OFFICIAL REPORT
AITHISG OIFIGEIL

Environment, Climate Change and Land Reform Committee

Tuesday 23 January 2018

Session 5

The Scottish Parliament
Pàrlamaid na h-Alba

Tuesday 23 January 2018

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ENVIRONMENT, CLIMATE CHANGE AND LAND REFORM COMMITTEE
3rd Meeting 2018, Session 5

CONVENER

*Graeme Dey (Angus South) (SNP)

DEPUTY CONVENER

*John Scott (Ayr) (Con)

COMMITTEE MEMBERS

*Claudia Beamish (South Scotland) (Lab)
*Donald Cameron (Highlands and Islands) (Con)
*Finlay Carson (Galloway and West Dumfries) (Con)
*Kate Forbes (Skye, Lochaber and Badenoch) (SNP)
*Richard Lyle (Uddingston and Bellshill) (SNP)
*Angus MacDonald (Falkirk East) (SNP)
*Alex Rowley (Mid Scotland and Fife) (Lab)
*Mark Ruskell (Mid Scotland and Fife) (Green)
Stewart Stevenson (Banffshire and Buchan Coast) (SNP)

*attended

THE FOLLOWING ALSO PARTICIPATED:

Jonathan Hall (NFU Scotland)
Professor Gavin Little (University of Stirling)
Isobel Mercer (Royal Society for the Protection of Birds)
Andrew Midgley (Scottish Land & Estates)
Robin Parker (WWF Scotland)
Professor Colin Reid (University of Dundee)
Dr Annalisa Savaresi (University of Stirling)
Daphne Vlastari (Scottish Environment LINK)

CLERK TO THE COMMITTEE

Lynn Tullis

LOCATION

The Robert Burns Room (CR1)

Scottish Parliament

Environment, Climate Change and Land Reform Committee

Tuesday 23 January 2018

[The Convener opened the meeting at 09:33]

Decision on Taking Business in Private

The Convener (Graeme Dey): Good morning and welcome to the third meeting in 2018 of the Environment, Climate Change and Land Reform Committee. I remind everyone present to switch off their electronic devices, as they might affect the broadcasting system.

Agenda item 1 is for the committee to decide whether to take items 4 and 5 in private. Do members agree to do so?

Members *indicated agreement.*

European Union Withdrawal (Environmental Implications)

09:34

The Convener: Item 2 is to take evidence from two panels on the environmental implications for Scotland of the United Kingdom leaving the European Union. I welcome back Professor Colin Reid from the University of Dundee; Professor Gavin Little, who is professor of environmental and public law at the University of Stirling; and Dr Annalisa Savaresi, who is a lecturer in environmental law at the University of Stirling. Good morning.

As you can imagine, we have a series of questions, which we will get straight into. Where are the UK Government and the Scottish Government in the process of developing the necessary common frameworks to cover environmental issues post-Brexit? What needs to happen in the coming year?

Professor Colin Reid (University of Dundee): It is very hard to say where we are. We are faced with unfinished business from the devolution settlement of the 1990s. Because the European Union frameworks were in place, we did not think hard about how we operate on a UK basis among the four Administrations. We have not sorted out how we deal with the fact that the UK Government departments are both the UK departments for international matters and the English departments for internal ones. Because of the constraints created by the EU frameworks, we have never had to think hard about how we control divergence or fragmentation within the UK.

There are two different dimensions just now. One is the short-term need to sort out environmental and other sectoral frameworks. The other is big, long-term constitutional issues. We are trying to make arrangements that will work whatever happens over the next 10, 15 or 20 years, by which time Governments may be very different.

Those of us on the outside do not know about the private discussions between Governments. We had hoped that the debates on the European Union (Withdrawal) Bill would have given us some of the thinking on the ways forward but, with the amendments delayed until the House of Lords stages, we are at a loss—certainly, I am at a loss, although I should not speak for my colleagues, as I am sure that they are much better informed than I am.

Professor Gavin Little (University of Stirling): I do not think that we are much better informed about that. I agree with what Professor Reid has

said. On the one hand, we are reacting in a fairly ad hoc way to what is happening on Brexit. We also have to deal with an important and significant development of the devolution settlement on the hoof. The communiqué in October from the joint ministerial committee on European Union negotiations is a good starting point, but we should not underestimate the nature and scale of what lies ahead. We are engaged in a significant bit of heavy lifting in terms of constitutional reform.

Dr Annalisa Savaresi (University of Stirling): I second entirely what my colleagues have said. I will not repeat the valid points that they have made, but I will add that it is important to distinguish between two things. The first is the urgent questions that need to be tackled as soon as possible, because of the uncertainties as to what the transition period will entail for the specific subject area, and because there are urgent decisions that need to be taken ahead of March 2019 regarding the EU emissions trading scheme, fluorinated gases and a number of other issues that have been flagged by colleagues across the country. The second is the medium and longer-term decisions on exactly who will be doing what and how.

The Convener: Given the scale of the task at hand, both in the short and longer term, are you concerned about the amount of work that has to be done in a relatively short space of time?

Professor Little: It would be appropriate to be concerned, but a great deal depends on the political will and determination of the four Governments of the UK—or three at the moment, because Northern Ireland is without a devolved Government—to roll up their sleeves and do the work that needs to be done. That work will be significant, both in making organisational arrangements and in developing the degree of political trust and consensus that will be necessary to build sustainable and robust constitutional structures.

Kate Forbes (Skye, Lochaber and Badenoch) (SNP): Moving on to specific issues, a few of which you have touched on already, would you identify the most critical environmental areas or issues where Scotland should be particularly concerned about ensuring a co-ordinated approach to environmental policy between Scotland and the rest of the UK? What would your list of priorities be?

Dr Savaresi: It is very important to be extremely clear on the message that different areas are governed and regulated in different ways today, as a result of the overlap between international, EU and domestic law measures. Every area needs to be looked at carefully on its own merits because even within the same subject area there are areas that will need to be tackled urgently due to Brexit, and there are other areas that can pretty much continue as they are.

I do not know whether you read the evidence that was submitted to the UK Parliament as part of an inquiry on fluorinated gases and their regulation in the UK post-Brexit. There were two different EU instruments that were implemented in different ways. One could continue as usual—there were some concerns about the proper implementation of EU law but, nevertheless, the governance, apparatus and regulation are there—and the other cannot. That is exactly the exercise that needs to take place, and it is a very large exercise. I know that the Scottish Government and the Department for Environment, Food and Rural Affairs are in the process of doing that. However, it is very hard to say, "Here is a list," because the list does not exist yet. There is a great deal of urgency in producing that list and knowing what to do.

Professor Reid: There are different scales of urgency. For some things, there is an immediate technical need to put something in place to replace an EU element that will disappear, but that does not necessarily have any particular policy-substantive content, whereas there are other areas where, politically, socially and economically, it is important to have either a united policy or scope for divergence where that is beneficial. As has been said, every area needs to be looked at individually. Within each area there might be some points where a common framework is needed for commercial economic interests, but that can operate within a wider policy.

One example relates to packaging waste. The target recycling rate in the different parts of the UK could be quite different, but for commercial reasons we might want to have the same rules on what combinations of materials in the make-up of packaging are allowed. Even in that one little area, there could be different frameworks. There is then the question of who should decide what the common standards are and so on.

Richard Lyle (Uddingston and Bellshill) (SNP): There is so much to do on Brexit and so little time to do it. Do panel members have views about how many common frameworks covering environmental policy areas are required to be sorted, revised, updated, improved or established?

Dr Savaresi: The decision on frameworks is both political and technical, with various elements playing out. There may be a number of areas where you receive advice, such as, as we have said, the EU ETS and fluorinated gases and chemicals, but, at the end of the day, it is down to politicians to first make political decisions as to how to address that topic. It is very hard for us to provide an informed guess. There are certainly many areas that need to be addressed. The issue

is how you decide to address those areas, and that is largely a political decision.

The Convener: Perhaps that is so, but all three of you have put a considerable amount of work in from a very early stage. I am sure that you have views of your own and it would be interesting to tease those out. I welcome the evidence that you have given, but I am sure that you can go beyond that and outline what you think.

Professor Little: We have to think quite clearly about what we mean by frameworks. If we are talking about frameworks in the context of governance structures as opposed to environmental subject areas, we get a slightly different perspective depending on how we approach that issue. If we think of common frameworks in terms of governance structures, my sense is that the most obvious way of organising common frameworks would be in the context of a statutory-based system that draws on the basic features of the design that we have already for the EU's decision-taking processes.

09:45

In terms of common framework areas, different subject areas could be divided into sub-units or councils according to ex officio ministerial remits, rather like the situation that we have at the moment with the European Council of Ministers. For example, you could have a fisheries and agriculture council, an environment and climate change council, and so on, but that is just one suggestion and there are many different ways in which frameworks could be established. Dr Savaresi is correct to say that it is fundamentally a matter of political organisation.

Professor Reid: It depends partly on what you mean by a common framework. Is it about a common end result that could be achieved by each Administration having complete authority over the matter but doing parallel things to begin with, which might well mean immediately carrying over the EU rules, or are you talking about there being a common framework that binds the different Administrations to do the same thing together into the future? That comes back to the structural issues, I am afraid.

Richard Lyle: The basic situation is that we are going away from the EU, the EU court and all the other different organisations. Do we really need to set up an organisation? For hundreds of years we have added in different types of laws. For the past 40 years, we have added in all these EU laws. Do we need to bother? I voted to remain, by the way, but do we really need to get uptight about it?

Professor Little: We do not necessarily need to get uptight about it, but we need to make proper provision to deal with these areas. The reasons for that are, in many ways, quite plain, because we are talking about an area where retained EU law will intersect with the devolved jurisdictions and competences. If those areas are to be dealt with appropriately and in a structured way, there need to be structures and processes in place to do that.

Although I am not in favour of gold plating or setting up grand institutions or anything of that nature, it is useful to think about what the EU currently does in terms of the basic function of its institutions and organisations, and then to think about how we can replicate that in a scaled-down, narrowed-down UK context, so that we have effective decision taking and effective policy making in these areas. Otherwise, there is a risk that it could be ineffective and not very thorough in doing the job that it needs to do. Some areas may not be particularly controversial, but they are quite complex issues and will require quite a lot of work to get into the guts of the different subjects, really understand them and produce good-quality policy and law.

However, for some of the subject matter involved, unless it is dealt with in the context of an established structure, it could quite easily result in cross-border constitutional politics. That might be appropriate in one context but, from an environmental perspective, it might deflect away from consideration of the environmental issues themselves. For those reasons, and given the weight that attends anything to do with the constitution and the nature of the devolution settlement, we need to have properly constituted statutory structures and processes.

Dr Savaresi: I believe that there is a need to be uptight about some things that are very urgent, as I mentioned. To go back to the example of fluorinated gases, a hydrofluorocarbons registry that is presently managed by the EU allocates quotas directly to businesses within the EU. In all likelihood, the registry will not service the UK after March 2019, so what do we do? At the hearing before the UK Parliament in December 2017, businesses raised concerns about what they should do. They have spent money to comply with the regulations but, at the end the day, if they are not compliant they will never be able to export to the EU market again. At the same time, we could become a dumping yard for cheap substandard Chinese products that do not comply with domestic rules. A number of issues need to be tackled urgently—and we should be uptight about them.

Alex Rowley (Mid Scotland and Fife) (Lab): I return to Professor Reid's example about common standards for the packaging of plastics. Is our starting point not that the four nations should have the same standards in place given that we comply with EU regulations? If we accept that, we are not

starting with a blank sheet of paper. I suppose that many people are concerned that we would start to see pressure put on some of the nations to relax the standards and the regulations.

