OFFICIAL REPORT
AITHISG OIFIGEIL

Culture, Tourism, Europe and External Relations Committee

Thursday 15 March 2018

Session 5

The Scottish Parliament
Pàrlamaid na h-Alba

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CULTURE, TOURISM, EUROPE AND EXTERNAL RELATIONS COMMITTEE
7th Meeting 2018, Session 5

CONVENER

*Joan McAlpine (South Scotland) (SNP)

COMMITTEE MEMBERS

*Claire Baker (Mid Scotland and Fife) (Lab)
*Jackson Carlaw (Eastwood) (Con)
*Mairi Gougeon (Angus North and Mearns) (SNP)
*Ross Greer (West Scotland) (Green)
*Rachael Hamilton (Ettrick, Roxburgh and Berwickshire) (Con)
*Richard Lochhead (Moray) (SNP)
*Stuart McMillan (Greenock and Inverclyde) (SNP)
Tavish Scott (Shetland Islands) (LD)

*attended

THE FOLLOWING ALSO PARTICIPATED:

Ian Davidson (Scottish Government)
Dr Matias Margulis (University of Stirling)
Dr Gracia Marín Durán (University College London)
Luke McBratney (Scottish Government)
Liz Murray (Global Justice Now)
Michael Russell (Minister for UK Negotiations on Scotland's Place in Europe)
Peter Ungphakorn

CLERK TO THE COMMITTEE

Katy Orr

LOCATION

The Robert Burns Room (CR1)

Scottish Parliament

Culture, Tourism, Europe and External Relations Committee

Thursday 15 March 2018

[The Convener opened the meeting at 09:04]

Decision on Taking Business in Private

The Convener (Joan McAlpine): Good morning and welcome to the seventh meeting in 2018 of the Culture, Tourism, Europe and External Relations Committee. I remind committee members and members of the public to turn off their mobile phones. Any committee members using electronic devices to access papers should ensure that they are turned to silent.

Agenda item 1 is a decision on whether to take agenda item 4 in private. Do members agree to take that item in private?

Members *indicated agreement.*

Withdrawal from the European Union (Negotiations)

09:04

The Convener: Agenda item 2 is an evidence-taking session as part of our inquiry on article 50 negotiations and the United Kingdom's future trade policy. I welcome today's witnesses: Peter Ungphakorn, who is a former senior information officer at the World Trade Organization secretariat; Dr Gracia Marín Durán, who is a senior lecturer in international economic law at University College London's faculty of laws; Dr Matias Margulis, who is a senior lecturer in political economy at the University of Stirling; and Liz Murray, who is the head of Scottish campaigns at Global Justice Now.

I remind members and witnesses that we have a lot of ground to cover and our time is short, so it would be helpful if questions and answers were as brief as possible.

I will approach the issue chronologically and look first at the proposed transition period. The Council of the European Union's guidelines on transition propose that the UK will continue to participate in the customs union and the single market. Is the UK likely to get agreement from the EU and third countries to continue participating in the EU's free-trade agreements with those third countries? My understanding, which is borne out by other committee evidence-taking sessions, is that some third countries might object to continuing their relationship with the UK, because the UK would no longer be a legal party to the treaty that it signed with the EU. What is your opinion on that concern?

Peter Ungphakorn: I am not a lawyer, so I do not know entirely how the legal aspects of that situation would work, although I have read and heard people talk about other countries wanting to improve the conditions that they have under their free-trade agreements. In other words, they see Brexit as an opportunity to gain more from the UK. However, I do not necessarily see it in that way. It is about countries trying to preserve their trading rights in a new context, which is the UK's separation from the EU. Provided that both sides understand that and are willing to negotiate in good faith, I would have thought that it would be possible to do that.

The real question is how quickly that can be done and whether it can be done in two years. That will depend on a number of things. A lot of work will be involved in taking over, rolling over or grandfathering—whatever you want to call it—the , and how quickly that is done will depend on the

resources that are put into that and how stretched the UK and other countries are in the negotiations.

The Convener: My question was not so much about the grandfathering of the free-trade agreements, which is an important area to explore, as about what happens in the transition period. My understanding is that, although the UK would be bound by EU free-trade agreements during the transition period, third countries would not necessarily be bound by them.

Peter Ungphakorn: Yes. I would have thought that they would have to give their agreement to that.

Dr Gracia Marín Durán (University College London): I will provide the legal answer to that question. Politically, third countries might object, but legally that will depend on the individual agreement. In the most recent EU FTAs, such as the comprehensive economic and trade agreement with Canada, the territorial application of those agreements is to any territory where the EU treaties apply. In so far as the EU treaties will continue to apply to the UK during the transition period, legally speaking, FTAs will also apply, because the UK will continue to be a territory in which the EU treaties apply.

The agreement with Canada is one of the most important ones for the UK, given current trade flows, and such an agreement applies not only to the EU and its member states but to any other territory where the EU treaties apply. During the transition period, there will be no problems legally, because the FTAs will continue to apply. The question is whether, during the short transition period of two years or less, the UK will have the capacity to renegotiate these FTAs in practical terms or the legal capacity to do so.

Given what I have just said about the fact that the treaties will continue to apply, the UK will still be bound by the EU common commercial policy, which, as we know, is an EU exclusive competence. The Commission's draft withdrawal agreement of February 2018 is rather ambiguous on whether, given that the common commercial policy is an exclusive competence of the European Union—only the EU has the power to negotiate agreements—the UK will have the capacity to negotiate agreements during the two-year period. The UK will definitely not have the capacity to conclude any agreements.

The question of whether the UK has the capacity to negotiate must be clarified further, because article 124 of the draft withdrawal agreement is ambiguous. It says that the UK cannot conclude any new international trade agreements during the transition period unless it is authorised to do so by the European Union, because that is an area of its exclusive competence. The question is whether that is physically possible within such a short time and whether it is legally possible—whether the UK will have the capacity to negotiate and conclude something in an area that will continue to be the exclusive competence of the European Union during the two-year period.

Jackson Carlaw (Eastwood) (Con): I have a point of information, convener. It is being reported in the press this morning that that agreement has been secured and will be part of the outcome of the discussions that will take place next week.

Dr Marín Durán: Are you referring to the draft withdrawal agreement?

Jackson Carlaw: The United Kingdom has secured permission to undertake negotiations in relation to new trade agreements during the transition period. That is what is being reported this morning.

Dr Marín Durán: That may be what is being reported, but the draft withdrawal agreement does not say that. That is why it is a point worth clarifying in the actual agreement. Article 124 of the draft withdrawal agreement says that the UK cannot be bound by any new agreement—that does not mean that it cannot negotiate such an agreement, but it means that it definitely cannot conclude such an agreement during the two-year period—unless it is empowered to do so by the European Union. It is an area of EU exclusive competence, which means that only the EU has the competence to negotiate and conclude international trade agreements. It is worth clarifying article 124 and what is in the agreement rather than what is reported.

Jackson Carlaw: However, that will be part of the negotiation and it is being reported that that is the outcome—in other words there has been progress on the properly agreed transitional arrangement.

Dr Marín Durán: That may be so, but the text that I have seen does not say that so clearly.

Jackson Carlaw: Not yet.

The Convener: I want to ask about the tariff rate quotas. In October, the EU and the UK proposed that the future TRQs of the UK and of the EU, which would exclude the UK, should be calculated by apportioning the EU's existing commitments. We know that several countries have written to the WTO expressing concern about that. Can you say a little bit about that and about how it is likely to be resolved, if at all?

Dr Matias Margulis (University of Stirling): Thank you for the invitation to speak to the committee today.

As you know, several WTO members, including the US and Canada, raised concerns about the method that the EU and the UK are proposing to split up the tariff rate quotas. We can take three points from that: first, they are unhappy with the current method, which is a technical matter; secondly, and as a larger point, they are concerned about losing what they view as the full value of the TRQs; and, thirdly, that the proposal could not be achieved through technical rectification and would have to be approved by all WTO members. It is a clear signal by the WTO members that there is a line in the sand, that a technical option is no longer on the table and that the matter will be referred for members' approval.

That introduces several issues that need to be taken into account, such as what the new method will be and how WTO members will be consulted along the way, given that they want input into the process. There is also the broader question of whether splitting up the TRQs will be sufficient or whether the UK, the EU or both will have to offer something in addition in order to gain WTO member agreement. The matter has turned out to be a lot more complicated than was originally assumed.

09:15

The Convener: It has been quite a long time since Gracia Marín Durán and Matias Margulis were last here. It must be well over a year since you gave evidence to the committee. At that time, we talked about the UK's letter to the car industry, which suggested that the industry would be okay as a result of future trade deals. More recently, in her Mansion house speech, the Prime Minister talked about what has been described as a pick-and-mix approach to regulations for different sectors—the Government will adopt some regulations and not others. Will you share your views on that particular speech and the idea that recognition and mutual recognition can be approached in a pick-and-mix way?

Dr Marín Durán: There is a bit of a misunderstanding around the way in which mutual recognition is framed in the debate. The fact that the UK will not engage in mutual recognition does not mean that it will not have to comply with EU regulations—it will have to comply with regulations anyway, because there is no way of exporting to the European Union free from European regulation. That paradigm does not exist. If the UK wants to export agricultural products or cars to the European Union, it must comply with the relevant product standards. Mutual recognition simply means that a country's regulation will automatically be considered compatible with the regulations of the EU.

Legally speaking, it is feasible for the UK to pick and choose whether to have an understanding of mutual recognition in certain sectors as opposed to others, but I am not sure whether that makes sense, given that not having mutual recognition does not mean that the UK will not have to comply with EU regulation. The UK will always have to comply with EU regulation, because any country that exports to the EU has to comply with whatever regulations are in place for the product or services concerned. Mutual recognition just means that such processes are made easier, because the UK's own regulations will be automatically recognised as being compatible with the EU's, just as they are currently within the internal market. Although it is possible to pick and choose, I am not sure whether that makes sense, because mutual recognition simply facilitates the process of having to comply in any event.

The Convener: Thank you very much.

Claire Baker (Mid Scotland and Fife) (Lab): I want to ask some questions about establishing the UK's position at the WTO, given that that position will need to be renegotiated. We are interested in what you think might be the particular areas in which WTO members might push for concessions from the UK. Questions have been raised around common agricultural policy payments and their future under renegotiated terms. Where might the pressure points be in those discussions?

