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Cenedlaethol
Cymru

National
Assembly for
Wales

Cofnod y Trafodion The Record of Proceedings

Y Pwyllgor Materion Allanol a Deddfwriaeth Ychwanegol

The External Affairs and Additional Legislation Committee

31/10/2016

Agenda'r Cyfarfod
Meeting Agenda

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for the Remainder of the Meeting

Cofnodir y trafodion yn yr iaith y llefarwyd hwy ynnddi yn y pwyllgor. Yn ogystal, cynhwysir trawsgrifiad o'r cyfieithu ar y pryd. Lle y mae cyfranwyr wedi darparu cywiriadau i'w tystiolaeth, nodir y rheini yn y trawsgrifiad.

The proceedings are reported in the language in which they were spoken in the committee. In addition, a transcription of the simultaneous interpretation is included. Where contributors have supplied corrections to their evidence, these are noted in the transcript.

Aelodau'r pwyllgor yn bresennol
Committee members in attendance

Michelle Brown Bywgraffiad Biography	UKIP Cymru UKIP Wales
Suzy Davies Bywgraffiad Biography	Ceidwadwyr Cymreig Welsh Conservatives
Mark Isherwood Bywgraffiad Biography	Ceidwadwyr Cymreig Welsh Conservatives
Steffan Lewis Bywgraffiad Biography	Plaid Cymru The Party of Wales
Jeremy Miles Bywgraffiad Biography	Llafur Labour
David Rees Bywgraffiad Biography	Llafur (Cadeirydd y Pwyllgor) Labour (Committee Chair)

Eraill yn bresennol
Others in attendance

Dr Charlotte Jennie Burns	Prifysgol Caerefrog University of York
Dr Richard Cowell	Prifysgol Caerdydd Cardiff University
Yr Athro/Professor Dickon Howell	Prifysgol Newcastle Newcastle University
Dr Stephen Hull	ABPMer
Dr Victoria Jenkins	Prifysgol Abertawe Swansea University
Yr Athro/Professor Bob Lee	Prifysgol Birmingham University of Birmingham

Kerry Lewis Prifysgol Aberystwyth
Aberystwyth University

Dr Margherita Prifysgol Bryste
Pieraccini University of Bristol

Yr Athro/Professor Prifysgol Abertawe
Volker Roeben Swansea University

Swyddogion Cynulliad Cenedlaethol Cymru yn bresennol
National Assembly for Wales officials in attendance

Alun Davidson Clerc
Clerk

Wendy Dodds Y Gwasanaeth Ymchwil
Research Service

Elisabeth Jones Prif Gynghorydd Cyfreithiol
Chief Legal Adviser

Rhys Morgan Dirprwy Clerc
Deputy Clerk

Dechreuodd y cyfarfod am 13:33.

The meeting began at 13:33.

Cyflwyniad, Ymddiheuriadau, Dirprwyon a Datgan Buddiannau
Introductions, Apologies, Substitutions and Declarations of Interest

[1] **David Rees:** Good afternoon. Can I welcome Members and members of the public to this afternoon's meeting of the External Affairs and Additional Legislation Committee? We'll continue our investigations into the impact of the decision to leave the EU, and the implications for Wales.

[2] Before we start, just a bit of housekeeping business. There is no scheduled fire alarm this afternoon, so, if one does go off, please follow the directions of the ushers. Can Members and everyone else remind themselves to turn mobile phones off or on silent please, and any other equipment that may interfere with the broadcasting equipment? We are bilingual, and therefore if you require translation from Welsh to English, translation is

available on the headphones on channel 1. If you require additional sound, then amplification is available on channel 2.

[3] We have received apologies from Eluned Morgan this afternoon but we have no substitute.

**Gadael yr Undeb Ewropeaidd: Y Goblygiadau i Gymru—yr Amgylchedd
a'r Môr**

**Leaving the European Union: Implications for Wales—Environment and
Marine**

[4] **David Rees:** If we move on to the focus of today's session, the first is actually to focus on environmental and marine issues, particularly in relation to law and the aspects of law relating to those.

[5] Can I welcome this afternoon's first set of witnesses? Professor Bob Lee from the University of Birmingham; Dr Victoria Jenkins, Swansea University; and Kerry Lewis, Aberystwyth University. Can I welcome you all, and can I also thank you for your submissions that we've received, which have been very helpful? But, clearly, everything we need to go through is going to be based upon questions now, as we try to explore some of these issues that we are facing and that we'll have to overcome as part of the negotiations around post-Brexit aspects.

[6] Perhaps I'll start off. In a sense, as we've been going through this, I've seen more and more complexities arising, and perhaps the environmental and marine aspects are some of the larger areas that Wales has responsibility for, as a devolved nation, in relation to the EU. Perhaps, Professor Lee, you can actually start off by saying what you see are the major challenges now facing us here in Wales, as we look at post-EU situations and the responsibilities that will come to us.

[7] **Professor Lee:** I think, perhaps, the major challenge you face is knowing what the Government in Westminster will actually do, because so much depends on that. An awful lot depends, in our area, on whether there is a so-called 'soft' or a 'hard' Brexit. In the softest form of Brexit, if we were to follow a Norwegian approach and retain membership of the European Free Trade Association and of the European Economic Area, then you might find very little change indeed in environmental law. At the other extreme, in the hardest form of Brexit, if we were to fall back simply on any World Trade

Organization approaches to dealing with the rest of the world and the remainder of Europe, then an awful lot of environmental law would be up for negotiation.

[8] **David Rees:** Kerry, anything to add to that?

[9] **Ms Lewis:** In terms of the issues that I'm looking at, I think one of the key things is that, whatever scenario we end up with, the position of nature conservation seems to be outside many of those things. So, it seems to be the broad view that it's not going to be part of any trade deal. So, we want to think about, in Wales, how we want to approach that and what that means for how habitat and species protection goes forwards.

[10] **David Rees:** And Dr Jenkins.

[11] **Dr Jenkins:** I would say one of the biggest challenges is that we need to think about how we ensure that we maintain, as Kerry has mentioned, all of the existing body of EU environmental law, and I think the biggest threat that we might foresee is the fact that we would have to make a case for the environmental law as it stands at the moment.

[12] **David Rees:** Thank you. Jeremy.

[13] **Jeremy Miles:** Thanks, Chair. Can I just explore this question of the mechanism by which EU law would be transposed into English and Welsh law at the point of Brexit, through the great repeal Act? The Prime Minister has talked about transposing it into British law, which obviously begs a number of questions, and to the extent, which is significant, that environmental legislation is devolved to Wales, do any of you foresee that the idea that the Act would bring into UK law in some generic sense—would that be a breach of the Sewel convention, for example, which requires the UK Parliament not to legislate on matters that are devolved to the Assembly? That's the first question. So, would there necessarily be an issue with that? And I guess the second part of that is: could there potentially be an issue with that, depending on whether the Act sought to claw back existing powers in this field that Welsh Ministers have to date?

[14] **Professor Lee:** Okay. Shall I make a start? David Davis, in his announcement of a great repeal Bill said, and I've got it here

[15] 'We will start by bringing forward a great repeal Bill that will mean the

European Communities Act 1972 ceases to apply on the day we leave the EU.’

[16] But then later in the speech, he said

[17] ‘The great repeal Act will convert existing European Union law into domestic law, wherever practical.’

[18] So, rather than a great repeal Bill, we’ll actually get a great savings Bill, it seems to me. And then, if all that happens is that we save all of those provisions that would otherwise fall away with the repeal of the European Communities Act—and the European Communities Act 1972 says quite simply that all rights, liabilities, obligations, et cetera, under EU law have effect in the UK—so if we produce the savings provision that overturned that presumption and said that we will retain, pending of course some greater inquiry as to what we might in the longer term retain, and what we might choose not to retain, then I don’t think that’s necessarily, on the face of it, problematic, because, within areas of devolved competence, that saving having been made for the UK, Wales could then, at its leisure almost, decide which of those savings it was happy with and agreed with, and whether there would be areas in which, actually, it would wish either not to have certain European rules on the environment or at least might want to reshape or reconsider them.

[19] The problem that would come would be if something not so simple happens in the great repeal Bill and if, in the great repeal Bill, the Westminster Government decides to pick and choose. Then, I think, we are in a very difficult position indeed, and I think, given Scottish attitudes to that as well as Welsh and Northern Irish attitudes, we might even be at a point of some constitutional crisis.

[20] **Jeremy Miles:** So, you think it depends on the specifics—in particular, whether there’s, in effect, an attempt to claw back secondary legislation powers under the Act.

[21] **Professor Lee:** Yes. I would hope that the great repeal Bill would be a very simple piece of legislation.

[22] **Jeremy Miles:** But you wouldn’t foresee that of itself requiring—. For example, because there are devolved, in this and indeed other fields, competences that are subject to that Act, you wouldn’t foresee, or would you, that the nature of the Act would need to be something that devolved

administrations had a role in agreeing? So that it was clear that, where powers had been devolved, there would be an agreement with the Welsh Government, Scottish Government, and so on, about the nature of the provisions in the Act around those areas.

[23] **Professor Lee:** Well, in its simplest form, and assuming we're talking post Wales Bill, so, under the Wales Act, there ought not to be an enormous problem. I don't necessarily see that this great repeal Bill would have Schedule after Schedule after Schedule in every area in which the EU has had competence for the last 40 years. I think it would be a much shorter and simpler Bill, and it would retain, pending greater scrutiny, vast parts, if not all of, EU law in domestic law. There would then be quite an enormous job of work to do because, for example, it's not at all uncommon for statute law and statutory instrument law to contain read-overs, for example, to European directives. So, if you look at industrial emissions controls, for example, they're only explicable by reading alongside them the European directive. That gives rise to problems. It gives rise to problems, because what happens if that directive changes post Brexit? It gives rise to problems if there are further reinterpretations of those obligations by the European Court of Justice post Brexit. But on the face of it, if there's a simple retention of EU law and its incorporation into domestic law, then in all those areas that are not then reserved under the Welsh Act, it would in my view leave the Welsh Assembly free to determine what it might do.

[24] **Jeremy Miles:** But it turns on the simplicity or otherwise of the legislation.

[25] **Professor Lee:** Very much so.

[26] **Jeremy Miles:** Just one final question: in the equivalent of this committee in the Scottish Parliament, one of the witnesses giving evidence, either oral or written evidence, has suggested that the Scottish Government should consider a great continuation Act, which effectively—presumably prior to the passage of the repeal Act—would state that the relevant legislation related to the devolved competences would continue. That would be an Act of the Scottish Parliament. Do you see that—well, perhaps you could comment on that in the context of the Welsh constitutional arrangements.

[27] **Professor Lee:** Well, put simply, the only need for that would be if the great repeal Bill was not of the simple sort that I have said, but a more complex sort. Then, one might expect that, in Scotland as well as in Wales,

devolved administrations would wish to sit down in Whitehall and say, 'What is going on here? Unless we get something that gives us freedom within both the powers and spirit of devolution, then we might look at something that would be along those lines'. But that would be a very, very complex job of work, and it would stretch the capacity of Welsh Government greatly.

13:45

[28] **Jeremy Miles:** Sorry, why would it be complex?

[29] **Professor Lee:** Well, because if you are going to have this continuation, you can only do it within areas of devolved competence, and therefore you would have to begin somehow to carve out what it is you continue and what it is that you can't.