Professor Reid: The starting point is the same, but you could have pressure both ways. For example, if one Administration wanted higher standards, that would cause trouble for industries, manufacturers and retailers that want to sell across the UK. However, if one Administration was in favour of deregulation and wanted to reduce costs in industry and so on, it could have lower standards that the other parts of the UK do not accept. That might happen in two, five, 10 or 20 years' time. What will happen when those differences arise? Will we say that all bits of the UK must be the same in these matters? Will we say that we need to agree what the position will be, or will each part be able to go its own way? We would need to work out a structure to deal with that situation.

In a sense, we are in a good place to reach agreement, because we are all beginning at the same point rather than coming together from different places. We should take advantage of that capital—the fact that we are in the same place—to work out what will happen when things get harder.

Alex Rowley: Given the pressures that are on Government and so many areas because of Brexit, is it realistic for Governments to agree to keep the status quo for a time? Perhaps the pressure is not as great to try to deal with everything, because it is clearly the case that we will not be able to do that. Is it a realistic proposition to say that, in many areas, we simply agree to keep the status quo until there is the time to work through matters?

Professor Reid: That would be fine. There is a question about whether, if EU issues were to change during the standstill, we would change with them. Again, whether the different elements would agree to that without certainty about what the future arrangements would be comes back to a political decision.

The Convener: And the word that you used earlier—"trust".

Professor Reid: Yes.

Donald Cameron (Highlands and Islands) (Con): I think that Professor Little might have already answered my question. The EU provides a model for how the situation could be managed, in so far as the Commission is the enforcement agency, the European Court of Justice is an adjudicator and a number of member states have different priorities. How much would you take from that model? If you could take a lot from it, would that be as difficult as some might have us believe?

Professor Little: I suppose that, if we are going to alight on the EU model, the amount that we would have to take from it depends to a considerable extent on the Brexit that will emerge. If we have a situation in which the UK agrees to comply with much EU environmental law as part of a future trade agreement with the EU, the structures and the processes that would need to be in place would be focused primarily—much as they are at the moment, in some respects—on the implementation of EU provisions.

If we have the so-called hard Brexit and are therefore not required to be compliant with EU law, I would not, as I have said, be in favour of gold plating some constitutional arrangement, but we need basic mechanisms to ensure effective executive action by Government with support from a secretariat that is independent of the different Administrations. We will also need an adjudicatory mechanism and a mechanism that gives the different legislatures proper oversight and scrutiny.

As for whether that will be difficult, that again will come down to whether political trust and consensus can be established across the different Governments and Parliaments. If that can happen, it should not necessarily be that difficult. I am not saying that it would not require a fairly substantial piece of work, but I do not think that it would be too difficult. However, the question is whether the trust is there and whether consensus can be built.

Claudia Beamish (South Scotland) (Lab): Good morning. I have a specific question; I am not sure where it should come, so I am just going to ask it now.

Like all the things that we are talking about, the emissions trading scheme is EU-wide. How might that be taken forward and how might what we do interface with the EU?

Dr Savaresi: There are a number of things to be said about the emissions trading scheme, the first of which is that you do not necessarily need it, if you do not want it. Over the years, the European Union scheme has received its share of criticism, some of which can be supported. Therefore, the first political decision to make is whether you wish to continue with the scheme after Brexit.

If you decide to continue with it, there could be a UK-wide scheme, which would probably be the more rational thing to do. However, Scotland could have its own scheme; that would not be unheard of, and it could happen. As you might have heard, the EU is having talks with California on ways of joining up emissions trading schemes. Having subnational entities join the emissions trading scheme might have been unheard of until recently, but that is not the case any more.

We do not know where those negotiations will go but Scotland could, in principle and at a

technical level, do the same thing. The question, though, is whether it has the constitutional powers to do that. That brings us back to the devolution issues that we have already discussed, and I guess that, in that respect, we are in uncharted waters. It is certainly one of the many issues that the Administrations would have to discuss if Scotland was adamant about continuing with the emissions trading scheme on its own and the rest of the UK decided not to bother with it any more.

Claudia Beamish: Might there be some other way forward such as, say, a carbon tax? After all, we need to be able to recognise our own contribution to emissions.

Dr Savaresi: I completely agree that something needs to be put in place if you decide not to have an emissions trading scheme, but what can you do instead? The scheme is a policy tool that tackles the largest emitters and the most polluting industries. Something needs to be in place. This is an area where we need to be uptight, because there must be absolute certainty about what will happen to these polluters after March 2019.

You could continue with the emissions trading scheme—in other words, the status quo—for a period of time, ideally up to 2020, when the present commitment period finishes, and then decide what to do. If you decided not to do that, a carbon tax would be the obvious replacement, but it would need to be engineered to ensure that it did the same job as—if not a better one than—the emissions trading scheme of putting the incentives in the right place for polluters to continue reducing their emissions, adopting the best available technologies and so on.

The Convener: Let us move things on. Mark Ruskell has a few questions on the principles of the common frameworks that we have been talking about.

Mark Ruskell (Mid Scotland and Fife) (Green): What are your views on the common principles that have been established through the early joint ministerial committee communiqué? Are they adequate? Do you have any concerns about what is in there? Is anything missing?

Professor Little: I think that it is a good starting point. It is very much a pragmatic approach.

As things develop, one would hope to see the inclusion of a more principle-based way of thinking—perhaps, for example, in the context of the creation of what I called in my paper a "governing statute" to regulate the system. In that sort of context, it would be possible to start to introduce broad statements of principle or intent on how the different Administrations and Parliaments propose the common framework should operate. Ideas such as subsidiarity, the precautionary principle and so on could be included that context.

10:00

Dr Savaresi: To expand on that point, in this specific subject area, there are a number of principles of environmental law that come from various sources—national law, EU law, international law—and it is important to realise that they will not just go away with Brexit, although those that are embedded in EU law might. It is therefore important to look at those EU environmental law principles that we want to carry forward through Brexit. The Scottish Government has expressed a clear opinion in that connection; the issue is to understand what exactly it means by that.

The principle of subsidiarity is a good example. It is a principle of EU constitutional law, not environmental law, so what will be its fate after Brexit? We do not know.

The Convener: Perhaps we would look for the polluter pays principle to be involved in that.

Professor Reid: The polluter pays principle is a good example. It is important that any of these environmental principles are set against an ambition of a high level of environmental protection. In some circumstances, "polluter pays" can become "Well, if the polluter is willing to pay." It only operates as a principle if it is within the guiding objective of maintaining or achieving a high level of environmental protection.

Mark Ruskell: We are aware that, if the UK is going to be able to establish or re-establish the kind of trading arrangements that we have with the EU, we might have to negotiate up to 36 trade deals with other trading blocs around the world. Do particular principles in the way that trade deals are negotiated need to be reflected in the underlying principles of the common trade frameworks?

I cite the recent EU-Canada comprehensive economic and trade agreement. At the Canadian end at least, provincial Governments appeared to be quite strongly involved in deciding the Canadian Government's eventual position on the deal. There seems to be an element of involvement of devolved Administrations and federal Governments.

Professor Reid: I cannot say anything about the internal workings of the Canadian constitutional arrangement. However, happily we are now seeing in these trade agreements some references to environmental objectives and principles that make sure that environmental regulations and standards cannot be deregulated or undercut. We would look for such broad

principles or objectives to be included in any trade agreement.

Professor Little: It is also worth pointing out that the provisions in articles 191 to 193 of the Treaty on the Functioning of the European Union were inserted into EU treaty law by the Single European Act 1986. The environmental title introduced by that act was, of course, largely the creation of the UK Government of the time. What we now consider to be key EU principles were, to a considerable extent, derived from UK policy thinking.

Dr Savaresi: Many civil society organisations have already pointed out the issue that Mr Ruskell has raised. Future trade deals might become a vehicle for opening up the UK markets to lower environmental protection standards for products. That is definitely a concern that I share, and it is something that definitely needs to be kept on the horizon. Once more, it depends on having a political mandate in the context of the negotiations that are yet to come.

Mark Ruskell: How should the common framework on trade operate across the UK? How should it involve devolved Administrations, citizens, movements and others?

Dr Savaresi: It is an interesting opportunity—at least from an academic point of view—to do some comparative constitutional work on how other federal region states deal with those specific issues. There are interesting examples both inside and outside the EU, such as Belgium and Canada. There is clearly a need to consider such examples and how the UK might take heed of them.

Professor Reid: You have a spectrum from the traditional UK position, in which central Government decides everything and has a completely free hand, to the Belgium example, where the different provinces have a strong say and a veto on what happens. We have to decide where we want to sit on that spectrum and what the required and acceptable level of involvement by the devolved Administrations is. In addition, but separate from that, is the issue of stakeholders' and public participation in policy and whether using the standard mechanism of executive accountability to Parliament is adequate to achieve the level of input that we consider desirable.

Professor Little: It is important to keep in the back of one's mind that we are talking about common frameworks that are established to deal with the areas where retained EU law intersects with devolved competence, rather than with the general aspects of trade.

John Scott (Ayr) (Con): I declare an interest as a landowner and someone who is likely to be affected by the outcome of the discussions. I thank the witnesses for preparing such elegant and detailed papers. They are much appreciated.

What challenges does Scotland, in particular, face in developing, implementing and agreeing the common frameworks? Have we the capacity to do that, given that, as Professor Reid said earlier, Scotland has not previously had that responsibility? Historically, it has been done by the European Union and before that by UK Administrations and DEFRA?

Professor Reid: The answer will vary from sector to sector. In some areas, Scotland has a strong base and the necessary expertise, but in others we have been reliant on what has happened elsewhere: where matters have not been so important to the Scottish economy and Scottish industry we have, understandably, taken a back seat.

If we are talking about initially simply rolling over EU standards, that will not be a problem, because we can plan and look ahead. If there is to be joint working within the UK, you can share expertise, either by having expert groups working together or by making de facto arrangements in which the different Administrations take the lead on different subjects. There may not be an immediate problem if things are just rolled over, but there needs to be a lot of thought about what will happen in the future and whether we will develop our own strategies or work with others to develop them.

Dr Savaresi: It is important to realise that capacity building is taking place in London as well as in the devolved Administrations. Unfortunately, many governance arrangements have been managed directly by Brussels, which means that there is an urgent need for capacity building across the board and not just here in Scotland.

Professor Little: In that context, now is the time to start thinking about how a UK-wide secretariat, independent of the Administrations, might usefully operate, and in which areas it would do so.

John Scott: You spoke earlier of political trust for the self-evident reason that at least avoiding duplication of effort would be valuable. Divergence is inevitable over time, even if we start from a common position. Is there an ordered structure for a framework, at either Scotland or UK level, that springs out at you and that you could write to us about that would enable us to develop our capacity to do that work?

Professor Reid: I am afraid that there is no simple answer. A lot will depend on work that is done on the basis of the often very good working relationships at the front line. There are expert groups that work together and organisations that draw together bodies from across the UK on environmental matters. At the technical level, we

are dealing with that and co-operation is very good. Those relationships can be built on.

However, the structures for co-operation are different in different areas. Sometimes they are based on statutory provision, sometimes they are ad hoc arrangements and sometimes they are an offshoot of current European arrangements. It is a question of looking at each individual sector and seeing what is already there—what is working well and how far up policy levels it can get before there is a need for political decisions.

John Scott: Are you optimistic that the political will either exists or will develop for such frameworks to be put in place at the political level, in order to allow the specific detail to be argued out where collaboration already exists?

Professor Reid: I suspect that, as a matter of pragmatism and practicality, leaving the experts to get on with as much as everybody is happy with is going to be the way forward. However, there will come crunch points, and they will become part of the wider constitutional structural issue that we have talked about, because I suspect that the different Administrations will not want to create hostages to fortune by, for example, conceding in one area, even though that might make sense in the short term, if doing so could be seen as a precedent for what might happen in the future in more controversial areas.

John Scott: Thank you.

