1. Given my legal expertise and knowledge of the constitutional setup of the Kingdom of Denmark (comprised of Denmark, The Faroe Islands and Greenland – commonly referred to as the ‘Danish Realm’) my evidence focuses on the Committee’s last question:

10. What role should the devolved institutions have in negotiating and agreeing treaties?

2. When considering the future role of the devolved institutions in the UK’s external relations, it is important to acknowledge that the individual interests of Scotland, Wales and Northern Ireland may not necessarily align with those of the rest of the UK. In many cases, these diverging interests are best served if the devolved institutions are given some role in negotiating and agreeing treaties affecting devolved areas. I therefore believe that a constitutional discussion on how these powers may be crafted and used is in order, and should take place in consultation with the devolved administrations. In this context, I should like to use the Faroe Islands’ reserved powers model as an example: I believe it provides useful lessons for the present enquiry.¹

The Powers of the Faroe Islands

3. The Faroe Islands – located in the North Atlantic, midway between Scotland, Iceland and Norway – is a devolved region within the Kingdom of Denmark. Powers were first devolved to the Faroes by the Home Rule Act of 1948.² In 2005 the Home Rule Act was amended, and the competence of the Faroese Parliament was substantially expanded by the so-called Takeover Act, through which the Danish Parliament devolved yet more powers.³

4. Like the Scotland Act of 1998, the Takeover Act is based on a reserved power model. Unlike the Scotland Act, however, the Takeover Act enables the Faroes to extend their powers unilaterally in all matters not already within their competence. The only areas exempt are exhaustively listed and include: issues relating to the Danish Constitution; citizenship; the Supreme Court; monetary and currency matters; as well as foreign policy, defence and security.⁴

5. As a result of the Takeover Act, the Faroese authorities can unilaterally decide what powers are devolved and when. Presently, the Faroes enjoy full authority over numerous areas, including external trade relations; imports and exports; taxation and financial policy; business regulation (except the banking sector); regulation of fisheries and other natural resources; energy and the environment; the labour market; social security, emergency preparedness; education; research; and culture.

**Negotiating and Agreeing Treaties**

6. While ‘foreign policy’ is explicitly mentioned as a reserved area, under Danish constitutional law treaty making is not reserved. It is not unusual for units of states to have a limited power to negotiate and conclude international agreements with foreign states and international organisations. In Australia, Belgium, Canada, Germany, Switzerland and the United States sub-national entities all possess some degree of international treaty-making capacity.  

7. Whether a sub-national entity has such capacity – commonly referred to as ‘international legal personality’ – depends on two factors. Firstly, the attribution of international competence to the sub-national entity under domestic law; and, secondly, the recognition of that sub-national entity by other international law subjects, most importantly, states.

8. In the case of the Faroes, the first requirement is satisfied by the Authorisation Act 2005, which endowed the Faroes with a considerable degree of international legal personality.

9. With regard to the second, a ‘circular note’ by the Ministry of Foreign Affairs of Denmark to the United Nations and its members unequivocally spells out the powers bestowed upon the Faroes:

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4 Ibid s.1(4). Although foreign policy falls within the responsibility of the Danish Government, the Faroese authorities have the right to be consulted on external affairs which are of special concern to the islands and have a special adviser at the Ministry of Foreign Affairs and may post attachés at Danish embassies.


The Danish Parliament (Folketing) ...in agreement with the Faroese Authorities... has adopted legislation providing statutory full powers for the Government of the Faroes... to conclude certain international agreements on behalf of the Kingdom of Denmark...8

10. Recognition of the Faroes’ international legal personality is evident from the fact that, since 2005, they have negotiated several international agreements, including a special economic treaty with Iceland (the Hoyvík agreement) which established a single economic area between the parties.9

11. Even before 2005, however, the Faroes had established the practice of negotiating international agreements with only nominal involvement of the Danish authorities.10 This is especially true of fisheries agreements, but it is equally true of other areas.

12. Implied recognition of the Faroes international legal personality may furthermore be inferred from their membership of international organisations. The Authorisation Act allows the Faroes to apply, in their own name, for membership of international organisations that are open to entities other than states and associations of states.11 The Faroes is, among others, a member of the North Atlantic Marine Mammal Coordination Organisation (NAMMCO);12 the Northwest Atlantic Fisheries Organization (NAFO);13 the North Atlantic Salmon Conservation Organization (NASCO);14 and the North East Atlantic Fisheries Commission (NEAFC).15

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8 Available at <http://www.stm.dk/multimedia/CircularNote_GR.pdf>.
12 NAMMCO was established by the 1992 Agreement on Cooperation in Research, Conservation and Management of Marine Mammals in the North Atlantic, to which Norway, Iceland and the Greenland and Faroese Governments are parties.
13 NAFO was established by the 1978 Convention on Future Multilateral Cooperation in the Northwest Atlantic Fisheries, as a successor to the International Commission of the Northwest Atlantic Fisheries (1949-1978). Denmark, in respect of Faroe Islands and Greenland, became a party in 1979, whereas Denmark is represented via the EU.
14 NASCO was established by the 1982 Convention for the Conservation of Salmon in the North Atlantic Ocean. Denmark in respect of the Faroe Island became a party in 1982, whereas Denmark is represented via the EU.
15 NEAFC was established by the 1980 Convention on Future Multilateral Cooperation in Northeast Atlantic Fisheries. Denmark in respect of the Faroe Island became a party in 1982, whereas Denmark is represented via the EU.
13. The Faroes’ capacity to enter into international agreements or join international organisations is, however, limited. Firstly, any agreement must fall entirely within the Faroes’ devolved competences. This limitation, among others, means that the Faroes cannot enter into agreements in relation to defence or security policy, or any other matter excluded from devolution. The exercise of the Faroes’ international law powers must, moreover, be geographically limited to their territory. Finally, at least in principle, the Faroes cannot join international organisations of which the Kingdom of Denmark is already a member.

14. This Committee asked: What role should the devolved institutions have in negotiating and agreeing treaties? In answering this question, it is my submission that the Committee can draw important lessons from the Faroes’ experience with external governance and international legal personality. The devolved powers progressively conferred upon the Faroes have enabled them to reach almost complete internal self-government, as well as a large degree of external self-government. These powers have allowed the Faroes to serve their own interest – most notably with regard to fisheries – while preserving the unity of the Kingdom of Denmark. While it is not for me to say whether this is the best option for the Faroes, or indeed the UK’s devolved institutions, the example of the Faroes clearly illustrates that formally there are no obstacles in international law preventing Scotland, Wales and Northern Ireland from following a similar path.

6 December 2018

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16 Non-compliance by the Faroes with an international obligation will create State responsibility for the Kingdom of Denmark as a whole. Cf. ibid, s1(5). See also the International Law Commission, Responsibility of States for Internationally Wrongful Acts (2001), Art. 4 and commentaries thereto, especially International Law Commission, Yearbook of the International Law Commission (2001) Vol II Part II 40, para.10.