[30] **David Rees:** Would either of you two like to comment on anything that you've heard?

[31] **Dr Jenkins:** Just one comment, really. We do have the advantage, perhaps, in EU environmental law that a lot of the legislation is through directive, which means that it has a basis in either primary or secondary legislation. So, you know, that's one point for the idea that we may retain some kind of continuity there. And also the fact that much of environmental law operates within international frameworks, so there's another reason for continuity in that respect.

[32] **Ms Lewis:** The other thing I would add to that: we've talked there about whether there would be an issue in terms of devolution—where the power will sit in terms of the decisions made about what to retain. I also think it's important to contemplate where the power will lie in terms of, 'Will these future decisions, or the scrutiny of whether to keep or lose these environmental provisions going forward—is that going to be a ministerial decision or is it going to be subject to the scrutiny of an Assembly committee?' I think that's a very important question.

[33] **David Rees:** Thank you. Michelle Brown.

[34] **Michelle Brown:** I just wanted to ask about the implications of Brexit. Once we Brexit, what happens in relation to the precedent set by the European Court of Justice? How do you foresee that working?

[35] **Professor Lee:** That's a very good question. We don't really know the answer to that. Provision, of course, could be made in a great repeal Bill to state precisely what the status of European Court of Justice determinations would be. It was done in the European Communities Act 1972, in section 3(1), where we were told in no uncertain terms that the judgment of the European Court of Justice should be followed in the UK courts, and it would be possible by statute to reverse that presumption. If one doesn't do that in the great repeal Bill, then it would be a matter for the judges whether then to take account of those interpretations laid down by the European Court of Justice. But, of course, we would no longer be members of that legal system, and therefore, on the face of it, there's no logical reason why they would do so. Put in lawyer's terms, I would have thought, at that point, that the views of the European Court of Justice might be persuasive, but not binding.

[36] **David Rees:** Is that okay?

[37] **Michelle Brown:** Just one more. With the great repeal Act, do you think—? I mean, the Wales Bill has been a bit of a disappointment in that it's rolled things back a little bit. Do you think the great repeal Act gives us an opportunity to maybe claw some things back that we have lost via the Wales Bill?

[38] **Professor Lee:** I'm not sure that I do see that. I think, you know, for good or for bad, assuming that it goes through, the Wales Bill will reserve to the United Kingdom certain areas of competence. I'm not sure that I see quite how that might be outflanked, because the only thing that, in a sense, could be retained or recycled from European Union law would be within those areas in which the Welsh Assembly had devolved powers.

[39] **Dr Jenkins:** But I would add to that that I think you could learn lessons from the experience of the Wales Bill, because it wasn't really predicted, perhaps, that moving from a conferred-powers model to a reserved-powers model would end up with the situation where you were having to think about the powers being taken away from the Assembly. So, as the devil will be in the detail, then when the great repeal Act is drafted, that should be borne in mind. I think we should learn lessons from that experience.

[40] **Ms Lewis:** Could I add something to the previous question on ECJ jurisprudence? Bob talked there about—those decisions going forward would obviously no longer be binding, but there may also be opportunities in reviewing how much legislation is retained going forward. There may be an

opportunity to consider the principles that have come through the ECJ decisions and whether to clarify those principles as part of the legislation going forward. So, for example, with the habitats regulations there are interpretations of that legislation where the ECJ has clarified and confirmed the meaning of certain phrases or principles, and there may be an opportunity to retain certainty by bringing those into the legislation rather than us relying on them not being overturned by a court at a later date. So, that's something else that could be considered.

[41] **David Rees:** Thank you. Suzy.

[42] **Suzy Davies:** I wonder if you can help me with the relationship between two comments that you made, Professor Lee, actually. The first is that the great repeal Bill will be introduced and brought into UK law. Complicated or straightforward, it doesn't really matter, because after that point all the competences will lie either with this place or the UK Government. But you started with your introduction by saying that the nature and status of environmental law will also depend on hard Brexit and soft Brexit. Can you tell me the difference between those two scenarios? I understand what you said about the first, but I don't understand how it fits in with your opening remarks.

[43] **Professor Lee:** Let me go back to my opening remarks. So, there are a number of possible scenarios going forward in terms of how we might retain access, or not, to the single market. The first might be this model—which looks unlikely—that we would seek membership of EFTA, with the agreement of EFTA states, and we would retain membership of the European Economic Area.

[44] **Suzy Davies:** Apologies. I do understand that bit. It's the relevance to environmental law and how much of it we keep.

[45] **Professor Lee:** So, if we wanted that solution, the only way we could have that solution would be by signing up to the environmental acquis in the European Union. That is fairly clear. So, pretty much everything in European Union law—certainly in European Union environmental law—with the possible exception of agriculture and fisheries. Kerry will tell you that there will be some doubt about habitats and birds, but pretty much everything else—every environmental matter, like waste, for example, that could possibly touch on trade—would be retained.

[46] **Suzy Davies:** Okay. So, the great repeal Bill, in those circumstances, would be limited, because we would have to comply with European law anyway for a period that's determined by our EFTA agreement rather than by the great repeal Bill.

[47] **Professor Lee:** Yes.

[48] **Suzy Davies:** Got you.

[49] **Professor Lee:** Though I'm assuming that the great repeal Bill might be put in place relatively early, even before we know what the eventual solution will be to how we trade with the remainder of Europe and the rest of the world.

[50] **Suzy Davies:** Okay. So, the timing is critical, because it's potentially open to the administrations in the UK to start changing some environmental law on the back of the great repeal Bill, only to find themselves having to reverse it all back if they join a particular trade agreement. Right, thank you. I get it now.

[51] **Professor Lee:** That is an extremely good point, and to my mind it's absolutely right. Let me give you another scenario: that we choose not to go into EFTA or the EEA and we seek a bilateral trade agreement with the European Union, along the lines of CETA—the Canadian agreement, which will be, perhaps, signed today. In that scenario, if you look at CETA, if you look at that bilateral trade agreement, there is a whole chapter on the environment and it contains some fairly surprising things. It contains quite a strong statement on the precautionary principle, for example; it contains a requirement for continual environmental improvement; it contains a requirement that nothing done in the name of trade shall dilute environmental protection in either jurisdiction. So, if that were the solution, we would then have a very different reason or a different set of imperatives when we revisited what was retained in the great repeal Bill in European Union law, and some of it we will keep and some of it we might not.

[52] **Suzy Davies:** Thank you very much.

[53] **David Rees:** Thank you. Steffan.

[54] **Steffan Lewis:** Thank you, Chair. Just to go back to the point that you made about the ECJ—just to clarify. I suppose I'm asking about the

precedents that they set in their decision. So, there will be ambiguity about whether or not the precedents in the original interpretations made by the ECJ would still be binding and standing. Therefore, are you suggesting that in this—I'm not going to call it the great repeal Bill; it's a terrible propagandist term. In the European repeal Bill, are you arguing, therefore, that there is a clause there to say, 'All determinations by ECJ to date are still in continuation', in order to have some clarity?

[55] **Dr Jenkins:** I think we're saying it's very difficult to answer that, because, at what point do you stop looking to the rulings of the ECJ when interpreting the law in the UK? That will be the problem. If we were to put that within the Act, there would have to be a point at which that would end, presumably. So, it's going to be very difficult, I think.

[56] **Professor Lee:** Presumably, this Bill to fulfil the mandate of the referendum would actually say that future decisions of the European Court of Justice would not be binding on the courts of England and Wales. The question might be to what extent should existing judgments of the European Court of Justice bind. I would have thought the great repeal Bill might contain a clause that they are no longer binding. That would then leave the judges free, perhaps, to hear an argument in court as to the possible interpretation of regulations that have been transposed from European directives in the shade of former decisions of the European Court of Justice, but they wouldn't necessarily bind our courts; they would be persuasive.

[57] I would just add that you can think of examples where that might not be an unpopular position. I think it is generally thought by many environmental lawyers that if you look at waste law and, in particular, the definition of what constitutes waste or not, that, actually, decisions of the European Court of Justice have got us into one unholy mess, the effect of which is actually to inhibit quite useful recovery and recycling activity. I think it's fairly clear—and I could point you—there's a Court of Appeal decision called OSS, and if you look at the judgment of the Court of Appeal in that case, it's pretty clear, and they don't hide this, that they are pretty fed up with that line of case law from the ECJ. So, the judges themselves, equally, wouldn't necessarily want to carry on being bound by the European Court of Justice. I'll leave it there.

[58] **Ms Lewis:** I would just add to that. I think if it isn't dealt with in legislation, then there may be some uncertainty for a period of time while we see how the courts respond to that potential freedom from the European

Court jurisprudence.

[59] **Steffan Lewis:** On that point, does the British state have full competence on making that determination in a repeal Bill as it applies to Scotland and Northern Ireland, or would that be up to a concurrent decision? How would that work in terms of applying those elements to the other two jurisdictions?

[60] **Professor Lee:** Constitutionally, the Westminster Parliament is the Parliament of the United Kingdom and, therefore, even though Scotland and Northern Ireland have separate legal systems, there's no constitutional reason in principle why that sort of provision that no longer binds Scotland or Northern Ireland to earlier decisions of the European Court of Justice could not be contained there. I would imagine, however, that, as the Bill made its way onto the statute book, those areas would be the subject of considerable discussion between—not merely, actually, the administrations in Westminster and in Edinburgh, but also, even, the Scottish judiciary.

[61] **Steffan Lewis:** Yes, I was going to ask about that. If the Scottish Parliament passed an environmental Bill and it became an Act, and they said, as far as environmental standards are concerned and all the rest of it, that ECJ judgments past and future would be binding on Scotland, but the repeal Bill by the UK Government said otherwise, what happens in that scenario? It isn't inconceivable. Because both Governments want a very different relationship with Europe I just wonder, constitutionally, is it a matter that because the Westminster Parliament is the sovereign Parliament and that's the end of that matter, putting the politics of it to one side, just from the mechanical, constitutional point of view?

14:00

[62] **Professor Lee:** From a constitutional point of view, if pressed on that, I would say that is the consequence of the Acts of Union 1707.

[63] **Steffan Lewis:** Thank you for that answer. Just to follow on from that, of course, with marine and environmental law, within these islands we know that it's not just the UK that's going to be impacted by Brexit, but also the Republic of Ireland and the Channel Islands and the Isle of Man. Is there a case now for strengthening legal frameworks across these islands when it comes to environmental law in particular, especially when you consider the freedom of travel and movement and the business and trade that happens

between these islands? Because, of course, the Isle of Man and the Channel Islands, although not part of the EU, have been bound by much of the European Union legislation and directives because of their relationship with the UK. And, of course, Ireland is a close neighbour. What implications do you think there are there in terms of the environment?

[64] **Professor Lee:** So, if you take the Channel Islands and the Isle of Man, protocol 3 to the accession treaty that was signed in 1972 ties in the Isle of Man and the Channel Islands on issues insofar as they relate to trade, but only to trade. Therefore, the Isle of Man, for example, could not put up trade barriers against imports from elsewhere in the European Union. But, in fact, the Isle of Man doesn't recognise—I think I'm right in saying—free movement of persons as such, and doesn't enjoy free movement of persons for Manx citizens. It's inevitable, I think, that there will be some re-negotiation of that post Brexit, but I think that will largely be bilateral between the Channel Islands, the Isle of Man and the UK Government.