Peter Ungphakorn: For technical reasons, tariff rate quotas are the biggest problem. As I said, it is a question not necessarily of countries seeking concessions, but, as Matias Margulis just said, of countries trying to protect what they consider to be the value of access. At the moment, under TRQs, a country has a quota of, say, 100,000 tonnes of a product and it can export that anywhere in the EU. If the UK was split from the other 27 EU countries, the fluidity and freedom of exporting to any part of the bloc—of being able to choose whether to export to Germany one year and to the UK the next year—would be lost. That is WTO members' objection to the proposal of tariff rate quotas. They are concerned about preserving what they consider to be the commercial value of access to those quotas.

A technical issue that nobody had thought about has also come up. Conceptually, it is simple: a country has a quota of 100,000 tonnes of something, of which 30 per cent goes to the UK and 70 per cent goes to the EU. That is the common approach of the UK and the EU. However, it turns out that there is no reliable data for that because, although the tariff quotas are defined at a very detailed level in relation to the products, the consumption data, which is how we know how much of the product has ended up in the UK or the EU, is much broader. There is a

problem with taking a figure from a broad category, such as beef, and saying that, for a particular type of beef, such as high-quality beef, the ratio should remain 30:70.

Delegates told me that the UK and the EU had suggested to countries such as New Zealand and Australia that, if their industry had better figures than theirs, they would like to hear them. However, it has taken months for the UK and the EU to come up with such figures.

Regarding the CAP subsidies—we are talking only about trade-distorting subsidies that are directly related to prices and production—the whole of the EU uses only about 8 per cent of its entitlement. As the trade-distorting subsidy is small compared to the entitlement, there is a lot of room for manoeuvre. I do not see that dividing up how much of that should be the UK's and the EU's entitlements would be much of a problem in the WTO, because more than 90 per cent of the entitlement is unused, leaving huge room for manoeuvre. If that were to become a problem, that would suggest there was a lot of ill will in the negotiations, which I hope people will avoid.

Services are the other area in which there will need to be decisions on how to deal with the UK's commitments. That work should be fairly straightforward although, like many things that we say are straightforward, it will be fairly time consuming because there is a lot of detail. However, it ought to be fairly easy to extract the UK's commitments from those of the EU.

There are also commitments in the WTO on Government procurement. Unlike in other areas of work in the WTO, to which the UK signed up as the UK as well as the EU, the Government procurement agreement was signed only by the EU. There will have to be a legal way of dealing with that in order that the UK can have its own commitment that is separate from that of the EU.

Claire Baker: You talked about 8 per cent of the entitlement being used and flexibility around the remaining 90-plus per cent. My knowledge is probably lacking here, so will you explain why the amount of remaining entitlement is so large? Why is only such a small proportion of what is available being used?

I have a linked question on state aid. When there are discussions on leaving the EU, it is argued that our trade deals are too restrictive. In the Parliament, we have discussed the restrictions that state aid places on us, including on film studios and our industry base, where Government intervention could be positive, if it were allowed. The argument is always made that state aid rules prevent our making such interventions. Is there any room for manoeuvre? It is suggested that there would still be state aid restrictions under WTO membership. Would they be as restrictive as they are now or are they likely to be more flexible?

Peter Ungphakorn: As I understand it, the European Union changed the support—what the WTO calls domestic support—that it was giving to agriculture from coupled payments, which are directly related to production and prices, to decoupled payments, which are fixed and not related to how much the farmer produces each year. The change was partly because of the budget and partly because the EU was anticipating an outcome in the WTO agriculture negotiations that would have reduced countries' entitlements. That did not happen, but the EU went ahead and made the change anyway. That is the reason why the EU is using only about 8 per cent of its entitlement for domestic support.

I am not an expert on state aid, but as far as the WTO is concerned, the restrictions are mainly to do with whether the state aid has an impact on exports; if it is aid in general, the WTO would be silent on it.

Dr Marín Durán: I will clarify that. EU rules on state aid are far more restrictive than WTO rules for a simple reason: the basic rule in the EU is that there is a general prohibition on state aid unless it is authorised by the Commission. In the WTO, you are not generally prohibited from providing state aid—or subsidies, as the WTO calls them—except in relation to those that affect exports or are contingent on exports. You do not have to be authorised to provide subsidies; you provide them, and if other members consider that there is a problem they can challenge you. The WTO system is more flexible because you do not have to seek a priori authorisation from any entity in WTO, there is a lack of a general prohibition but also in terms of monitoring or supervision of state aid.

Dr Margulis: To return to the original question and the types of concessions, we should keep in mind what Peter Ungphakorn said about it depending on what signals the UK puts out about its likely offer and what tariff level it is likely to set post-Brexit. Will it keep its tariffs the same as the EU's or will it lower them slightly? What happens will change how other members perceive whether the value of their existing arrangements is being diminished. Other countries are looking at the situation in terms of diminishment of what exists on the table. That will be largely defined by the future UK-EU relationship, and because we do not yet know what that will look like, there is a lot of uncertainty.

On the agreement on Government procurement, members should recognise that many Scottish institutions are listed in the WTO subnational schedules as being subject to the agreement. It might be worth while for members and their staff to look at which specific Scottish institutions, such as

Scottish Enterprise, are in the WTO Government procurement agreement, and to consider whether there are other institutions that you might want to add to any revised schedule for when the UK joins the agreement individually. There are issues to consider at a Scottish level.

Ross Greer (West Scotland) (Green): Yesterday, the European Parliament passed an interesting resolution on the terms of a future UK-EU trade relationship, particularly in relation to tax. It says:

> "The resolution makes clear that any future trade deal must be dependent on UK adherence to EU standards on taxation, including anti-money laundering legislation, exchange of information, anti-tax avoidance measures and must address the situation of its overseas territories."

That is a combination of the UK having to continue to adhere to current rules as an EU member state and having to adhere to the rules following any changes to the status quo. It is relatively normal for the EU to make such demands when it is negotiating trade deals. What impact will that have on the negotiation of the future UK-EU relationship?

Peter Ungphakorn: That is not my area of expertise, so I defer to colleagues.

Dr Marín Durán: As you say, the EU's concern in the future trade relationship about a race to the bottom not only on taxation, but on social or environmental legislation, where it is to be expected that the third country would lower standards in order to obtain an unfair competitive advantage—that is, unfair from the EU's perspective; whether it is unfair is open to discussion. That has been a concern with all the countries with which it has concluded a free-trade agreement and it will be a concern with the UK, too.

The EU will surely demand that the UK adheres to minimum standards not only on taxation, but on social and environmental matters, and not lower them in order to obtain a trade advantage or to attract foreign direct investment. The EU has already demanded that from other countries with which it has concluded free-trade agreements, such as Canada and Korea, even though it trades less with those countries than it does with the UK.

The UK remains one of the EU's main trading partners, but the more economically independent the UK wants to be, the higher the EU demands will be in order to keep the playing field level in regulatory terms.

Ross Greer: The UK's overseas tax haven territories are unique and are a result of our particular history. Are there any comparable relationships between the EU and other third countries that have their own overseas territories with similar reputations as tax havens?

09:30

Dr Marín Durán: I would not know.

Ross Greer: Would it be realistic to assume that, in the event of the trade deal being negotiated, it would be dependent on the tax status of our current overseas territories changing quite significantly, to bring them in line? I understand that, at the moment, those territories have been able to continue operating in the way that they have because the UK is an EU member state, but they are not part of the EU. If the UK were a third country in an agreement with the EU, would those territories also have to be brought in line?

Dr Marín Durán: I do not think that we have a comparable situation, because all the overseas territories involved relate to the other member states. I cannot think of an example of a third country in a comparable situation with which the EU currently has a free trade agreement. The only comparable situation that I can think of relates to other member states, but obviously that does not help.

Richard Lochhead (Moray) (SNP): I would like ask about timescales and the capacity for negotiations. You have talked about the two-year transition period and the concluding deals that will come after that, and during that period the UK will have to negotiate a continued relationship with the EU—never mind negotiating trade agreements with the rest of the world. Does the UK Government have the capacity for all that? How long would it take? I presume that for big countries such as the US, it could potentially take several years.

Dr Marín Durán: It has taken years for the European Union to negotiate all the agreements, and the EU is an entity that has a built-in capacity for such negotiation. Commercial policy became an exclusive competence of the EU in the 1970s, which means that the EU has about 40 years' experience in negotiating trade agreements on behalf of an ever-growing trading block, which gives it an awful lot of bargaining power vis-à-vis third countries.

I have doubts about whether the UK can achieve all that within two years, because, as we have been saying, every other negotiation depends on what is negotiated with the EU. What all the other third countries will expect or want to change in their bilateral free trade agreements will very much depend on what the UK and EU negotiate. The terms of trade between the UK and the EU will affect the terms of trade between everyone else. That is assuming that the UK leaves the customs union. If the UK stays in the customs union then there is no problem and things

will stay as they are. However, it appears that that is no longer an option.

Assuming that the UK leaves the customs union, what it negotiates with the EU will affect everyone else. That applies to both the bilateral free trade agreements and the negotiations in the WTO over the tariff rate quotas, because as Matias Margulis was saying, it is no longer a technical change, but requires the involvement of the other WTO members. It has been recognised by the UK and the EU in their joint letter that the tariff rate quotas will require negotiations in the WTO or at least what they call "active engagement".

Aside from the point about how such quotas are distributed between the UK and the EU, the tariff quotas currently work in such a way that they do not include exports from the EU to the UK and vice versa—that is intra-EU trade of agricultural products. Exports from the EU to the UK and from the UK to the EU are currently excluded from the tariff rate quotas, which apply only to third countries such as those that have raised the objections in the WTO. What will happen post-Brexit? Imagine that we agree a formula on how to divide the quotas—let us say 50:50, to make things easier. Will the EU also have access to the UK's 50 per cent share, given that under that arrangement the EU would now be a third country in the WTO? Will the UK have access to the EU share? That is the problem.

The time is limited and the capacity is limited, too, because for the past 40 years, the EU has been doing all that on behalf of not only the UK, but every other member state. In addition there is the fact that every other negotiation depends on what the UK and the EU agree first. It is challenging.

Dr Margulis: The capacity issue cuts two ways. First, there is the issue of bargaining capacity and the extent to which the UK can develop capacity to bargain, revise current agreements and negotiate new ones. Secondly, there is the issue of the implementation burden that comes with taking on a lot of the current practices and regulatory work that the European Commission does. The amount of resources that need to be pumped in, just to have a baseline capacity, are quite substantial.

It is probably not very realistic to imagine that the UK can pursue a highly ambitious agenda in the short term, simply because of the learning curve and the fact that you have to get people in who have to learn to do the job, which cannot be done in two years. As Peter Ungphakorn was saying, it takes three or four months to get some figures on tariff rate quotas. That gives you a sense of the scale of the speeds at work, so two years seems pretty optimistic.