The Convener: Following this, we will have a session with stakeholders, on whose role I want to touch briefly. Have you considered the scenario in which stakeholders who are concerned about a position that the Scottish Government wants to take on standards in frameworks try to circumvent the devolution process by going direct to the UK Government in order to encourage an approach that seeks unanimity and a level playing field across the UK?

Dr Savaresi: Here, as in many other areas, we are in uncharted waters. As you know, civil society organisations have strongly raised the point about consensus on enforcement of environmental law post-Brexit. That is clearly an issue for all Administrations—not only the UK Administration.

What there will be after Brexit on this specific point, we really do not know. There will be a consultation on the issue. I assume that it will be very lively, because strong ideas have already been developed in that connection—Professor Reid has already made an important contribution to the debate. This is about making the most of the constitutional opportunity to engage in dialogue on where powers should lie, who should exercise them and when.

Professor Reid: Interest groups, whether they are for higher or lower standards, will apply pressure to get the decision that they want at whatever level it is to be made. That might be at international level, UK level or devolved level. They will try to manipulate the situation and will argue for powers that are key to them to rest at the level at which they think they will get the best out of them.

The Convener: Yes—that is another factor in the whole issue of developing trust and taking the process forward.

Richard Lyle: I find the area very interesting. I suggest that everything is back on the table. Am I right in saying that every EU law that has been passed in the past 40 years will stay active until it is individually dismantled or replaced, or it is agreed among the parts of the UK that we will amend it?

10:15

Professor Reid: That is the current situation under the European Union (Withdrawal) Bill, subject to the facts that not everything can be carried over and that some provisions will have to be changed, amended, enhanced or added to, simply to make them work.

Richard Lyle: With the greatest respect to lawyers, I suggest that will we have some of them going about saying, "We're not in the EU now, so that law disnae count, your honour—we can go back to the law that was passed in 1948."

Professor Reid: Given how the bill is currently drafted, that will not be possible. However, there are some grey areas in terms of how far some case law from the European Court of Justice will continue to have influence, so there may be scope for arguing that we should take a different line from what was said by the court in Luxembourg.

Richard Lyle: Thank you very much.

Finlay Carson (Galloway and West Dumfries) (Con): Professor Reid has suggested that a co-ordinated approach across the UK will be essential for successful operation of the economy and the market, and for meaningful protection of the environment. It may be for the JMC to decide on some aspects of governance and compliance, but what role do you see the Scottish Parliament—as opposed to the Scottish Government—having in development and scrutiny of common frameworks?

Professor Reid: That comes back to the structural issue. If the common frameworks are just to be agreed between the Executives, the role of the Scottish Parliament will be to monitor and hold accountable the Scottish Executive on its contribution to the discussions. If the common

frameworks are to be a matter for discussion and consultation but, ultimately, will be for the UK to decide, it is very hard to see how the Scottish Parliament will have a role in that.

If the frameworks will have to be agreed between the Executives, the question will be how the Scottish Parliament will hold the Scottish Executive to account, either beforehand, as regards its negotiating position—what it will say in the negotiations—or afterwards, in looking at the common framework that emerges, saying that it thinks that the Government was wrong and that it wants to hold the Government to account. What would happen after that? Could Parliament undo the framework or would the Assemblies and Parliaments get together and say that the framework must be approved by each of them? That would maximise democratic accountability.

However, that would also obviously complicate matters because, where there were extra stages, there would be issues such as we have heard about in relation to Belgium and the Canadian trade example, in which Assemblies—perhaps for short-term and differing political reasons—do not agree to something, which then holds up something else that has been agreed. There is an argument to be had about the balance between efficiency and accountability.

Finlay Carson: Given your work and experience in the area, if you had a crystal ball, what would you expect to see? How will the Scottish Parliament's role work out? I would like all panel members to address that.

Professor Reid: That is very hard to predict, because the extent to which the Parliaments have, for the past however many years, controlled what happens at EU level has been very limited. At present, that is the case even as far as implementing EU measures is concerned: if the Scottish Government agrees that the UK Government will legislate on a matter that combines devolved and reserved competences, the Scottish Parliament does not have much say in controlling or holding anyone accountable for such a decision, and it has no say about delegated legislation that might be made on that at Westminster. The question is whether we are simply trying to replicate the fairly hands-off position that the Scottish Parliament has had, or whether this is being taken as an opportunity to increase the level of control of and accountability for what the Government does.

Dr Savaresi: I agree with that assessment. It is incredibly hard to predict what will happen, especially in relation to the bigger constitutional questions that are on the table, which are an opportunity to settle bigger issues that go well beyond the remit of this subject area. The outcome of that constitutional conversation will affect what this committee or any other like committee across the UK can say on how environmental governance is done after Brexit.

Professor Little: Without repeating the points, I will say that I very much agree with that. I also think that the Scottish Parliament has the opportunity to take the initiative on developing how the structures might operate, because the situation is so fluid: there is pretty much a blank canvas at the moment and there is a political vacuum.

John Scott: Notwithstanding what Dr Savaresi has just said, the bigger constitutional issues may or may not be resolved, but there must be a pragmatic approach taken from March next year. Do you have any views on the appropriate mechanisms for agreeing and monitoring common frameworks? We need to have something in place from day 1. What should it be?

Dr Savaresi: It is clear that, at present, existing mechanisms will have to be relied on. There is so much to be addressed that I do not imagine that you will find a quick-fix solution, but being engaged in the conversation that Michael Gove has initiated in the context of DEFRA will definitely be important. Even if Scotland maintains its own enforcement schemes—as it should: its legal system is separate, after all—the question is what can be drawn from that conversation that is useful for Scotland in understanding what mechanisms can be put in place, given that, currently, there is an enforcement machinery that will no longer operate after Brexit.

The Convener: Does anyone want to come in on that? Does that cover your position?

Professor Reid: It is a matter of what battlefield is chosen by the various parties and actors. A high-profile environmental issue could be chosen as the one that is seen as an example of evil London imposing its power on us, or as the shining example of how all the Administrations can work together in friendly harmony, going forward. There are lots of different battlegrounds, and conflict might arise, whichever side of the argument you are on. The environment offers lots of opportunities for that. Alternatively, everybody might just think that we must keep the show on the road and just get on with making the practical things work, despite the higher-level political issues.

John Scott: I suspect that your latter point about just keeping things going on a hand-to-mouth basis and dealing with the constitutional issues as and when they occur will be the pragmatic approach.

What is you view on the likely amount of secondary legislation, which is your field of expertise? Can you give an update on that? We

are working on the basis that there will be something approaching 1,000 such instruments.

Professor Reid: I have absolutely no idea. That will partly depend on how things are divided up. There are pieces of secondary legislation that are two pages long and some that are almost 1,000 pages long. Things could be very different depending on how we divide them up.

The Convener: We should have collectively declared an interest in that.

John Scott: I think that the Scottish Parliament is working on the basis that there will be 1,000 or so statutory instruments coming up the road. Do you have a view on that?

Professor Reid: That is not an unreasonable estimate, because there will be a lot of minor changes. You could try to do a lot by general deeming phrases that would apply across the board, but that would make the statute book very hard to operate.

Donald Cameron: On the question of enforcement, if there is a UK-wide common framework, what enforcement mechanism should exist?

Professor Little: My feeling is that there needs to be a statutory scheme that, among other things, makes provision for enforcement. One could see political mechanisms being put in place that would allow fines to be imposed and which would, if need be, be backed up by a judgment from the UK Supreme Court.

Donald Cameron: How would you enshrine in Scots law general principles of EU law such as subsidiarity or environmental principles like the precautionary principle, the polluter-pays principle and so on?

Professor Little: A governing statute would probably be the most appropriate place in which to include such general principles, because that would not only provide them with a high degree of legal authority but would—assuming that the legislation was passed by the UK Parliament and consent was granted by the devolved legislatures—be emblematic of political consensus around them.

Donald Cameron: Does anyone else have a view on the matter?

Professor Reid: The enforcement mechanism will depend partly on the status of the frameworks. If they are just political frameworks, you will not necessarily want to go down the road of imposing fines. The question will be how to hold the different Administrations to account and ensure that they comply. If fines are imposed, where would the money go and where would it come from? Would it simply circulate in the public sector?

Principles need to appear somewhere in legislation if they are to have any effect, but what form will they take? Are they simply things that one must have to regard to, or must it be expressly shown how they are being taken into account?

The reporting mechanisms that play such a wide and important role in climate change legislation can be one way of ensuring that things are being monitored and that people are complying. If reporting were public and to Parliament, you could use the standard political accountability mechanisms instead of creating a separate architecture.

However, it all comes back to the question of the status and role of the frameworks. Is there enough trust for the agreements to be political ones, or do we want formal and legally enforceable provisions that create complications and might put in place obstacles to changing things in the future?

Donald Cameron: I am trying to pin down an example of an issue that might arise. What if one of the devolved Administrations were to take a different view on, for example, the environmental impact of a herbicide on crops but that issue somehow fell outwith the common frameworks? How would such a scenario play out? How would we work that out?

The Convener: Also, how would it work if it was a non-devolved Administration? What if it was the UK Government?

Professor Reid: Currently, if the UK Government has the power to decide and the competence to deal with such an issue, it will simply make the rule for the UK as a whole. However, if the issue were to be completely devolved and were therefore not subject to a common framework, each Administration could do its own thing. That inconsistency would cause problems for agriculture, retail, the food sector and so on.

If you have a common framework, the question is whether the Administrations are actually bound by it. If so, is the agreement simply a political one under which, if an Administration goes off on its own, there are political consequences—you do not talk to that Administration, say, and other negotiations are affected—or are the Administrations legally bound by it? If the latter is the case, is the binding legal obligation such that it invalidates the law that the devolved Administration has made, just as legislation by the Scottish Parliament and Government that breaches EU law is simply invalid, or might there be a different sort of obligation under which the Administration must account for what it has done, there is a delay in making a law or there is some

extra process to go through? There are many different ways of doing this, because a legal obligation can bite in different ways.

Dr Savaresi: That brings us back to the question of whether the principles are enforceable as a matter of domestic law and whether the constitutional arrangements, too, are enforceable. Those decisions have yet to be made.

The Convener: Are you aware of any international examples of enforcement systems that work effectively and might be good models for the UK to adopt? I accept that that is not an easy question.

10:30

Dr Savaresi: Unfortunately, the enforcement of environmental law is a vexed question not only for the UK or the EU but across the board. Therefore, it is important to stay realistic about the issue and to understand that it is a common challenge that faces not only you. The contingent situation that you face is that you currently have a mechanism that works, although it could be better. The challenge is to exploit that opportunity if you can, to make the mechanism even better. Best practices exist in various sectors. For example, on fisheries, you would want to look at Norway, which is regarded as a fast mover and the best example of how to manage fisheries. However, it depends on the subject area, and I am afraid to say that it is hard to tell what is the best for everything.

Claudia Beamish: I want to drill down a bit more into the enforcement issue. Is there a place for enforcement within the devolved Administration? It depends on what happens with the frameworks and so on but, if there was such a body, what would it be? If there was to be a UK-wide enforcement body, what sort of body would be the most valuable and useful? I do not want to imply that enforcement is the be-all and end-all but, to use the old cliché, we need a stick as well as a carrot. For example, this week there are more concerns about air pollution, which we have just done an inquiry on. I would like to get your views on that.

Professor Little: One of the things that can usefully be taken from the EU model is the role that the European Commission has in enforcement. If we established for the common framework areas a UK-wide secretariat that was independent of the Administrations and that had a statutory duty to uphold and enforce the provisions that were in place in those areas, that would, in all likelihood, be reasonably effective and appropriate. However, there must also be scope for court-based adjudication.

Professor Reid: There needs to be an independent body that has its funding and staffing guaranteed. In relation to how it will be informed, reporting obligations can be an important way of ensuring that Executives keep thinking about their obligations. As a way of providing information about what is happening, the body should be able to receive complaints, although it should not necessarily be obliged to deal with every one of them.