[65] **Dr Jenkins:** Can I just add to that? I think your question raises a bigger point, which is the fact that there's rarely an environmental issue that isn't an issue that requires global action. It is really important, going forward, that even as a devolved government, the Welsh Government considers its position in relation to the areas that you've discussed: the UK as a whole, Europe, and action on an international level. So, it's important that we look to these broader frameworks as we're moving forward.

[66] **Steffan Lewis:** Yes. That was going to be my final point, actually, because what's been emerging over several decades now, I think, is a rise in paradiplomacy, and environmental policy has been, in many respects, a key feature of paradiplomacy. We have sub-state nations and regions entering into international agreements and treaties, even—where they're allowed to—on environmental policy, and much of it to do with setting international standards because they're frustrated with the United Nations or big institutions and that the states themselves can't find any agreement. I just wonder, within these islands, given our proximity here in Wales to the Republic and to Northern Ireland, whether we could use the fact that we have some competence over environmental policy, whether that might be another legal avenue of binding ourselves to multinational agreements, even though they might be limited to these islands, that could sort of counter any regressive steps by the British state.

[67] **Professor Lee:** Okay. We saw, last Friday in Northern Ireland, two

challenges in relation to the invocation of article 50 and what that might mean. There is a case that has been argued in the High Court—Santos—in which judgment has not yet been given, but that case could turn out to be, I think, very, very significantly important because when the European treaty was signed in 1972 by Britain, it was signed as an Executive action by Ted Heath and the foreign Minister, but it was signed off by the Executive and then it was transposed into English law by the European Communities Act 1972. That act of transposition does not, as such, take place with most treaties. So, if you imagine the Paris agreement, or a treaty on climate change, we don't necessarily expect that that will then be incorporated lock, stock and barrel into domestic law. If the Santos case decides that Parliament have no say in the triggering of article 50, that, as with joining a treaty, leaving a treaty is simply an Executive action, then that cedes an awful lot of power to the UK Executive. If, however, it is decided that there might be room for parliamentary intervention, in that it actually would require a vote of the UK Parliament to trigger article 50, then that begins to shift the powers back away from the Executive.

[68] I think, in that scenario, interesting questions arise. One might put it like this: suppose that post Paris there's yet another climate change agreement, and people gather together in some far-flung corner of the globe—Havana, or wherever—to negotiate the next stage of the climate change agreement, one issue for Wales would be: does Wales want to be at that table? Because for 40-odd years, that's not been the experience. The vast swathe of environmental treaty law that has been passed post 1972 has been signed and ratified by the European Union on behalf of its member states, and much of that negotiation has actually been conducted by the European Union on behalf of everyone. If, now, it wasn't the European Union at that table, but it was people from Whitehall, then would we be saying in Wales, 'Well, just a minute, there is a very definite Welsh interest in how we go forward on the climate change issue and we also want to be at that table'? And if the answer to that question is 'yes', do we have the human resource, and so on, to fulfil that?

[69] **David Rees:** Thank you. We talked about access to the law in the sense of the European Court of Justice. We're able to make complaints, we're able to contact the EU quite easily at this point in time, and we're involved in this. What are your fears on the loss of that access and its replacement within the UK, and the implications for any organisation that wishes to raise concern over breaches of environmental law?

[70] **Professor Lee:** So, I know that Victoria, for sure, is going to want to say something, and Kerry as well I suspect. Let me just give you one concern that I have straight away, and that is of an enforcement cap. I mean, for good or for bad, we have got very used to the European Commission partly policing our environmental law and referring matters to the European Court of Justice—Aberthaw, of course, I could mention in this context. That will disappear. I think one question for us in Wales is: would we want something that then, in a sense, would begin to fill that enforcement gap? Victoria, I guess you want to say something about this.

[71] **Dr Jenkins:** Yes. In terms of participation, clearly the EU and the UK are both signatories to the Aarhus convention on participation in environmental decision making. We've agreed that participation in environmental decision making is very important, very significant. That has underlined the directives on access to environmental information, and participation in decision making, and access to justice. So, that will continue to be very significant. We would then be relying on our processes of judicial review, and we've established that those processes do not necessarily comply with the Aarhus convention and issues around that. There is a mechanism under that convention for us to make a complaint to the Aarhus complaints committee, so that would still be an avenue that we could follow. But, yes, we would be relying on judicial review and we'd be relying on that to provide an effective means of challenge to any decisions in this field.

[72] **Ms Lewis:** I would completely agree with what Bob and Victoria have said there, and add that the relative ease with which a complaint can be made to the Commission means that a member of the public, or an individual or an NGO can raise that issue, and it's the Commission that brings the proceedings.

[73] And the problem that we're left with is that our judicial review process relies on a private individual or an NGO bringing those proceedings. We know that there are all sorts of issues with that. Again, it may be one of those opportunities that, in the scrutiny process that follows from the repeal Bill, where we're going through all of these European Union regulations and deciding which things we should save, one of the things we might be considering is a proper statutory appeals process, so that it makes it very clear in the legislation who can bring an action and for what, and that we continue to hold the Government and the decision makers to account through whatever channels we can.

[74] **David Rees:** That final point, I think, is an interesting one, because clearly, if there's an infringement, it's the member state that's held to account. The situation will come with the repeal Act, but we're not clear yet as to whether that will continue to be the case or whether it will be the individual operator, as such, or perhaps a devolved nation, even. So, I'm assuming that there are some concerns and negotiations that will have to be undertaken as part of that process to make sure we're clear as to who is accountable.

[75] **Professor Lee:** Yes. And, coming back to an earlier conversation, it may be, of course, that if one mechanism by which we retain trading rights is a bilateral agreement with another state, then—. One of the reasons why Wallonia was so difficult—. I mean, there were all sorts of other domestic reasons, but one reason why there was a sort of anti-globalisation push in Wallonia against the Canadian-European agreement was the access that individual multinational corporations from Canada might have to the dispute resolution mechanisms under the Comprehensive Economic and Trade Agreement and what that might mean in terms of environmental standards. In other words, whether multinational corporations could use a bilateral trade agreement to push back environmental standards in the absence of the sorts of mechanisms that we've had to date.

[76] **David Rees:** Jeremy.

[77] **Jeremy Miles:** Just to take that one step further then. So, in the absence of an equivalent to the European Commission that would effectively take on, at its cost, the enforcement mechanism, to replicate that in a post-Brexit world would require, by the sounds of it, a similar sort of regulatory body that would respond to allegations of breaches by individuals and would then take on enforcement, either through the courts system or through other mechanisms. Is that what you're positing? Is that a safe assumption?

[78] **Ms Lewis:** That's one potential way of doing it. Obviously, this isn't a matter that's a devolved issue, but there are also discussions about the creation of an environment court and a proper forum to be hearing all sorts of environmental disputes. That may be one thing that is taken forward.

[79] **Professor Lee:** One thing to bear in mind in saying that is that, in relation to air quality, if we take that as an example, both in relation to urban air quality and in relation to particular individual incidents like, again, if I come back to Aberthaw, there's not necessarily a breach of domestic law.

The power station at Aberthaw was working within permit, but what it wasn't doing was meeting nitrous oxide standards in European Union law. The urban air quality cases taken by ClientEarth look similar to that: there's exceedance of the urban air quality directive, but there's no domestic action; it's only by using its access to the European Court of Justice that ClientEarth sought to get at least a court declaration that the UK was not compliant.

[80] **Jeremy Miles:** But in your response there, have we come back, in a sense, full circle to the content of the great repeal Bill and what happens after that? That is, if there is, at least for the time being, a straightforward transposition, then that distinction wouldn't be so applicable? Is that correct?

[81] **Professor Lee:** As someone who worries about the environment, one of the things that I worry about greatly is what will happen to targets. So, what will happen to targets on things like air quality or the amounts of renewables in our energy mix or climate change targets? Everywhere you look, European environmental law is replete with somewhat aspirational at times, but aspirational targets to drive the environment forward. When we're talking about a great repeal Bill and when we're talking about what we save and when we're talking about what we junk, one of the worries is that one of the very easy things to junk is, 'Well, let's not be bound by these targets anymore.'

14:15

[82] **Jeremy Miles:** Okay.

[83] **David Rees:** Thank you. Does any other Member have any other questions?

[84] **Mark Isherwood:** Can I just clarify in my mind what you've been saying around this? If all the constituent parts of the United Kingdom agree that we want a consistent standard for air quality or water quality, a legal process will exist to agree a framework that could be enforced through an agreed UK-wide court or otherwise, whereas—you used the term early in your presentation of 'constitutional crisis'—one would assume a UK Government would wish to avoid a constitutional crisis that set devolution law, the Wales Act, against other legislation that could follow under a great repeal Bill. Is that a fair summary?

[85] **Professor Lee:** Yes. Only to add one proviso, I think, which is that the

extent to which the UK remains free to make those determinations will depend on what happens post Brexit. So, if it's re-signing bilateral agreements of any sort with the European Union, it may well be that the European Union will come back and say, 'Yes, but only if—.' Given what I've said on standards, it's not always been the case that Britain has been in favour of environmental standards. It has, at times, thought that some standards—drinking water would be an extremely good example—are excessive and unnecessary. So, there would be areas where, if left free, the UK might well wish to rewrite those standards, but the proviso is 'if left free', because, depending on the form of Brexit—the precise post-Brexit agreements will determine the freedom that the UK will have.

[86] **Mark Isherwood:** Where I live, the main local water company is cross-border, which also raises other questions we haven't got time to go into.

[87] **David Rees:** No, we haven't got time. Michelle, you had one question as well.

[88] **Michelle Brown:** Just one quick—I don't know whether the answer will be quick. If it were left to you, are there any particular problematic, difficult areas of environmental law that you would change? If you had a knife or a black pen, which ones would you target first to repeal or change?

[89] **David Rees:** On that particular point, it could be a long list or a short list.

[90] **Michelle Brown:** Sorry.

[91] **David Rees:** Perhaps you can give us a note as to what you may think would be the case in that, because that will give you time to think, particularly, on those ones and we can have a note on that then as a consequence—to save you quickly thinking off the top of your head and perhaps we go on a list that is going to take us a bit over the time that we need. Is that okay?

[92] **Professor Lee:** Yes, of course. I'd just add very quickly that, whatever one thinks of this process, it does provide an opportunity to think about things in a different way and maybe in a smarter way.

[93] **David Rees:** Thank you. On that point, thank you very much for this afternoon's session. Thank you for your evidence. You will receive a copy of

the transcript. If there are any factual inaccuracies you identify, please let us know as soon as possible so we can correct them. Once again, thank you and thank you for the presentations as well. We'll now have a five-minute break.

*Gohiriwyd y cyfarfod rhwng 14:18 ac 14:26.
The meeting adjourned between 14:18 and 14:26.*

**Gadael yr Undeb Ewropeaidd: y Goblygiadau i Gymru—yr Amgylchedd
a'r Môr
Leaving the European Union: Implications for Wales—Environment and
Marine**

[94] **David Rees:** Can I welcome Members back to this afternoon's session of the External Affairs and Additional Legislation Committee, where we are continuing our investigation into the implications for Wales following the decision of the British public to leave the EU? This afternoon's sessions are focusing upon the environment and marine. Can I welcome Dr Charlotte Burns from the University of York and Dr Richard Cowell from Cardiff University to this next session, and can I thank you for any evidence we've received? Clearly, the implications for marine and the environment and the—. It's one of the larger areas of the EU that impacts upon Wales in the sense of devolved responsibilities within Wales, and I suppose the first question in general is, perhaps: can you give us an outline, in your opinions, of the scale of the implications of Brexit upon the environment and marine areas within Wales and the competencies within Wales?