Dr Marín Durán: It is now less than two years: from March 2019 to 31 December 2020 is not even two years.

Peter Ungphakorn: I agree. My experience of watching negotiations is that something unexpected always comes up to delay things.

Richard Lochhead: The UK expertise in negotiating may be limited to UK citizens who work for the European Commission—they are the ones who have experience negotiating through their work for the European Commission. Will they be obliged to continue to work for the EU during the transition period, or will the UK Government be able to call them back to work as part of the UK negotiating team? If not, I cannot see how the UK will be able to have a negotiating team.

Dr Marín Durán: In the withdrawal agreement, there is something about that and what will be the status of current UK officials of the EU or the European institutions. I have not read that in detail, but there is an attempt to regulate that in the withdrawal agreement.

One should not forget that some of those UK nationals have applied for nationality of other member states and have obtained it. I used to be an EU trade negotiator, and some of my former colleagues have applied for Belgian nationality and so on. That is not very difficult. It is pretty much an individual's choice whether they want to come back to the UK. If they do not want to come back, it is not really possible to force them because during the transition period they can still apply for Belgian or Luxembourg nationality, given that if they have been working for the EU institutions they have been resident in those countries for many years already. They can say, "Well I am Belgian now and I will stay here". It would be difficult to force those officials to come back.

I agree that much of the EU capacity is made up of great trade negotiators and lawyers from the UK, who are currently negotiating for the EU and defending the EU in the WTO.

Peter Ungphakorn: Last week, in the Public Accounts Committee of the House of Commons, the permanent secretary at the Department for International Trade, Antonia Romeo, and her number two, Crawford Falconer, were asked that question about capacity. They gave fairly detailed answers. It is interesting to hear what Crawford Falconer said about what is needed for negotiations. I suggest that that is worth looking at. The bottom line was that they felt that they had enough people, that they were training them well enough and that Crawford Falconer's experience would help with that.

Richard Lochhead: They would say that.

Rachael Hamilton (Ettrick, Roxburgh and Berwickshire) (Con): I am sorry to go on about tariff rate quotas, but it is an interesting subject, because it will affect agriculture around the world. Could the UK benefit from some of the third-country trade deals with the EU that are currently in discussion or that have already been completed? Is it not just a political point or a protectionism point from each side?

There are two points here. We can either replicate or replace those trade deals that, through the EU, we currently have with third countries or, we could just do what Norway has done and take agriculture out of trade negotiations and then separately negotiate free-trade agreements outwith Europe?

Dr Marín Durán: In purely legal terms, the UK cannot remove the tariff rate quotas that it is currently committed to providing in the WTO. The UK is bound to that in the EU schedule. The question is what share the UK will take from the EU. I agree with Matias Margulis that that is no longer something that the UK and the EU can agree bilaterally, because it is not just a technical change but a change that affects other countries, so the UK and the EU will have to engage in negotiations with at least those countries that currently benefit from the tariff rate quotas. The ones that the UK is committed to in the WTO cannot be taken out completely.

Free-trade agreement concessions can be withdrawn completely, because those are subject to negotiations. You could argue that closing your market makes sense to you but, were you to do so, third countries would also close their markets to UK exports, whether in agriculture or other sectors. Whether that would make sense overall is not an assessment that I can make.

Trade negotiations work both ways. If you were to take away something from third countries, they would want to rebalance concessions somewhere else. If you are exporting a lot of agricultural products to them, the rebalancing might be in the agriculture sector, but it might be in another sector.

The balance of concessions in free-trade agreements will be reopened to negotiation. If you put in more or take out something, that allows the third country to do exactly the same. The more that you demand, the more that they will demand, and vice versa.

Peter Ungphakorn: I will elaborate on what Gracia Marín Durán has said. We have to distinguish between two activities. One activity is preserving the legal status quo, as is happening with the schedule of commitments in the WTO, including the TRQs. It has emerged that the concept of status quo is a little bit more complicated than it sounded, because it is not necessarily just a question of splitting up existing quantities, as we also have the notion of the value of market access and the commercial value. However, that should be a comparatively simple exercise, at least in the sense that it need not become too political.

The other activity relates to changing the status quo, should you want to do so. Gracia Marín Durán said that you cannot take tariff rate quotas out of the WTO. That is true in the sense that you cannot remove the quota that gives a low tariff, because that is a commitment. However, you can take tariff quotas out of the WTO by saying that the low tariff would apply across the board, without limits. That can be done through commitments in the WTO or unilaterally. Even if you had a tariff quota of 100,000 tonnes duty free, you could unilaterally expand that without violating WTO commitments, because you are being less protectionist than you were and, in the WTO, you can always be less protectionist than the commitment that you have made in the WTO.

There are other questions. Rachael Hamilton mentioned Norway. It may have taken agriculture out of the relationship with the EU in some respects, but the Organisation for Economic Co-operation and Development figures show that Norway and Switzerland are the two most protectionist countries in the world on agriculture. Is that a good model to follow?

The Convener: How much power will the UK have to negotiate trade agreements outside the EU?

Dr Marín Durán: Do you mean after the transition period?

The Convener: Yes.

Dr Marín Durán: It will have full power and full autonomy.

The Convener: You described the balance in the negotiation process. As a negotiator outside the bloc, how much power will the UK have in trying to get a good deal from the different countries?

Dr Marín Durán: In my view—I might be wrong—it will have less power than it does now. Let us look at the concessions in the free-trade agreements and imagine that we do not want to leave them as they are, but instead want to reopen everything for renegotiation. From a third-country perspective, those concessions were not negotiated with the UK market; they were negotiated with a market in which any exports to the UK—that is, goods crossing its border—meant automatic access to a market of 27 additional countries. That value will be lost, because it will just be the UK market.

The value of any concessions in free trade agreements has changed tremendously from a third-country perspective because, if I am exporting my bananas from Ecuador to the UK, I can no longer automatically access the whole of the EU market. You can expect third countries to demand and to review the concessions accordingly, because they were made to the UK under the assumption that anything exported to the UK has automatic access to the European Union. If the UK leaves the customs union—as it seems that it will—that automatic access is lost.

09:45

Stuart McMillan (Greenock and Inverclyde) (SNP): A few moments ago, Peter Ungphakorn said that, in terms of the wider political context, some things will happen that will lead to change. How important is the wider geopolitical situation to the UK's trade negotiations and trading operations post-Brexit?

Peter Ungphakorn: How long have you got? The most difficult example to look at is a possible UK-US free-trade agreement. Can anyone tell what US trade policy is and what it would negotiate with the UK? It is very complicated; we just do not know what it is.

Gracia Marín Durán spoke about the power of the UK to negotiate with others. The matter is complicated, but I agree with those who have said that the UK's power to negotiate with other countries as a member of the EU is greater than its power to do so on its own. For example, India wants to export to 28 countries, so it will give priority to negotiating with those 28 countries—or 27, post-Brexit—rather than one, unless it has a product that it is particularly interested in selling to the UK market. That is a generalisation, and there will be differences in product areas and in countries and so on.

Matias Margulis may have an opinion on this, but I would have thought that Canada would be more interested in getting a good deal with the EU through CETA rather than in getting a Canada-UK deal.

Dr Margulis: I agree with all the previous comments. The UK has put itself in a pickle in that it has publicly said that it wants to negotiate many agreements as quickly as possible. Very few countries do that; they know that they must sequence and spread out the agreements over time, because they can handle only so many at the same time. The fact that the UK has said that it is willing to take deals as quickly as possible has put it in a situation in which it will have less bargaining leverage, because the political imperative is much greater at the UK end to negotiate agreements than it is for the other countries.

On the broader geopolitical issues, in addition to the unknown US trade policy, there are questions about the future of the WTO and, now that it seems to be back on, the trans-Pacific partnership. There is a lot of movement. Some would suggest that free-trade integration is picking up again, but in other areas things are being put into reverse. The global trading and geopolitical environments are very unstable, and the UK is partly contributing to that instability.

It is important to remember that the UK has introduced instability into the global market through Brexit. That will have unforeseen consequences down the road, but it might change how other countries view the relationship with the UK and the speed at which they might want to enter into an agreement with it.

Dr Marín Durán: Sometimes, because of the use of expressions such as "grandfathering" and "rolling over", the feeling is being created that the UK must retain all the 40 or 50 free-trade agreements that the EU has with third countries, but it does not have to. After the transition period, the UK can come out of those agreements and trade with those countries on WTO terms. You will tell me that WTO terms are worse than those in a free-trade agreement and free-trade agreements are concluded precisely to do better than the WTO. That is correct but, given all the capacity challenges that we are discussing, is it really wise to try to renegotiate 50 free-trade agreements in less than two years?

I am not an economist, but your trade flows with the rest of the world are shown in the Scottish Parliament information centre briefing on the issue. Does it really make sense for you to quickly renegotiate the agreement with Canada when Scotland's trade flows to Canada are less than 1.6 per cent of its total exports? You could quickly renegotiate that deal in two years and get a bad deal for 1 per cent or so of your exports. That needs to be thought about.

There is no obligation on the UK to retain those 50 free-trade agreements after the transition period. During the transition period, they will be retained. Given the limited time and capacity issue, the UK should take that time to rethink which of those free-trade agreements are worth retaining. In situations where 1 per cent or less of your trade is with a third country, you could be better off trading in the WTO for the time being and then, when you have more time and capacity, engaging in free-trade agreement negotiations. That is just a suggestion. There is no obligation to roll over.

Stuart McMillan: Does Liz Murray have any comments?

Liz Murray (Global Justice Now): I do not have anything on the technical side, but I will mention the Trade Bill, which will have to go through a process of legislative consent here. Speaking on behalf of Global Justice Now and as part of the trade justice Scotland coalition, we are suggesting that the Trade Bill needs to be amended to include some level of parliamentary scrutiny.

The UK Government believes that those third-party deals will be cut and pasted, so there is no need to include provisions for allowing parliamentary scrutiny of them in the bill. From listening to the evidence that was given to the House of Commons Public Bill Committee on the Trade Bill and from what I have heard here, it sounds as though that is not a correct assumption. Certainly, at least some of those deals will be opened up for renegotiation. It is therefore very important that the Westminster Parliament and the Scottish Parliament have a say, because of the different potential impacts in the different parts of the UK, which I could say a little bit more about.

The Convener: I think that Mairi Gougeon has a question on that.

