS. Pulling out at the end of the present cycle of the ETS would be the least painful option for installations that own allowances. It would then be possible to address the technical issues—and possibly even the compensation issues—that need to be addressed. That would also provide a good opportunity to work out what to do with the installations after 2021, because they are the largest polluters, so they will have to be stringently regulated to reduce their emissions.

The ETS is not the only option, and other options could be pursued, such as a UK ETS or a carbon tax. Many policy tools and regulatory tools could be deployed, and the ETS is not necessarily the best—it has had its problems. There is no doubt that the EU will carry on with the ETS post 2020, and that regulatory certainty is an asset for investors in the sector. However, the ETS will not necessarily be the best option for the UK after Brexit. It will be for the UK to decide what it wants to do in the sector, but something will certainly need to be done and something will have to be in place by 2021.

Mark Ruskell: Right. Does anyone else want to give their view?

Professor Reid: My view is that I am happy that other people are a lot more expert on the subject than I am. [*Laughter*.]

The Convener: Bob Ward wants to come in.

Bob Ward: Yes. There are pros and cons to the UK leaving the EU ETS. It is certainly true that it is better for companies to be inside a large emissions trading system than inside a small one because the opportunity to buy and sell permits is greater inside a large system and you are more likely to have a stable price over that period.

If the UK leaves the ETS, there will be significant costs associated with extracting itself. No doubt those costs will have to be passed on to consumers. There will then be the cost of setting up whatever replaces the ETS. On the whole, leaving the ETS is less of a good idea than staying in. If we leave, it may be an opportunity to design something that functions better than the EU ETS, which has been hampered in recent years by a structural flaw that means that it has rules for dealing with cases where the price has spiked, but not where it has dropped. Hence we have had this extended period of very low carbon prices, which has undermined future investment in low-carbon alternatives.

The Westminster Government attempted to address that through the carbon price support rate, which added £18 a tonne on top, but it then immediately undid much of the good of that support rate by freezing it instead of continuing to increase it.

The UK will have options and trade-offs around whether it wants an emissions trading system that has some sort of relationship with the EU ETS. The advantage of an emissions trading system is that it sets a cap—you know the level to which you are going to reduce emissions—but you do not know what the price of carbon will be. Equally, if you set a carbon tax, you know what the carbon price will be, but you do not know what emissions reduction you will get as a result. In general, economists think that emissions trading systems tend to push towards the most efficient savings of emissions, because the trading system allows us, for instance, to go to the parts of the system where reductions in emissions are cheaper; on the other hand, carbon taxes can be administratively easier to implement.

11:30

If we go down the route of extracting ourselves from the ETS, we will need to look at what makes the biggest sense for our current system. It is worth remembering that the traded sector covered by the emissions trading system accounts for only 40 per cent, roughly, of the UK's emissions. In an ideal world, we would want a strong uniform carbon price right across the economy to give the most cost-effective emissions reductions.

The Convener: Forgive me if I have this wrong: if the UK stays in the ETS as a sort of associate member, in the midst of a drive to reduce the cap, it would have no voting rights. It would be part of a policy that it had no input to shaping.

Bob Ward: That is my understanding. The question is how much influence the UK currently has. The UK wanted a more ambitious reform of the ETS and ended up with a rather watered-down version. It is true that, if we were a member of an emissions trading system, we would want a role in determining its rules. It becomes a trade-off. Are

we better off in a trading system that is likely to be more cost-effective for our companies because the trading of permits offers more options, or would we rather have greater control over the rules of a system that has larger overall compliance costs?

Mark Ruskell: Further to that point, where do you see reform of the ETS going beyond 2020? What rules are we likely to have post 2020? What flavour of ETS will we have?

Bob Ward: We can look at the low carbon price from two points of view. It has meant that our emissions have been cheaper to reduce than we would otherwise have expected, but the price being so low for so long is a problem. Many companies do not expect a high future carbon price as a result of the ETS. Re-establishing in the future the credibility of a strong price and the expectation of a price will need to be a priority for the post-2020 phases of the ETS. The easiest way is to set more ambitious caps.