[95] **Dr Burns:** Who wants to go first?

[96] **Dr Cowell:** I could have a shot at going first. I think the implications are very significant. If I was to measure it against the things the Welsh Government might achieve through the Well-being of Future Generations (Wales) Act 2015 and its own domestic legislation, I think how it responds to Brexit and the extent to which the Welsh Government is able to promote its own particular response to Brexit will be a major indicator of its own ability to promote environmentally sustainable development within its territory. So, it's a key moment of opportunity, but also a potential risk.

[97] I think my other points would be that, given the enormous legal uncertainty, it almost matters as much what values and goals the Welsh Government and the Assembly choose to promote, really, because, in a

context of uncertainty, knowing what it is you want to push for can be as important as knowing what the mechanisms for pushing for it might be. But, clearly, I think there are a number of risks attached to this process. Some of the risks, I think, will be well known: the risk that we will see deregulation or unwise changes to environmental policy that lower environmental standards, with perhaps Wales being forced to do so in line with what goes on elsewhere in the UK; there are risks that some of the advantages of EU-style environmental policies will be traded off too swiftly; there are risks also, as is often the case when regulations are discussed, that business-based perspectives on the merits of deregulation come across loudest in that kind of context.

[98] **David Rees:** Thank you. Dr Burns.

[99] **Dr Burns:** Like Richard, I think the scale is hugely significant. Environmental policy is one of the most Europeanised areas of policy that we have in the United Kingdom, and it's a devolved area to Wales, so the ramifications are highly significant. And I suppose, like Richard, I've been thinking in terms of risks and opportunities that our exit from the European Union raises, and particularly in the context of the devolved administrations, and one obvious risk is fragmentation of UK environmental policy, where, at the moment, although Scotland and Wales have the opportunity to develop their own environment policy, it's within that broader context of EU policy. So, in the absence of EU policy, what will the broader context be within which the devolved administrations are making their policy? Will there be a broader framework or not?

14:30

[100] The other risk is about the fact that we benefit at the moment via our membership of the European Union from an array of expertise, resources and agencies to which we'll no longer have access at a time when we've seen public services facing cuts. So, there's a question there about those expertise and resources: where will we get the knowledge to create our own environment policy?

[101] Then the third issue, I suppose, is one about governance and accountability frameworks. I think in the previous evidence session somebody was mentioning air quality and ClientEarth action. At the moment, if the UK Government doesn't implement legislation, then there's an opportunity, whether it be individual citizens or for NGOs, to take the

Government to court for failure to implement rules. There is also a whole set of accountability mechanisms built into legislation. I notice that Andrea Leadsom said last week that a third of EU environmental legislation would fall when the great repeal Bill comes into force. We don't really know what that third consists of, but part of me wonders: is that the accountability and reporting requirements that are contained within some EU legislation that will no longer apply? We'll no longer have to report to the European Commission on water quality, for example. If we don't have to do that, should there not be some kind of onus upon, whether it be the British Government or the Welsh Assembly Government, to report to somebody about what they're doing, why, and how, and some accountability or governance frameworks put in place to replace that?

[102] On the positive side, there is an opportunity to develop local environmental policy that is more sensitive to local circumstances, and also to update environmental policy in the light of new science more rapidly than we can do in an EU context at the moment. So, enormous significance, I think, and an array of risks, but also some opportunities there as well.

[103] **David Rees:** Thank you. Mark.

[104] **Mark Isherwood:** Thank you. If I can focus on a few specific issues, I'll list them rather than hit you one at a time, but, if you want to come back on those individually, please do. What are your views of the risk and opportunities of leaving the EU on the future status of European protected sites, on UK and Welsh commitments under the convention on Aichi biodiversity targets, on legislation such as the habitats and birds directive, and on the environmental assessment and planning processes?

[105] **Dr Burns:** You should definitely do the last one there, Richard.

[106] **Dr Cowell:** Okay.

[107] **Dr Burns:** No, sorry, I'm not saying you can't do the others, but I'm just saying, yes, that's a Richard one, not a me one.

[108] **Dr Cowell:** I should say that I'm not an environmental lawyer, but planning is something that overlaps my sphere of expertise. I think it's fair to say that the UK would persist with a system of using environmental impact assessments and strategic environmental assessments, but there's a risk that it would lose some of the qualities it has inherited by having those

underpinned by European directives, which, in general, tend to underpin a more formal approach, allowing less discretion for UK Governments to decide when and where they apply it, and moves towards more consistency across applying it to a range of possible sectors to enforce important principles like making sure that alternatives are considered, for example. Without that, I think there's a very strong chance that the UK Government might go for an approach that is more discretionary, less applied to a wide range of projects, more minimal in the sort of things it might ask of developers in terms of considering alternatives, for example, and would lose, of course, the legal facility for the pursuit of redress, which Charlotte has just talked about. If groups are dissatisfied with the implementation of the EIA or SEA process—that's been very important in the past, when Governments have sometimes decided a priori that a plan doesn't really require SEA; things like the sustainable communities plan, things that were promoted by the previous Westminster Labour Governments. Taking them for court decision has been quite important to making sure that those things are properly assessed.

[109] I'm also, for that reason, slightly sceptical of the view that's often circulated that it will be okay with things like EIA because they're also underpinned by international conventions. As Charlotte's just hinted, again, those international conventions would not, I think, prevent the UK from reconstructing a process to allow greatly more flexibility as to when, where and how it was applied.

[110] **David Rees:** Dr Burns—*[Inaudible.]*

[111] **Dr Burns:** Yes. I was seeing if you'd finished. I suppose what I would add to Richard's comments, though—. He's mentioned international conventions. This is quite often referred to—that it'll be okay because there's a range of international conventions in place, so the convention on biological diversity would be an example of that. A lot of those international conventions, though, are much weaker than European legislation, and they don't have the strict implementation and enforcement frameworks that we see at the European level. So, there's no way of guaranteeing that they're enforced beyond naming and shaming countries for failing to meet targets. Biological diversity is a really nice example where states have consistently failed to meet the targets that have been set. The renewed target was set, I think, in 2010, because the targets before that had failed to be met, so it's an ongoing issue.

[112] The other issue would be in relation to all of the policies that you

outlined—habitats and birds and protected sites. There have been calls for repeal of those pieces of legislation, despite the fact that we had a review of the habitats and birds legislation in 2012, which showed that it was fit for purpose. We've had a review of it at the European level, which has shown that habitats and birds legislation at the European level is fit for purpose. It's still an area where we see lots of calls for repeal of certain aspects of those pieces of legislation. And in a post-Brexit world, we will have the capacity to adjust that legislation, so I think there is a risk that some aspects of legislation might be rolled back.

[113] Certainly, an area of concern for the NGO community and people from the wildlife trusts, in particular, who I've spoken to is that equivalent UK legislation is not phrased as clearly as EU legislation. So, when it comes down to matters being discussed in court, you're less likely to see natural areas being protected if it's being decided on a piece of UK legislation, but not on a piece of EU legislation, because there's much more scope for interpretation.

[114] **Dr Cowell:** I'd just like to underline those points on the habitats and birds directives. I think they are genuinely at potentially quite significant risk, partly because there are constant pressures for repeal and also because the evidence presented that complying with them presents a real cost to business—the evidence is extremely weak. I think you can look for ways in which the UK Government has already, perhaps, exercised some attrition of their protective value, in the way that the national policy statements on energy, for example, are worded, which would tend, I think, to diminish the extent of the protection that would be given to those sites in the face of projects that would come under that fast-track infrastructure consenting procedure.

[115] And there are also—. Some of the things that I believe the Welsh Government submitted in its evidence to the balance of competences review on the habitats directive did rather give the impression that the tests set for damaging developments under the habitats directive—the IROPI principle, the imperative reasons of overriding public interest—could be recast until each better reflected a more balancing approach between sustainable, economic and environmental objectives. I think that misunderstands the meaning of sustainable development in quite a fundamental way, but could be given as giving more scope for short-term trade-offs, so in favour of a development when it possibly threatens these kinds of sites. I think that reporting procedures, like associated impact assessments where a development might

impact upon these sites, would also be the sort of thing that one might feel is at risk of being weakened.

[116] **David Rees:** Dr Burns, you indicated that there's been a review. At what level—is it at UK level or EU level?

[117] **Dr Burns:** So, in 2012 there was a domestic review of habitats regulations, and then earlier this year the EU regulatory fitness review was carried out, which found that the legislation was fit for purpose at European level.

[118] **David Rees:** Okay. So, there's been one at the UK level and there's been one at the EU level. Thank you. Mark.

[119] **Dr Burns:** Yes.

[120] **David Rees:** Thank you. Mark.

[121] **Mark Isherwood:** You said that concerns had been raised. Are you able to tell us who raised those concerns, not necessarily individuals, but what organisation or interest was raising those concerns?

[122] **Dr Burns:** Certainly, during the referendum debates, Owen Paterson and George Eustice, I think, both made pronouncements about the habitats and birds regulations. I'm not aware, though Richard may be, of particular groups that may have raised questions about habitats and birds. Certainly, I've heard different evidence anecdotally—so maybe not evidence—different anecdotes about different representatives of industry. So, I've heard from the Aldersgate Group that builders' associations, actually, are in favour of the habitats and birds regulations because they're very clear and they know what they're allowed to do. But builders would quite often—. Building groups—maybe those would be identified as seeking to weaken the habitats and birds regulations.

[123] **Dr Cowell:** It's also worth noting that there's a variety of legal varieties or strengths that Brexit—but under most of them, the habitats and birds directives would no longer apply, because even if we remain members of the single market, it would not be a piece of legislation that's attached to that.

[124] **Mark Isherwood:** And how also do you think we could best surmise the impact on issues such as emissions trading schemes, commitments under

the Paris agreement on climate change, and the targets on the renewable energy directive? We heard from the previous witnesses about the possibility, by agreement, of a UK framework, with a UK environment court to tackle issues such as redress, which you referred to. But would you concur that that might be a way forward by agreement, or through agreement, between the constituent parts of the UK?

[125] **Dr Cowell:** Just a quick reaction to the idea of an environment court—. I'm not a legal specialist, and I'm not quite sure of the merits of that, except that it would almost certainly be charged with overseeing the implementation of things that have already been agreed—that is to say the content of targets and policies here. Thinking about renewable energy targets, my understanding is that although we're subject to renewable energy targets, the 2020 targets, up to the end of the decade, post-2020 EU energy-related targets do not include national targets on renewable energy. So, in a sense, we move into a rather different period thereafter in any case, no matter what the future might hold. So, I guess we'd be into a debate within the UK about whether or not the devolved administrations, certainly Scotland, who favour renewable energy targets specifically, would win in arguments against Westminster, which has generally favoured the technology neutrality of carbon reduction targets, which would allow a variety of approaches, including nuclear or whatever to meet those decarbonisation targets. So, I'm not sure the targets issue applies that strongly in the medium term in the context of renewable energy.