Mairi Gougeon (Angus North and Mearns) (SNP): That ties in perfectly with what I want to ask Liz Murray. I want to tease out some more from the trade justice Scotland coalition submission. I attended an event in Parliament a wee while ago at which we discussed some of the issues with the Trade Bill in particular. I want to get Liz Murray's thoughts on some of the free-trade agreements that we are part of at the moment. Where do you think that the problems in those have been? Your submission says that there is "a clear democratic deficit". How do we best go about trying to resolve that through the Trade Bill?

Liz Murray: I am not able to give you details on specific trade deals that we are party to as part of the EU at the moment, because we have been looking at the new generation of bigger trade deals—the transatlantic trade and investment partnership is the classic example, and then CETA—and, through those, the encroachment into a public policy space that we have seen. The deals are moving away from tariffs and quotas—away from the customs barrier, if you like. We need to consider how the mechanisms in those trade deals could be used, such as the investor-state dispute settlement mechanism or even the investor court system. They could be used to sue Governments for loss of profit through public policy decision making, for example, which would have a chilling effect.

That is influencing our view that it is vital that parliamentarians have a say. They need to get it into the current Trade Bill so that if parliamentary scrutiny is needed for the transfer of those trade deals that the UK is part of as a member of the EU, it is there. It would also set a precedent for future trade deals. Because of what we saw with the transatlantic trade and investment partnership, we are particularly concerned about a possible future trade deal with the US.

There was another part to your question. I am sorry but I did not note it down.

Mairi Gougeon: That is fine. What do we need to see come out of future agreements? I would also like to tease out a bit more about what you said about the wider impact on other public policy areas as a result of some of the agreements that might not have been considered so much as part of the Trade Bill.

Liz Murray: Do you mean where public policy has had to change?

Mairi Gougeon: Yes. I am asking about the wider impact of some of the agreements and where you have seen changes in other areas.

Liz Murray: There are many examples around the world in which Governments have had to put their public policy measures on ice, if you like. In yesterday's news, there was the example of Philip Morris having sued the Australian Government. Philip Morris did not win but the case took six or seven years or so, and it is estimated to have cost the Australian Government $50 million in legal costs, although that is not a certain figure. That case had a chilling effect on countries that were thinking about implementing a policy of plain packaging for cigarettes, particularly New Zealand, which held on and waited for an outcome.

There can be huge costs to Governments through that system and direct effects on the public policy space. An example that might be transferable to the interaction between a national and a subnational Government is the Lone Pine Resources case. Lone Pine is suing the Canadian Government for a decision by the Quebec Government to put in place a moratorium on fracking.

I will relate that case back to here, but I am talking about these things only to back up the evidence for why we think that parliamentary scrutiny is really important, and for why we think that the Scottish Parliament should have some say over future trade deals. Well over a year ago, a parliamentary question was asked about what would happen if the UK Government were to be sued under a trade deal for policy differences between the devolved Administrations and the UK. The answer was that the claim would be brought

against the UK for a difference in policy under investor-state dispute settlement.

If the UK Government fought the claim and lost it under an ISDS for something that relates to an act of a devolved Administration, the memorandum of understanding between the UK and the devolved Administrations would apply. That provides that the devolved Administration would be responsible for the payment of the legal costs and awards that were made by the tribunal to the extent that they arose from the failure of the devolved Administration to implement or enforce an obligation. We said in our evidence that Scotland is inextricably linked to those trade deals, so they could impact on policy in Scotland and the ability of the Scottish Parliament to take its own decisions in the interests of public health in Scotland, the environment in Scotland, and so on. There could also be financial consequences if the UK Government were to be sued under a trade agreement for differences for something that the Scottish Parliament had enacted.

At the moment, the Trade Bill has no provision for parliamentary scrutiny by MPs or the devolved Administrations. An amendment has been tabled to try to rectify that. We think it is important and that is why we suggested that the Scottish Parliament should withhold its consent until or unless the bill is amended to allow more parliamentary scrutiny.

The Convener: Matias—you have experience with negotiating in Canada, where the regional Governments were very involved. Do you want to pick up on any of the points that Liz Murray made in the Canadian context?

10:00

Dr Margulis: Over the past 20 years, as trade agreements have moved beyond the border, as Liz Murray was saying, they are no longer about tariffs—they are largely about national regulation, because the general push has been to have global convergence. That is the broader effect of trade agreements.

In the Canadian context, as it became clearer that trade agreements were having an impact on the areas of health, energy, environment, labour, policy and so on—on many areas that were, in the Canadian context, provincial areas of jurisdiction—there was a process of increasing participation over time of the provinces in the development of trade policy. The CETA case was quite exceptional in the sense that provincial Governments were part of the negotiating teams and, to a certain extent, the negotiations. They were not there for the final deals but they were part of the process along the way, largely because the provincial Governments had the expertise in particular areas.

In the Canadian context, there has always been a strong and thorough provincial consultation process to ensure that the provinces have real-time input as things are happening in the negotiations. It has worked quite well in the Canadian context to have a pan-Canadian approach but also political buy-in at all levels for any deal. That has been viewed as important.

I should note that in the Canadian context, it is very ad hoc—it is not formalised through any proper institutional mechanism. However, it is a practice that has been adopted and depending on the trade deal or the Government in power, that relationship can become stronger and more inclusive or, at other times, less so. There may be some lessons there for the devolved Governments about the mechanisms that could be put in place to ensure that information flows both ways as opposed to just being told something after the fact.

Liz Murray: I believe that the UK is quite unusual in that, in the ratification process with CETA as a member state, there is very little input at all from MPs. We do not feel as though we are asking for anything radical, in that there are many examples of other countries, including Denmark, Belgium, Germany, and even the US, having much greater interaction and much more say for different levels of government.

Peter Ungphakorn: I will just quickly clarify something in relation to what Liz Murray said. I do not want to take away from her argument—I agree with her about scrutiny and about the investor-state dispute settlement. However, although the dampening effect of the challenge on plain packaging may be the case in smaller countries, in New Zealand's case, as I understand it, New Zealand was waiting for an outcome in the WTO dispute settlement, which is not an investor-state dispute settlement—it is Government to Government.

The Convener: Thank you for that clarification. Ross Greer is next.

Ross Greer: Much of what I was going to ask about has already been covered. I have just one small additional point. Public procurement is an area that has increasingly become part of trade negotiations. It is also one of the remaining significant areas of disagreement between the Scottish Government and the UK Government in relation to the withdrawal bill and the issues of devolved powers and re-reservation and so on.

Does anyone have an example of what objective is sought when public procurement is brought into trade negotiations? Have there been any examples in which trade deals have been

negotiated that have resulted in a significant shift in how public procurement operates?

Dr Margulis: It is not my specific area of expertise but if you look at the WTO Government procurement agreement, in the renewed version of 2012, there is a really good example. You can see the specific sectors that countries have opened up. You can look at it EU member by EU member, including the UK. If you look at the schedule, you can see which bodies in each EU country have been listed as being open to Government procurement bidding from members of the agreement.

What is important about the WTO Government procurement agreement is that Governments assess a threshold for the size of contract at which it becomes open to members and then they list specific sectors in quite a lot of detail. The general thrust is to open up Government procurement to international competition. If you look more specifically at the EU schedules, you will get a better sense of the profile of, for example, English, Welsh, and Scottish bodies that are currently part of the agreement. That does not fully answer your question but I think that it is probably relevant.

Ross Greer: Absolutely. That was useful. Liz Murray might know whether I am right in saying that one of the specific concerns about TTIP was about the opening up internationally of tendering processes for health services in the UK.

Liz Murray: Yes—and other public services, such as universities and tertiary education, and potentially water services.

Peter Ungphakorn: But it is also possible to negotiate a carve-out for those.

Dr Marín Durán: Yes. That is what the EU usually does. Again, this is not my area of expertise, but the EU usually excludes what it defines as public services from its free-trade agreements. That was another division with the United States during the negotiations.

Liz Murray: It depends on whether there is a positive or a negative listing. A negative listing seems to us to be, if you like, a less secure way of doing it, particularly if things change in the future, because you are locked into that. There are important distinctions and things that concern us there.

Ross Greer: The EU, as a large and powerful trading bloc, is able to negotiate such opt-outs. Will the UK be able to do that if it is in negotiations with the US, for example? Will we have the clout to negotiate the levels of exclusions that we would perhaps want to see?

Peter Ungphakorn: It would have a price.

Ross Greer: It would be a trade-off.

Peter Ungphakorn: Yes.

Liz Murray: I add that there are differences between, for example, the NHS up here in Scotland and the NHS down in England, but it would be the UK Government that did the negotiating for trade deals—and with no Scottish input. We are suggesting that there should be a Scottish Government representative on the negotiating team, but at the moment that is not being proposed.

Ross Greer: Thank you.

The Convener: I want to go back to an area that we should, perhaps, have covered earlier—the whole issue around rules of origin. I see some looks of exasperation. [*Laughter*.]

Peter Ungphakorn: It is six minutes past 10!

The Convener: Obviously, the UK will have to apply rules of origin if it wants to have preferential access to EU markets. Can you say anything about the challenges of gearing up for rules of origin after the transition period. Is it achievable?

Dr Marín Durán: Legally speaking, rules of origin are an awful area of trade law. I never teach it in my courses because it is highly technical and complex to understand.

From a legal perspective, quite a bit of effort will be required for the renegotiation. I will discuss what the problem is, always assuming that the UK leaves the customs union, because in the customs union there are no rules of origin: products come from the EU and it does not matter how they have been assembled or whether there are inputs from Spain, Italy and so on in products that are exported from the UK. The origin is the EU market. If the UK leaves the customs union, that will have to change, and they will be products that originate in the UK.

At the moment, we have full cumulation at regional level within the EU market so, as I said, it does not matter where the inputs come from, and the good is an EU good. Will the UK be able to maintain the full cumulation that we currently have in a free-trade agreement with the European Union? A free-trade agreement will need to have rules of origin. Will the UK be able to maintain that full cumulation such that it does not matter where inputs come from and the good will be one that originates in the UK, or will the EU require, as it requires from third countries in other FTAs, that a minimum percentage comes from the UK in order for it to be a UK good that can be exported to the EU on the terms that are agreed in the FTA? That is the legal challenge for the negotiations.

There is also a practical challenge. At present, to export to the EU, a company does not have to prove any origin. It can just export, saying, “This is an EU good.” Even if we assume that the

requirements on rules of origin that are negotiated in the FTA can be met—whether there are criteria that need to be met or whether the EU will allow the UK to fully cumulate on a regional basis—companies will need to prove to the customs authorities of any of the 27 remaining EU member states that the criteria have been met.