The body should also have the ability to take issues to the various Executives. With the work that the European Commission does, the few cases that get to court are the visible ones but, in many cases, the Commission speaks informally to member state Governments and says that there seems to be an issue. It can apply a bit of pressure and make Governments realise that they have to fulfil their obligations. Where there are clear legal obligations, we need to have clear legal remedies, but a big area of work is in making Governments realise that they are not quite doing what they said they would do. That is a huge area that will be a big gap when we no longer have the Commission to do that. The simple fact that Governments know that somebody is looking over their shoulder makes all the difference.

Dr Savaresi: As well as policing, there is adjudication. Members will know that Professor Macrory from University College London has for many years advocated the establishment of an environmental court. You may want such a court in Scotland, but I would say that there is mixed evidence in support of establishing such a court. It is important to realise that environmental questions can be technical and specific. A specialised court would have advantages in that it would have specialised judges who would look only at environmental matters. The concern is that a separate court system may develop case law and jurisprudence that was not necessarily plugged into the holistic system of case law.

Claudia Beamish: Is there an opportunity to have a similar body functioning on a UK-wide basis, or is that a matter for the Supreme Court? We want to hear your views in order to understand where we are going.

Professor Reid: Where the matter ends up will depend on the kind of dispute. The Supreme Court is not the place to decide the merits of environmental decision standard setting, for example, as the courts are not the best place for deciding on multifaceted political choices made by different Administrations. Rather, there needs to be some form of negotiation or arbitration and a clear decision-making process for the common framework whereby all four parties have agreed what happens if all four do not agree. That may involve qualified majority voting, although it is hard to see how that would work when there is such disparity in the size of the different units. That is all

tied together with the nature of the framework and whether the framework is one of recommendations that operate at a political level or one that creates formal legal obligations and rules with which each Administration must comply.

John Scott: Indeed. If we had agreed frameworks and there was a breach, who would adjudicate? Given that you have already said that you do not think that the Supreme Court would be the appropriate body, are you talking about establishing a new court to deal with post-Brexit Britain and the complications that might flow from that? I presume that it would sit at a UK level if it was to adjudicate between devolved Administrations.

Professor Reid: It depends on what kind of disputes we are talking about. If the common framework took the form of very detailed, quasi-legal rules, a court could deal with a dispute in those terms. However, if the various Administrations simply could not agree or there was a broad statement of policy and three of the Administrations thought that the other one was going off the rails, that dispute would not be appropriate for a court. The more formal and precise the dispute, the closer it is to being appropriately dealt with by a court. If you are talking about Administrations disagreeing between themselves, the chance of there being a superior body to adjudicate seems unlikely.

Dr Savaresi: I would add that that is because of the current constitutional arrangements and the legislation that goes with them. In other systems and federal states, specific constitutional arrangements that are enshrined in constitutional laws can be enforced. In such systems, if there is a dispute between Administrations, it is taken to the tribunal that is designated for such disputes. The UK is not currently in that position, so it is hard to configure the scenario. However, in the future, given the political will, you could establish laws and courts to provide such adjudication.

John Scott: With one or two notable exceptions, the committee members are lay people and, although we are all long on defining the problems, we are short on solutions. We are looking for solutions from you as constitutional law experts—and they would be gratefully received.

Professor Little: As Professor Reid has said, if disputes crystallised around legal rules and issues, a body such as the Supreme Court would be the appropriate and effective ultimate decision maker. However, if you are talking about essentially political disputes between Administrations, a court would not be the appropriate place to resolve those. The way to resolve those disputes would be through a pre-agreed voting system, although that raises particular difficulties in the context of common frameworks because England dominates the UK in population terms.

It should not be impossible to develop systems of weighted voting that acknowledge not only England's position but that of the devolved Administrations. However, for the system to work, there would have to be a governing statute that established general parameters. In some areas, it might be agreed, for example, that there must be unanimous agreement for something to happen. Those are all political issues for politicians to grapple with.

Dr Savaresi: It would be important to develop a clear legal basis for the exercise of powers so that everybody knew who was doing what; then, if there was a dispute over who was doing what, there would be a clear statutory basis to look at.

That goes back to the point that I made previously. My state of Italy has constitutional arrangements with a specific clause concerning what the regions do and what the central Italian state does and, if there is a dispute, the issue can be brought before the administrative courts. It goes both ways, though, because the central Administration can say, for example, that Lombardy has acted beyond its constitutional powers and so on. Clearly, the UK currently does not have such a mechanism as a matter of course—that is what I was pointing to earlier.

The Convener: The final question is from Mark Ruskell.

Mark Ruskell: Going back to the issue of trade, is there potential for the investor-state dispute mechanism to sit alongside the court arrangements that we might end up with in the UK? How would that interface with a replacement for the European Court of Justice or the Supreme Court?

Professor Reid: That raises a separate issue about the desirability and role of investor arbitration and so on. What you are talking about is a legal relationship between the two states that would be different from the European Union set-up whereby there is much more collective decision making and general rules being made. If you are talking about the terms of a one-off treaty between the two parties and the possible role of individual investors, you are coming back to the wider issue of where control lies and how far international agreements will override devolution arrangements. I am afraid that there is no easy answer or solution.

The Convener: Okay. Thank you for your time for this evidence session, which has been very useful.

Professor Reid: May I just add one point, convener? In preparing my evidence, I was

conscious of the fact that I was not providing solutions. I think that we are all struggling with the fact that there are some big, fundamental political and constitutional decisions to be taken. We can work out the consequences of those, but there are big questions around how framework agreements and constitutional arrangements between the different parts of the country are going to work. Is it going to be political? Is it going to be legal? What are the arrangements going to be? Those are not questions that technicians or lawyers can answer; they have to be resolved at a higher level. Yes, a lot of pragmatic, low-level stuff can be done in the meantime, but those big questions will have to be faced at some stage.

The Convener: That said, if anything comes to mind, feel free to write to us.

I suspend the meeting for five minutes to allow the panels to change.

10:43

Meeting suspended.

10:50

On resuming—

The Convener: Welcome back. The committee will now take evidence from a panel of stakeholders on the environmental implications for Scotland of the UK leaving the EU. I welcome Jonnie Hall from NFU Scotland, Isobel Mercer from the Royal Society for the Protection of Birds, Andrew Midgley from Scottish Land & Estates, Robin Parker from WWF Scotland and Daphne Vlastari from Scottish Environment LINK.

I will kick things off. Where do you understand the UK and Scottish Governments to be in developing common frameworks to cover environmental issues post-Brexit? What needs to happen over the coming months? What input to that process, if any, are stakeholders like you having?

Jonathan Hall (NFU Scotland): There was a bit of a vacuum, to say the least, for a considerable period of time, but it is my understanding from speaking to people at Westminster and in Edinburgh that the so-called "deep dive" has now commenced because there has been agreement on a number of principles that would allow the establishment of common frameworks. Importantly, among those principles are the preservation of the internal UK market, the UK having the ability to negotiate future trade deals, ensuring that the UK's commitments to international obligations continue and the management of common resources. I understand that there have been a significant number of meetings of civil servants across the devolved Administrations on those principles alone, starting to look at not just future agricultural policy but environmental regulation, a great deal of which is currently driven by the EU and is then transposed into UK and Scots law.

How long that deep dive will last remains to be seen; those involved will have to come up for air at least a few times. Where that will lead—what will continue to be covered at UK level under a commonly agreed framework and what will be devolved—remains unknown, but the sooner we get there, the better. We think that there is an absolute need for commonly agreed frameworks across the UK on all manner of environmental legislation and regulation, but we also think that Scotland should have the ability to take measures that would enable those to be delivered.

Andrew Midgley (Scottish Land & Estates): Good morning, everyone. Our understanding is very similar to Jonnie Hall's as regards the extent to which the negotiations have progressed, the deep dive and exploration of the issues. I simply add that my understanding is that the focus of those discussions is on governance and how common frameworks might be established between the constituent parts of the UK rather than on their content. Consideration is being given to how things will work and, if that can be sorted out, the other elements will flow through at a later stage.

That seems entirely appropriate. The only thing that I would note is that the UK Government seems to be further ahead on the content—I have in mind the future of agriculture and rural development policy. We hear strong messages from the UK Government on the direction in which it would like policy to develop, and we assume that it means policy for England. There is work going on in Scotland in those areas and the Scottish Government has appointed agricultural champions and rural advisers, but it looks as if the UK Government is further ahead, which is a bit of a worry in terms of the UK Government's ability to corner the conversations that follow.

The Convener: Is there any opportunity for you guys as stakeholders to engage in the process at this stage?

Jonathan Hall: I do not want to dominate the debate, but I think that so far there has been more opportunity for engagement than has perhaps appeared to be the case, looking in from the outside. However, it needs to be worked at hard. You have to knock on doors and make yourself awkward, or annoying, if that is the right expression. There has not been a genuine willingness on the part of either the Scottish Government or the UK Government to embrace an awful lot of what, I believe, stakeholders have to offer the process, but our very presence as

organisations tells you that we are here to lobby and to try to influence. That is what we are doing and I think that inroads are being made.

The Convener: Daphne Vlastari, do you have any comments from an environmental perspective?

Daphne Vlastari (Scottish Environment LINK): We are aware of the deep dives, although we are not so close to the content. On common frameworks and opportunities for engagement, we are struggling because of the nature of the intergovernmental processes that we have in place. With respect to the joint ministerial committee, we feel that transparency and stakeholder engagement could be greatly improved. Members of the previous panel discussed the recent statements that they have made about the principles that should guide the common frameworks, and one of the key principles that is missing is stakeholder engagement. How do we initiate a dialogue about the structures that we will need in future? We would like to see the situation amended, clarified and improved.

Kate Forbes: In which particular environmental policy areas are you concerned about maintaining a co-ordinated approach between Scotland and the rest of the UK? What are the risks if that does not happen? I recognise that the list could be as long as your arm, but what are the main concerns when it comes to the importance of developing a co-ordinated approach?

Robin Parker (WWF Scotland): My list is towards the length-of-your-arm end of things. There are a lot of things that need to be part of the common frameworks discussion. I am not suggesting that there need to be lots of common frameworks, because there can be lots of issues under one heading, as well as lots of headings with just one issue under each, as members of the previous panel said. I would add two further facts. First, a large proportion of Scottish environmental law has some sort of basis in EU law—the figure that usually gets put on that is about 80 per cent. Secondly, of the 111 areas in which the UK Government identified an intersection between EU competence and the devolution settlement, the largest number fall under DEFRA's responsibility. Obviously, those do not map entirely to your committee's responsibility, as there are areas for which the Department for Business, Energy and Industrial Strategy and the Department for Transport have responsibility in which your committee might have an interest. However, it points to there being a lot of policy areas that will be of interest, because a lot of environmental issues are, by their very nature, transboundary issues that ignore the political boundaries that we impose. There are also a lot of common resources that we need to manage jointly. We could start by setting out some basic principles on which areas need joint oversight and where there are transboundary issues that need to be jointly managed, and we could go on in that way.

11:00

Daphne Vlastari: It is also important to highlight that you can have different ways of working together. The joint ministerial committee has acknowledged the need to work together to manage resources, but we already have different ways of working together across the UK—we should not lose sight of that important element. It is not as though, because we were members of the EU, there was no discussion between the Scottish and UK Governments.

In our written evidence, we included a number of examples of existing co-ordination between all the Governments in the UK. Those vary from very technical areas, such as the Joint Nature Conservation Committee, which identifies different species or sites that ought to be protected, to the political, such as when all the Governments in the UK came together to make a political statement on the marine environment and their agreement was reflected in different pieces of legislation in their own domestic law. That is an important element to take into account, too.

We probably need to deliberate on what mechanisms we would need for each policy issue or area, which is perhaps easier said than done.