[126] **Dr Burns:** On the idea of an environmental court, I've heard that idea suggested, or some kind of equivalent to the climate change committee—an environment committee that would act as an independent body to hold the Government to account. We have the Supreme Court, so I don't know if we need to have a separate environment court. I think the issue would be making sure that laws are framed in a way that they're not open to interpretation in the way that they quite often are when they're framed within the UK, as opposed to in the EU. I think that's the primary issue there. So, I think we need to have some kind of accountability body. Whether or not it needs to be an environmental court, I'm not quite sure. Like Richard, I'm not a lawyer, but if I were a lawyer, I'd be sitting here saying, 'No, we need a new court.'

[127] On ETS, renewables and the Paris agreement, I think, in the immediate short term, we will, I assume, carry on with our commitments that we've made at the European level. I'm hoping that we will join with our European

partners in crafting the burden-sharing agreement on how each state will assume the burden of meeting the Paris targets. I assume that we'll carry on with our nationally determined contribution that we've agreed to with our European partners.

[128] On ETS, I'm not an expert on ETS. I know from those who are that it's going to be fantastically complicated to try and unpick our way from the ETS, so I would hope that there would be some kind of agreement reached to keep the UK as part of ETS. Similarly with renewables, I take Richard's point that, post 2020, we're not tied into any targets, so then it would be up to the Government of the day to decide what those targets are. I would hope, maybe suspect, that we will keep working with our European partners. Given that climate change is an international issue, it makes sense for us to work with them and agree targets that will be similar to them.

[129] Certainly, if we become a member of the European Economic Area—that seems increasingly unlikely given the political mood music that we've heard since September, but if we did, then European Economic Area members tend to follow the European Union's lead. But even outside of that framework, I would imagine that, over the short term, we would follow the European Union's lead, particularly if Britain wants to continue being a climate change leader. Does that answer your question?

[130] **Mark Isherwood:** Except for the idea of a UK framework, regardless of how it's enforced, or redress-managed—it would have to be in accordance with the devolution settlement in order to avoid a constitutional crisis.

[131] **Dr Burns:** Yes, which you heard in the previous session. I think we caught the end where you mentioned a constitutional crisis. Certainly, when I opened, I said I thought there was a risk of fragmentation, and Richard and I were chatting about this beforehand. One obvious way to overcome that risk of fragmentation is to adopt within a UK context a situation similar to that that we have in the European Union, where you have a common framework with minimum standards and you can go higher than those standards if you want to. So, that's what exists in the EU and that's what exists in the UK. So, Wales and Scotland can go further on, for example, energy or climate change if they want to. So, it seems to me that that would be a sensible solution. But I'm not a lawyer, so we might need a lawyer here to tell us whether or not it's possible.

14:45

[132] **Mark Isherwood:** Thank you.

[133] **David Rees:** Thank you. Jeremy.

[134] **Jeremy Miles:** Well, you've actually just answered the question I was going to ask you.

[135] **Dr Burns:** Oh, sorry.

[136] **Jeremy Miles:** That's fine. I won't ask it again. So, it's conceivable—I mean, it's implicit, I think, in what you've been saying—and you may have also said—that having a UK-wide replacement for what is the current EU framework is a good thing. You're obviously assuming that there'll be a certain amount of attrition, as you put it, Dr Cowell, in terms of the reduction in standards. But it would be possible, would it not, just to confirm, that, under its devolved competencies, the Welsh Government could choose to continue to apply what would be a continuing, evolving, European level of environment regulation, if it wished to do that? Could you outline some of the factors around that? There are obvious upsides from an environmental point of view, but, in the context of a UK environmental framework, might there be some downsides to that as well?

[137] **Dr Cowell:** I suppose that a UK-wide environmental framework might do different things to the balance of flexibility that devolution has already conferred on the various devolved administrations. I guess we have a sort of microcosm of the problem that the EU faces—what level of flexibility is it desirable to allow vis-à-vis avoiding the risk of some kind of race to the bottom, or competitive downward pressure here? And it's a trade-off between those two principles. My understanding is that, yes, the Welsh Government would, presumably, have the flexibility to keep choosing its own standards, as it already has done in certain aspects of the agri-environment policy, the environmental policy on waste and so on, to take its own approach. But I guess it's done so in the context in which business operators, with the choice to operate in England and Wales, or the choice to operate in the UK and Europe, cannot say to Wales, 'Your standards are too high for us to invest here, compared to our neighbour, and unless you change the downwards, we're not going to put any money in your area.' So, it's the context in which the wider EU framework at least sets minimum sorts of requirements there, which militates the effectiveness of corporate power, one might say.

[138] **Dr Burns:** So, I suppose one thing I would say is, whatever kind of Brexit we get, we will still have to implement a lot of the *acquis communautaire* if we want to access that market. So, on anything relating to chemicals, pesticides, any of that kind of stuff, I imagine we will still have to be implementing those environmental rules and regulations. So, there will be some kind of EU framework there. I think having a UK framework—the idea of having a UK framework is a good thing, because there are some areas of policy—water being an obvious one: we can't stop water at the border; air quality—. I mean, this is the reason why we co-operate with our European partners on these areas already. So, I think, as a replacement, it would be a good thing. It does raise, then, a lot of questions about what the minimum benchmark will be set at, and who gets to decide what that minimum benchmark is. If I were a Member of this Assembly, I would be very unhappy at the idea that it gets decided by somebody in Westminster, without Wales and Scotland being consulted, and that it might be set at a level that you don't think is appropriate. And then, as Richard says, there's that question mark—if you do try and push ahead with better environmental standards, does that end up hurting you economically?

[139] So, I think the idea of having a minimum standard is a good one. I would like to make sure—see—that all the devolved administrations are involved in the discussion about what that minimum standard is. And also, we're talking about Wales here, but if you think about Northern Ireland and Ireland—we need to take that into account as well: we have immediate neighbours in whose interest it is that we maintain similar environmental standards. So, I think that broader EU context will still be informing that minimum standard.

[140] **Dr Cowell:** Just also a quick point about the scope of any cross-UK agreement, in relation to the idea that we will still have to implement certain environmental regulations because of trade requirements. There may well be environmental issues attached to various trade deals that we might strike, but the total—some of those will not be a particularly comprehensive environmental regulation picture. It will be more attached to products—things that trade between countries—whereas other issues will be left outside that. So, you get a situation in which trade-related environmental policies move in certain kinds of directions, reflecting the trade deals, and others might not be so linked to that. So, the idea that you could have a national agreement that's more comprehensive in its scope, in its treatment of the environment, than you might get as a sum of various trade-related

deals is also worth thinking about.

[141] **Jeremy Miles:** Thank you.

[142] **David Rees:** Thank you. Suzy.

[143] **Suzy Davies:** Thank you. You both actually answered the question I was going to ask, but just on that final point about the level of protection that trade arrangements are inevitably going to give, just in practical terms, can you outline for us the main areas you think are likely to be excluded from trade organisations? I mean, we've got a fair idea, but you might have some more.

[144] **Dr Cowell:** Some of the ones are the habitats and birds directive and the bathing water directive. Assuming that we're not a member of the European Economic Area, then I guess things like environmental impact assessments and strategic environmental assessments would come up in that. I think things that tend to be land related—

[145] **Dr Burns:** Soils policy.

[146] **Dr Cowell:**—soils policy—tend to be things where national governments prefer to retain control, if at all possible. So it may be that the things that are most likely to remain are the things that pertain to the movement of products and the standards to which they're produced between countries—so, chemicals regulation might be and safety regulation might be.

[147] **Suzy Davies:** Okay, it was just to have a few examples on the record, really.

[148] **Dr Burns:** Waste would be a classic example where there's actually a market in waste, so I can't see how we would not be bound by something similar to what's in place at the moment.

[149] **Suzy Davies:** Okay, thank you.

[150] **David Rees:** Thank you. Steffan.

[151] **Steffan Lewis:** I'm just trying to get my head around the idea of why Wales, which currently has competence over areas of environmental policy, would want to voluntarily subject itself to UK frameworks and, potentially, UK

environmental courts that are, probably, I think we can say over the course of the last two decades of devolution, not going to be that interested in Welsh interests, particularly if we have a Welsh Government that is ambitious in meeting environmental targets—the Scottish Government certainly is and has exceeded many of its own targets. Why on earth would we want to take a step back?

[152] You mentioned earlier that Andrea Leadsom's already announced that a third of environmental laws or directives are going to fall with this wonderful repeal Bill. I assume there wasn't much discussion with the Welsh and Scottish Governments about that announcement, so I'm trying to figure out what the benefits are. Why wouldn't it be more beneficial for the Welsh Government to decide, 'We will subject ourselves to European standards and world standards, and try to exceed those standards, and, if the UK Government, on behalf of England, decides that it wants to go backwards and go back to the 1980s in terms of how it dealt with environmental issues, then that would be an issue for them'. I take the point that, obviously, there are certain issues like water supply where there would have to be bilateral discussions, but rather than ceding that to the British state, surely it would be better for us to decide that we're going to subject ourselves to a higher standard than, probably, a backward one at Westminster.

[153] **Dr Burns:** I don't see those two as being mutually exclusive. I think there will need to be some co-ordination domestically between the different nations in a range of areas, but I don't see that as then being inconsistent, given that Wales has that power over the environment, with pursuing much higher standards if you want to. So, yes, I completely agree with you, but I think, assuming that whatever's agreed post Brexit still affords you that opportunity, I would applaud the Welsh Government for doing that and maybe embarrassing the UK Government or English Government—whatever we end up with—into doing the same thing. So, I don't see those as being mutually exclusive, not least because we will need to have some kind of minimum co-ordination across the nations. Richard.

[154] **Dr Cowell:** It's a trade-off, isn't it? It's about control versus consistency, one would hope, at a high standard. I guess that one would have in the microcosm in the UK the kind of trade-offs one makes by being an EU member, in a sense—one sees a modicum of sovereignty for consistency of standards across the member states. I certainly admire the way the Welsh Government has set out its stall as potentially pursuing higher standards. I certainly think it should resist business arguments that consistency is by far

and away the most important thing, even if it means consistency downwards. I think a lot of those arguments are also sometimes slightly spurious, frankly. Of course, if you ask business whether it would like all the regulations to be the same, it would say 'yes', but that's not to say it's materially harmed by meeting the higher standards in one place than another.

[155] But I guess it's about balancing the Wales of high environmental aspirations with the pressures to create jobs and growth in an area that still lags behind UK norms and, on certain occasions, may feel it lacks the scope to say 'no' to potentially attractive projects or trajectories of development. I guess the dilemma that most recently springs to mind is the way that Wales fell in behind the UK in setting aside zero-carbon homes targets, I think under pressure from house builders, who said, 'We can choose to build anywhere. George Osborne has abandoned these in the UK. We can wait you out and we've got plenty of permissions over here'. So, in some sectors, I think one may face those kinds of trade-offs. Clearly, the ideal thing would be to construct it—. There may be merits in constructing the kind of joint framework that bids standards upwards, but a standard that would consistently bid them downwards would be bad on sovereignty fronts and environmental fronts.

[156] **Steffan Lewis:** I suppose my point is that were it not for the European Union, standards here in the UK would probably be absolutely dreadful. So, you can forgive me for being a bit pessimistic about just allowing the UK Government to get on with it.

[157] **Dr Cowell:** Yes, absolutely.

[158] **David Rees:** To clarify that point, your expectation, your hope, is that the repeal Act would ensure that we still maintain competence to set standards within Wales beyond a national framework.

[159] **Dr Burns:** Yes.