It is time consuming not only to negotiate rules of origin, but to prove that the criteria in the rules of origin, whatever they are in the free-trade agreement, have been met. Obviously, that is a challenge vis-à-vis the current situation, because there are no rules of origin in the current situation.

Dr Margulis: The financial burden of taking that on is quite high for exporters. There is the process of training and teaching firms how to fill out the form—to put it nicely—and the cost of doing that. That is quite expensive for businesses, and will have knock-on effects on exporters' competitiveness.

Peter Ungphakorn: It is worth saying that there is another aspect. The push will come from business. I tried to look at Scottish industries to see where they might be interested in rules of origin. It is quite clear that, in the UK as a whole, the car industry has already started to push for diagonal cumulation—I will not go into that; it is explained in the documents. Is butter from Ireland used in shortbread? If it is, rules of origin for shortbread might become important if it is to be exported to Korea, for example.

As I said, the push will come from business, and the Government might find itself sandwiched between other countries that might have a view on what kind of rules of origin there should be in relation to their own domestic industry. They might say that they need them.

Claire Baker: To carry on from the question about rules of origin, what about geographical indications, which the EU has? Scotland takes advantage of them. How will they change? Do you see a change coming?

Dr Marín Durán: I was going to add a brief comment about that. GIs are also a very complex area of WTO law. There are some general rules on geographical indications in the WTO and in the trade-related aspects of intellectual property rights agreement that will continue to apply to UK relations with third countries when the UK leaves the European Union.

The issue is that the EU has been quite aggressive—to put it nicely—in its policy on geographical indications in free-trade agreements. It has required third countries to go beyond the current commitments in the WTO, which are slightly more flexible for foodstuffs than they are for wine and spirits. Basically, the WTO rule is that countries have to recognise one another's geographical indications, but there are a number of exceptions. In its FTA negotiations, the EU has tried to limit the capacity of countries to use those exceptions. Canada knows that well for Gorgonzola, Parmesan and other things. It considers that they are generic names, but the EU does not. That applies especially to cheeses and foodstuffs. I think that the UK can expect that the EU will try to do the same in a free-trade agreement and that it will ask the UK to continue to protect EU geographical indications, as it does now automatically.

Claire Baker: What will be the UK's ability to protect our own products in future trade agreements?

Dr Marín Durán: That should not be a challenge vis-à-vis the EU, because the EU is very much into protecting geographical indications. The challenge will be with third countries. The EU has had relative difficulties in convincing third countries to go beyond the TRIPS agreement in FTAs. For instance, Canada was not too happy about certain terms that it considered to be generic. With the US, it was the same for feta cheese and other geographical indications that the EU pushed for. That is particularly the case for foodstuffs; it applies less to wines and spirits, such as Scotch whisky, but it is really important for agricultural foodstuffs.

I do not think that that will be too much of an issue in the bilateral negotiations, as the EU will ask the UK to continue to do what it has done until now, and the UK will have its own geographical indications protected in the EU. The problem will be the extent to which the UK can persuade third countries. The EU has had difficulties in pushing its own agenda completely in that area.

The Convener: I am afraid that we have to end the discussion there, as our next witness is due in one minute. I thank our panel of witnesses for coming to give evidence to us. We will have a brief suspension to change the panels.

10:14

Meeting suspended.

10:18

On resuming—

UK Withdrawal from the European Union (Legal Continuity) (Scotland) Bill

The Convener: Our third item of business is an evidence session on the UK Withdrawal from the European Union (Legal Continuity) (Scotland) Bill with the Minister for UK Negotiations on Scotland's Place in Europe. The Parliament agreed to designate the Finance and Constitution Committee as the lead committee and the Culture, Tourism, Europe and External Relations Committee as the secondary committee for consideration of the bill.

I welcome the minister, Michael Russell, and his officials, Luke McBratney, constitution and UK policy officer, and Ian Davidson, head of constitution and UK relations at the Scottish Government.

Before we move to the detail of the bill, minister, I know that you were rather tied up in Parliament and were unable to attend the plenary meeting with the First Minister yesterday. Are you in a position to update us on what happened there? Can you share anything with us about your previous joint ministerial committee (EU negotiations) meeting?

The Minister for UK Negotiations on Scotland's Place in Europe (Michael Russell): I am happy to do so. I had intended to support the First Minister at the Downing Street meeting yesterday, but I was otherwise engaged here.

At the meeting, the Prime Minister, the Welsh First Minister and our own First Minister all expressed the sentiment of endeavouring to secure an agreement between the three nations that are involved on the issues relating to the bill that are still outstanding. It is fair to say that the First Ministers of Scotland and Wales were very clear about what would be required to secure that agreement, particularly on the issue of consent coming from those legislatures to any proposal from the UK Government to establish frameworks. That issue has bedevilled us during the entire discussion. A great deal of work has been done on frameworks, and you will have seen the list of 111 items that I issued yesterday and the list of 153 that the UK Government produced last Thursday. Issuing a new list of that nature without consultation or even giving it to the ministers was not helpful in building trust, and was the wrong thing to do—I hope that that is taken in the best spirit.

We have done a lot of work. If the UK Government's intention is to seek the consent of the legislatures on any items in that last group of 24 or 25 items, and if a procedure is agreed for adding any items should that be required—that has been an issue for the UK Government—an agreement can be found. If there is no willingness to do that, an agreement cannot be found, which is where we find ourselves.

That was also the issue at the JMC(EN) last week. At the JMC(EN) that took place at the proposal of Mark Drakeford, from Wales, there was a trilateral of David Lidington, Mark Drakeford and myself to see whether we could break the logjam. Mr Lidington chose to make that a full meeting of the JMC(EN), which was not helpful in the sense that informal discussion sometimes has a chance of producing results when formal discussion does not.

That said, we held the meeting, we rehearsed our positions and the Scottish and Welsh Governments brought to the table some new ideas, including the idea of a written agreement that would make it clear that consent would not be unreasonably withheld. That was added to by a UK minister, who thought that a proposal should not be unreasonably made, which seems like a nice, neat balance. We have not had a formal response to that suggestion as yet, and those discussions will continue.

I understand that David Lidington renewed his commitment at the joint ministerial committee plenary to continue to have discussions and he said that he would be willing to come to Edinburgh or Cardiff, if necessary. I hope that we will have those discussions.

The Convener: A number of members want to ask questions on that specific area before we move on to the detail of the bill.

Jackson Carlaw: In essence, that issue determines whether the Scottish Government wishes to proceed with the continuity bill here in Scotland. Agreement on the matter of consent would facilitate an agreement and, I assume, unlock the necessity for the bill to proceed. I think the First Minister was the first politician—if I can put it so directly—who, in an answer at First Minister's question time, identified consent as being the nub of the issue. Discussions were taking place and rumours about the final hurdle were here, there and everywhere, but the First Minister crystallised the argument around the word "consent".

I realise that discussions are on-going and I do not want to prejudice them at all. However, in so far as all parties in the Scottish Parliament have understood the concern that the Scottish Government has about consultation as opposed to consent, does the Scottish Government understand—even if it does not support it—the UK Government's concern about the use of the word

"consent" as opposed to the word "consult"? I have never been clear that it does. I understand the issue that underpins the Scottish Government's concerns, but does the Scottish Government understand the UK Government's reservation?

I might be optimistic in thinking that that is the case because of what has been said about consent not being unreasonably withheld and about requests not being unreasonably made, which seems to finesse around the same point. I have heard it said that, given the history of everything that has gone on, it is difficult for the Scottish Government to trust the UK Government. At the same time, however, it is saying that it would like the UK Government to trust that the Scottish Government would not unreasonably withhold consent. I think that Alex Neil asked in the chamber whether there is a process for having a discussion that finesses those two positions into one that is resolvable, and I am trying to understand whether something is happening to facilitate that.

I am sorry if I went on rather long, but I hope that I am getting to the heart of the issue.

Michael Russell: You are getting to the heart of it. Let me start by saying that I would be happy to finesse the issue—many fine minds in the civil service on both sides of the border have been devoted to that—but by "finesse" I do not mean "fudge". There cannot be fudging of the issue.

We understand—we have understood for a considerable period—the UK Government's concerns. They were concerns that surprised us. Let me roll this all the way back to the first discussion that I had with David Davis about the detail of the withdrawal bill, at the start of July last year. I do not say this critically, but there was a lack of knowledge of the devolution settlement and, particularly, of the fact that the UK Government has the power to stop things happening or to reverse decisions of the Scottish Parliament. That power exists in the Scotland Act 1998, which is, at the end of the day, sovereign. I do not say that with happiness; it is not what I want to be the case, but it is the reality.

If, as I believe it is, the UK Government is afraid that we will behave in what it sees as an irrational manner or—to put it more positively—in a manner that is contrary to what it believes to be in the United Kingdom's interests, and wants the ability to prevent our doing so, it already has that power, which the Scotland Act 1998 gives it. Why would it want another power so to do? It took a long time for it to be understood in London that that power exists. I pay tribute to Mr Carlaw and others who have worked hard to understand the situation. I am not asking you to confirm this, Mr Carlaw, but I am sure that you have found that there is a lack of detailed knowledge of devolution on the part of the UK Government and its officials.

The issue became how we gave the UK Government that reassurance. Equally, we had to be clear in our minds about what would and would not work for us. We have been pretty methodical in applying tests to where we are. We tend to work like that, and we did it at the start of the process, when we discussed with Damian Green the principles that would underpin the process of setting up frameworks. We were keen to have a rational, criteria-driven approach. Damian Green understood that and agreed, and we got the principles established.

We have applied four tests to what is taking place and what might come out of it, and I am happy to put them on the record, because I do not think that it does any harm to do so. The first test is that the scope of any power and the circumstances in which it would be used must be agreed, as must the exercise of the power. That test is very clear, and it respects the devolution settlement. Secondly, any constraint must apply equally to all the Administrations. Thirdly, any power of constraint on orders made under the withdrawal bill should, as is generally the case with powers used under the bill, expire automatically after a defined period—sunsetting, in other words. Fourthly, the devolved legislatures should exercise at least the same degree of scrutiny over orders and the frameworks that flow from them as the UK Parliament does.

Those are clear tests. The unlocking of those tests comes in the first test, because, if we accept the first test, the others flow from it. We could have a form of words that covers the other tests, but we cannot have a form of words that does anything with the first test—it is binary: it either is passed or is not. The backstop that the UK Government wishes to have is the obstacle to getting the first test passed. As we contend, a backstop exists in the Scotland Act 1998, so there is no need for an additional, unnecessary backstop, which is derailing the process. That is the debate.