Andrew Midgley: Our biggest focus has been the common agricultural policy. Fairly early on after the vote to leave the EU, we came out to say that there was a need for a common framework on food, farming and the environment. I recognise that the common agricultural policy is not as clear-cut as environmental legislation. It is a large, complicated area that includes a funding mechanism; and it does not entirely overlap with the committee's remit, although the committee has a definite interest in it. However, we are focused on the common agricultural policy because it has a huge influence on management of the land, which has a huge influence on the delivery of a range of things that the Scottish Parliament and Government are interested in, such as climate change and environmental management. The money that is paid through the common agricultural policy is a big lever in helping to deliver environmental objectives.

We took the line in support of a common framework because of a number of risks. The first element is the market. If one constituent part of the UK does something radically different from what the other parts do, will that create problems internally within the UK? We must acknowledge

that there is already divergence—the Scottish Government is entirely right to highlight that—but how much divergence is acceptable before it becomes a problem? We do not necessarily have a clear view on that.

The same arguments apply to trade relationships, which are the second element. When thinking about negotiating international trade deals, we need to consider whether one part of the UK doing something entirely different from what the rest do will create a problem.

The third element is funding. At the moment, we get about 17 per cent of the funds. We are worried that if there is no framework, funding will be delivered to Scotland through the block grant, which could lead to a reduction in the funding available for the land management that we want to see delivered in relation to wider environmental benefits.

We acknowledge that there are lots of ifs and buts in all this, because the Scottish Government could decide, even with a lower budget, to apportion more funding to land management if it chose to. However, we took a more cautious view and thought that the pragmatic approach was to go for a framework to try to safeguard all those elements.

More broadly than that, in respect of the water framework directive, the nitrates directive and so on, there are activities that could be done in different ways. I should clarify that the water framework directive is delivered in different ways at the moment. Again, we must acknowledge that there is divergence on the implementation of a broad set of policy objectives, but we can live with that. Therefore, the question becomes: how much divergence is acceptable? We would envisage a common framework providing the envelope—the outer limits—that stops there being too much divergence that then becomes a problem.

Isobel Mercer (Royal Society for the Protection of Birds): Another important point in the entire conversation about common frameworks is what regulatory alignment might be necessary in the future, depending on the future relationship between the EU and the UK. The areas in which we need to develop common frameworks will be hugely circumscribed by the content of the withdrawal agreement and any future trade deal.

It is important to build on some of the comments that my colleague Robin Parker made and examine the current arrangements and why there has been such strong governance by the EU in environmental legislation. We come back to the point that nature is inherently transboundary. Because of that, it has been recognised that a common, co-ordinated approach is extremely effective to protect, for example, habitats and species that cross borders across the UK and the other EU countries. Minimum environmental standards are needed to prevent unfair regulatory competition and a race to the bottom. That is important because post-Brexit those reasons will continue to apply to intra-UK co-operation, so there will be a continued need for common frameworks in many policy areas.

We have not come up with a list of the specific priority areas that we believe will definitely need to be agreed, but there are some areas in which there is a clear need, for instance species and habitats conservation, site designation, selection and monitoring criteria and protection of transboundary protected areas, such as the upper Solway Firth and marshes, which cross the border between England and Scotland. Those are all areas in which there will be a continued need for co-operation.

As Andrew Midgley already touched on, water quality is another key area, for example in relation to river district catchment management. Marine life is another example, not just in relation to fish stocks; sea birds, whales, porpoises and small cetaceans cross vast areas, so there will be a clear need for continued co-operation there.

The Convener: We will come on to the whole issue of co-operation and common frameworks shortly.

Jonathan Hall: I echo much of what Andrew Midgley mentioned. Our priorities are in line with the Scottish Government's, in that the big three environmental challenges for land use and land management are climate change, water quality and biodiversity. Rather than shying away from that and seeking to erode, amend or adjust a whole raft of legislation that comes from the birds directive, habitats directive, nitrates directive and the water framework directive, we would see this as a new opportunity to utilise agricultural land management to try to deliver more solutions, as mentioned by the previous panel.

That is partly because of the internal market issues that Andrew Midgley talked about, but also because our ability to trade and our continuing need to trade with the rest of Europe and further afield will be built more than ever before on a transparent and clear ability to deliver on environmental requirements and animal health and welfare, a point that Isobel Mercer made.

There are two or three sensitive areas for NFU Scotland in looking at how things might work in a UK context. One is pesticides, which was mentioned briefly by the previous panel. Distorting internal UK agricultural trade by allowing certain plant protection products in one part of the UK but not in Scotland, for example, would be a big problem.

The issue of biotechnology and gene editing is a vexed one and cannot be brushed under the carpet. Clearly, there are diverging views across the UK.

We will all have to wrestle with those issues at some point and have an open debate about the pros and cons, with many on all sides.

I want to finish with a very small example of how there has been a divergent approach to things under the CAP. I realise that greening under pillar 1 is quite a particular issue, but nitrogen-fixing crops are one of the greening components that individual farmers in Scotland, England, Wales and Northern Ireland can put in place, and the conditions attached to and stringent requirements placed on their management in Scotland have meant that Scottish farmers have rejected them as an option, which has led to a perverse response, with farmers in Scotland shying away from producing more protein crops, because they do not see it as a worthwhile activity. The whole matter of sticks and carrots, therefore, becomes really quite important.

Robin Parker: As a caveat to my earlier comments—and I might not have listened carefully enough to the exact wording of the question—I think that, for all the reasons that I highlighted earlier, common frameworks are very desirable, but whether they can be made to happen or are necessary will very much come down to how the current devolution settlement is seen and the outcome of the withdrawal bill for retained frameworks.

Our starting point is what is best for the environment—there is one very good environmental reason why we need to end up with shared frameworks that have been commonly agreed by the UK's different Governments. Inevitably, Governments that have signed up to the contents of such frameworks will be more invested in delivering them effectively; and the environmental outcomes will be better delivered because of that commitment to the frameworks' effective implementation.

Richard Lyle: Good morning. Having listened intently to what Andrew Midgley, Isobel Mercer and Jonathan Hall have said, I will not ask the question that I asked the academics. Each of your organisations has, for a number of years, discussed issues with and put pressure on the EU, and I am sure that, given the comments that have been made about farming, land management and what is happening in Isobel Mercer's organisation, you are all concerned about Brexit. Are you having discussions with similar organisations in England, Northern Ireland and Wales about the number of common frameworks that might be required to cover environmental policy areas? Andrew Midgley has mentioned numerous things, Jonathan Hall sounded as if he had a long list and Isobel Mercer followed with similar comments. What work are you doing to present to the Scottish Government your concerns and your views on what things should be covered by common frameworks?

Jonathan Hall: I am happy to kick off on that. We work very closely with our colleagues in the National Farmers Union in England and Wales and the Ulster Farmers Union—and, indeed, with colleagues south of the Irish border in the Irish Farmers Association. We also work with farming unions across Europe; we still have a Brussels office.

We are still very much taking a co-ordinated approach to EU legislation but, as for what will happen beyond Brexit, we are very mindful of the sort of regulatory framework and environment in which agriculture and food production will find itself in future. As I have said, instead of shying away from that and suggesting that we need to start dismantling things, we think that the whole cut-and-paste exercise of the withdrawal bill is the right sort of starting point for us. I do not remember whether I have said this already, but the last thing that UK or Scottish agriculture wants is to have the race to the bottom that Isobel Mercer referred to. We want to maintain those environmental standards and, I would argue, elevate them.

Not only that, but we see the future direction of the CAP and CAP-type support as being driven largely, as Michael Gove said at the Oxford farming conference, by the idea of public funding for public benefit and public good. We do not view that as an either/or—in other words, as either supporting agricultural businesses to produce food on the one hand or supporting land management in the round to deliver environmental benefits on the other. If we are smart about this, we can bring those two things together, and I think that that view is very much shared by other farming unions across the UK. We need to get smarter not only at our farming, but at how we address issues such as water quality, climate change, biodiversity and so on.

For too long under the CAP, because of the very nature of its two pillars, there has been a big gap between the two: we have said that we will support farm incomes and will allow farms to become a bit more efficient, to invest and so on, but that we will also pay farmers to do agri-environment, management and so on. We need to bring those two things together. What is good for the bottom line of the agricultural business in relation to nutrient use, for example, is also good for water quality and tackling climate change.

11:15

Driving efficiencies into agriculture is the way forward, rather than worrying about what legislative sticks are required. We need a legislative backstop on a number of fronts without question, and we can arguably raise that, but we are not getting too hung up about it. We are more inclined to think about how we encourage better practice and the best available technologies to drive an industry that is the bedrock of the food and drink sector in Scotland and which is responsible for 70 per cent of land use in Scotland.

The Convener: In that dialogue with other farming unions, do they respect the idea of 17 per cent of the funding continuing to go to Scottish agriculture? Do they respect the unique nature of Scottish agriculture, with less favoured areas and so on?

Jonathan Hall: On the second point, there is a complete understanding across other parts of the UK that Scotland is significantly different from the rest of the UK. We have always said that any agricultural policy that works particularly well for Cambridgeshire is a disaster for Scotland. A one-size-fits-all approach—"DEFRA-centric" is the expression that I keep using—is unacceptable. We get support and recognition for that. None of our union colleagues across the UK is saying that we need a common approach to the delivery of agricultural policy schemes and mechanisms; it is quite the reverse. Michael Gove now agrees—we get those signals from DEFRA all the time.

On your very political point on convergence funding, without question there is disagreement between ourselves and the other farming unions. If the Treasury continues to fund agriculture and rural development in the UK to the same extent as we currently enjoy under the CAP and there is any move towards Scotland gaining a greater share of funds than it currently gets, somebody else will lose out. Our Northern Irish colleagues are particularly vociferous about that because Northern Ireland would be the area to lose out.

That said, Michael Gove has given Fergus Ewing a commitment that there will be a full review of the convergence issue and the allocation of funding across the United Kingdom. Although we are less inclined to worry about what has happened in the immediate past or what is happening now, we think that that review will be critical in setting a baseline for funding allocations from 2019, 2020, 2021 or whenever onwards. That is a vital piece of work. As Andrew Midgely pointed out, any type of Barnettised approach would be disastrous as well, so we have to tread carefully in that review process, but it is nevertheless very much welcome.

Robin Parker: The answer to Mr Lyle's question on how much we work with our colleagues across other parts of the UK on Brexit is that we do a lot of work with them. There are any number of telephone calls and co-ordination meetings and we follow what colleagues are up to in Westminster. We have identified similar major concerns and priorities in terms of the environmental issues that are threatened by Brexit. The basic principles are the same everywhere in the UK.

We have to do a lot of work to remind our colleagues in London about how the devolution settlement works in the UK and that a great deal that is relevant to Brexit is devolved to the Scottish Parliament. Anyone who has worked with anyone in England will know that there is not a good understanding of devolution there, so we all have a job to do in explaining and hammering home that message constantly.

It also goes back to the question about where we are. The difficulty and the challenge that we face when working with our UK colleagues is that there is no clear process for us to feed into for deciding whether common frameworks are needed and where, and no clear process for developing them.

The WWF approach might be a good one to consider. WWF exists in many European countries so when a common framework for the whole of the EU is being developed, the process is clear and transparent and we know what the next steps and phases are. Organisations such as ours can tell the public when the key moment is for them to lobby the national Government or the European Parliament, or tell my counterpart lobbyists in Brussels when the key moment is for them to be hammering on the commissioner's door.

There is nothing equivalent to that in the current situation. There is no process. My colleagues will be called in to have a nice meeting with DEFRA and they will state all their concerns, or we will have a nice meeting with the Scottish Government and state our priorities, but it is hard for us to see how those things will be developed into a common framework. The most important point is that, when conflicts arise, things will need to work well.