[160] **David Rees:** To which his line about the not mutually exclusive issue—do you want to come in?

[161] **Ms Jones:** Could I, just to clarify? You've both very kindly emphasised that you're not lawyers. From my point of view, it's kind of the other way around. The UK cannot impose a common framework on the Assembly, on the Scottish Parliament, on the Northern Irish Assembly, unless those

legislatures give their legislative consent. Now, it all comes down to raw power in the end, doesn't it? If the UK Government was willing to provoke a major constitutional crisis, then the UK Parliament is sovereign and it could override, but it would absolutely have to bring its legislative tanks onto the devolved's lawn to do that. So, as Steffan Lewis has said, it would be a choice of ours to cede that to the UK Government, really. They cannot force us at the moment to have a common framework. In policy terms, that may be very desirable, of course—a common framework—or no; that's your area of expertise.

[162] **Dr Burns:** I agree with you, and perhaps I'm being naive here in being a fluffy environmentalist who thinks everyone should co-operate with one another and have an agreement. I think one of the drawbacks with the way that Brexit is being negotiated is that nobody really knows what's going on—it doesn't sound as if representatives from Scotland and Wales are being particularly well informed about what's going on, and you may end up being presented with a take-it-or-leave-it offer. From my perspective, that's undesirable. What we need is involvement of all the parties and a negotiated minimum benchmark for a UK framework. So, I'm not advocating that Westminster comes and tells you how to run environment policy, but rather there be a consultation about what those minimum standards should be and then leave the devolved authorities the freedom to pursue higher standards if they want to. But I recognise that might be naive and it may be legislative tanks on lawns that we'll actually face.

[163] **David Rees:** Thank you for that. In relation to the EU review, was there an issue with the UK's interpretation of some of the standards and the directives? Whereas developers might have accepted the habitats directive as such as good, is there a question at the moment of the UK's interpretation of those directives?

[164] **Dr Burns:** Do you mean in terms of gold-plating—the term that's often bandied about?

[165] **David Rees:** Yes.

[166] **Dr Burns:** I've seen academic articles reviewing this, and the Government's own review on the habitats directive, both of which found that there was no evidence of gold-plating and that there hasn't been an issue with the way that it's been implemented. I think there's a handful of cases identified in the habitats review, but that, generally speaking, it was fit for

purpose and working well. But the gold-plating rumour still circulates. Richard.

[167] **Dr Cowell:** Maybe it's the examples of environmental fig-leaving, where the EU is blamed for things they can or can't do, which may become more abundantly clear.

[168] **David Rees:** Interesting interpretation. Are there any other questions from Members? If there are no other questions, can I thank you very much for your attendance this afternoon? It's been very interesting. Thank you very much. You will receive a copy of the transcript. If you find any factual inaccuracies, please let us know as soon as possible so we can correct it. So, once again, thank you very much.

[169] **Dr Burns:** Thank you.

[170] **David Rees:** We'll go into a short break before the next session.

*Gohiriwyd y cyfarfod rhwng 14:59 a 15:04.
The meeting adjourned between 14:59 and 15:04.*

Gadael yr Undeb Ewropeaidd: Y Goblygiadau i Gymru—yr Amgylchedd a'r Môr

Leaving the European Union: Implications for Wales—Environment and Marine

[171] **David Rees:** Can I welcome Members back to this afternoon's session of the External Affairs and Additional Legislation Committee? We continue our inquiry into the implications of Brexit upon Wales. This afternoon we are looking particularly into the environment and marine policy areas. For our next session I welcome Professor Dickon Howell, Newcastle University; Stephen Hull, Associated British Ports Marine Environmental Research; Dr Margherita Pieraccini, University of Bristol; and Professor Volker Roeben, Swansea University. I thank you all for attending this afternoon and for the written evidence we've received. Clearly, we want to move on to questions as much as possible. With a panel of four, I know that you'll tend to want to say everything, but if we can avoid repeating some of the statements others have made, that would be very helpful for us because we have limited time.

[172] I'll open the questions. I will give each one of you an opportunity to

answer this one. The decision of the people to leave the UK is actually going to give us large issues to resolve in environmental and marine policies, areas around which Wales has devolved competencies. What scale of task do you think is facing the Welsh Government and the Welsh people in relation to looking at how we address those particular areas following Brexit? I'll go from left to right, on my left to right.

[173] **Professor Howell:** Thanks. Before I start, it's worth saying that I'm a professor at Newcastle University, but, prior to that, I was seven years at the Marine Management Organisation in England. So, I was part of that, in growing a marine agency and working in marine policy in Whitehall. Having had that kind of background in the complexity of our marine space, my first reaction is that the challenge is going to be quite a large one. I think marine policy, just because of the spatial nature of where it covers, has a lot of trans-boundary issues. There's a big need to look at things at quite a large spatial scale—so, sea basin scales rather than smaller regional scales when you're looking at assessing particular different situations. I think, in marine in particular, a lot of the policy development has been done with our colleagues in Europe. In many instances, with the UK leading that policy development and negotiation, the challenge, I think, as with every area around policy, as some of the people said earlier, is making sure that when we are exiting from the European Union we are maintaining cohesion in our policy outcomes, we're assuring ourselves that they remain what we want them to be, and that we have the correct governmental delivery mechanisms underneath to be able to deliver against them. Through all of that, I think cohesion and consistency are the most important things that you'll have to deal with.

[174] **David Rees:** Thank you. Stephen.

[175] **Dr Hull:** Thank you. As other people have said, the sea has no borders. So, I think it immediately presents challenges for devolved administrations in considering their position, because we do need to manage our seas, in some way, at the regional sea scale. Therefore, co-operation and consistency are good themes. I think also that the sea is a public asset as well. It differs from land, doesn't it, where private interests have rights over particular parcels of land, but I think that also creates challenges for policy makers in thinking about delivering public benefits. In terms of Brexit as a whole, I think it very much depends on what model of Brexit we follow as to whether or not there will need to be any change. I think, beyond that, if there is opportunity for change, we have to ask ourselves, 'What do we want to change?', and 'Are we

currently achieving what we want for marine space, and, if not, why not?', and if there's an opportunity to do something different then we should pursue that, but that also might be quite challenging.

[176] **David Rees:** Dr Pieraccini.

[177] **Dr Pieraccini:** Right. I completely agree with this point. I think that there are so many uncertainties, it is really difficult to be able to give just one answer. The uncertainties are not only surrounding the type of agreements that will be negotiated because, obviously, article 50 doesn't give us any substantive requirements in relation to how to go about doing that, but also in relation to the role of devolved administrations. So, what role can they play during Brexit? This renders the question quite difficult. Depending on the agreement that will be negotiated, at the end of the day, I think from my perspective, which is primarily from nature conservation law, it will be quite challenging, whichever type of option is chosen. Because, even if the UK stays within the EEA, the EEA agreement doesn't cover the nature conservation directive and it doesn't cover habitats or the wild birds directive. That means that there is a lot more freedom for the UK and devolved administrations to go about doing their own work in that particular area.

[178] I think, from the Welsh perspective, obviously the Welsh Ministers have already had quite a lot of Executive power going on about deciding how to implement Part 5 of the Marine and Coastal Access Act 2009. The way that they've gone about thinking about domestic, let's say, protected areas, marine conservation zones, has been rather different from the English approach.

[179] If European sites are going to play a less relevant role, or there is some type of amendment that is made to the conservation regulations that will transpose the habitats and wild birds directives to UK law, then it's quite important that Wales steps forward when it comes to domestic provisions for new marine conservation zones. Given that they have powers not only for inshore, but now I think, with the Wales Bill, also for offshore marine conservation zones, there is a lot of room, and a lot of power, but it needs to be used, I would say.

[180] **David Rees:** Thank you. Professor Roeben.

[181] **Professor Roeben:** I am a lawyer, obviously, and would like to focus on

legal implications here. First of all, it's clear that article 50 is, so far, completely open as to the agreements that will be struck—the critical legal benchmark. It's obviously also the case that if this is negotiated by the Westminster Government, I think that will have a very strong impact on what can then be done later on. So, I think the first lesson here, or the first implication, is that it is critically important for the National Assembly to be very much aware of what these negotiations will look like and to have an impact, if possible.

[182] Then, second, if the agreement comes into force after two years, obviously all EU law will no longer apply. That means it needs to be replaced by national law. So, it can either be UK law or Welsh law, and I think that's critical again, in terms of, first, what the National Assembly will do under its devolved competencies and, second, also to realise that the umbilical cord of much of EU law will have been cut because of the exit. The question is: how does a devolved jurisdiction think about its links with the dynamic development of the European Union law that will continue at EU level?

[183] The third aspect, and I think that's been really overlooked so far, is that the EU is important, but it is really, now, international law that makes many of the primary decisions in environmental law, and also marine environmental law, and the law of the sea in general. So, it's international law that's driving the agenda really, rather than EU law. EU law has turned into implementing machinery for international law. So, what happens if that implementing machinery falls by the wayside because of Brexit? I think that is actually then the job of this Assembly to do much of the implementing work within its competencies that, so far, has maybe been done at EU level. So, that's actually something that very much will be the focus of the work of this Assembly because, precisely, the EU as an implementing agency of international law will no longer be there.

[184] **David Rees:** Thank you. Moving to questions, Michelle.

[185] **Michelle Brown:** Would you comment on the potential implications of Brexit for the development of marine plans, the development of those plans with neighbouring EU countries, and, finally, whether you would recommend a common approach across the UK to marine planning?

15:15

[186] **Professor Howell:** I'll take that first. I think, when you're looking at

Brexit, for me, coming from the delivery side of Government, the most important thing is to look at the policy outcomes that are driving your delivery. You have various mechanisms for doing that delivery, many of which are regulations and law, some of which aren't, and I think, when you go back across and review those policy outcomes, there are some of them that, obviously, we may want to change—and I think CAP is probably one of them when you're looking at agriculture—but in the marine space, a lot of the European policies that have come through have been led from the front by the UK, certainly from the Whitehall perspective, and marine planning is one of those. On the marine planning directive, certainly in England and in Scotland, marine planning was well under way before the marine planning directive was in place and that was a deliberate tactic on behalf of Whitehall. So, I don't think Brexit should have any impact on the policy authorisation, if you like, to deliver marine plans.

[187] As to whether the way you develop marine plans needs to be mandated, there's so much flexibility in the marine spatial planning directive at the moment that the way marine plans are being developed in Scotland, Wales, Northern Ireland and England is almost completely different anyway. I think the consistency point comes when you are looking at how you deliver those policy outcomes that are nationally held, or which are obligations from Europe, such as the habitats directive.

[188] In terms of trans-boundary working, again, the maritime spatial planning directive has, I believe, a provision in it that you have to work with your neighbours, but I think that's considered as best practice anyway, so I don't think that people are not going to continue to do that. My personal view is that marine spatial planning is one of those marine policy areas that I don't think is going to be massively impacted by Brexit, to be honest.

[189] **David Rees:** Does anyone else have anything to add to that?

[190] **Dr Hull:** Yes. I think, for marine planning in the UK, the process is fairly well established. As Dickon says, the devolved administrations all do it slightly differently, but working under a common UK marine policy statement. I think what the UK is doing is already quite consistent with what's required by the MSP directive. I think the UK has not necessarily been very good at working with its neighbours, particularly in the North sea, to co-operated and co-ordinate, and the situation I think has probably been a bit better in the Celtic seas.