As you said, this will depend on trust. How do we reassure people of what we are trying to do and how do we reassure people that there is no Trojan horse in this? In the context of the independence referendum, the answer was to have a written agreement about a range of things, which allowed matters to go forward. If we were to have the first test accepted and passed, we should enshrine it in some sort of written agreement that is visible and public and that says that no one is going to propose things that are unreasonable or withhold consent unreasonably. That is still a way forward but, first, the Administrations must accept that they can and will meet those tests—that is the issue.

The House of Lords will have to confront that issue as well. It will consider those items for the first time next Monday, I think. There will be no resolution, because there is no expectation of a vote. There has not yet been a vote at the committee stage in the House of Lords, and that is not normally what the House of Lords does. However, I presume that, when the withdrawal bill returns at the report stage, after Easter, there will be a vote on the amendment that has been tabled by the UK Government—which, it is important to say, does not meet those tests—and any other amendments that have been tabled.

10:30

Jackson Carlaw: I am grateful for all of that. Of course, the distinction between this process and the Scottish independence-type discussions is that those discussions would have been between Scotland and the rest of the United Kingdom whereas the frameworks that we are talking about involve the three devolved Administrations and Westminster, and the Scottish Government has just as much of a vested interest in the not unreasonably withheld or asked question. In a matter affecting a UK framework, which could be just as important to any trading organisation or economic factor in Scotland, none of those Administrations would want to find that the discussion was being prejudiced by a dispute the origin of which was absolutely nothing to do with the issue at hand but was motivated by something completely different. Is it not the case that having four parties to the framework means that there must be a mechanism by which we can ensure that the process can proceed across the territories of all four of them—across the United Kingdom? That is different from the kind of bilateral arrangement that you may have been referring to.

Michael Russell: No, I was not—I want to be clear about that. Any agreement would be between three parties, certainly. An agreement with Northern Ireland is difficult to envisage, because there is no Administration or Parliament there just now, and I do not think that the civil service could enter into an agreement. In a sense, the United Kingdom Government might be agreeing with itself in Northern Ireland, given the way that things are.

Jackson Carlaw: For the moment.

Michael Russell: For the moment. However, at the moment, that would be a multilateral space.

I want to challenge you a little on the issue of trade. For the United Kingdom Government, this is clearly about trade. There are wider issues, but this is about trade. What we seek is a normal part of the trading relationship with a range of countries. The Prime Minister keeps holding up the Canadian treaty as an example. If we were going to negotiate a trade treaty with Canada—which is, admittedly, a federation—that would be done on the basis that, where the powers of the provinces relate to items within the treaty, it would require the agreement of the provinces. That is part of the constitutional settlement and, therefore, it is taken as read—that is how negotiations proceed. The same principle applies, for example, to Belgium's relationship with the EU. Rights are given and they are exercised responsibly, although there can, of course, be exceptions. The position taken by one of the Belgian Parliaments in relation to the Canadian treaty is an example.

I will make a point that I made to David Lidington last week. We need to establish the principle, and we can then legislate for the exceptions. In this circumstance, if the principle that there must be consent is accepted, we can legislate for circumstances in which there are difficulties as they arise. The United Kingdom Government has started with the difficulties and exemptions and is now trying to derive a general principle from those. With the greatest respect, I suggest that that is the wrong way to argue this. I have made it clear that the tests are for the general principle. If we can agree that principle, the exemptions and difficulties can be dealt with and allowed for.

The Convener: Richard Lochhead has indicated that he wants to come in. Is the question on negotiations?

Richard Lochhead: Yes. My question is on negotiations of consent. I struggle with Jackson Carlow's view that there is an easy bridging between the principles of consent and consultation—they are two fundamentally different principles. Can the minister assure me that he will continue to pursue the line that we will accept only the principle of consent, and that there will not be goodwill agreements or frameworks agreed to outwith the legislation that would weaken that principle?

Michael Russell: The First Minister has made it absolutely clear that she could not consider coming to Parliament and recommending that Parliament accept an agreement with the UK Government that does not meet the test as I have put it: the scope of any power and the circumstances in which it would be used must be agreed, as must the exercise of the power. That is the basic requirement. Carwyn Jones has said exactly the same thing; he could not see himself going to the Welsh Assembly in those circumstances. That is the basic issue that is at the heart of the matter. If that issue is resolved, progress can be made.

Mr Carlaw raised the question of the continuity bill. The bill is perfectly operable. It has been

improved by extensive scrutiny and will, no doubt, continue to be improved. The very last thing that we did last night was agree to an amendment in the name of Liam Kerr to remove the phrase

"or any provision of this Act"

from section 37(1), which says:

"The Scottish Ministers may by regulations repeal this Act".

The choice, again, is binary: the act will either be in force or be repealed. Section 37(2) reads:

"Regulations under subsection (1) are subject to the affirmative procedure."

There it is: the act can be repealed. We can introduce regulations for Parliament to approve and we have said that we will do so, provided that the tests are met and that consent is given.

The Convener: The presentation of the issue and the public discourse around it has tended to concentrate on the 25 areas on which the UK Government says discussion on legislative frameworks is needed. However, in your letter to MSPs, you emphasise that the UK withdrawal bill as drafted will allow the UK Government to constrain the powers of the Scottish Parliament in any devolved area—it could take any devolved power and put it in its basket. Is there an understanding that that is what the withdrawal bill is doing? How hopeful are you that we will get agreement on that aspect of the withdrawal bill?

Michael Russell: We are talking about areas of intersection—we are not yet at the stage at which absolutely any devolved power could be removed. It is right for the Scottish Government to be always mindful of the threat to devolution; that is what we are there for. We may have other political objectives—I do, as do you, convener—but it is the role and responsibility of the Scottish Government in this to ensure that the devolved settlement is not undermined and that we do not lose power; indeed, we are talking about gaining more powers.

In those circumstances, we are currently talking about areas of EU intersection. Anything on the list could move from the first category, which is things that the UK Government is not really concerned about, to the new category, which is things that UK Government now believes are reserved. That may sound silly, but often lawyers can argue any convincing case and might well do so—although I am not badmouthing lawyers. The problems that we have are that the list is not agreed, the list that we thought that we were getting close to agreeing has changed without any notification—a difficult thing to have happened—and there are some very important things on the list that will be subject to freezing or re-reservation.

People might have just shrugged about agricultural support, for example, which appeared on the December list, but it covers

"Policies and Regulations under the EU Common Agricultural Policy covering Pillar 1 (income and market support); Pillar 2 (rural growth, agri-environment, agricultural productivity grants or services and organic conversion and maintenance grants); and cross-cutting issues, including cross compliance, finance & controls."

I do not have to tell Richard Lochhead what that means; it is absolutely at the centre of agriculture in Scotland. Moreover, that gives the lie to the argument that those are items that are held only in Brussels, because the way in which support is given and defined can be, and is, altered in Scotland. I have used the example of less favoured area payments before; there are others. Those are active issues.

Agriculture, animal welfare and chemical regulation are very important. In my constituency, there is an ongoing argument about use of neonicotinoids and their possible effect on private water supplies. I have constituents who will be immensely worried that control over that will be moving from the Scottish Parliament and Government to elsewhere.

Let us consider what other areas are on the list. Food and feed safety and hygiene laws are so important for our food and drink industries, as is environmental quality. I look at all that stuff and feel very concerned. Mutual recognition of professional qualifications sounds dull, but it is exceptionally important to the health service and other areas. Public procurement—which we debated in the chamber yesterday—is worth a vast amount of money. We are talking about extremely serious matters that we are required to defend in the interests of Scotland. We could have agreement on them, provided that the issue of consent is recognised.

The Convener: Before I bring in Claire Baker, Rachael Hamilton has a supplementary.

Rachael Hamilton: It is clear that the common frameworks are very important. You said that your fourth test is to have the same level of scrutiny of common frameworks as the UK Government. How will you scrutinise the common frameworks? How will you represent the views of Scottish businesses on water quality and food labelling, for example? It appears that the general public believe that a power grab is taking place, but do they understand the implications of common frameworks? How will that be translated into your scrutiny?

Michael Russell: I want to separate the tests from Rachael Hamilton's more general question. I repeat what I said about the fourth test: the devolved legislatures—that includes all of us; in other words, the Parliament—should exercise at

least the level of scrutiny over orders and the frameworks that flow from them as the UK Parliament will exercise. That is an issue of parliamentary democracy. Even after stage 2, I am still talking about the bona fides of that. What I am saying is that we believe that, if the UK Parliament has a role, the Scottish Parliament and the National Assembly for Wales should, too.

I have said what I think the issues are about frameworks. I do not think that removing responsibility for food safety and food labelling from the Scottish Parliament in a way that is not time limited and over which we would have no control would be of benefit to Scotland's food and drink industries, nor do they believe that that will be the case.

With devolution, the principle of subsidiarity applies. What is the right place for decisions to be made? This is an argument that goes a long way back. There was an exhibition outside the chamber, I think two weeks ago, of the work of John P Mackintosh, who is quoted above the reading room door. I am old enough to have served on John P's rectorial committee at the University of Edinburgh. John P Mackintosh was a political scientist as well as an active politician, and he wrote extensively on subsidiarity and why it is important. Subsidiarity drove the process of establishing this Parliament. It is the principle that underlies the common frameworks, and it is one that people understand.

If I talk to farmers or people who are concerned about neonicotinoids in my constituency, I tell them that they can raise issues with me and I can make representations on them as a constituency MSP—as Rachael Hamilton can. However, if we go down the route that the UK Government is taking, that will not be possible. Our responsibility for such areas would go, and we do not know when we would get them back or what state they would be in when we got them back. Agreement that there will be participation by the devolved legislatures is very important, as is the work that we do together to ensure that the frameworks benefit us all. That is what has been going on—we have been developing a way in which they will work together.

The principles that Damian Green agreed to were crucial. Under those principles,

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

deal with a range of things that are listed. The principles also state:

"Frameworks will respect the devolution settlements and the democratic accountability of the devolved legislatures".

That includes Rachael Hamilton's constituents and my constituents, to whom we are reporting on this issue. Another principle is that

"Frameworks will ensure recognition of the economic and social linkages between Northern Ireland and Ireland and that Northern Ireland will be the only part of the UK that shares a land frontier with the EU. They will also adhere to the Belfast Agreement."

In other words, we said that we recognise the wider context and that we are all committed to getting it right.