There are examples of things having worked well. A really good example was the development of a marine policy statement for the whole of the UK. All the ministers came together, agreed a common approach to marine planning, and separate marine legislation was enacted in the different parts of the UK. The challenge will come on topics on which there is disagreement. How will those disagreements be resolved? How can we, as stakeholders, influence those processes? As parliamentarians, how can you and your

counterparts scrutinise those processes? There are no answers to those questions at the moment.

Isobel Mercer: Richard Lyle asked about working with UK colleagues and whether we had a list of areas where we think that common frameworks will need to be developed. We do not have a definitive list. We work closely with colleagues in all the UK countries to identify common areas of concern about the implications of Brexit and the discussions that we have had with our respective Governments.

Because there are so many political and legal uncertainties about where we might need to develop common frameworks, we have focused on a list of principles that we think could guide the development of those frameworks. We have been working collaboratively on that across our UK organisations.

For example, we were pleased to see that the issue of flexibility was in the JMC communiqué. A policy framework guides, but it should also allow flexibility to tailor the implementation of legislation and policy to the political, environmental or cultural context of each country in the UK. As Robin Parker said, the common frameworks should be jointly developed and agreed by all four nations, and they should be subject to sufficient scrutiny by the relevant legislatures when appropriate. As Daphne Vlastari said, they should also be subject to appropriate stakeholder consultation. We think that those things are key to ensuring that common frameworks have the best outcomes for environmental protections.

Another issue is the creation of shared governance arrangements to ensure that any governance gaps that might emerge as a result of losing the oversight and accountability of EU institutions, such as the European Court of Justice or the European Commission, are jointly and effectively tackled by all four Governments.

The Convener: Let us explore the principles for the common frameworks.

Mark Ruskell: Isobel Mercer has already touched on some of those, but I would like to get views from across the panel. She mentioned the JMC communiqué. What are the panel's views on that? Are there gaps? Are there areas that concern you?

Daphne Vlastari: We have already touched on a couple of areas. One is that there is no reference to stakeholder engagement, which is critical. We have not done any such exercise in the past in the UK or Scotland, so we need to make sure that we take views into account in a thorough, consistent and transparent manner. Unfortunately, the JMC process, which seems to be the main vehicle through which the discussions are being held on an intergovernmental basis, lacks the necessary transparency. As far as we understand it, there is no parliamentary oversight or scrutiny, so engagement is not easy. It is not very easy to engage if you do not know when the meetings are happening or what they are going to be about. In effect, we find ourselves on the receiving end of a decision that has been made and so we are playing catch-up, which is not ideal.

Mark Ruskell: How does that relate to the Aarhus convention?

Daphne Vlastari: You may know that there is consideration of a complaint to the Aarhus committee on the EU withdrawal bill. The bill potentially amends environmental legislation and, as such, public engagement should have been taken into account. Of course, that did not happen. It is an on-going process. If we believe in good governance, we should have a proper public engagement process in place.

I want to raise another aspect of common frameworks. It is great that all sides recognise the need to jointly manage common resources, but that should not be done in a restrictive way, in that although UK common frameworks or common frameworks with Ireland should set minimum targets with which we want everyone to comply, they should also allow the different Administrations to go beyond those requirements. That is currently possible under the EU framework; as long as any Scottish Government initiative does not go against EU rules, it is more than welcome to go ahead. In the frameworks, we want to maintain that provision, in addition to flexibility.

Mark Ruskell: I want to go back to the issue of trade, which is covered in the JMC communiqué. As Professor Little said, there is a question about the extent to which environmental legislation intersects with trade negotiations and discussions. To what extent will environmental and animal health and welfare regulations be on or off the table when it comes to trade deals?

Jonathan Hall: That is very difficult to predict, but we think that they should be on the table as part of the trade negotiations. As an agricultural economy and given the importance of our food and drink sector, our unique selling point relates to provenance, much of which is driven by our environmental standards and management as well as animal health and welfare issues. We will not be able to operate in any market for agricultural or food products that is based around stacking it high and selling it low. That is not where we want to be. We want to retain our standards and even improve on them, so that they are very clear to the consumer. The story behind our products—what we grow or rear in Scotland—must be clear.

From the outset, we have had major concerns that any open free-trade agreement that is about

sucking in cheap imports of food from other parts of the world where the environmental standards that we follow do not operate will result in the so-called race to the bottom, which is not where Scottish agriculture wants to be. You import food, but you export responsibility for environmental management. It is quite simple.

The point that was made by the previous panel is correct: environmental issues must be embedded in trade negotiations. It cannot just be about pounds, shillings and pence—trade flows, balance of payments and so on—but must also be about the non-financial considerations behind those issues, such as the standards to which we produce and the reputation of what we produce.

Mark Ruskell: Do you believe that such standards should be part of the negotiation and that the negotiating stance should lead to increasing standards and better quality?

Jonathan Hall: Yes. That should be on the table and part of the negotiation, and should be built around the fact that we operate to high animal welfare and environmental standards. That should be as much a part of any trade negotiation as looking at the trade flows and the financial balance sheet. We must retain what is arguably Scottish agriculture's USP, which is that we are not a stack-it-high and sell-it-low agricultural economy that is about driving down costs, regardless of the impact on the environment.

11:30

Mark Ruskell: How involved has the NFUS been in the Canada-EU CETA deal and the deals that I gather are being worked up with Israel and South Korea?

Jonathan Hall: We have had a negligible influence. We are endeavouring to make as many inroads as we can. With regard to some statements that Liam Fox has come out with in recent times, we want clarity and certainty on what the UK Government's position is on some of the issues.

Mark Ruskell: I would like the views of the rest of the panel on whether they see environmental regulations as tradeable. Are they in any current deals or wrapped up with any deals that are coming forward?

Daphne Vlastari: From an environmental non-governmental organisation point of view, we do not want our environmental protections and animal welfare protections to be compromised by any new trade deals. When it comes to having a close trading relationship with the EU, we should consider the fact that the EU will want guarantees about environmental protection and animal welfare. That will probably limit the extent of the potential for deregulation.

Another aspect to take into account is the Trade Bill that has been laid at Westminster. We have not confirmed whether that will require a legislative consent motion, but the assumption is that it will not, because the bill deals with an issue that is considered to be reserved. However, there is concern among the wider environmental NGO community about the number of statutory instruments that the bill provides for and the relative freedom that it will allow ministers, without any parliamentary scrutiny, to continue with trade deals or to re-enact existing ones post-Brexit.

Another aspect that I want to highlight—we are not trade experts, but we are delving into this issue—is what the constitutional capacity is at the moment for the devolved Governments to be involved in the trade issue and what process there will be for them to become engaged. Again, we come back to the issue of intergovernmental relations and the mechanism that is set up to address those. The Welsh Government has come up with some ideas that merit consideration about how devolved Administrations could be involved in issues that are in principle reserved but which impact on devolved areas.

I have talked a lot about the JMC process, but the limitations of that process have been highlighted in different committees in the Scottish Parliament and at Westminster. It is a key constitutional issue that we need to address in order to have the best frameworks in place for the future.

Robin Parker: I will add a couple of points. Fisheries are another obvious example of an area where, from our point of view, environmental considerations should be part of the discussion. Theoretically, there is a threat that environmental issues could be traded away. As with what Jonathan Hall said about Scottish agriculture, the selling point for Scottish seafood in the international markets is that it is a highly sustainable product. The direction therefore has to be to push up environmental standards in Scotland and the UK in any seafood trading arrangement.

There are examples of how environmental issues have been positively pushed as part of trade arrangements. An often overlooked part of the common fisheries policy is its global dimension. For example, in the EU but particularly in the UK we eat a huge amount of tuna, and work has gone on in the EU to push up environmental standards globally in relation to tuna fishing and similar issues. The question therefore is how that kind of work will continue. It is hard to see how environmental issues will not be part of the trade debate.

The difficult question to think about is where the intersection between trade and devolution will be. What will the Scottish Parliament's role be? For example, even if there were a Canada-style trade agreement—examples have already been referred to—the other party would want reassurance that any environmental standards or commitments that were agreed to as part of that agreement, which, as things stand, would be made by the UK Government, would be delivered in both England by the UK Government and Scotland by the Scottish Government. That creates fundamental questions about the nature of the UK.

Daphne Vlastari highlighted the Trade Bill. My understanding is that it will require a legislative consent motion and that the Scottish Government's current thinking is not to grant that, for the same reasons that apply to the European Union (Withdrawal) Bill to some extent. The Scottish Parliament and its committees will require to think about the Trade Bill.

The Convener: Talking about the involvement of committees in the Parliament, I think that Finlay Carson wants to explore a couple of areas.

Finlay Carson: I should declare an interest, as I have been a member of the NFUS.

The NFUS has said that it thinks that a

"strengthened Joint Ministerial Committee, or an emulated Council of Ministers"

could provide better dispute resolution. Does that suggest that Scottish interests are best served through the JMC, or do you have other suggestions about how Scottish interests could be best represented?

Jonathan Hall: We are straying into some sensitive areas. As things stand, I suspect that the JMC approach is what is available and, without anything suddenly lurching away from that, I cannot see any change from that being the case for the foreseeable future. It is about working with what we have; that is certainly our approach. None of us knows how things will pan out in the longer term, but there are existing structures that we will all have to work with.

As we go through the transition from 2019 to 2021—or whatever the period might be—and beyond, I think that a constitutional governance body to oversee issues of divergence or disagreement across the UK that is separate from the political process will be needed. The first panel discussed that. I am not enough of an expert on these things, but it is clear that, as we currently operate under the CAP in Europe, we have the European Commission, a European justice system and several degrees of audit too many, but they are independent of the political process in many senses. Therefore, there is a degree of ensuring that member states abide by their obligations and implement and spend taxpayer funding in the right way, and there is an audit trail.

There is the question of how we will operate future agriculture policies, meet environmental requirements and ensure that there is a consistent approach across the UK. I do not see any problem with that at all; it is an absolute necessity, if only for transparency and certainty for the taxpayer's interests—or the interest of society as a whole. However, I am afraid that how that is constituted is way above my pay grade.

Finlay Carson: I ask the rest of the panellists the same question, but will they also reflect on how the Scottish Parliament would play a role in scrutiny thereafter? How do they foresee the Scottish Parliament being involved?

Andrew Midgley: I support what Jonnie Hall ended by saying. I suspect that there is a need for a new entity or body. More than a committee is needed.

At the moment, my core interests are around the common agricultural policy. What works at the moment? There is the European Commission, which, in effect, sets things out through wider processes in Brussels. The Commission, along with the Council of Ministers and so on, allocates funding and establishes the structures through which any framework works. For example, under the common agricultural policy, the direct payments regulation and the rural development regulation have been established. Under one, every member state has to do something that is broadly in line and, under the other, there is a greater degree of flexibility in implementation, so member states can design their rural development programmes, or that can be done at the regional level. That is then policed. The Commission can examine the degree to which member states adhere to the things that they said they would do.

The JMC could go so far down the route of setting out a direction of travel and agreement among the member states, but we would immediately get into issues, such as the weighting that is given to the voices in determining the way forward. There would also be questions about who does the policing. That cannot be done by a committee in that sense, so would DEFRA do it? However, that might be a bigger problem, because DEFRA also represents England. There is a set of issues.

That leads us down the route of a new entity that is created for the purpose of overseeing the creation and management of the various frameworks. That links with the questions about how many frameworks we should have and how they might work, because we need to take into account the practical and pragmatic element that

we cannot create so many frameworks that they each all need their own institution. It has to be doable. There might be things that are doable within member states and do not need to be given to such a body. All of that has to be worked out. We have not yet created a clear model, but we are in the realms of a separate body.

Daphne Vlastari: If I understand Finlay Carson's question correctly, he is alluding to the governance gaps that we have identified. By withdrawing from the EU, we would lose some of the functions of monitoring and reporting that are carried out by EU agencies and the role of the Commission in coming in when there is a complaint that a member state or other actor is not implementing EU legislation correctly. Then, at the end of the spectrum, there is intervention by the European Court of Justice. Those are the functions where there would be what we in environmental NGOs call governance gaps.