There is also the question of what we do about the non-traded sector. The aviation sector is slowly moving towards coming up with its scheme, which means that it has not been included in the ETS.

A strong price signal is absolutely fundamental to driving the investment that we will need in low-carbon technologies. The UK has tentatively gone down that route through the carbon price support rate, although that adds only a small amount. My guess is that we would need a carbon price of no less than £50 a tonne, and higher if we are going to be serious about meeting the Paris targets. That does not look likely at the moment in the ETS.

The way in which the reform has been handled has also tended to undermine the confidence of companies. The more that policymakers intervene in the operation of a carbon pricing system, the more it undermines the confidence of companies that the rules will stay the same and they can plan for the future. In a sense, you are caught—you want to leave the system to operate more or less as it is, but leaving it with structural flaws has its own consequences.

Dr Savaresi: The European Commission has made its proposals for the reform of the EU ETS post 2020. Whether those proposals will be welcomed and how they will pan out in practice remains to be seen. However, the big focus, which was just mentioned, is on ensuring that we get some kind of stability in and a more robust price for CO_2.

We know for sure that the land use sector will not be included, so there will be no effort to move towards the universal EU ETS that Bob Ward mentioned a few minutes ago. There are a lot of very good reasons for that decision and in itself it is a good decision, especially in the context of a system that still has quite a few teething problems, even in a fairly homogeneous sector where measuring emissions is fairly easy.

If the scheme was expanded to include other sectors that are less heavily regulated, measuring emissions would be harder and trickier. Such an expansion should be considered only when we have a robust, well-performing emissions trading scheme, when no surprises can arise and there is none of the hot air and technical jargon that is used to depict the fact that we are paying for emissions reductions that are not taking place. That is where we are with the EU ETS.

On the subject of technicalities and arrangements, it has already been mentioned that even though they are not members of the EU, EEA member states have opted to join the EU ETS. They have installations in their own jurisdictions that are part of the system. That could be an option for the UK but, as was mentioned, the problem with that is that the UK would not have a say in how the rules are drafted. That is always the issue with EEA membership; you are part of a regulatory system that you have no control over. However, Bob Ward's point is also fair—there is an issue with how much the EU member states actually control the EU ETS. There is widespread dissatisfaction with the system and so far it has been very hard to fix it.

Kate Forbes (Skye, Lochaber and Badenoch) (SNP): We have covered an enormous amount of ground this morning. As we move towards the end of the meeting, what lessons would each of you identify that we could learn from other countries on specific environmental issues or on environmental policy as a whole?

The Convener: You have stumped them.

Professor Morgera: I do not think that there are easy precedents or examples to look at. Probably the biggest challenge is that this raises questions that are unprecedented and it forces us to look at even well-known areas of environmental law with very different eyes. I have worked on some of these issues and I find myself reaching very different conclusions now that I need to consider Brexit. There are more considerations that should be looked at. We need to look at environmental law as a whole and not just pick priorities, because that can be very dangerous. Of course, climate change is very visible but it is intimately connected to what we do with biodiversity, water, and environmental impact assessments.

We need to consider the environment as part of a broader sustainable development strategy and think about trade, investment, human rights and human health. The biggest lesson is that we need to work much more across disciplines and expertise to understand how pulling one thread

may mean unravelling many other things that we are trying to address. I do not think that there is any clear example of somebody who has excelled in integrating environmental policy in different sectors. The challenges are on-going, so there are no simple examples that we can examine.

Professor Reid: As a different way of avoiding the question, I would say that much depends on the wider legal background. Let us take the simple example of nature conservation. In the United States, the attitudes towards what landowners can do on their land are so different from what they are in Europe that the approach that we have of sites of special scientific interest, for example, does not work or exist there in the same way. Those differences pervade all the systems: the legal structures, the legal ideas and, likewise, the way in which the economy works. Is the economy driven by small businesses or larger businesses? What is important in the trade-offs between food security, food production and profit?