Claire Baker: I am interested in the scenarios that we might face once the continuity bill is passed, which is set to happen next week. When we took evidence last week, we discussed with Professor Nicola McEwen the three options that are set out in the policy memorandum. I was particularly interested in the middle way, which deals with what might happen if the continuity bill and the European Union (Withdrawal) Bill are both passed. There is a suggestion that there could be qualified withholding of consent by the Scottish Parliament, in which case the two bills would merge in some way. Could you provide more detail on how that would work?

10:45

Michael Russell: The continuity bill was very carefully and well drafted and has been improved further by scrutiny and amendment. Therefore, we have a bill that is capable of operating. In the last statement that I made to the Finance and Constitution Committee last night—at whatever hour we were doing it—I made a commitment that I will not seek to overturn amendments that were made to the bill at stage 2 merely because I want to get my own way. I will bring back changes only if I believe that amendments are not operable. I want to have a bill that is operable and functional.

A number of things could happen. It could be that section 37 is used and we bring in regulation to repeal the continuity act because we have achieved agreement with the UK Government. We would repeal the continuity act and agree a legislative consent motion. That would have to happen by the last amending stage of the withdrawal bill, which would be the report stage in the House of Lords, which will be some time after Easter. There is slight vagueness about that because, as I understand it, it is possible to amend a bill at the third reading stage in the House of Lords, but we are expecting that it will happen at the report stage. That is one scenario: the legislative consent motion is passed and we say that we have all done a great job; we have a bill that works well, and we have accepted the circumstances.

If there is not agreement on the withdrawal bill, we would have to operate the continuity legislation, which is operable. With good will, the continuity bill could work with the UK Government; it has been drafted so to do. That is why we have

followed the UK bill very closely, and why the Welsh have taken the same approach. Therefore, we might find ourselves in a situation in which we operate our act, and the UK act operates—shorn, of course, of the parts to which we have not given consent, which is important—so that the two operate together and we try to work together.

We would, for example, try to co-operate on a programme of secondary legislation that would reflect the reality of the situation that we would be in. I do not think that that would be difficult, but it would not be our first choice, which remains to get an agreement with the UK Government.

Claire Baker: I agree that agreement between the two Governments would be far better, but I want to understand how that process would work if we are not in that situation and the two bills are passed. Would it need the agreement of the UK Government for both acts to be operable? Would one take precedence over the other? It is not the best language to use, but my assumption is that the UK legislation would trump the Scottish Parliament's legislation if we were to end up there.

Michael Russell: That would depend on what the UK Government chose to do. That is the final option, but there are a number of options within that. I am honestly not trying to complicate the situation any more that it is; I would simplify it, if I could.

We would have a range of options. At the absolutely extreme end, the continuity bill is challenged by the UK Government through the Advocate General or the Attorney General and it goes to the Supreme Court. We would then go along another part of the branch diagram, on which the Supreme Court would say either that the continuity legislation is entirely legitimate and constitutional or that it is not. I am absolutely confident that it would say that the legislation is within the rights of this Parliament. By grinning, Mr Carlaw seems to mean that he does not agree with me—which will not be a surprise to anybody who knows us or who knows this Parliament.

If the continuity act were judged to be within the competence of the Parliament, it would be up to the UK Government to say, "Even if that is the case, we don't want it" and to use its power under the Scotland Act 1998. Alternatively, it could choose to accept that there will not be a legislative consent motion, which would of course apply only to parts of the bill, and to take out those parts of the bill and find a way for us to work together. That would be perfectly possible. The continuity bill is designed so that that could be done. It would be irresponsible of us to bring to Parliament anything that could not do that.

That is where we are; in the end, those are all decisions that the UK Government must make; it has to decide whether it wants an agreement on the basis that I have outlined. If it does not or cannot move in that direction, it will have to decide whether to challenge the continuity legislation or live with it and accept that it will not get a legislative consent motion. Then, of course, we would have to see what the view of the House of Lords would be of there being no legislative consent motion but a desire in the UK Government to overrule an act that had been legitimately passed in the chamber of this Parliament. I do not want that to happen.

The best solution is the one on which Claire Baker and I agree, which is to get agreement with the UK Government. If that happens, and assuming that the continuity bill is passed next week, section 37 of the continuity act would come into play. I make that commitment again here, as I have done every day, several times a day, for the past few weeks. That is what will happen.

Mairi Gougeon: The European Commission's draft negotiating guidelines on the future relationship state that a free trade agreement

"cannot offer the same benefits as Membership and cannot amount to participation in the Single Market or parts thereof."

What is your view on those guidelines?

Michael Russell: The guidelines are clear and they are not a surprise. Six months ago in Brussels, I was having discussions in which people were saying to me, "If the UK Government has these red lines, this is what the outcome will be, because there is no way round that." People were saying, "If that is absolutely where the UK Government stands, this is what happens." At the start of "Scotland's Place in Europe: People, Jobs and Investment"—I usually have a copy to wave around, but I have left it somewhere because other things have been happening this week—there is an EU Commission diagram that shows that to be the case. It shows the type of arrangements that the EU has come to with other countries, such as European Economic Area membership, the special arrangements with Ukraine and Turkey and the Canadian treaty. That shows the direction in which the red lines are driving us.

The Commission has made it absolutely clear that the outcome is predicated on the existence of the red lines. If the red lines change, the possible outcome changes, but whether it is in membership of the EU or membership of a golf club, you cannot say that you intend to have all the benefits of membership but not observe the rules. With a golf club, you cannot say that you intend to turn up every morning, play 18 holes, go to the bar, have lunch, play another 18 holes, go to the bar in the evening and go to all the social events but not pay any fee and absolutely not abide by the rules, so

that, no matter what the draw is and whether the course is closed or open, you will keep doing that. That just is not possible. Simply, you cannot be a member of the club and not observe the rules.

We then get the ludicrous spectacle of the people who believe that that is possible blaming the EU for having its rules and saying that it is making us a victim. The EU is simply saying, "We deeply regret that you do not want to be a member of the club but, if that is your decision, there are consequences that flow from that." That is not victimising or bullying; it is just saying what the legal situation is.

Mairi Gougeon: Last week, there was a lot of press coverage and publicity about reciprocal access to fishing waters. What is the Scottish Government's view on the provision on that in the guidelines? How can that issue progress from here?

Michael Russell: At the weekend, there was an intervention on that issue from Ruth Davidson and Michael Gove, who called for the UK to leave the common fisheries policy on 29 March 2019. They said that, from that moment, or at least when coastal state status kicks in, everything would be as they promised to fishermen in Scotland during the referendum and thereafter—promises that were repeated by members of the Scottish Parliament in the north-east of Scotland and in the chamber.

There are two problems with that. One is that, at the same time, the UK Government is endeavouring to negotiate a continuation for a period of time, which requires observing the acquis communautaire—not cherry picking from the acquis but observing it. There has never been an indication at any time that fishing will be exempted from that. Indeed, I asked David Davis that question directly at the JMC(EN) in October and I have continued to ask it, and I have always had the same reply, which is that fishing will be included. Therefore, what was promised and continues to be promised cannot be achieved. I therefore perhaps understand why Michael Gove and Ruth Davidson are making a bit of a noise—it is because they are about to be found out.

The second issue is that the United Kingdom Government has form—indeed, all United Kingdom Governments have had form on this—in taking Scottish assets such as fishing and trading them away for advantage to itself. Again, I think that Mr Gove and Ms Davidson recognise that that action is presently under way. They might be trying to stop it—I do not know, but the UK Government's track record on this is quite clear. That is where those things are going.

There is a third problem that Michel Barnier and others have clearly set out. When he was in Jutland two weeks ago, talking to Danish fishermen, M Barnier made clear what has always been the case: access to water and trade are inextricably linked. Indeed, the UK Government knows that. For example, it knows that Iceland and Norway, as members of the European Economic Area, accept tariffs that increase the costs of their fish exports so that they can have exclusive access to and negotiate their own waters. The idea that was very much put about during and after the referendum, particularly in the north-east, that there is some magic squaring of this circle and that tariffs and access are not linked was—and this is being kind—magical thinking. Some might simply call it being deceitful about the matter.

That is the reality of where we are. We do not want Scottish waters to be traded away; indeed, we have always opposed that. Moreover, we have always argued for local management. We do not think that the common fisheries policy has been successful—of course it has not—and we think that it needs to be replaced; however, we are also opposed to people saying things that are not true. Eventually, they will get found out.

Mairi Gougeon: Finally, before this evidence session, we took evidence from a panel on possible future trading arrangements. Certain sectors and industries in Scotland are perhaps of greater importance to us than they are to the UK as a whole, and we heard evidence from the trade justice Scotland coalition on the current democratic deficit with regard to our input into the Trade Bill and the on-going discussions around it. What discussions are under way between the Scottish and UK Governments on ensuring that the Scottish Parliament and Government have a meaningful say in these things, especially in negotiations and discussions on trade?

Michael Russell: There are two areas of importance in this respect, the first of which is a resolution to the present difficulty over the withdrawal bill. If that happens, it becomes easier to have discussions and build trust.

The second area is the commitment from the UK Government to bringing to the JMC(EN) a paper on the involvement of the devolved Administrations in the negotiating process. We have not seen that paper, and we do not know what will be in it, but Mark Drakeford and I have been making this particular point for well over a year now, because it is germane to the issue that you have raised of how we develop a negotiating stance on matters that pertain to devolved competence.

We have also tried to make it understood that the issue of different circumstances applies. An example outwith the trade area in that respect is migration. As is clear from the evidence that we

developed for the Migration Advisory Committee, which has been published and debated in the chamber, Scotland is much more dependent on EU migration than the rest of the UK is. That needs to be understood in the development of migration policy, but it has been really hard to get it understood. I had a conversation with the UK minister in which it seemed to me that, in his mind, he was equating the situation in Scotland with the situation in the construction industry, which is experiencing a shortfall in workers and is saying, "We have a problem with migration." I pointed out to him that this is perhaps something that needs to be understood in a different sense. If you represent, as I do, an extreme rural constituency that is losing and cannot renew its population—to be blunt, we are not breeding fast enough—you need migration. If you do not have it, you will continue to have depopulation and services will continue to diminish. That is the reality.

The only migration that works in this regard and which has worked over the last period has been European migration. It has been easy for people to come and go; some of them stay for a long time, some for ever and others for just a brief period. We need a solution that mirrors freedom of movement, and we need to make sure that that is understood. The same applies to trade and a whole pattern of other issues; we need to get that across, and through our discussions with the UK Government and through the frameworks, which specifically mention this issue, we need to ensure that the UK Government recognises the relative impacts of all of this. Of course, the UK Government's own work on economic impact shows how severe the impact will be on different parts of the United Kingdom.