The solution partly depends on the final deal with the EU. Discussion is on-going with the Commission and the European Parliament, and some are hinting at the fact that the EU may require the UK as a whole to comply with a number of environmental pieces of legislation as part of the deal. We have known from the beginning that the EU will require some sort of mechanism to verify that the UK is living up to its end of the deal.

The solution also depends on the extent and development of the common frameworks. If those are jointly agreed and respect the devolution settlement, as we argue should be the case, we would expect there to be either a number of bodies in the different countries to deal with the issues or a joint body that looks at the issues from the point of view of the four UK countries. We can envisage different models. Some of the functions that are currently carried out by EU bodies, such as monitoring and reporting, could easily be done by agencies such as the Scottish Environment Protection Agency, Scottish Natural Heritage or the equivalent, or by the Joint Nature Conservation Committee across the UK.

The most salient point is about how we replicate the roles of the Commission and the ECJ, because that is the main supranational bit that holds everyone equally to account, and that is the bit that we would be missing out on. That is why there has been a lot of discussion about whether having one truly UK-wide body would make most sense. If, for example, the Scottish Government has been very active on a specific issue such as waste management and has gone way beyond what is required but, for some reason, other parts of the UK are lagging behind and not respecting the established frameworks, such a mechanism would allow the Scottish Government to challenge other Governments and say that they are not playing according to the established rules and that they need to elevate their ambition. That supranational element is one great asset of the EU that we will be missing out on, but we could replicate it in that way. We could do that in different ways. An environmental court could be set up in Scotland—that was mentioned earlier—to which, say, a UK-wide ombudsman or other commissioner or regulator could refer cases. We could also have those positions refer to the Scottish Parliament, depending on the issue or the approach that needs to be taken.

11:45

We need to examine the potential for different solutions, and I think that the Scottish Government is doing that. It has set up different subgroups that are looking into that, and deliberations are on-going with a view to a report being produced towards the middle of March, I think.

It is equally important to take into account what is happening at the UK level, with the secretary of state also having committed to address the governance gap. It is important that, if we jointly feel that a joint, supranational-type body for the UK is the preferable option for better environmental outcomes, any process that any of the Governments takes fully involves the others as equal partners, rather than seeking to add them at the end of the process. Rather than people saying, "You can tag along if you want," the process should be jointly developed.

Andrew Midgley: I did not answer the second part of Finlay Carson's question, which was about scrutiny. That is potentially a very big issue. If a separate body is created that operates at a level above the devolved power—that is, at a UK level, but not necessarily at UK Government level—a potential vacuum of scrutiny will be created. It would come down to how the powers were used to create the body and the establishment in that process of UK legislation, presumably with legislative consent, to enable the Scottish Parliament to scrutinise that body. That needs to be established right at the beginning so that we do not allow a vacuum of scrutiny and the committee can then do its job.

Isobel Mercer: I think that we have established that two different issues are being discussed here. One is the need for new and improved intergovernmental working arrangements to develop and agree those common frameworks. That is where we would definitely call for a new and improved version of the JMC or some sort of council of ministers with increased stakeholder consultation, scrutiny and transparency. There is a clear need for that, as everyone has agreed.

On the point about new governance arrangements to tackle post-Brexit governance gaps, which my colleague Daphne Vlastari discussed in some detail, it is important to reiterate that the governance gap is very much a spectrum, with monitoring and reporting at the softer end and enforcement, compliance and ensuring implementation at the other end. Because of the complicated nature of that spectrum, it is very unlikely that one solution would tackle all the aspects of the governance gap.

That means that, even if some sort of UK-wide regulatory environmental body was created, it is unlikely that it would be sufficient to tackle the governance gap as a whole, and it is highly likely that, in addition to that UK body, there would need to be country-specific solutions in Scotland and the other countries—such as, perhaps, an environmental court or an environment commissioner that was specific to Scotland, as Daphne Vlastari discussed.

From an environmental perspective, there would be some advantages to having a UK-wide body, particularly in relation to the pooling of resources and expertise. The environment is an area where data collation and management is extremely important, and monitoring and reporting can be extremely costly—particularly, for instance, in the marine environment—so there could be some advantages to pooling the expertise in those areas.

The Convener: If we get this right, is there potential to reduce instances of the likes of non-governmental organisations going to judicial review in such areas? That option would not necessarily be removed, but if we pin this down, might there be that advantage for both NGOs and the process of government?

Isobel Mercer: Yes. For any new body that is created, whether it is an overall UK body or an individual solution for a country, a key part should be a mechanism to ensure that civil society can take complaints or issues to that body, for instance if people believe that there has been a breach of an environment act in that country. I believe that that mechanism could potentially—

The Convener: Because the judicial review process can be expensive and very time consuming.

Isobel Mercer: Exactly. This would get round the issue of the Aarhus convention implementation in Scotland and ensure that there is a mechanism that is accessible to all and is not prohibitively expensive.

Jonathan Hall: May I add one thing, convener? I am just thinking out loud. In many senses, land managers in particular are in a transaction process with the taxpayer, which is relatively easy to audit given that farmers, crofters and others get paid for certain land management actions. It is about the inputs and the outputs to that.

Where we have always struggled is with the outcomes that are associated with those actions. The difference between outputs and outcomes will be critical. If we spend X on agri-environment schemes to try to improve our biodiversity, we might measure financially how much we have spent and how many hectares have been involved in some agreements, but we are very poor at saying that we have delivered X, Y or Z for the environment in terms of biodiversity, water quality and so on. That remains an area of real challenge.

However, there is arguably an opportunity here. Thinking of special protections and special areas of conservation under the birds directive and the habitats directive, and the state of waters under the water framework directive, SNH and SEPA have a clear role to play but where is their governance to say that they have met a certain standard? We know that we still have challenges on a lot of our designated sites in terms of reaching favourable status—or favourable condition or whatever the right expression is.

We will always be pretty good at doing the obvious accounting, but the real challenge, arguably for all the institutions in Scotland, is to develop processes that actually say whether they have delivered what they set out to achieve. That is a different question.

Robin Parker: I can offer three points, which build on other things. The first one is on the convener's question about judicial review. We are, in a way, trying to replicate some of the roles of the Commission. As we have seen in what the Commission has done, often its just starting that process has been enough to kick folk up the bum. There is the example of clean air; it started without the Commission having to go to through the whole legal process, even though the Commission is able to do that.

I appreciate the tidying of the conversation. The first question is really what we do in the event that we are developing a common framework and there is a dispute. In that process, obviously it would be beneficial to have some way to grease the wheels towards agreement. We feel that in many cases, if something can be agreed, that will be beneficial for the environment. However, the obvious thing that will happen if there is a dispute is that people will fall back on the devolution settlement, and whoever has the powers to do that thing will be where things are implemented. Generally, we feel that in many areas where there is a common environmental issue, that is not the ideal approach.

Daphne Vlastari set out the case very strongly for why there might be a need for a common governance body to fill the governance gap that we have highlighted. As Isobel Mercer said, maybe in some areas, although not other in others, there might be more than one solution.

To return to Finlay Carson's point, there could be an important role for the Parliaments when it comes to who owns what—which governance body is responsible for something? Who is that a child of? If it becomes a child of one Government, that does not level the playing field. Inevitably, there is a risk that it becomes in thrall to that Government. I think that the better option is that it belongs to the Parliaments. That will end in better governance solutions.

However, that is a really challenging point to reach. We have to give some credit on this issue to Michael Gove, who responded very quickly to the concern that we raised that there is a governance gap. That presents the danger that there will be a move to start a process of consultation quite quickly.

The question that goes back into your court is, if you share our concern and our conclusion that a governance solution is beneficial, there is very little precedent, so you will have to work quite hard with other Parliaments in the UK to create a governance solution in a different way. If we think again about where we might learn from examples, the only one that we have of a parliamentary commissioner-type role is in models such as the Children and Young People's Commissioner Scotland. However, such commissioners belong to only one Parliament and are not shared across Parliaments.

Donald Cameron: I refer members to my entry in the register of interests, in that I am a landowner and farmer, and a member of SLE.

I have one specific question and one general one. My specific question, which is for Jonnie Hall, is on the back of something that Andrew Midgley said on future agricultural support. Mr Midgley suggested that the UK Government is cornering the market, and you referred to Michael Gove's Oxford speech. Do you believe that the Scottish Government is behind the curve in setting out its views on agricultural support, say, post 2022?

Jonathan Hall: I think that it is, but, arguably, that is for understandable reasons. I agree entirely with Andrew Midgley that DEFRA is setting the running, but as it has been in the driving seat—given its UK Government ministers—it is in a position to do so. That has allowed DEFRA thinking to be initiated and to start to creep out, and we have not seen that approach from the Scottish Government. There have been agricultural champions and the National Council of Rural Advisers and so on, but those have been about very high-level and highly principled notions such as where Scottish agriculture wants to be in the future and what it needs to deliver beyond food production alone.

We are lagging behind on specific measures and mechanisms that might actually get us to whatever that vision might be. That is the level at which DEFRA has at least started—although not yet concluded—a phase of work in which it is looking at various options on how funding might be better allocated to active land managers and farmers. It is also looking at productivity and innovation measures at the same time as tackling some big environmental challenges, such as the notion of limiting support payments to agricultural businesses in different ways, how we might recycle such funding and so on. That is quite constructive thinking, which prepares for a new approach beyond the life of the CAP, as it were—or beyond our time with the CAP. That chimes more closely with our thinking and what we have been saying about that than some of the messages that have come out of the Scottish Government.

The Scottish Government's themes and principles are right, but it has not yet backed them up by asking how we start to achieve such things. A lot has been said about vision and longer-term objectives and so on, but that has not yet translated into thinking "If we start at point A in 2018 or 2017, how do we get ourselves to point B by 2021 or to point C by 2024?". That is the thinking that really has to happen now, otherwise we will be left behind.

Donald Cameron: I want to move to common frameworks. I appreciate that we have covered a lot of ground on those already and that time is short, so I ask each panel member to be as brief as they can, please, in outlining their headline challenges that Scotland faces in agreeing and implementing them. How would you sum up those challenges?

The Convener: Headlines, please.

Mr Cameron, you have flummoxed them.

Robin Parker: The biggest one for me is the memorandum of understanding that was agreed at the JMC. No one could disagree with what is in it, but the question is about the process for what happens next. To me, that is the biggest challenge. It is a moving target. What do we feed into?

Daphne Vlastari: I echo those thoughts. I also flag up that, today, we have perhaps not talked enough about the role of the Republic of Ireland. It is very important for Northern Ireland to have the same standards and so on as the whole island of

Ireland, which is also important for environmental issues.

The frameworks will not necessarily be for only the UK or Great Britain; they might be for the UK or the British Isles or even—for marine issues, for example—some Nordic countries. We will need to incorporate that flexibility in our reflections in the future.

12:00

Andrew Midgley: I would pick out what Robin Parker said. We are moving through this process together and the big challenges of implementation may be too far ahead. The JMC's communiqué about the definitions of principles sets out that

"Common frameworks will be established where they are necessary in order to"

prevent various things. The debate that is needed is what counts as "necessary". I do not think that we know where the thresholds are in some of the topics that we have talked about. Those thresholds could mean that we did not need to worry about having a framework for some areas, whereas for others, we could be likely to go past a threshold and would need a framework.

I have in mind the divergence of policy in the way in which farming is implemented across the UK. We can live with that; we implement farm support in different ways. However, what extent of divergence could become a problem? We do not have clarity on those thresholds.

The same question would apply to environmental issues. Environmental legislation is implemented differently—such as the water framework directive and landscape designations—so divergence is not necessarily a problem that needs to be solved by a framework. However, how would we know when divergence had gone too far and that a framework would be required? I am not sure that we have done the work to know where that threshold would be.