[191] Many years ago, I was project manager for the DEFRA marine planning pilot, which looked at the Irish sea as a whole. At that point, that was before devolution and we were looking at the Irish sea as an area that would benefit from a single integrated plan. Since then, with devolution, we now have at least four different plans and they've all occurred at different times and in different ways, which I think is a shame, because it undermines some of the integration, but I think it also has to respect devolution settlements. That's just a reality that we accept. So, yes, Wales will plan for its area of sea and England for its area and Scotland the same, and if they want to put windfarms in their patch, they may make that choice and I think that is fair as part of the devolved settlement that they can choose to do that.

[192] **David Rees:** Thank you. Suzy.

[193] **Suzy Davies:** Thank you for those answers. I just want to ask you about the special areas of conservation and the special protection areas—actually, they're quite relevant in the part of Wales that I represent. Can you tell me, bearing in mind what you just said, Dickon Howell, about Brexit not being likely to have a massive effect, what's going to happen to the SPAs and the SACs, and in particular any legal action that's arisen as a result of failure to observe them? I'm thinking of the Burry inlet and harbour porpoises on my patch in particular.

[194] **Professor Howell:** Sorry, very quickly—I won't address the legal points; I'll leave them to my colleague—when I was saying that Brexit wouldn't have an effect, I was talking about marine planning as a policy, so, the mechanism of being able to deliver a marine plan. Obviously, special areas of conservation and special protection areas are there as a provision under the transposition of the habitats directive, so they will be directly affected.

[195] The question from a policy point of view is whether the UK, in its negotiating position, and Wales, as a devolved administration, want to continue to maintain the policy outcome that gave rise to the habitats directive, i.e. we want to have some fairly strong environmental policies that give limited consideration to other concerns so that we can protect those special habitats. The policy question there is one that I believe was spoken about in the previous session, which the Welsh Government and DEFRA are going to have to figure out when you're negotiating what you want that policy position to be, and then the mechanisms by which you manage that policy and deliver that policy can be different, whether it's NRW, the Marine Management Organisation or Marine Scotland, but they almost come from

that policy framework. So, the big question in that area is what that policy framework is going to look like, and I don't think anyone's clear on that at the moment.

[196] **Suzy Davies:** Before we move on to the lawyers, thank you very much. Do you think NRW is actually a big enough and robust enough organisation to take on this work as it currently stands? I'm not asking you to be mean to anyone; it's a genuine question.

[197] **Professor Howell:** I may have given you a different answer six months ago, actually. I think NRW have a very small team for what they have to do with regard to marine management. I think if you look at the way that we were resourced in England, as compared with the resource in Wales, the difference is of the order of about 10 times the magnitude. So, in England, the Marine Management Organisation has got 350 people, with 60 people working in the marine licensing team, and I think NRW's got maybe somewhere between 10 and 20 people working in their marine licensing team and a similarly small amount working on marine planning. They are very competent at their jobs; there may not be enough of them.

[198] **Suzy Davies:** That's very helpful, thank you very much. If we go back to where I was before, who's going to look after these things now and how are we going to enforce them?

[199] **Professor Roeben:** I think that's critical. I agree on the NRW question, but enforcement is the critical question, I think. As I said, one of the main implications of Brexit will be that the UK will, and that includes Wales, cut itself off from the dynamic development of that law at the EU level. There will no longer be any opportunities to make references to the European Court of Justice. There will no longer be any clear-cut individual rights that can be enforced and that's the greatest danger, if you consider this, effectively, as a tool you want to continue to use, because the legal situation will be very much weakened. There will be this lack of context and this lack of those additional legal guarantees that you have, because now courts can refer to the ECJ and the ECJ—the European Court of Justice—will give a European-wide, rather robust interpretation. So, the question is what can take its place. In a way, one of the points that Wales should consider is actually having some link to the European judicial system. That is quite innovative, and may not be necessarily to everybody's liking, but I would consider this a serious concern, because, otherwise, effectively, the law will be set for England mainly, which is quite natural, given the fact that that is the main player

here—

[200] **Suzy Davies:** Well, we might disagree on that particular point. Do you think that the great repeal Bill would be able to achieve the same outcome that you've just been talking about, which is a nod to the ECJ for not just persuasive rulings but binding rulings, and, actually, that we use England and Wales law and Scottish law and all the rest of it to make those rulings part of our law? Does that make sense?

[201] **Professor Roeben:** Yes, it does. Again, that is a critical question, and I think that we know very little about the great repeal law, but from my understanding, and I have some background understanding, that is not the intention that is behind the great repeal Bill. I think the clear intention is to cut the link, and I consider this a great concern for Wales, because it is necessary. I think it is a fact that the European Court of Justice has been, overall, a great champion of the effectiveness of this legislation, and I think great attention needs to be paid to how the interpretation, the dynamic interpretation, of these instruments will continue. I wish I could be positive about this, but—

[202] **Suzy Davies:** If you had a crystal ball, yes.

[203] **Professor Roeben:** —I think what we can learn, or I think what we can take away, is that this is something that Wales should pay very close attention to, because it's not enough to have the law. The great repeal Act will incorporate many of these directives, and that is fine, but the real issue is how they will evolve afterwards and, from a lawyer's point of view, that's more important than the actual wording of the law as it was originally enacted; it's how it is interpreted. If you lose the European Court of Justice's interpretative force, then something needs to take its place. Somebody will make the decisions on the interpretation, and I think that is a strategic question for Wales.

[204] **Suzy Davies:** Thank you. You seem to agree, Dr Pieraccini, is that right? Do you want to add anything to that?

[205] **Dr Pieraccini:** Yes, I think so, especially in relation to the field of SACs and SPAs, because, even if we stay within the EEA, for example, we do have an enforcement mechanism, which is the court of justice of the European Free Trade Association, which works to make sure that Norway and the others are able to properly interpret and implement EU law, and then you

have the EFTA surveillance authority, which acts in a parallel way to the Commission for these countries. But, once again, because SACs and SPAs are not covered within even that type of agreement, there won't be any kind of alternative enforcement mechanisms, as such.

[206] In relation to the habitats directive especially, I think the court of justice of the EU has done a really good job, sometimes, in strengthening even provisions under article 6, let's say, and in interpreting in a very precautionary way article 6 and projects that are likely to have a particular negative impact, and the meaning of 'likely', and I'm thinking here of the Waddenzee case, in which there has been a very interesting, strong precautionary interpretation of those provisions. I'm not so sure, when it's left to the UK courts, whether that same strong, precautionary interpretation will be taken on board. Having said that, I think that, in marine, it's all newer and more complicated, but we need to be sure to remember that the UK did already have very good nature conservation law to start off with, under the Wildlife and Countryside Act 1981, amended later on by the Countryside and Rights of Way Act 2000, especially. Therefore, lots of SACs and SPAs on land have been superimposed over sites of special scientific interest, so the conservation regulations have transposed the habitats directive and the wild birds directive in a way, I would say, that has not required too much effort for the UK, but at the same time, it's not just gold-plating, you've actually been able to work with the existing system and refine it.

[207] So, I don't think that will ever go away, in a certain sense; I think it would be unthinkable that they would decide all of a sudden to get rid of the conservation regulations, because they are very much intertwined with the pre-existing domestic regime, on land. In the sea, there's a bigger question mark, but, at the same time, SACs and SPAs are covering the marine environment—well, I think in Wales, there are quite a lot, but, if you look at the annexes of the habitats directive, actually there are not so many, I think, marine species and habitats that are covered. That's why I was saying earlier that I think also the domestic MCZs could add up and could help to fill those gaps. But, clearly, when it comes to interpretation, when it comes to the Commission's role of bringing enforcement proceedings, all of that would clearly be lost—probably.

[208] **Suzy Davies:** Okay. Just one final point on this—it is, I promise you, the final one—interpretation sounds like it's going to be left to the UK courts, ultimately. Do you subscribe to the idea that we should have a separate environmental court? Side by side with that, do you have any concerns about

who would have the locus standi to actually bring any cases against naughty Government?

15:30

[209] **Professor Roeben:** I think it would be a good idea to have such a code, and I think the other question is also critical, about standing. And I think the law's been moving into giving standing in environmental questions to bodies, effectively—public interest bodies. I think, but that is, obviously, completely up to you, that that is an area where Wales could be very innovative under its devolved competencies—in terms of the laws going there.

[210] **David Rees:** Does anyone have a different view? No. Thank you. We'll move on. Mark.

[211] **Mark Isherwood:** We've touched on cross-border arrangements, both within the UK, between the constituent parts of the UK, and then more broadly. What do you think the impacts of diverging marine management regimes both within the UK and between the UK and other states will be, and how should we best seek to address those? It slightly touches on the previous question about the framework.

[212] **David Rees:** Professor Howell.

[213] **Professor Howell:** I think I've said all along that from a policy outcome point of view—so, to get the most successful policy outcomes and to deliver them effectively—coherence and consistency are what you need. The challenge always is in trying to negotiate agreement on what that policy outcome should be. I think the difficulty that we face at the moment is that there is a large body of environmental policy—I know we're talking about environmental law, but there is a large body of environmental policy that has been agreed at a UK level for the necessity of negotiating with the European Union, and then has come out as an obligation back to all the different devolveds, and including Whitehall. That's how you've got consistency.

[214] My understanding at the moment is that within DEFRA they're developing their 25-year environment plan, which is to some degree what they see to be their way of setting out how they're going to deal with Brexit in environmental terms, though it remains to be seen how much detail there will be in that. The difficulty will be in seeing how that 25-year environment

plan lines up with the Environment (Wales) Act 2016 or any of your natural resources policy statements, or any of the work that you've been doing over the last three or four years to put your natural environment on a more strategic footing in Wales. Because those two things will need to come together in some way to provide a UK position that you can negotiate from.

[215] I think that's as applicable across any area of environment policy as it is marine. But, in marine, as we talked about earlier, you have all the issues of having to assess things on a regional level, and the lines on a map down the Dee estuary and the Severn estuary don't mean anything to the wildlife that are living there, or to the people that are earning their living from that space. So, it's important that, whatever happens, you have a policy framework that is similar enough that it can be delivered in a similarly consistent way. I think Marine Scotland operate differently to Natural Resources Wales, and they operate differently to the Marine Management Organisation across marine licensing, nature conservation, marine fisheries, marine planning—all of their areas of delivery they operate differently, but they are all guided by the Marine and Coastal Access Act 2009 in England and Wales, and the Marine (Scotland) Act 2010, which is pretty similar, up in Scotland, and the national policy statement and the European policy framework.

[216] If you take the European policy framework away, you've still got all of those others, but there is a large body that suddenly becomes more flexible and there is more opportunity to discuss what that might be. And the danger is—. There are two dangers. One is either nothing gets done because there's so much uncertainty that no-one wants to move, or the other is that agreement can never be reached, and environmental policy gets fragmented across the devolveds, which I don't believe is a good thing for our natural environment, either marine or terrestrial.

[217] **Mark Isherwood:** Would anybody else like to comment?

[218] **Dr Hull:** I would agree with Dickon. I think there's a risk of divergence in how some of the frameworks are implemented. I don't think it helps. Particularly the water framework directive and the marine strategy framework directive, there are standards in both of those that are consistent across Europe. But I think any system of marine management will continue to require to have those standards. We need to understand what the state of the marine environment is so that we understand where we need to do better. The question about whether we might choose to relax some of those

standards is a policy issue. At the moment, it would be difficult to see why we might want to do that, having subscribed to those standards already. So, there's no a priori reason why the standards would need to change. If we're serious about managing the marine environment, and improving environmental quality, then we need to continue with that process.