The Convener: I have a couple of supplementaries to Mairi Gougeon's questions. First, you mentioned that you are preparing a paper with Mark Drakeford. Can you indicate when that will be published?

11:00

Michael Russell: We are not preparing that paper. What I said was that the UK Government is bringing us a paper on the issue of involvement in negotiations. Obviously, that will be a JMC paper, so it will be within the confidential space of the JMC. However, the outcomes of that—if there are any outcomes of it—will obviously be a matter of reporting to the Scottish Parliament.

The Convener: I picked you up wrongly there, so thanks for clarifying that.

On the other issue, Mairi Gougeon referred to the panel of trade experts that we had here before our evidence session with you. At the end of that session, Dr Gracia Marin Duran, a lecturer in economic law at University College London, was asked about geographical indicators. Her interesting response was that the EU was very keen to protect its own geographical indicators. She did not see a particular problem for the UK in terms of that negotiation with the EU, but the rules for other trade agreements outwith the EU are a lot less easy to enforce. Given that geographical indicators are one of the areas that the UK Government has said that it is keeping for itself, what are the problems in that regard?

Michael Russell: I think that they are pretty severe. It could be a useful European discussion, because it would be better to have a pan-European system. Although there was antipathy to the geographical indicators system, in the end it seemed to be so necessary that even the United Kingdom Government could not resist it. If it is determined to have its own system, the question arises of what validity and recognition the system will have in the international sphere and whether it is something that could be traded away. Whisky is a good example, because there is a clear definition of whisky, particularly malt whisky. However, for a long time, the United States wanted to change that definition because it wants to get into markets and be able to call things what they are not.

Given those circumstances, there might be a tough set of trade negotiations. The naivety of those who believe that the United States' sentiment would overrule its hard practical edge and that there would be no difficulty in having the most beneficial trading arrangement with the United States has been given a bit of a dunt in recent days by the Trump Administration's actions. Negotiating trading arrangements is going to be a tough business. I noticed today that the process has started to try to get an indicator for Scottish venison, which is something in which the Scottish Government has been deeply involved. It is highly likely that people will be able to ignore such an indicator if we are not part of the European system.

Stuart McMillan: Good morning, minister. The stage 3 process for the continuity bill will take place next week, but the withdrawal bill is estimated to finish its passage at Westminster around May. Can you explain the time difference between the bills? Is there any particular reason why you want the continuity bill process to finish earlier?

Michael Russell: Yes, and I will briefly explain it. However, I will also have copied to the committee a letter, which committee members might have seen, that I sent to the Delegated Powers and Law Reform Committee at some stage in the past fortnight—the days are blending together—that gives the legal reasons why we

have to get the continuity bill passed within the timescale that we have set out and before the UK withdrawal bill gets royal assent. There are legal reasons within the withdrawal bill itself.

There is a clear practicality involved in this. We have spent a lot of time—many hours and days—trying to get an agreement with the UK Government. It is no secret—indeed, we have talked about it openly—that we have been discussing continuity bills with the Welsh since last summer and have had useful discussions on whether a continuity bill would be a route that we could follow. However, we have always felt and continue to feel that the UK agreement would be better.

Eventually, though, with the clock ticking, the requirement for us to have the continuity bill passed and sent for royal assent within the timescale of the UK withdrawal bill and before that bill gets royal assent itself meant that we were getting to the last moment when that could be done. We held off for as long as we could, but in the end we could hold off no longer. We have exactly the same timetable as the Welsh Government; indeed, I think that its bill will reach stage 3 on the same day as ours.

Another issue is that, for us, the process of royal assent is longer than that in the UK bill process. We have a month's lying time, as I think you could call it, before a bill can be given royal assent, and during that time it can be legally challenged by the Lord Advocate, the Advocate General or the Attorney General. The time between the stage 3 process and royal assent is, I believe, about five weeks, whereas a UK bill can be given royal assent within a day or so. Is that right?

Ian Davidson (Scottish Government): It can happen quickly.

Michael Russell: For us, the process contains a period of time where we have to do things that the UK Government does not have to do.

It is not certain when the UK bill will be passed. The House of Lords report stage should happen after Easter; it has been running behind, but it might catch up. There will then be the final reading, followed by what is called ping-pong. If the Lords make changes to the bill, the Commons will be asked not to accept them, and the bill will go backwards and forwards. Royal assent for the withdrawal bill is likely to be given around the third week in May, providing that the UK Parliament keeps to the timetable. We hope that our bill will have received assent by that time, too.

Stuart McMillan: I am on the DPLR Committee—

Michael Russell: You are, and you have questioned me on this before.

Stuart McMillan: Indeed, and one of the issues that came up was that of the secondary legislation as well as other primary legislation that would emanate from the UK's leaving the EU. It is estimated that some 300 pieces of secondary legislation will require to come through this Parliament. Do you think that the Parliament has the necessary staff to deal with all that in such a short space of time?

Michael Russell: It will have to. We would have this burden, no matter what took place. I oppose leaving, as it is a wasteful black hole that is sucking in energy, initiative and money unnecessarily, but unfortunately we are engaged in the process, even though we did not vote for it. We will have to do these things, and we are organising ourselves to do them. The number is estimated at 300, but I suspect that it will turn out to be more. We can work in collaboration with the UK Government—indeed, we intend to do so, no matter what happens—but it is going to be a heavy burden.

There is also the cost. The Chancellor of the Exchequer has given an allocation of money for this, and some of that will come to Scotland. The allocation will have to be discussed, but it might not be enough. We will just have to get on and do the job, and people are committed to it. It has been a difficult, interesting and unusual couple of weeks, but all the officials, including those in the Parliament, who have engaged in this process have risen to the challenge tremendously. There will be challenges ahead, but I am confident that they will rise to them.

Stuart McMillan: Have discussions started on how much of the resource will come to Scotland?

Michael Russell: Yes, although that is a matter for Mr Mackay rather than for me. My understanding is that that is the case. Discussions are also well under way on preparations, but perhaps my officials will want to say something about the issue.

Luke McBratney (Scottish Government): This is closely linked to Ms Baker's earlier point about the three scenarios that the bill is preparing for. Since December 2016, when "Scotland's Place in Europe" was published, the Scottish Government's consistent position has been that the best scenario for discharging the responsibility to prepare our legislation for EU withdrawal was a single bill and a single scheme, because it provides the maximum opportunities for co-ordination between the Governments.

The bill's policy memorandum indicates the situations where we hope that that will take place. Where the required changes are technical and uncontroversial, or where they are the same or similar across the UK's jurisdictions, they can be

made at UK level, with the appropriate involvement of the devolved institutions. I believe that Mr Russell explored with Ms Baker earlier the opportunities for attempting to maintain as much of that co-operation as possible, even if the continuity bill ultimately has to come into operation.

Stuart McMillan: That was helpful.

Finally, will the legal text of the withdrawal agreement and the negotiating guidelines for the future relationship have an impact on the continuity bill's provisions?

Michael Russell: It is difficult to say. There is a linkage between everything in this process. If I had to, I would point to the operation of frameworks, particularly with regard to the Northern Irish situation. Indeed, I have already highlighted the final principle with regard to the frameworks. The Northern Ireland situation requires to be resolved, and it is difficult to see that happening without a degree of regulatory alignment north and south. If Northern Ireland is part of a framework on, say, agriculture in which there is regulatory alignment between Northern Ireland and Ireland, with the result that the European system operates in Northern Ireland, how do we work with that with regard to the framework? Clearly, a framework implies regulatory alignment between the parties in it. Do we, then, enter into regulatory alignment with the rest of the EU? When I raise that question, I tend to get a sort of "We're thinking about that" reaction. However, it is an issue, and if it applies to agriculture, it will apply across the board in a variety of other places.

There are linkages, and we are aware of them. With regard to the issue that Mairi Gougeon raised, for example, the negotiating guidelines raise issues for us in terms of the UK's red lines and why, as we believe, they are misplaced. Another issue that they raise is the engagement of the devolved Administrations, which represent the devolved competences in a process in which devolved competences will be part of the negotiations. Those are linkages.

Ross Greer: Can you clarify what you said about the UK Government bringing forward a paper on devolved involvement in future trade negotiations? Is the expectation that, if agreed, this paper will lead to amendments to the Trade Bill? If not, is it still the position of the Scottish Government that the bill will need to be amended?

Michael Russell: Just to clarify, I was not talking about involvement in trade negotiations; I was talking about involvement in the negotiations with the EU on future status and all the associated issues. The issue in the paper that the UK Government is bringing forward and which has been on the table for some considerable time is how the devolved Administrations become engaged in and influence that process in the areas of devolved competence.

We might also argue that there are areas outwith devolved competence in which we should also be engaged; indeed, I have used the example of migration in that regard. The paper, if it is agreed, will presumably allow us to influence what happens in the negotiations in some way, and that, in turn, will allow us to influence the outcomes and how they are put into legislation.

If we are aware of what is happening and if we can influence it—and the outcomes—in a genuine way, we will presumably be in a better position to ensure that any legislation or action that flows from the negotiations, including trade action, is influenced by our view, the Welsh view and, I hope, the Northern Irish view.

Ross Greer: Thank you, and I apologise for misunderstanding what you said.

It is still the Scottish Government's position that the Parliament should not grant legislative consent to the Trade Bill. As for the withdrawal bill, it was quite clear that the process would result in an alternative bill being put forward by the Scottish Government. What is the endgame if the Trade Bill is not amended satisfactorily?

Michael Russell: It depends on the agreement on the EU withdrawal bill, because the issue is substantially the same. It is the issue of consent, and its resolution will apply not only to the Trade Bill, which we have seen, but to bills that we have not seen. Presumably, therefore—I say presumably, because we do not have this guarantee—those bills will do two things: they will recognise the devolved competences and the need for consent, and they will also recognise the need for an active process of legislative consent in this Parliament. In other words, Sewel will apply.

The reason why I have been inactive with regard to the Trade Bill is that I am not the trade minister. Keith Brown is responsible for that area, and he is taking the issue forward. To the extent that I am involved in it, it is because it involves the same issue that has arisen with regard to the EU withdrawal bill and which we must resolve.

I have always said that the EU withdrawal bill is a gatekeeper bill. If you get that one right, it opens the gate to getting the rest right. If you get it wrong, or if there is no agreement, you are going to have a continuing disagreement on every piece of legislation. I cannot say that I look forward to that.

The Convener: We are out of time, so I thank the minister and his officials for giving evidence today. We will now move into private session.

11:14

Meeting continued in private until 11:23.

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