It is always dangerous to look around the world because particular measures might look wonderful but, when we try to transplant them, there can be huge problems because, in many ways, they are products of their own contexts.

The Convener: It has been fascinating to hear the witnesses' evidence. It strikes me that there has been little or no disagreement between the witnesses across the subject matters that we have covered. Is that the case across wider academia? If it is, what role can academia play in assisting the UK Government and the Scottish Government to identify the risks and opportunities and plot a way forward? Are the witnesses aware of any approaches from either of the Governments seeking access to the sector's expertise?

Dr Savaresi: As you may know, I co-ordinated the report on the environmental impact of Brexit in Scotland that the Scottish universities legal network on Europe published before Christmas. All the witnesses, except Bob Ward, contributed to that report. On the back of that, we had a meeting a couple of weeks ago with the Scottish Government, which was seeking our expertise. The idea is to engage in sustained dialogue with the Government because there is, fortunately, much expertise in Scotland on environmental law. However, as Elisa Morgera has explained, we are fairly specialised, so it makes sense to address each issue individually and engage with us in a conversation. That is what we do and what we know but, at the same time, there is much that nobody knows about Brexit, so it makes sense to bring our heads together to try to figure out what we should or could do.

Professor Reid: Our apparent unanimity might be because, at this stage, we are still identifying the challenges rather than producing the solutions. When we get to working out what the best way of dealing with the challenges is, we might find that different people have different views.

Bob Ward: Academia has a big role to play in ensuring that Brexit's impact on environmental policy is not just about regulation. That is a particularly crucial point on climate change. Some people in the English national political system portray climate change as simply a drag on economic growth and a cost to be minimised. That is a profoundly narrow and mistaken point of view, and I am glad to say that Scotland seems to have a slightly more enlightened one.

Trade opportunities will exist. The Paris agreement is a big, international policy driver that will drive the development of low-carbon goods and services throughout the world. Most of the world is outside the European Union. If the UK wants to take advantage of trade deals outside the European Union and build them up, it ought to look in particular at the low-carbon goods and services sector.

Academia needs to help those in the devolved administrations and in Westminster to understand the point. It is a huge trade opportunity. The UK has very considerable comparative advantages in many low carbon technologies and a world-class science base that is working in many areas of low carbon research and development. We need to be sure that this is not portrayed as a regulation issue only. It is about trade opportunities, driven by the Paris agreement.

11:45

Professor Morgera: We are all part of an informal network of environmental lawyers in Scotland. Most of us are also part of the Scottish network on EU law. There is willingness in academia to collaborate. What has been challenging until now has been to collaborate in an effective way. That is partly because the timeframes are very tight. We need to work much more across the board than we have done.

As we have heard in the discussion today, if the policy direction or even the questions were made clear, that would allow us to explore one or other direction in a more effective way. We are interested in participating in the debate, and our students and colleagues are very willing.

Now that we have mapped out the challenges and have an understanding of whether, for example, the Scottish Parliament has particular questions, ideas and opportunities in mind, we have a more specific sense of the directions for investigation that we could support with evidence and exchange.

The lesson to be learned from the perhaps disappointing answer that we have just given is that the only way to find a good approach is to have a broad-based dialogue in which academics speak not only to each other but to NGOs, other stakeholders and business. We need to work out together what could work and what kind of creative solutions we could all try to come up with. It needs a systematic approach that identifies key questions and a timeframe for us to get together and reach out to stakeholders.

Professor Little: I endorse that entirely. It is important that the academic contribution is a multidisciplinary one. That requires academics to think about how that collaboration should be configured. It also requires bodies such as the Parliament to have an awareness of the collaborative activity among academics and the contribution that academics can and cannot offer.

The Convener: Thank you for your helpful and enlightening contributions. The next meeting of the committee is on 21 March, when we will take evidence from the Cabinet Secretary for the Environment, Climate Change and Land Reform on the Carbon Accounting Scheme (Scotland) Amendment Regulations 2017. The committee will also review its work programme and consider its response to the "Wildlife Crime in Scotland" annual report.

11:48

Meeting continued in private until 12:21.

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

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