[219] **Dr Pieraccini:** Just a very quick thing to add: I think Wales is going quite far already, because—compared to other devolved administrations—the Environment (Wales) Act 2016, by putting and endorsing an ecosystem-based approach to natural resource management, by talking about sustainable natural resource management, and by even putting a duty, a positive duty, on public authorities to enhance biodiversity, is trying to really incorporate what the marine strategy framework directive has been doing and pioneering, which is this ecosystem-based approach. So, those kinds of principles, which are key principles, have, in a certain sense, already been internalised, at least in the statute. So, it's really a matter of how best to implement those principles, and not just forgetting them or making them part of a nice rhetoric, like a sustainable development type of thing.

[220] **Professor Roeben:** Can I just add one thing to this cross-border element? We shouldn't forget that our neighbour is Ireland and that the convergence with them will be critical to maintain. So, this may also have to be done on a bilateral basis, that is, not necessarily UK-wide, but between Wales and Ireland, because, if you look at the planned under-sea, high voltage direct current cables that will transport much of the renewable energy from Wales, within this big idea of the northern seas, I think that it's critical that there is convergence particularly between these two places.

[221] **David Rees:** Thank you. Jeremy.

[222] **Jeremy Miles:** Thank you, Chair. Can we look the marine strategy framework directive and the extent to which you feel that Brexit is going to affect our monitoring of progress against the descriptors in the directive, and, more broadly perhaps, coming out of that, what effect that would have on the health of the marine ecosystem generally?

[223] **Dr Hull:** There's the issue about whether MSFD has EEA relevance, which I don't think has been properly bottomed out, and Norway feel that it doesn't apply, but others think that maybe it should. So, again, under Brexit models, it may be that the UK remains committed to full participation in meeting those standards.

[224] **Professor Howell:** MSFD is an interesting directive, because it's a framework directive, and the approach certainly that the UK have taken is that it's already meeting what needs to be done. You can argue about whether you think that's correct or not forever, but in that it's not theoretically imposing any new management regimes or regulation as such into decision making, I think, as Steve said, there's always going to be the need to monitor our natural environment. And the most cost-effective way to do that is to look across all of our marine assets in Scotland, Wales, Northern Ireland and England and use them in the most effective way, which means national monitoring on a regional sea scale. Currently, the mechanism that co-ordinates the MSFD in Europe is OSPAR. That's a treaty of the countries bordering the North Atlantic and it's not an EU body, but it is being used by the EU to co-ordinate MSFD. Now, we will remain a member of OSPAR, and I think our duties under OSPAR potentially could mean that the monitoring requirements of MSFD could potentially remain as well, although I'm not sure how that would work itself out.

[225] I think the other important point to make about the health of the ecosystem is that monitoring in itself only tells us the state of the patient. It's not going to tell us what we need to do to make it better. If we don't have it, we don't know that there's anything wrong, you're absolutely right, but not being part of the MSFD doesn't mean that we aren't going to be able to take steps to manage our marine environment well. It just means that we're going to need to find another way of monitoring, because if we don't have the monitoring—. It's the monitoring that's the essential part of the system to tell us whether the policies that we're delivering are working or not.

[226] **Professor Roeben:** [*Inaudible.*]—will be the responsibility of the devolved jurisdictions.

[227] **Dr Pieraccini:** Monitoring is very resource intensive, though, so that's something that needs to be kept in mind within the current context—how easy will it be to provide regular monitoring, given that it's extremely resource intensive, and it's been proven as such in so many other European countries, as well as in England.

[228] **Jeremy Miles:** On that point, then, do you detect any appetite on the part of the UK Government to move away from that? Is there a trend away from that? You mentioned that some of the regulations have been driven, effectively, by the UK Government, across Europe. Do you detect there'd be a

weakening of that impetus?

[229] **Dr Pieraccini:** The way that that's been happening so far in other areas is a risk-based type of approach, so what will end up being in monitoring will be the areas that are considered more at risk. But, clearly, that already required quite a strong and scientific knowledge of what's going on, and, in the marine environment, I think there is quite a gap in knowledge. Consequently, just employing a risk-based approach may end up minimising the possibility. But that's the easy way with limited resources, I would say.

[230] **Professor Howell:** If I may add one more thing, just to back up what Margherita was saying there, in the way that we monitor our marine environment, there is a national monitoring programme, which draws on capacity from our research councils and the devolved administrations. Also, a lot of our monitoring is done in collaboration through the European programmes, and it's those European programmes that, whilst we will probably still get the data from, we won't get the influence over what they do.

[231] So, for example, a lot of the monitoring in the future is looking to use satellite-based sensors. The European Space Agency recently put up a new array called Sentinel, and, as a member of the European Union, we were able to say, when that mission was being tasked, 'We want these sensors on to meet our requirements for marine monitoring'. When we step out of the EU, there's a question over whether we will have that influence; you'll still get the data, but you might not be able to task that kind of equipment to meet our needs. So, you're missing out on a big capital asset, effectively.

[232] **Jeremy Miles:** Thank you.

[233] **David Rees:** Thank you. You've talked this afternoon quite a few times about consistency as being important. Do we currently have the consistency you would expect to have, or would expect to see, post Brexit? Interesting silence.

[234] **Professor Roeben:** That is a fascinating question. I think the big push from the European Union has been to develop this consistent approach, and it has, I think, displaced the member states, effectively, in many regards, in regard to the UN convention on the law of the sea. Now, clearly, it is the EU that speaks for all member states, and that comes back to this critical point: after Brexit, the UK will be on its own, effectively. It will have a direct voice

again, but it will also be completely on its own, responsible for implementing the law in a consistent fashion. So, I think this is something nobody really has an answer to.

[235] But it means, you know, how do you ensure—from a UK, but, more importantly, from the devolved jurisdiction point of view—how do you ensure that you’ve got consistency when that is now entirely in your hands? Because the EU will no longer be doing this. And consistency is absolutely indispensable if you want to ensure actual marine environment protection, but also if you want to make sure that the sea can continue to be used as a communication tool—and that is critical, of course—and not just for ships, but also, more importantly, I think, for the electricity cables that will be connecting the North sea—and that includes the Irish sea and the waters around here.

[236] So, this is, I think, a task of a magnitude that is beyond the grasp, I think, of most observers. But what is clear is that this main push of the European Union, with the consent of the member states, to take the place of the one implementing agency of the UN convention on the law of the sea—the law of the sea and the marine environment—will fall away. So, it’s the UK, and that means, in other words, the devolved jurisdictions—within their competencies, they’d need to take that responsibility. And I think, in a way, it’s a great chance—it’s a great chance.

[237] **David Rees:** So, this is a key factor for you for negotiations with the UK Government, and with the EU, basically.

15:45

[238] **Professor Roeben:** Because, as you say, Mr Chairman, the UK will be internationally responsible if it isn’t implementing that international law and the central government will therefore be dependent on the devolved jurisdictions. Absolutely.

[239] **David Rees:** Thank you. Have any other Members got any other questions?

[240] **Jeremy Miles:** I have a question about EU funding for marine science. Do you have any concerns about the future outside the EU for that? And if so, what are they?

[241] **Professor Howell:** When I was at the MMO, I was chief scientific adviser for two years and worked quite closely with the chief scientific adviser from DEFRA. I know that our strategy—and it remains a strategy within Government, I believe—is that the one thing that was a constant, when we were looking at funding research programmes in Government, was EU funding. If you take that away and you consider that—certainly speaking within Whitehall, Government departments and agencies are getting cuts year on year—there comes a point, particularly when you're looking at marine science, as it's an expensive thing to do, when you need large capital assets that are expensive to buy and expensive to maintain. You quite quickly get to that point where actually you don't have enough operating money to maintain that capital asset, and once that capital asset disappears it's not a slow drop off, you go off the edge of a cliff, because you no longer have the functional ability to go out and do what it is that you need to do. So, from a science point of view, I'm quite worried.

[242] **Dr Hull:** It depends, obviously, on the model that's pursued. Again, if we remain part of the EU, then we would continue to contribute. Outside of that, who knows? The UK may be able to negotiate access to these programmes for a fee, but it is a risk. It's certainly causing issues now in terms of partnering arrangements for projects. Certainly, the academics I've talked to have experience of that, particularly in terms of leading projects, where that has become increasingly difficult, and sometime even being a partner.

[243] **Jeremy Miles:** As a British academic.

[244] **Dr Hull:** Yes.

[245] **Dr Pieraccini:** Yes. I can confirm that. That is also the experience I have—not personally, but from other colleagues. So, that's really worrying, I think.

[246] **Jeremy Miles:** So, the impact's real, even in advance of Brexit itself.

[247] **Professor Roeben:** I think that's an existential question for the Welsh universities, because if we get cut off from this European funding, the question is of distribution. So, even if the UK Government decides to replace this in full, which is probably not possible—the Horizon 2020 money—the question is: where does it go? The Welsh universities have done well under European funding, in terms of many areas—Swansea is one, and Cardiff,

certainly. So, the question is, indeed, not just how to replace that money but also how does it get distributed across the UK.

[248] **Professor Howell:** One final point, I think. European funding, of course, not just in science but in any area, is going to be very challenging. If you think of marine, the main pots of money come through—for research—things like Horizon 2020, but also things like the European maritime and fisheries fund. The European maritime and fisheries fund is set on a seven-year cycle, which means it goes across administrations, which means that you are delivering funding against a policy that's set at a European level and you can give businesses certainty, R&D companies certainty and certainty that when the administration changes, you're not going to get your funding pulled out from underneath you. I think that's going to be one of the biggest challenges: how you maintain that certainty, regardless of whether you're going to maintain it over the next two years—how you put in place a process that can maintain certainty of funding across administrations and effectively saying, for one administration to say, 'I'm going to put funding in place that is going to fund this policy outcome regardless of whether the next administration agrees with it or not'. And that's something that doesn't play well in national politics, to be honest. So, it's going to be very interesting to see how that works itself out.

[249] **David Rees:** No other questions? Can I thank you, therefore, this afternoon for your evidence? Thank you very much. It's been very interesting. You'll receive a copy of the transcript. If you find any factual inaccuracies, please let us know as soon as possible so we can have them corrected. Once again, thank you very much for your time.

15:50

Cynnig o dan Reol Sefydlog 17.42 i Benderfynu Gwahardd y Cyhoedd o Weddill y Cyfarfod

Motion under Standing Order 17.42 to Resolve to Exclude the Public for the Remainder of the Meeting

Cynnig:

Motion:

bod y pwyllgor yn penderfynu that the committee resolves to gwahardd y cyhoedd o weddill y exclude the public from the cyfarfod yn unol â Rheolau Sefydlog remainder of the meeting in

17.42(vi) ac (ix).

*accordance with Standing Orders
17.42(vi) and (ix).*

Cynigiwyd y cynnig.

Motion moved.

[250] **David Rees:** Can I move now that, under Standing Order 17.42, we resolve to meet in private for the remainder of this meeting? Are Members content? I see they are. We move to private session.

Derbyniwyd y cynnig.

Motion agreed.

Daeth rhan gyhoeddus y cyfarfod i ben am 15:50.

The public part of the meeting ended at 15:50.