Isobel Mercer: I will build on the comments that have been made; one of the biggest stumbling blocks is the inadequacies of the current intergovernmental working arrangements. New arrangements that are more transparent and more consultative are needed to move forward on how we make binding decisions. The JMC communiqué in October was positive in setting some principles, but we were concerned about the second communiqué, in December, which said that common frameworks would be agreed in a minority of areas, but did not establish which areas or whether environment would be included.

Jonathan Hall: The convener touched on the different agricultural landscape in Scotland in his opening remarks. I have a personal interest in hill farming and have a major concern about the latent environmental management of extensive farming systems in Scotland. There will be a lot of focus on intensive land management and specific issues across the UK, but there is always a danger that when it comes to the future benefits that we could derive—socially, environmentally and economically—from looking after our hills and uplands, Scotland may have to bat pretty hard on that issue, because it is not the same in other parts of the United Kingdom.

The Convener: I presume that that would have the support of the NFUS?

Jonathan Hall: Absolutely.

The Convener: Thank you. I will bring in Finlay Carson, briefly.

Finlay Carson: I feel that there is consensus that the Scottish Government is behind the curve and playing catch-up. Would the scenario be better if the Scottish Government worked more closely with NGOs to find the perfect model to deliver agricultural or environmental policy in Scotland and used that model to ensure that the UK framework fitted it instead of waiting for the UK framework, which could compromise the ideal model for Scotland? It is like the chicken and the egg—have we got things in the right order? Should we formulate our ideal model and use it to inform how the UK framework should be built up?

Jonathan Hall: There is arguably a case for that. You said "agricultural or environmental policy", but we all need to get into the habit of saying that those two policies are not mutually exclusive. The Scottish Government could take a lead with such an approach by developing policy with a range of stakeholders and saying that we have a lot of common interests and could start to set the agenda if we got our approach right.

Such an approach would certainly reflect Scotland's wider needs; arguably, it could then have a role to play in the UK context, too. Initiatives are under way and thinking is being done, but, as I said in response to an earlier question, that work needs to be taken up a notch. We need to get something tangible pretty quickly. There is a lot of posturing going on, which is not getting us to where we need to be.

Robin Parker: Most of the comments that have been made so far about the UK Government taking the lead have been made in the context of the intersection between agriculture and the environment. I do not know much about agriculture, but my UK colleagues also thought that Mr Gove's speech contained many welcome elements with regard to what it said about agriculture.

Purely for the sake of balance, I will highlight a number of areas in which I think that the Scottish Government is leading and will explain why I think that there is an impasse. The Scottish Government has been quite strong in talking about the environmental principles—with a capital P—and has led the UK Government in that area. Roseanna Cunningham has made it clear that she is committed to those principles and wants them to continue in Scotland. In contrast, as we have pointed out, the UK Government has not copied and pasted the environmental principles into the European Union (Withdrawal) Bill—because they are in the treaties—in the same way that it has copied and pasted everything else. In other words, the current status of the environmental principles will be lost.

The ideal solution would be to get the environmental principles included in the withdrawal bill by the time it was passed. It would be helpful if more Scottish interests could say that that is a red line. The alternative would be to take unilateral action—we could legislate in some way for the continuation of the environmental principles in Scotland—but the most desirable solution would be for the principles to apply everywhere.

The Scottish Government has been saying that the solution is membership of, or closer alignment with, the single market. If we were to follow the Norwegian model when it comes to our relationship with the EU—regardless of how likely we think that that is—we would have to follow almost all environmental regulation and legislation that is developed in the EU. The common fisheries policy and the CAP are treated slightly differently, but even on fisheries policy Norway decides to accede to the environmental element of most fisheries regulation and legislation.

I have forgotten the final point that I wanted to make—sorry.

The Convener: I invite Claudia Beamish to wrap up the discussion.

Claudia Beamish: I would like to get some brief, top-line comments on enforcement arrangements, which I appreciate is a difficult area because we have no clarity on what the common framework arrangements will be. Do the panellists have any initial comments to make about monitoring arrangements, prosecuting rights and court structures? In the interests of time, you do not have to repeat points that you have already made, but further comments would be welcome.

Daphne Vlastari: We have already touched on the fact that we would favour the introduction of environmental courts in Scotland as one way of addressing the governance gap and providing the necessary motivation for people to keep to the law.

On the monitoring and reporting side, a variety of possible solutions exist. It is important to highlight the fact that we already have UK-wide co-ordination on some aspects of monitoring and reporting when that is important for scientific and practical purposes. I am thinking of the functions of the JNCC. We probably need to assess which functions we will miss out on when we leave the EU. We ought to assess which ones we want to maintain in Scotland and across the UK and then reach an agreement on what would be most practical and best for the environment and what would make the most sense from a wider impact assessment point of view.

The Convener: This question is for Jonathan Hall and Andrew Midgley. I presume that you would want an environmental court to work more timeously than the Scottish Land Court, which you will have had experience of.

Jonathan Hall: We would prefer not to see it work very often. Seriously, though, our agencies—SNH and, particularly, SEPA—have adopted a very different role with regard to farmers and land managers over the past three, four or five years. Their approach, which has been very effective and positive, has been less about enforcement and using the rule book to deal with breaches and compliance issues and more about education and advice. Farmers and land managers are being taken out of a confused, non-compliant state—rather than a criminal state—and put into a better place to ensure that they deliver on a whole raft of environmental requirements.

A legal system is required, but it should be a last resort; instead, the focus and attention should be on providing good advice and having effective strategies for putting remedies in place before we put people through the court system—which, after all, does not benefit the environment. We need to educate people and seek out good, if not best, practice; indeed, that is how we should gear our environmental measures in future agricultural policy.

Daphne Vlastari: I do not think that there is any disagreement between us in this respect. Courts would be the last resort. What we are talking about are different kinds of accountability bodies to provide greater awareness of regulatory responsibilities before we resort to that approach. That is exactly what the EU system does, and we would want to replicate that aspect.

At the moment, Scotland is not compliant with the Aarhus convention with regard to the limitations that are imposed on judicial review. Environmental courts would, therefore, be a solution to an existing issue and would go some way towards addressing the governance gap.

Isobel Mercer: Daphne Vlastari has just touched on this, but I want to link the idea to the earlier point about judicial review and the establishment of an environmental court or commission. One key element of such a move is that it would offer merits-based reviews and access to independent experts, environmental judges and specialists, which would be good.

The Convener: John Scott has a final question.

John Scott: I declare an interest as a member of the NFUS.

A theme that has emerged is the need for the Scottish Government to come forward with its own plan, because at the moment we are lagging behind. We have our own unique landscapes, environment, agriculture and needs. I know that NFUS, Scottish Land & Estates and others have plans in that respect, but what is the logjam at the Scottish Government end? Given the close discussions that apparently all of you have had with Scottish Government officials, why do you think it has not come forward with a plan?

Robin Parker: I cannot believe that I am the first person to mention this, but the elephant in the room as far as the current impasse is concerned is the withdrawal bill. I understand why it has created an impasse; after all, what it says about the development of common frameworks is important.

Let me try to explain that comment. My understanding, from what UK Government ministers who have come before the Finance and Constitution Committee have said with regard to the withdrawal bill, is that EU common frameworks will be kind of corralled at the UK level and UK competences will be maintained until another common framework is developed and agreed between the different Governments. At that point, you will work out what lies in each place. That sounds fine as long as the process is a happy one and everyone agrees, but there is legitimate concern about what will happen if agreement is not reached and the issue in question has been corralled at the UK level.

The alternative route—it is the direction in which the Parliament seems to be heading—is to bring the common frameworks back to the devolved level and then work together to create and build up common frameworks from that point. It is regrettable that, although different people have been able to put forward their vision and perspective and argue their case, any move to bring people together to negotiate and develop those issues has been missing. That is the problem.

The Convener: The issue of trust was discussed in the previous evidence session.

12:15

Robin Parker: Trust is not the issue that I am highlighting; rather, the issue is how we develop and manage our shared resources together. We have a starting point but, given the different visions, where will we end up? The process and the nitty-gritty of working things out and having disagreements about what to do are important. The withdrawal bill has prevented that process from starting in earnest, because we have returned to dealing with fundamental constitutional issues and the emphasis is on figuring those out so that all of us—stakeholders, parliamentarians and Governments—can get into negotiating the meat.

Daphne Vlastari: I echo Robin Parker's points. Some of the academics have, in their written submissions, explicitly mentioned the issues with clause 11. Once relevant amendments are tabled in the House of Lords on how to resolve the differences of opinion between the Scottish Government, the Scottish Parliament and the UK Government, we will be able to move forward much more constructively. Where the powers lie and all those other issues flavour and colour any discussions that we are having on UK or common frameworks and the relevant governance bodies.

The Convener: It is not just the Scottish Government that has concerns.

Daphne Vlastari: Indeed, the Welsh have concerns, too.

Andrew Midgley: The relationships between the Governments interplay with how and the extent to which the Scottish Government has proceeded. That raises the issue of trust, which you mentioned, convener. I get the sense that the Scottish Government hears some of the pronouncements from Westminster and then has to spend a huge amount of time trying to work out what it means. It has to work behind the scenes to get the detail that would enable it to formulate a position.

Although the Scottish Government does not appear to be as far ahead in its thinking, circumstances mitigate some of that. There is some reticence to develop thinking until we know more about the shape of where things might be going. There is logic to that position, but it does not prevent DEFRA from developing its thinking. The worry is that it will shape the conversation if we are not at the table.

The Convener: I thank all the witnesses for their time this morning. Your contributions have been incredibly useful.

I suspend the meeting briefly to allow the panel members to leave.

12:17

Meeting suspended.

12:19

On resuming—

Subordinate Legislation

Electricity Works (Environmental Impact Assessment) (Scotland) Amendment Regulations 2017 (SSI 2017/451)

The Convener: Item 3 is subordinate legislation. Further details on this negative instrument can be found in paper 3.

Are there any comments on the regulations?

Mark Ruskell: I do not want to significantly delay the regulations passing through Parliament, but there are a number of questions to be asked and a degree of clarity required about the change, particularly in terms of how a significant adverse effect is dealt with in the environmental assessment process.

I understand that the minister has indicated his intention to come to the committee to answer questions. Therefore, I look to you, convener, to see what options there are for us to get more clarity about what the statutory instrument is intended to do, how the EIA process works and what we are talking about in relation to changes to offshore wind farm consents that might be considered under the proposed simplified regulatory process.

Richard Lyle: We are talking about four large-scale offshore wind farm projects that received consent in October 2014 and faced various serious delays because of judicial review. In his letter, Paul Wheelhouse says:

> "I want to make clear that I regret the necessity to breach the 28 day rule, which ordinarily gives time for the Committee to consider the instrument."

He also acknowledges that the situation is "far from ideal". Maybe we should, as Mark Ruskell suggests, ask the minister to come along for a discussion at some point. Still, I support the instrument.

The Convener: It is worth saying for the record that the minister wrote to the committee to make that offer. We may want to avail ourselves of the opportunity.

Claudia Beamish: I support what Mark Ruskell said. In the interests of sustainable development in our marine environment, it would be helpful if the minister could come before the committee as he has offered to do. The issue is the balance and appropriateness of environmental protection and its analysis coupled with how we pursue our climate change targets through offshore wind. It is an important issue and there is public interest in it, so it would be helpful if the minister came to the

committee, but I do not want to delay the regulations in any way.

The Convener: I am getting the sense that the committee wants to invite the minister along to answer the valid questions that have been raised here today but that we do not wish to make any recommendations on the regulations. Is that the case?

Members *indicated agreement.*

The Convener: At our next meeting, on 30 January, we expect to consider oral evidence from the Scottish Association for Marine Science on its report on the environmental impact of salmon farming.

12:23

Meeting continued in private until 12:59.

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